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Legal forms of Not-for-Profit Organisations in Europe

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Introduction

In the world of economists a lawyer feels a bit strange. How does an economist look to a lawyer? Is he a formalist, some one who focuses on forms? And is an economist in his own eyes some one who is interested in facts in stead of forms, words, rules etc., in which the lawyer is interested? If this how you as an economist look to it, I would like to make some corrections on this view. Take for instance the position of shareholders in a company. Economists are inclined to say that shareholders are the owners of the company. Legally this is incorrect. The contribution of the shareholder in the company has become the property of the company (legal person). The shareholder certainly receives some rights in relation to the company, but he is not the legal owner of it. The company as a legal person is a subject, not an object of law. To contradict the economists' formulation that shareholders are the owners of the company, is not only a question of words, it has also to do with facts. The shareholder (also the sole shareholder) has not the right to sell the property of the company; he may only sell his shares. The property of the company can be taken by the creditors of the company, the shareholders have this right only at the end of the liquidation after dissolution. I presume that this makes clear that lawyers have a different perspective on socio-economic facts. I agree that lawyers should not neglect the economic data, but economists like other people can not neglect the legal structure, as this also creates the basis for the economic reality.

I just made some reference to commercial economy, but also the economy in relation to not-for-profit organisations has clearly another perspective than law in this area. In the United States economic theories are developed in which is explained why not for profit organisations (NPOs) get their position in economy/society. [1] These theories are really interesting from a sociological and maybe economical point of view. They may have some influence on tax-law relating to NPOs , but with regard to civil law aspects they have no explanatory value. The legal rules regarding forms and activities of NPOs have no relation to the tendencies that are described in the social science theories. One reason for this is that social sciences/economy are more quantitative and law is more normative (qualitative). Law is in fact not so much about forms but about norms.

You may question what this means for my approach to social economy. I sympathize with the fact that this economy has another focus than the liberal, capitalistic economy. You may know that in Europe The Netherlands is one of the countries where no or nearly no recognition exists of social economy.[2] The reason is not that in The Netherlands non-

1 Compare Jon van Til, Mapping the third sector, voluntarism in a changing social economy, The foundation center, 1988, ,p. 91 ff.

2 See Rafael Chaves & José Luis Monzón Campos, The social economy in the European Union, Working Paper CIRIEC nr. 2008/02, p. 16.

capitalistic entrepeneurship is not important. The employment in the "third sector" is in The Netherlands relatively one of the highest in Europe (and the world).[3] It has may be more to do with the idea that enterprises should be treated in the same way as much as possible. Also with regard to this social economic approach I have my reluctance as a lawyer.

Before I will describe the different legal forms for not-for-profit organisations in Europe, I will make some general remarks about law and legislation.
The idea of law -especially private law- is to create, by a rule about rights and obligations, a balance between the interests of the parties in a given situation. In relation to NPOs the parties involved are: the establishers, the funder, the participants (members and board members), eventually employees, creditors, clients and of course the legal person itself. The legal differences in NPO-forms relate to differences in the positions of these parties to each other. The legal forms are not created in an abstract situation; they have their own historical background with their own legislative purpose. When the legislation about a certain legal form exists for a longer time, the legal form may be used for other goals than it originally was meant for. NPO-legislation is always very much connected with the culture of the country.
A very important *international* source for law on NPOs is the freedom of association.[4] Before the international treaties about the fundamental rights were concluded, in several European countries these rights were already recognized in their Constitution. The period in which the right of association was recognized in different countries and the way this right developed was however not the same.[5]

I will focus on the NPO-forms in the European Union. This Union is strongly directed to liberalization of the economy in Europe. An dominant aim is the harmonization of company law. The legal forms for NPOs as such have not the interest of the EU. Commercial NPOs do enjoy yet the freedom of establishment within the EU.[6] The legislation concerning NPO-forms is more a matter of interest for the Council of Europe, as this council is focused on the protection of human rights and observes if the freedom of association is not unduly limited. Both the Council of Europe and the EU promote the existence and the societal importance of NPOs/civil society.[7] [8] See more about Europe and NPO-law in par. I.(5).
There are many legal forms for NPOs in Europe. How the regulations exactly are in the different countries is not what I want to explain. I would like to give in par. II a rough overview

3 See Chaves & Monzón Campos footnote 2, p. 20. Compare L. Salamon, Helmut Anheier a.o,,Global civil society, dimensions of the Nonprofit Sector, The Johns Hopkins Center for Civil Society Studies, Baltimore 1999, par. 1. The data of Salamon include, different from Chaves enterprises in the form of a foundation.

4 Art. 11 European Convention for Human Rights.

5 Compare T.J. van der Ploeg , *Rechtspersoonlijkheid en organisatorische inrichting van verenigingen in relatie tot de vrijheid van vereniging* (Legal personality and the internal structure of associations in relation to the freedom of association), p. 83 ff in *De vrijheid van vereniging in Nederland* (The freedom of association in The Netherlands), Lemma, Utrecht 2000.

6 Art. 48 EEC-Treaty.

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

about different aspects of NPO law. This shows many different solutions for the same aspects. This has to do with the different (political) choices that are made. I focus in par. III on the social enterprises, which are neither purely commercial organizations nor NPOs as they are regulated in different countries. The last par. (IV) before the Conclusion deals with the question what sanctions can be imposed in case of mismanagement. A legislation that is friendly for NPOs (or social enterprises) is nice, but it should also consist of sufficient vehicles against mismanagement.

I. Europe and NPO-law

I.1 The importance of NPOs in European societies

As such the European Union is focused on economic integration of Europe and only since the Treaty of Amsterdam a non-economical subject like culture- is part of the scope of the Union/Community. The importance of NPOs lies for the community predominantly in the fact that they are a sign of a high level of democracy, or better of an important involvement of citizens in society. The position of not-for-profit organisations within Europe is very different. In some countries, like Belgium, Germany, The Netherlands and United Kingdom they play a very important role. Non profit organisations do as such not match with a socialistic political system, while in countries with such a system the ideology is that the general wellbeing must be furthered by the government and not by private organisations with their own specific characteristics and purposes.

From a liberal point of view, NPOs are important to learn democracy; people can learn how democracy and governance work in the area of their own choice.

NPOs form also an important countervailing power in relation to governmental policy and action, in another way than political parties.

NPOs are in many societal terrains active in service delivering, for instance in health, welfare, education, social housing etc. The origin of private service deliverance lies in the desire of privately organized citizens or church-linked organisations to deliver services from their own perspective and ethics. Most of these service delivering organisations are now (partly) subsidized by government. Although because of efficiency and economization, government directly or indirectly furthers merging of private organisations, it generally acknowledges the usefulness of the existence of private service providing organisations from the perspective of pluriform society. The government is not able to -and because of its neutrality should not- meet the different wishes in society in relation to culture, religion and ethics.

I.2. European Law on NPOs ?

The first legislative involvement of the EU in the area of the not-for-profit world, was the drafting of a Regulation about the European association by the European Commission. 9 These regulations dealt with international cooperation of organisations of these types. Apparently the drafting of these Regulations was not timed on the right moment. These draft-regulations have not been developed to Regulations. In a later stage, in 2003 a Regulation on the European Cooperative Company is issued by the Council of the European Union.[10] I come

9 COM (91) 273 final-SYN 386-391. There were in the same year also draft-Regulations on the European Cooperative Society and the European Mutual Society.

10 Regulation of the Council of the EU of 22 July 2003, Br. 1435/2003 .

back to this in par. III.

I.3. The European Convention on Human Rights as source of NPO-law

An important European source of law for this area of law is the European Convention on Human Rights, which is concluded by the countries participating in the Council of Europe on 4 November 1950.[11] The freedom of speech and of association and also the privacy right put important limitations to the treatment by the government -also in legislation- of non profit organisations. I will focus here especially on the freedom of association. According to the Convention the citizens -and organisations- are free to associate as they like. This freedom may only be limited by the state on specific grounds. The limitations have to be prescribed by law and necessary in a democratic society in the interests of national security or public safety, for the prevention of the disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.[12]

With regard to legal forms, this does not prevent the legislator to fix specific legal forms for specific purposes with specific conditions, but it urges the legislator to legitimate the conditions set for the different types of legal forms. The legislator should keep an opening for organisations that do not want to use certain forms, although it is clear that these organisations then cannot receive (legal) facilities.

Mostly rules about legal organisational forms concern legal persons. In modern continental society legal personality is almost a must for NPOs. This has as a consequence that also the attribution of legal personality can be evaluated from the perspective of the freedom of association.

In case government is involved in the decision making about the attribution of legal personality to a not for profit organisation, the applicants should have the possibility to appeal from this decision to an independent court. This principle is also included in the European Convention on Human Rights (art. 6).

The influence of the mentioned European Convention is large, especially by the fact that since 1998 individuals and (not for profit) organisations may apply to the court when they are a victim of the violation of the Convention by a country that partakes in the Convention (art. 34). This has as consequence that the European Court may take a decision contrary to the law of a country in case the Court judges that this national law is apparently contrary to the European convention. [13]

I.4. The European Convention on the Recognition of Legal Personality of International NGOs

After long discussions, in 2002 the European Convention on the Recognition of Legal Personality of International NGOs was concluded. This opens the way for a not for profit organisation (with legal personality in its own country) to operate as such in another country that had ratified this convention. The application of this Convention made the participants aware of the differences in the way of obtaining legal personality between the countries. As such this had no harmonizing effect, as far as I know.

11 It entered into force 3September 1953. Source: Jacorbs &White, The European Convention on Human Rights, 4th edition, 2006.

12 See art. 11 s. 2 European convention on Human Rights.

13 This is not the place to elaborate on the execution of the judgments of the Court. See f.i. Jacobs & White, The European Convention on Human Rights, 4th edition, 2006, by Clare Ovey & Robin C.A. White.

I.5. The use of foreign (EU) NPO-forms

When NPOs can be included in the category of commercial organisations, which in several countries is a possibility, they enjoy within the area of the European Union i.a. the freedom of establishment,[14] that is to say that they may perform activities in other European countries than where they are established. In how far their foreign legal persons-form only is regulated by the legal system of the place of establishment is a hot issue in relation to companies limited by shares.[15] When foreign (European Union) forms may be used by a citizen from a EU-country, this will challenge the national legislator to make the national law more attractive. We can see this in the use of the English limited by Dutch entrepreneurs.[16] The international trade and use of foreign legal vehicles has urged the Dutch legislator to make a law proposal about the flexible closed company limited by shares.[17]

This may as well happen in relation to cooperative societies. It may be principally incorrect to include cooperative societies in the category 'companies', as they are not focused on profit making, but on keeping the costs low for the members. On the other hand they can, to my idea, also not be included in NPOs, as their financial results are joined to their members, which is not the case in NPOs in general. See par. III.

A connected aspect is the rule of international private law that a country follows. There are two systems used in this matter. One system is called " theory of incorporation". This means that the law of the country of incorporation is decisive on the legal personality and about the applicable law. The other system is called "theory of the real seat". In this system the real seat or the headquarters of the enterprise are decisive for legal personality and the applicable law. Germany adheres to the real seat theory, while The Netherlands adheres to the incorporation theory. It is clear that in countries where the incorporation theory is followed, the chance that not only foreigners but also countrymen will use foreign legal forms when they have are subject to lighter rules, is larger.

The access to the national "market" for NPOs for foreign (European) NPOs brings anyhow a confrontation between the national and the foreign NPO-types. A comparison may be made and this may lead to requests for corrections of the national legislation of NPOs.

II. Legal forms of NPOs in Europe and their establishment

II.1 Common law and civil law

In Europe are -roughly speaking- two legal families: the civil law family, to which the continental European countries belong -apart from the Scandinavian countries that form their own family- and the common law family, to which the United Kingdom and Ireland belong - and former colonies from the UK, like the United States of America. With regard to legal forms

14 Art. 48 Treaty

15 See European Court of Justice 30 September 2003 Inspire Art Ltd, Official Journal C 275, 15/11/2003 p. 10, Sevic Systems AG (OJ C 289, 29 november 2003.) Official Journal C 36, 11/02/2006 p. 5. Compare P. Vlas, *Rechtspersonen* (Legal persons), 3rd edition, Kluwer Deventer 2002.

16 See the Inspire Art. Case, mentioned in footnote 15.

17 Acts of Second Chamber of Oarliament 2006-2007, Law proposal nr. 31058 to make the law on private companies limited by shares more simple and flexible.

of NPOs, one has to notice that the phenomenon of legal personality is more important in the civil law-countries than in countries from the common law-family. The way of regulation of legal persons is also different in both of these legal families. The civil law countries regulate legal persons forms that are characterized by purpose and other aspects and with rather specified rules on the internal organisation. The legal persons forms in the U.K. are more general and regulate less the internal structure. This is seen as a matter of the freedom of the establishers.
For NPOs the charitable trusts are in the U.K. much more important than legal persons..

II.2 NPO-forms in civil law and common law.
I will describe shortly the different forms for NPOs in civil law countries and in common law countries.
In civil law countries there is one legal form without legal personality: the informal association.[18]
NPOs with legal personality are:
Associations, organisations with members and a general assembly as well as a management board; conform the articles of associations the association may impose duties to its members.
Foundations, organisations with -normally- an endowment[19]; there are no members, but there may be affiliated persons, contractually connected with them; there is a management board and normally no countervailing power, be it that a supervisory or other board may be created. [20]

In common law countries the concerned legal forms are:
- without personality: the *unincorporated association* and the -*charitable- trust*. A trust is characterized by the fact that a trustor entrusts/transfers a part of his assets to one or more trustees, who administer the trust assets according to the trust instrument, which is written by the trustor. The legal title of the assets of the trust are with the trustees but only for the purpose laid down in the trust instrument. The charitable trust is a trust for charitable purposes and has some specific rules, different from other trusts.[21] In fact the trust is not considered to be a legal form of an organisation. As a chief commissioner of the charity commission once said to me: "A trust is not about an organisation but it is about property." A trust may be incorporated.
- with legal personality: the *company limited by guarantee*. This is a variation of the company limited by shares. It has members who guarantee a fixed amount in case of dissolution of the company.

II.3 Acquisition of legal personality and registration
There is at this point no distinction between common law and civil law countries. One could expect that civil law countries have more or less the same system, but this is not the case. There are different ways of acquiring legal personality throughout the continent.
One can discern between the acquisition of legal personality by a public decision and the

18 In The Netherlands and Germany informal associations are yet legal persons, be it with limited legal capacity.
19 This requirement does not exist in The Netherlands, However a foundation may be dissolved when it has not enough assets to perform its purpose.
20 Cooperative societies are dealt with in par. III.
21 See about charitable trust exhaustively H. Picarda, *The Law and practice relating to charities*, 4th edition 2009 (to be published).

acquisition by a private act.
In many countries government is involved in the establishment of an NGO as legal person, or may be more secure, in the acquisition of legal personality. There are many reasons why the government wants to be involved in the creation of legal persons, not only of NPOs but also of for profit organisations. [22]One is the fact that the creation of a legal person is the creation of a person in law, which needs recognition from the government as it wants to control who its inhabitants are. Another motive is of economic character. By the creation of a legal person, especially in case of foundations, property moves from citizens who take part in trade into the "dead hand".[23]
When government is involved it may take decision not only on the basis of the legal requirements, but also on the basis of conformity with the policy of the government. When the government has the power to approve or disapprove on the basis of the fact that the purpose or the policy of the NPO is pro or contra the policy of the government or when the government has discretionary power regarding the attribution of legal personality on another ground, this endangers the freedom of association. For that reason it is more suitable that 1) the requirements for obtaining legal personality as NPO-form are objective and 2) the decision that the NGO obtains legal personality is taken by a more neutral agency, like a court[24] or a notary public.[25] .
In a few countries the obtainment of legal personality by NGOs is a matter of the establishers only. It is then a private act. Examples are the association in Sweden, the informal association with limited legal capacity in The Netherlands and the association under the newest Belgian law of associations and foundations. When there are no formal criteria there is always the problem of the unclear border between the association as legal person and the contractual cooperation without it. This can lead to misuse.[26]
The Council of Europe has made important Recommendation with regard to the establishment-procedure for NGOs [27] Every participating country should evaluate its procedure on the basis of the Recommendation. I mention here the most important principles:

- A procedure should be finished within reasonable time;[28]
- Fee may be charged, but not at a discouraging level [29]
- A negative decision should be written and clearly motivated, such as: lack of documents, misleading name, the purpose is contrary to public order; fear for criminal activities.[30]
- There should be always appeal possible to an independent court. [31]

For the government but also for the public and for creditors or donors it is important to have an

22 Compare T. Schiller, *Stiftungen im gesellschaftlichen Prozess* (Foundations in societal process), Nomos Baden-Baden 1969, p. 25 ff.
23 Compare F.W. Hondius and T.J. Van der Ploeg, *Foundations*, Volume XIII, Par. 9 International Encyclopedia of comparative Law, 2000, p. 4.
24 For instance Gernany, regarding associations and Czech republic regarding foundations.
25 See The Netherlands regarding formal associations and foundations.
26 Compare T.J. van der Ploeg, *supra* footnote 5, p. 93 ff.
27 See Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe
28 Recommendation nr. 37.
29 Recommendation nr. 33.
30 Recommendation nr. 35 and 38.
31 Recommendation nr. 10 and 38; Compare also art. 6 European convention on Human Rights.

up-to-date register of NPOs with legal personality. In case legal personality is attributed by the government, as a general rule the registration is performed by it as a consequence of the approval-procedure. In some countries, like Germany and France regarding foundations, the approving government doesn't keep a publicly accessible register. In case the court reviews the application for legal personality, it is the court that registers. The notary public, who in fact also functions as a public officer in case he is involved in the establishment of an NPO with legal personality, does not keep a register of legal persons. The NPO is obliged to register at the commercial register of the Chamber of Commerce. The range of data that has to be registered for NPOs are varying rather much between the countries.

II.4 The purposes of NPOs.

NGOs vary more with respect to their possible purposes in Europe, than one would perhaps think. A general characteristic of them is that they may not distribute the eventual profit to the establishers, board members, members etc. This is called: the non-distribution constraint.[32] This does not prevent directors and other employees to be paid a salary, nor members of the board or other members who volunteer for their NPO to be compensated for the costs they make in that relation and in a moderate way for the time they have spend for the NPO.
I will sketch the different systems that exist on this point. It is necessary to make a distinction between foundations, associations.

a. The purposes of foundations.

One might expect that foundations generally need to have a public benefit purpose. In fact the legal form may in most countries also be used for limited or unlimited commercial activities. Mostly foundations can apply for a special preferential treatment in relation to tax and possibly subsidy when they are operating for the public benefit. In some countries like Belgium and Austria, the establishment requirements for a public benefit foundation are different from the requirements to establish a private foundation.

b. The purposes of associations

In a few countries exist special public-benefit associations, f.i. in France the *association reconnue d'utilité publique* [33] but this is not a restriction for associations in general. Mostly there is one type of (normal) associations.[34]
In some countries all purposes are allowed, be it that economic activities may only be undertaken ancillary.
In other countries there are also no limitations with regard to commercial activities. A logical limitation however is that when the association has a cooperative character, it has to take the form of a cooperative society. That is to say, the association is free to do so, but when an association performs economic activities in a ' cooperative' way, it should use the legal form cooperative society/company. [35] Originally associations were established for purposes of common interest for the members or for a commonly felt public interest. As it was set up as a civil legal person, it could by nature not performs commercial activities as this was not possible

32 This does not apply to cooperative societies.
33 In Greece associations can apply for philanthropist status according to Law 1111/1972.
34 An exception is the international not-for-profit association in Belgium.
35 In art. 2:26 s. 1 Dutch CC this is translated in a prohibition for associations t have a cooperative purpose.

in the time of the distinction between civil and commercial law. Where this distinction vanished, associations became more commercial and this is not limited later on by the legislator.

c. The purposes of Charities and other NPO's in England and Wales

Charity is a term from the common law world. In England and Wales charity law is for a part laid down in the Charities Act.[36] Charity is not a legal form itself. See about legal forms par. II.2 *supra*. It is a quality given to trusts, unincorporated associations and non-profit corporations because their aim is charitable.[37] When an envisaged exclusively charitable purpose cannot be reached any more, the Charity Commission or the High Court may on request amend the purpose of the concerned property to a purpose as nearly as possible to the original one. This is the so-called cy-près rule. This may be performed by transferring the property to a charity with a comparable purpose.

Charities enjoy fiscal facilities. In England the opinion is that charities should not meddle into political affairs, as this would be misuse of tax-money. This approach of the relations between political influence and tax facilities is typically Anglo-Saxon. On the European continent these restrictions for NPOs with tax facilities do not exist as far as I know.[38]

Charities are not the only NPOs in England and Wales. NPOs that do not have a charitable purpose may operate as unincorporated association, trust or company as they like. They may as such also be active in political matters.

III Social economy and social (?) enterprises

III.1. Legal forms for social enterprises and social economy

In the former paragraphs I made no reference to legal forms that are used in the social economy or for social enterprises. A generally used form is the *Cooperative society (or – company)* which is a member-organisation with a general assembly and a management board, which exploit an enterprise for the benefit of its members. Within Europe there are differences with regard to the allowed purposes, the influence of non-users and the place of capital. According to the European Regulation on Cooperative Companies, a cooperative company may (also) have as purpose the promotion of the non-material or idealistic interests of its members.[39] This type of cooperation has not only members but also shares and capital. The voting rights are connected to membership and not to shares. Also, depending of the national law, non-consuming members may exist

Generally cooperative companies/societies are not included in NPOs because they do not follow the non-distribution constraint. It seems to me however that it is in the context of this paper for the economic faculty of Bologna suitable to give also attention to legal forms for social enterprises, as you are very much focused on these topics in your teaching.

36 The latest Charities Act is from 2006.

37 See art. 2 Charities Act 2006 with the list of charitable purposes.

38 See Laura B. Chisolm, Exempt Organization Advocacy: Matching the Rules to the Rationales, Indiana Law Journal, Vol. 63, No. 2, 1987-1988.

39 See art. 1 s. 3 EU Regulation on Cooperative Company

As you know, certain countries have more developed law on social enterprises than others. This is connected to their adherence to the idea of social economy.[40] Belgium, Portugal, France, Spain and Italy belong to this group. I have not the intention to describe the social economy enterprise forms in general.[41] As The Netherlands is not a part of this group of social economy countries,[42] it seems interesting to me to discuss with you the advantages and disadvantages of the use of special vehicles for social economy. I would like to do that with reference to the social cooperative in Italy.
When I understand well, the social cooperatives in principle are just cooperatives, but with a specific social objective, like supporting handicapped or psychiatric persons etc. They have however there own legislation.[43] The people for which the cooperative is established are together with the staff member of the cooperative. The general assembly is for many important decisions the competent body. In this way the people 'with different talents' are taken seriously. This is the approach of the Italians. In my country we also want to take these persons serious. We establish then foundations, where disabled people work in f.i. a farm, restaurant, camping etc. but we do not establish social cooperatives. To construct a social cooperative seems to me to be a rather artificial way to take people with a handicap serious by giving them a vote in the general assembly. They can also be taken serious on the work floor. Important decisions in The Netherlands will be discussed normally by the manager with the people of the project. I understand that the Italian solution has to do with the fact that the Ministry of Justice was more flexible -by making a new legal form- than the Ministry of Finance was with the fiscal facilities for such a type of cooperative society. That makes it more intelligible, but also more regrettable. This is also not a convincing argument for the promotion of special legal forms for social enterprises. To my idea the creation of all sorts of legal forms for specific purposes makes the legal aspects rather unclear.

Are there serious differences between the social enterprises in the social economy context and the NPO-forms with enterprises in other (more liberal) economies?
It is clear that is social economy systems the government, by regulating specific legal forms, explicitly tries to further social aspects in enterprises, like membership for workers, democratic decision making, limited rights regarding profit distribution, and facilitates them with regard to tax.
In other (liberal) systems where NPOs with an enterprise are allowed, workers are in principle just employees, who may have a say through works councils or in case of cooperative societies where they are member, and may vote in the general assembly.
NPOs may not distribute profits to their members, establishers or board members. Cooperative societies/companies are yet allowed to do that, be it that ideologically cooperatives do not distribute profit to their members but diminish the costs for them.[44]
With regard to commercial activities, NPOs are generally taxed in the same way as other commercial organisations like companies limited by shares. The ideas behind this is that the

40 See Antonella Nova and Emma Clarence, The social economy: building inclusive economies, OECD Paris 2007.
41 See about legal forms for social enterprises in countries with social economy a paper from Bologna: Social enterprise across Europe by Claudio Travaglini, Federica Bandini and Kristian Mancinone; compare Chaves and Monzón Campos footnote 2.
42 See Chaves and Monzón Campos footnote 2, p. 16.
43 Law of 8 November 1991, nr. 381.
44 I am not competent to describe the relation between costs and profit in cooperatives.

use of a specific legal form should not be a vehicle for unfair competition.
On the other hand there are tax facilities for NPOs with public benefit and government subsidizes NPOs in case it wants to support the aims on the basis of administrative laws or practice.
In practice this may mean that the financial position of social enterprises in social economy-countries is the same as of NPOs with an enterprise for socially disabled people in other countries. . In how far it is important that the desired governmental approach is formulated in a law in stead of in long-term governmental policy, depends of the stability of governmental policy. Normally a law has a longer effect than policy, but there might be countries where laws are changed even quicker than policy.

Not everything that is called a social enterprise, is a social enterprise in the sense of the social economy. The term is also used in other European countries like The Netherlands, that do not adhere to social economy. The draft-law on social enterprise in The Netherlands does not apply to enterprises in which disables people receive a chance to work for living, but applies to NPOs who deliver public services. In par. III.2 I will describe some examples of these legal forms that are by researchers from social economy-side as from other background sometimes included in the category 'social enterprises'.

III.2 (Other) public benefit enterprises
There are also in other countries special legal forms for enterprises that are not directed on profit making but on some sort of public benefit.
In the *Czech republic* a type of NPO especially created for public benefit enterprises is the "Public Benefit Institution". This form is made in the framework of the privatization of public companies; many are because of their public interest subsidized by government. A condition to become such a legal form is that the organisation renders public services. The internal structure is the same as for foundations. The law obliges these PBIs to treat clients equally and to use the profits only for the promotion of the public service.

In the United Kingdom an interesting rather new phenomenon is the "Community Interest Company", created in 2005.[45] This is an English form of a non-capitalistic legal form for the promotion of the public benefit. A company limited by shares or a company limited by guarantee (see par. II.2 *supra*) can apply for this status at the Community Interest Company-regulator, who has to approve of it. This regulator in fact suspends the company from the obligation to distribute its profits to the shareholders. A Community Interest Company may use its assets only for a stated general (often local) benefit. Like the charities, Community Interest Companies are not allowed to be involved in political matters.

The newest form, be it that this is only a draft, is the " Social Enterprise" in The Netherlands. Already in 2000 in Christian-democratic circles the idea came up to create special legislation around the social enterprise, with which is meant, an NPO that delivers public services for instance hospitals, schools and public housing corporations. These enterprises are often private legal persons that are subsidized by government. In the concerned areas government and

45 The Community Interest Companies Regulations of 30 June 2005, nr. 1788.

private NPOs are interdependent. The idea was that by creating a common regulation of the internal; structure (governance) of these type of enterprises a lot of specific legislation could be deleted. The proposed internal structure is: a management board appointed by a supervisory board; the supervisory board has approval rights with regard to certain decisions of the management board; a representative body of interested persons is formed with advisory rights in relation to the decisions about which the supervisory board has approval rights; the representative body of interested persons may -optionally- have the right to advise about the appointment of the members of the management board. Originally -in the ' pre-draft'- the government wanted to create a new legal persons form " social enterprise" and had the hope that by the creation of a representation body of interested persons the policy of the management would not be dependent of government any more, because this internal body of interested persons would give the actual information of what society needs. In the draft, which is issued this summer[46] the new legal form is replaced by a certificate "social enterprise" that can be attributed to associations and foundations. In the draft the suggestion that the representative body of interested persons could replace in some way the government can not be found any more. Quite unclear is still, who the interested persons are, what their relation to the public benefit purpose must be etc. All in all, this draft seems, like the pre-draft rather out of balance.[47]
I mention these examples of legal forms that seem to belong to social enterprises in the sense of the social economy to show that they can not be included in this category.[48]

IV. Corporate governance

IV.1. Internal and external requirements

For all legal forms, under civil law or common law, in social economy-countries and other more liberal countries, there is the need for a good internal structure or good corporate governance. All organizations have certain aspects that have to be regulated. On a certain level one could presumably say that they are reigned by the same principles, although on more detailed level the differences are more apparent.. I will touch some of the aspects and give remarks about the application of the principles. In this paragraph in a way the differences in form, which were prominent in the earlier paragraphs, are relativized. It is not my aim to formulate rules that have to be laid down in a law. The concerned rules may also be laid down in codes of self-regulation or articles of association or even covenants between the parties involved.

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46 Acts of Second Chamber of the Parliament, 2008-2009, law proposal 32003.

47 Compare my critical comments about the pre-draft, T.J. van der Ploeg, *De juridische inkadering van de ' maatschappelijke onderneming* (The 'social enterprise' and the legal system), pp. 105 ff. in *Maatschappelijk ondernemen in het bijzonder in de zorg* (Social entereneurship , especially in the health sector), preadvies Vereeniging Handelsrecht 2008.

48 In the paper of Travaglini a.o., footnote 41, the Community Interest Company is included in the social enterprises, although about normative definitions, p. 10 ff , no information from England could be found, because one can not consider this form as a real social economy enterprise. Also in a Dutch book on social enterprises (H.J. De Ru a.o., *De maatschappelijke onderneming* (The social enterprise), 2005, p. 49 ff.) all sorts of legal persons (and non legal persons) forms are brought together, which are not comparable.

The relevant aspects of governance are:
There has always to be a *board*. Regarding the board there are two systems: the two-tier system, in which management and supervision are divided in two boards: the management board and the supervisory board. This system is used in civil law-countries. The other system is the one-tier system, where the board consists of executive directors and non-executive directors; there is no separate supervisory board. This is used in common law-countries.[49]
In the NPO-sector in The Netherlands, but I p[resume it will the same be elsewhere in Europe (on the continent), the division between management and supervision is stressed. This division is to y idea best guaranteed in a two-tier system.

When NPOs have members or 'shareholders' they form the *general assembly*, which has important competences with regard to the legal person, like appointment and dismissal of board members, amendment of articles of association, dissolution and other changes of status. Often the law does not give clear rules about the competences of the general assembly and leaves that to the articles of association. It would be good for the protection of the rights of the members when the law would contain more rules here.

Participation of employees; the participation rights of employees are not developed in all European countries, especially not in common law countries. It seems to me however that for a optimal and satisfactory functioning of NPOs (and other enterprises) employee participation is important. Employees belong anyhow to the stakeholders of the NPO and have generally a closer view on the activities of the NPO than subsidizing agencies, donating citizens etc.
The board will lend an ear to the last mentioned parties anyhow because the money comes from them.

Many big NPOs are *service rendering*. In that case it seems important to have a regulation regarding the *participation of clients, patients etc*. They are also important stakeholders. The participation of clients etc. mostly takes place in the form of a representative body, that has the right to advise in certain matters that are important for them.[50]

Two other aspects not related to the structure are important:
First is *public transparency*. The general data of an NPO, like name, address of the NPO, names and addresses of members of the management board, attribution of representative powers, articles of association should be available for every one. Normally this is organised through a public register where certain data from NPOs are registered. Next to that, an NPO can in this digital time create its own website with the information it thinks fit.

Another aspect is *external (public) supervision*. It is clear that regarding NPOs for public benefit external supervision is important to guarantee that the NPO acts according to its articles of association and according to the law. As far as I know such an external supervision does not exist in relation to associations. Apparently the general assembly is supposed to be the supervisor. The assembly may dismiss the members of the management board when they have no trust in them any more. In practice this supervision may be rather limited. The only possibility to correct mismanagement or bad supervision is when a member brings the

49 See f.i. W. Salacuse, Corporate governance, culture and convergence; corporation American style or with a European touch, European Business Law Review 2003, p. 471 ff.

50 In the Dutch law on participation rights of clients of care-institutions the clients council has influence on the composition of the management board or, when there are professional managers, on the composition of the supervisory board.

concerned decisions from the board or from the general assembly to a court. The court can evaluate from outside if the decisions taken by the bodies of the association were not contrary to the law, the articles of association or reasonableness and fairness. There it stops.
For foundations and charitable trusts on the other hand generally public supervision is provided for. The competent agency here is either the government (Germany), the court (The Netherlands) or the charity commission/high court (England and Wales). From the perspective of NPO, governmental supervision has a disadvantage as the supervision may be combined with the execution of the public policy by the same government.[51] Important is, that also when supervision is executed by a governmental agency, there should always be appeal to an independent court.[52]

IV.2. Sanctions in case of mismanagement

The regulation of the governance of NPOs cannot be effective without regulating what the sanctions are that can be imposed in case of mismanagement. The sanctions are not always exclusively formulated or NPOs, but nevertheless applicable to them. Sometimes the competence to impose sanctions is given to internal bodies; it is clear that the application can then be arbitrarily. In other cases the sanctions can be imposed by public authorities or by the court. Also creditors have the possibility to request the court for compensation of damage, to be paid by members of the management board, when they have evidently caused the damage. This sanction is for their own benefit. Good governance rules imply also sufficient protection of creditors. This is also for the public benefit.

The sanction that can be imposed are:

- A *warning* can be given by an internal or external supervising body. This will be given in case the fault is not of big importance or in case it happens for the first time. As a warning has generally no legal effect, it is not necessary that this ' sanction' is laid down in the articles of association or the law.
- A *fine* can only be given when it is regulated in the law (for the external supervisor) or the articles of association (for the internal supervisor). It should be in proportion with the misbehavior. This sanction can also be combined with another sanction.
  Members of the management board or executive directors can be *suspend*ed from their function by the internal body that has appointed them. Suspension is meant as a temporary measure in case the concerned officials have to be stopped in acting harmfully or in case they have to be expelled from the position to take harmful decisions. After a limited period there has to be convened a meeting of the body that is competent to dismiss the officials, in which has to be decided either to dismiss them or to render them their competences back. I only found the Charity Commission in England as as an example where a (semi-) public agency has the competence of suspension.[53]
- *Dismissal* of board members or executive directors and of members of the supervisory board or non-executive directors of associations. This sanction is an important means to stop mismanagement or dysfunctioning of supervisors. In associations generally is regulated

51 Compare T.J. van der Ploeg, A comparative legal analysis of foundations; aspects of supervision and transparency, pp. 55 ff in Helmuth K. Anheier and Stefan Toepler (ed.), *Private funds, public purpose*, Kluwer plenum New York, 1999.
52 Art. 6 European Convention on Human Rights.
53 Charities Act 2006, art. 18.

in the law that the general assembly may take this decision. I do not know countries where in this case also an external supervisor has this competence, although this under certain circumstances could be desirable.
Regarding foundations the articles of association may also give this competence to an internal body. This will be the supervisory board with regard to the members of the management board and the body that appoint the members of the supervisory board with regard to these members. As the law usually does not impose the necessity of internal supervision for foundations and charitable trusts, the law provides for an external supervisory agent to protect the general interest and (or) to protect the interest of the founders. In countries where government is involved in the establishment and supervision of foundations a governmental supervising body has the competence to dismiss mismanaging members of the management board. In other countries the court has this competence, on request of the public prosecutor or interested persons. Regarding the charitable trusts the Charity Commission under the authority of the high court may dismiss trustees and other officers in case of mismanagement.[54]

- Members of the (management) board have to fulfill their duties responsibly. The *NPO may hold* the member of the management board *liable* for the damage that is caused by his mismanagement. Not for all damage which is related to the performance of the concerned person as a member of the management board he can be held liable. It must reproachable how he acted, because a normal board member would not have done it and the blame that can be made should be really serious. The voluntariness of the function does not as such prevent members of the management board from this liability.
- Members of the management board may also be *externally liable*. The idea is that a member of the board acting on behalf of the NPO has also to take care for the third party with whom he acts on behalf of the NPO. When he knows or could know that the NPO will not be able to observe the obligations of the contract that he concluded, he is for that reason liable to the third party (creditor). Such behavior constitutes a tort from this member of the management board towards the creditor of the NPO. Not all countries recognize this liability; in some countries the members of the management board can hide themselves behind the corporate veil of the NPO.
  In my country we recognize as such this external liability, but sometimes courts have strange ways of thinking. An odd case was the following. In a small village some citizens wanted to organize a village feast. They established a foundation and they appointed themselves as management board. They concluded on behalf of the foundation a contract with a professional event organizer. They agreed on the price and promised the organizer to raise enough funds. The feast was a big success. Later on the event organizer asked the foundation for his money. The foundation could however pay only a small amount, because not enough funds were raised. The event organizer sued then the members of the management board on the basis of tort as they could have known when they concluded the contract that the foundation would not be able to pay the agreed prize. They understood beforehand that the foundation would not be able to collect enough money by their fundraising activities, was his argument. The court however dismissed the claim because the event organizer should have understood that members of the management board of such a

54 Art. 18 Charities Act 2006.

foundation are very much amateurs that can not be trusted to do a good job. So the risk was for the event organizer. I do not think this is an example to be followed.

Conclusion

In this paper an overview is given of the legal forms of NPOs in Europe. This is not complete but depicts the different types of NPOs. The European Convention on Humans Rights forms an important basis for the limits that have to be taken into account of by legislators. Entrepreneurial NPOs enjoy as such the freedom of establishment from the Treaty of the European Union. Although there could be some competition between the legal systems, also in the area of NPO-law, this apparently has not started until no. The main difference within Europe is between common law and civil law countries. For the first category charity-law is the most important, but that is not about legal forms. In civil law, generally the association and foundation are the used forms for NPOs, but the characteristics, the way of establishment and the supervision are regulated in many different ways throughout Europe. In mid- and south Europe social economy plays an important role. The law creates there legal forms of a cooperative type for social purposes. These same purposes are reached in other- more liberal- countries by traditional NPO-forms with help of tax- and administrative rules. In some countries that do not belong to the social economy zone are also created or proposed legal forms for not for profit enterprises. By social economists as well as by economic and legal researchers with another background they are sometimes put in the same category as social enterprises. This is however not legitimate. They are not created for the same type of purposes.
A common theme for NPO-law and for social enterprises is corporate governance. Very rough some aspects of it are mentioned of which transparency and external supervision ask most for attention.
In the end the sanctions in case of mismanagement are described. For a healthy NPO-sector, but also for healthy social enterprises it is not only important to make good rules about the legal form and good governance, but also to make clear rules to stop mismanagement and to care for compensation by the managers (or supervisors) to the damaged parties. NPOs and social enterprises may be not for profit, this does not mean that board members are free from responsibility.
Do these organizations receive fiscal and financial facilities because they can not be taken serious from economic and legal perspective? When this is the case, it would be better when they kept themselves in the shadow. If NPOs want to be seen as serious vehicles for important purposes they should also take the consequence of being taken serious from economic and legal perspective. That could mean less facilities and more liabilities.
It would be good when in Europe comparative legal research of NPO-forms in combination with tax law and law on subsidies together with the ethical and other norms that reign in the NPOs would be started. It is too limited to look to legal forms.

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