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EU Regulation of Charitable Organisations:

The Politics of Legally Enabling Civil Society

The ICNL-Cordaid Civil Liberties Prize Distinguished Research Award

Oonagh Breen
Professor in the School of Law at
University College Dublin

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I. INTRODUCTION

Traditionally, the European Union has adopted a laissez-faire approach towards the regulation and governance of charitable organizations. The legal enablement of these bodies occurs in the national legislation of Member States and thus stops at the borders of those countries, forcing nonprofit organisations that work across borders to grapple with different national legal and regulatory regimes. Different tax laws, different company laws and at times, different charity laws therefore apply to charitable organisations that wish to work across a number of European Member States. In some instances, the European Union lacks competence to harmonise national laws, for example, in the area of taxation. In other areas, such as company law, the EU has legislative competence to harmonise national laws but has chosen to exclude nonprofit organisations from the scope of its regulatory efforts. Whatever the underlying reason for this lack of enablement -- whether classified as benign neglect or legal parsimony on the part of EU institutions -- the current European legal regime prevents nonprofit organisations from enjoying fully the benefits of the common market.

One solution commonly proffered as a panacea for nonprofit organisations' difficulties is to develop a European legal vehicle to facilitate nonprofits that operate on a pan-European basis. To this end, demands have been made for a European Statute for Foundations and a European Statute for Associations, enacted by way of European Council Regulation and thus directly applicable in all Member States. These European vehicles, the argument runs, would have transparent and uniform requirements in each state and thereby cut down on the legal and administrative bureaucracy that nonprofits presently endure in attempting to open new branches or deal in Member States other than their founding Member State. The advantages cited in support of the adoption of such European Statutes tend to be three in number. First, proponents argue that the statutes would facilitate the giving and receiving of gifts and grants across borders and the general improvement of cross-border operations and activities of funders and foundations in Europe. Second, the provision of new instruments for cooperation among funders would both enhance the existing well-established practice of co-funding and engaging in joint activities and projects throughout the EU and also assist in the increasing number of trans-national

collaborative projects between European nonprofit organizations in third countries. And third, the statutes would enable nonprofits to enjoy fully the freedom of establishment for all activities which contribute to the objectives of the Community, irrespective of the form taken by the nonprofit that carries them on.

Legislative proposals for European foundation and association statutes have enjoyed considerable support in the nonprofit sector. In a recent Commission Consultation paper on *Future Priorities for Company Law Action*, responding foundations unanimously endorsed a Commission proposal for a feasibility study on the need for a European Foundations Statute.[1] The response rate to the question was an impressive 55 percent of respondents[2] with many foundations responding exclusively to this question in the Consultation,[3] implying strategic lobbying by these organizations. Advocates of a European legislative solution seek parity of treatment for nonprofit organizations with for-profit entities and view the European Company Statute, enacted in 2000 to provide a common European legal vehicle for public limited companies (plcs), as an ideal template for a similar statute tailored for nonprofit organizations.

This paper takes issue with those who view the introduction of a European regulation as the most effective way to facilitate nonprofit activity in the EU. It argues that the judicial route and not the legislative route may prove more fruitful if the aim is to achieve greater legal enablement of civil society organizations within the European Union. Part II outlines the difficulties associated with uniform European regulatory solutions in company law and explains why a European legal instrument will not provide an effective answer to the problems currently facing nonprofit entities. In the absence of a legislative solution, Part III considers alternative judicial and political attempts to create a legally enabling environment for nonprofit organizations in the EU. Finally, Part IV puts the judicial developments relating to nonprofits in the broader political context of an emerging European Union that can no longer be

[1] *See* Directorate General for Internal Market and Services, Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union (available at http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf) (hereinafter, 'Future Priorities Report'), at 26. *See* further discussion of this phenomenon infra n.112 and accompanying text.

[2] The average response rate for other questions in the survey, which dealt with company law issues, was typically in the low 40s.

[3] *See* n.1 *supra*.

viewed solely in terms of economics. The paper concludes that given the evolving nature of the relationship between EU institutions and civil society organizations a legal solution to facilitate cross-border nonprofit and charitable activities may be politically more effective and timely than a statutory solution.

II. EUROPEAN STATUTES: INAPPROPRIATE INSTRUMENTS FOR THE CREATION OF A LEGALLY ENABLING ENVIRONMENT FOR NONPROFIT ORGANIZATIONS

The Background to the European Company Statute

The idea for a European Council Regulation,[4] creating a European legal form that would be recognisable in all member states, is not new. The debate on the need for a European Company Statute began in Paris in the 1960s[5] and continued for the next forty years. Although there was little disagreement as to the general principle, achieving consensus on the model's details proved difficult. Over the following twenty years the Commission published various proposals[6] for a European company model but deadlock continued to persist in the European Council over the prescribed forms of worker participation in the proposed model.[7] A breakthrough occurred with the completion of the internal market in the early 1990s when the Commission published new initiatives to revive the Company Statute.[8] The publication of the

[4] A regulation is a legal instrument of general application that is binding in its entirety and directly applicable in all Member States.

[5] Congrès Internationale pour la Création d'une Société Commerciale de Type Européen, Report published by Revue de Marché Commun (Paris), supplement to No. 27, July-August 1960. The Congress drew on the practical and academic legal expertise not only of those within the existing six member states that constituted the EEC at the time but *also* boasted representatives from the UK, the United States and the Council of Europe. The Congress proposed the signing of a Convention between the six member states to recognise a common form of trading company that would exist alongside the national forms in each member state but would operate under uniform European rules, be registered in a central registry and subject to European judicial control. Tax matters relating to the company, however, would continue to be a matter for national law in each case. *See further*, Thompson, The Project for a Commercial Company of European Type (1960) 10 ICLQ 851, at 858.

[6] *See* Proposal For A Council Regulation Embodying A Statute For The European Company, COM(70) 600, OJ C 124 (10.10.1970); Bull EC Supp 8/70 and Amended Proposal For A Council Regulation On The Statute For European Companies, COM (75) 150 final, (19.03.1975; Bull EC Supp 4/75..

[7] On the general trials and tribulations relating to the legislative history of the European Company Statute *see* Sanders, *The European Company*, 6 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (1976); Wehlau, *The Societas Europaea: A critique of the Commission's 1991 amended proposal*, 29 CML REV. 473 (1992); Edwards, *The European Company – Essential Tool or Eviscerated Dream?* 40 CML Rev 443 (2003).

[8] Memorandum from the Commission to Parliament, the Council and the two sides of industry, "Internal Market and Industrial Cooperation – Statute for the European Company – Internal Market White Paper, point 137", COM(88)320; EC Bull Supp 3/88, outlining the Memorandum of the Commission on the SE Statute (in which the Commission moved from having an obligatory board participation system for all SEs to giving companies instead the choice between different board

Davignon Report[9] in 1997 enabled real progress to be made and the European Council finally adopted the European Company Statute in Nice in 2000.[10] The European Company Statute ('ECS') came into force in 2004.[11] The objective of the ECS is to enable companies incorporated in different Member States to merge or form a holding company or joint subsidiary while avoiding the legal and practical constraints arising from the existence of twenty seven different legal systems. Although the intention in 1960 was to develop a single European company governed entirely by European principles rather than the laws of any one particular Member State,[12] legal realities and cultural differences to company law forced the drafters to modify the model. The final version consists of a "European" public company that is registered in one member state, governed by the Statute in certain key areas (e.g., minimum capital, management structure, shareholder meetings) but otherwise is subject to national laws for public companies. The ECS specifically does not apply to nonprofit organisations.[13]

The ECS experience graphically illustrates the difficulties of attempting to accommodate the intricacies of divergent national company laws in one all-encompassing Council Regulation. The limited format of a legal regulation does not

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participation systems. *See also*, the Commission Proposal OJ C 263, 16.10.1989, in which the Commission for the first time suggested splitting the SE legislation into a Regulation and a Directive. The latter aimed to deal with the controversial issue of employee involvement

[9] Final Report on European Systems of Workers Involvement of the Group of Experts (hereinafter referred to as the 'Davignon Report') May, 1997. The Davignon Group concluded that the national systems of workers' involvement were too diverse, making general harmonisation impossible. The report proposed that priority should be given "to a negotiated solution tailored to cultural differences and taking account of the diversity of situations." It was agreed that the relevant parties should first try to agree on a worker participation model for each European company but if negotiations should fail, a set of standard rules would then apply instead.

[10] *See* Council Regulation 2157/2001, OJ L 294 and Council Directive 2001/86/EC, OJ L 294/22, 10.11.2001. The objective of the Regulation, which came into force in all Member States in October 2004, is "to create a European company with its own legislative framework." *See* further, http://europa.eu/scadplus/leg/en/lvb/l26016.htm (last accessed October 30, 2007).

[11] Only 6 countries managed to meet the 8 October 2004 deadline for the transposition of the SE Directive, thereby preventing employees from their country from participating in negotiations in upcoming SEs, *see* Commission Press Release, Company law: European Company Statute in force, but national delays stop companies using it, IP/04/1195, 08/10/2004. In the overwhelming majority of countries the considerable delay was not caused by substantial national debates on the substance of the Directive but rather by an apparent lack of interest in the issue. *See*, e.g., http://www.eurofound.europa.eu/eiro/2005/01/feature/si0501303f.htm (on Slovenian approach) and more generally, http://www.worker-participation.eu/european_company/countries_transposition.

[12] *See* Thompson, *supra* n.5.

[13] *See* Art. 3 Regulation 2157/2001 (providing that "Companies and firms within the meaning of the second paragraph of Article 48 of the Treaty and other legal bodies governed by public or private law, formed under the law of a Member State, with registered offices and head offices within the Community may form a subsidiary SE.") The aforementioned Art 48(2) EC specifically excludes nonprofit organisations from its scope.

lend itself to the distillation of the granular details necessary to create a generic legal vehicle that will work uniformly and coherently in all 27 member states. Drafters of the ECS were forced instead to agree certain lowest common denominator requirements that can apply to all member states by regulation with remaining issues that are not expressly covered by the regulation left to be decided by national law.[14] Whereas the law relating to minimum capital requirements, management structure, employee rights and shareholders meetings are governed by a European standard, other important matters (such as directors' liability, audits and accounts, liquidation and insolvency, tax and registration and publication of documents) still fall to be determined under the relevant national law. The troublesome issue of employee involvement has also been dealt with by an accompanying Council Directive and individual Member State legislation.

The Practical Effectiveness of the Societas Europae

The commercial take-up of the European company or "SE," as it is known,[15] has not been overwhelming. To date, there have been 105 SEs established throughout the EU.[16] Many of these have commenced life as shelf companies used not to facilitate the conversion of existing autonomous business operations in different Member States into one pan-European company but rather to assist new entities that want to enter a market quickly.[17] According to the European Employers Federation (UNICE), the perceived weaknesses of the SE include the absence of an agreed tax regime and the creation of now twenty-seven different national statutes to give effect to the Directive.[18] The value of a legal structure without these elements is limited since it cannot effectively facilitate cross-border trade, a flaw predicted by some commentators before the European Company Statute was enacted.[19]

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[14] *See*, in this regard, Articles 9(1)(c) and 10 of Regulation 2157/2001

[15] The European Company is known by its Latin acronym Societas Europae or "SE" for short.

[16] Source: http://www.worker-participation.eu/european_company/se_companies/brief_general_overview (figures current to November 2007.)

[17] *Ibid*.

[18] *See* Edwards, *The European Company – Essential Tool or Eviscerated Dream?* (2003) 40 CML REV 443, at 463. On the various national implementing legal instruments *see* http://ec.europa.eu/employment_social/labour_law/documentation_en.htm#10.

[19] *See* Edwards *supra* n. 18, at 463 (noting, "since many cross-border corporate structures are dictated by tax considerations more than any other factor, the availability of a pan-European instrument which leaves the existing mosaic of fiscal regulation untouched may prove to be irrelevant."). *See also*, Winter, *EU Company Law on the Move* (2007) 31 LEGAL ISSUES OF ECONOMIC INTEGRATION 97, 98 (commenting that, "The trouble with the Statute, in its agreed-upon form, is that it precisely fails to

The practical utility of the SE remains in doubt: 60 per cent of those responded to the question regarding the utility of ECS in the Commission's *Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union*[20] did not think the Statute was either very useful or particularly so.[21] Among the practical problems cited by those currently using the SE as a legal vehicle were: the persisting difficulties caused by the differing national taxation regimes;[22] the need to co-ordinate other Community legislation which could obstruct the creation of an SE; and the issue of whether an SE incorporated in one Member State which has operations in another Member State (which would require it to register a branch in that Member State if it were a public limited company) should be required to register a branch, given that the practice seems to vary between Member States.[23]

When surveyed as to whether there was need for a similar European statute for private companies, one quarter of respondents were against its introduction, citing the lack of interest in the industry in such corporate form. According to the *Future Priorities Report*, this negative impression was informed by the limited up-take of the existing SE model and yet again, the "doubted practical value of the Statute due to other obstacles to corporate mobility such as taxation, accounting, insolvency or employee participation issues."[24] Moreover, those in favor of the European Private Company (i.e., three-quarters of the 40% of respondents who answered this question) stressed the need for any new statute to provide a "uniform, genuinely supranational form with as few references to the national laws as possible." In other words, what is sought is

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achieve [its] objective. There is no uniform set of rules applying to the SE, as Member States were unable to agree to one set of rules.")

[20] Directorate General for Internal Market and Services, Report on Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union (available at http://ec.europa.eu/internal_market/company/docs/consultation/final_report_en.pdf) (hereinafter, 'Future Priorities Report'). The Report reported on the views of more than 270 interested parties who responded to the consultation; *see* further, Commission Press Release, Company law and corporate governance: public hearing on future priorities for the Action Plan, IP/06/574, May 4, 2006.

[21] *See* Future Priorities Report, *supra* n.20, at 22. Notably, the report itself takes a more positive approach to this figure, stating although at an early stage in its evaluation "Still about 40% of the respondents considered the European Company Statute to be very useful or partly useful."

[22] Although COM 88/320, *supra* n.8, at 15, suggested greater use of bilateral tax treaties to solve the taxation problems that would still be encountered by SEs, this solution has not proved practical in many cases.

[23] *Ibid*, at 23.

[24] *Ibid*, at 25.

an approach akin to the original aspirations for the SE but far removed from the actual SE model currently in operation.[25]

Current Obstacles affecting Civil Society Organizations that wish to operate on a Pan-European Basis

It is against such negativity that the enthusiasm expressed for the promulgation of European Statutes in aid of nonprofit organizations falls to be considered. Responding foundations to the Future Priorities Consultation unanimously urged the Commission to carry out a feasibility study on a European Foundation Statute.[26] Non-foundational stakeholders, many of which have experienced operational difficulties with the ECS, dissented from this call. Whereas some of the dissenters adopted a self-interested stance in counseling the Commission to ignore non-profit organizations,[27] the majority of dissenters raised a note of caution as to the ability of the proposed statute to solve the current structural obstacles that inhibit nonprofit activities throughout the EU.[28]

It is true that nonprofit organisations, like many for-profit entities, face structural obstacles when they seek to operate on a cross-border basis across the EU. These obstacles take the form of differing legal and fiscal regimes that operate in each of the 27 Member States with which nonprofit organisations must comply if established in any of these states.[29] Imagine, for instance, a donor who wishes to establish a pan-European foundation enjoying charitable tax-exempt status in the EU member-states of Ireland, France, Germany and Malta.[30] To establish the organisation French law

[25] *Ibid*., at 25.
[26] *Ibid*, at 26.
[27] *Ibid* (noting that, "A few respondents, mainly from the private sector, considered that the Commission should focus on issues which directly relate to enhancing the competitiveness of profit making entities and the improvement of the functioning of the internal market.")
[28] *Ibid*. (stating that "More than half of [those not in favour of introducing a new Statute] (mainly from the public sector, industry associations, representatives of the financial sector and some professional services providers) were sceptical as to the usefulness of such an instrument or would prefer other solutions to address the foundations' requests.")
[29] Information for this comparison is drawn primarily from the EUROPEAN FOUNDATION CENTRE, FOUNDATIONS' LEGAL AND FISCAL ENVIRONMENTS – MAPPING THE EUROPEAN UNION OF 27 (2007).
[30] These four states are chosen simply to illustrate existing national regulatory divergences – a combination of other member states might not provide the same logistical difficulties but would provide others in lieu. Thus as Dube, Rossi & Surmatz point out in (Summer, 2007) EFFECT 13, "While you need at least 3 ,000 euros to start a foundation in Copenhagen, Denmark, just a short drive across the Oresund Bridge in Malmö, Sweden, there is no such fixed requirement, although your assets should be adequate to pursue your planned purpose for five years. And if you set up a foundation in Cieszyn, Poland, you can run a business activity to generate income for it, but you can't do so if you set one up just across the Friendship Bridge in Tešin, Czech Republic."

requires both registration and state approval, which approval is subject in practice (although not in law) to a minimum capital requirement of €1 million. In Germany, registration and state approval is also required but there the State enjoys no discretion regarding such approval and although there is no official minimum capital requirement for establishment the foundation must have sufficient assets to carry out its purpose, which generally requires a minimum capital requirement of €50,000. In Ireland, registration with the Revenue Commissioners is required and there is no minimum capital requirement whereas the Maltese organisation must register and will require State approval if it wishes to register as a 'voluntary organisation.' There are *de minimis* Maltese minimum capital requirements with the prescribed amount being €240 for social purpose foundations and €1200 for all others.

Once established, a number of governance differences also emerge as between the four member states. Ireland, alone, requires that a majority of the governing board reside within the jurisdiction. French law requires all foundations to appoint an auditor and a substitute and to file annual returns and financial statements with the relevant administrative authorities. These reports must be made publicly available only if the foundation receives annual gifts in excess of €153,000 or support from public authorities. By contrast, German law does not have any publication requirement although dual filing is required both to the state authorities and to the relevant financial authorities if tax exemption is sought. Irish law requires all charities with an annual income of over €100,000 to prepare audited accounts but only imposes a public filing requirement on incorporated charities. Even then, this requirement is not consistently applied. If the company is a religious charity, it is statutorily exempt from making its accounts available.[31]

Retention of tax exemption also varies. If the foundation carries out activities outside its country of establishment its tax-exempt status remains unaffected in Malta. French law makes the continuation of tax-exempt status conditional upon proof that the activities are in the public interest and of a nonprofit nature whereas German law is the most demanding, requiring such activity to have a positive effect on the reputation of Germany and its population before tax-exempt status for foreign activity can be guaranteed.

[31] *See* s. 2 Companies (Amendment) Act 1986.

It is in the treatment of capital asset movement and tax treatment of donations, particularly cross border donations, however, that the diverse laws of the twenty seven member states create the greatest difficulties. In general, EU Member States agree that there are justifications for granting special tax privileges to charities. The private supply of public goods by charities for the public benefit of the community provides the basis for the tax exemptions and privileges that these bodies enjoy. A state's ability to tax, however, is seen as a sacrosanct power of a sovereign nation. It is an element of sovereignty that member states have been extremely resistant to sharing with the EC.[32] The resulting lack of harmonisation has meant that Member States have remained free to develop their own legal criteria for what constitutes public benefit for tax purposes and what ancillary legal requirements are placed on an organisation seeking tax relief for its charitable purposes. One such ancillary condition typically has related to establishment – only those organisations established within the territory of a Member State may be eligible for the relevant tax relief. In this way, national tax laws tend to limit tax benefits to domestic charities and discriminate against foreign charities. Of the twenty seven member states, only the Netherlands, Poland and Slovenia allow donations to foreign-based public benefit organisations to be income tax deductible for a resident donor. The Dutch and Polish laws in this regard are newly minted and result largely from national legislatures' attempts to pre-empt Commission infringement proceedings.[33] These laws, the scope of which has not yet been fully defined, are in the minority. Sixteen member states do not allow deductibility under any circumstances for such donations despite allowing deductions for donations to similar domestic organisations.[34] The remaining eight states allow deductibility in some limited exceptional cases.[35]

Many of these problems are felt equally by for-profit companies operating on a transnational basis in the EU and have not been resolved by the introduction of the European Company or 'SE.' Directors of SEs must still turn to the various national implementing laws to determine issues of liability, reporting and auditing

[32] To be adopted, European tax regulation requires the unanimous support of all member states. Not surprisingly, the Commission's attempts over many years to harmonise national tax laws have failed.
[33] *See infra* Part III.
[34] *See* further EFC, FOUNDATIONS – LEGAL AND FISCAL ENVIRONMENTS, *supra* n.30.
[35] Thus, France allows income tax deductions only if the foreign-based organisation would be recognised as being of public benefit in France.

requirements. Moreover, in no instance has the tax treatment of companies using the SE as their legal vehicle of choice improved since the Commission lacks the competence in the absence of unanimity at Council level to harmonise national tax laws.

The appropriateness of the ECS Model in the Legal Enablement of Nonprofits

It remains difficult, therefore, to see how the introduction of a European Statute – even one tailored to the specific characteristics of nonprofit associations or foundations – could hope to resolve the central structural problems encountered by such entities. Attempts to develop parallel nonprofit-friendly facilitative regulation to date have failed. In 2006 the Commission withdrew its proposals for Regulations on the Statute for a European Association (ESA)[36] and the statute for a European Mutual Society,[37] introduced in 1991, on the overarching grounds that they 'were not found to be consistent with the Lisbon and Better Regulation criteria, unlikely to make further progress in the legislative process or found to be no longer topical for objective reasons.'[38]

The withdrawal of the ESA proposal came in the wake of a frustrating 20-year incubation period. Institutional support for an ESA had sprung from the European Parliament's adoption of the Committee on Legal Affairs and Citizens' Rights *Report on Nonprofit Making Associations in the European Community*[39] in 1987.[40] With a suggested Treaty base in Article 12 EC's (ex Article 7 EC Treaty) prohibition of discrimination on grounds of nationality, the idea behind the European association was to facilitate transnational transactions by nonprofit membership associations. Despite its enthusiastic beginnings, the ESA proposal made little progress for almost 15 years since its fate -- like that of its sibling regulations the European Statute on Mutual Societies and the European Statute on Cooperative Societies -- was tied to that of the ECS.[41] Although the latter's enactment in 2000 gave some renewed impetus to

[36] COM (1991) 273, OJ C 99, 21.4.1992, 1.
[37] COM (1991) 273, OJ C 99, 21.4.1992, 40.
[38] OJ C 64, 17.3.2006, 3.
[39] Working Documents, Series A 2-196/86, January 8, 1987 (hereinafter "THE FONTAINE REPORT").,
[40] European Parliament, Resolution on non-profit-making associations in the European Community, OJ C 99/205 (13 April 1987).
[41] CEDAG, The Proposed Statute for a European Association: Background and Challenges, Document presented to the Liaison Group of the European Economic and Social Committee with civil society organisations and networks, Brussels, 28 February 2006. *See also* Gjems-Onstad, *The proposed European Association: a symbol in need of friends?* (1995) 6(1) VOLUNTAS 3.

the ESA proposal, the political necessary to make the ESA a reality did not exist. A number of stakeholders share the 'blame' for this demise. Some Member States viewed the enactment of a European Statute as an unwelcome Commission encroachment into an area of third sector policy previously reserved to national deliberation;[42] an unwarranted intrusion for which there was no legal Treaty basis.[43] Indeed, the Commission's commitment to the ESA proposal has not always been constant or consistent, due in part to the lack of definitive Directorate General responsibility for nonprofit associations during the 1990s.[44] Similarly, with each rotation of the Presidency of the European Council, the attention lavished upon the ESA varied with the individual interests of the Member State in control of the legislative policy agenda.[45]

Support for the ESA in legal circles has also been scarce. In its report to the EU Commission in November 2002 on a modern regulatory framework for company law,[46] the High Level Group of Company Law Experts recognised the difficulties surrounding the development of either a European Association or a European Foundation Statute. In particular it stated that a European form of association was not regarded by the Group as a priority for the short or medium term. According to the Group, long-term plans for any such legal vehicle should be dependent upon a review

[42] Germany and the United Kingdom are alleged to have subscribed to this view. *See* Jeremy Kendall & Laurent Fraisse, *The European Statute of Association: Why an obscure but contested symbol in a sea of indifference and scepticism?*, LSE TSEP WORKING PAPER 11, June 2005.

[43] Some Member States (most notably the UK) expressed concern as to whether Article 48 EC, which expressly excludes nonprofit entities from its scope, could provide a legal basis for the regulation for a Statute for European Associations, which by definition are nonprofit entities. Indeed, Perri ascribed the failure of the Statute as far back as 1995 to the disagreements among both member states and the organisations themselves. *See* Perri, *The voluntary and non-profit sectors in continental Europe*, in J. D. SMITH, C. ROCHESTER AND R. HEDLEY (eds), AN INTRODUCTION TO THE VOLUNTARY SECTOR (Routledge, 1995) at 141.

[44] *See* Gjems-Onstad, *supra* n.41, at 4, suggesting that, during this period, "it is obscure whether anybody, either outside or inside the official bureaucracy of Brussels, much cared about what happen[ed] to the proposals." *See also*, BREEN, *infra* n.120.

[45] Thus, the Greek Presidency in the first half of 2003 revitalised the consideration of the Statute for European Associations by prioritising it during its tenure, according to Kendall & Fraisse, *supra* n.42. Kendall surmises however that Greece's "interest may have had more to do with the national Government's wish to progress corporate legislation in general than a specific interest in the association sector as such." The Irish presidency, which followed, chose to focus on the mutuals statute to the exclusion of the association statute.

[46] Published in November 2002 and available at: http://europa.eu.int/comm/internal_market/en/company/company/modern
In its recommendations the Group stated that it failed to *see* how uniform regulations of the European Association and European Mutual Society could be achieved if there was no agreement on harmonisation of the underlying national rules. On the other hand, the Group acknowledged that the progress made on the SCE regulation (regulation for European Co-operative) represented an important precedent for the other proposed Regulations.

of European Statute on Cooperative Enterprises.[47] Thus the overall recommendation made by the High Level Expert Group was not to proceed with the introduction of the social economy statutes but instead to consider working towards the adoption of model laws instead. Arguing in favour of a different regulatory approach, the Group concluded:

> The work on such model laws would need to reach agreement on the basic characteristics the European legal form should have, and thus contribute to agreement on a certain level of harmonisation of these national legal forms. Once that level of agreement is reached, the introduction of alternative European legal forms could become feasible.[48]

Thus, strong opinions in the form of individual Member States (doubting the legal basis for the regulation and querying its proposed scope)[49] and of expert legal groups (doubting the utility of the EA as a legal vehicle)[50] along with institutional lack of direction militated against the introduction of the EA. Notwithstanding this death knell of the proposal for a European Statute for Associations, charities have continued to lobby for the development of a European Foundation Statute.[51] Institutional openness to this proposal to date, perhaps in light of the ESA experience, has been neither constant nor consistent.[52]

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[47] *Ibid*, Recommendation VIII.1. at 120.
[48] *Ibid*, at p. 122.
[49] General reservations on the need for such a regulation have been expressed by Netherlands, Sweden, Finland, Germany, Ireland, Denmark, and Austria; while Italy has made a scrutiny reservation regarding the need for the regulation. These are apart from the more particular concerns of the UK delegation regarding the content of the proposed regulation and its likely effect on charity law. *See* Working Party on Company Law (EA) Council Documents 6873/03 (17 March 2003) and 8401/03 (10 April 2003).
[50] *See* in particular p.120 et seq. of the High Level Company Expert Group's report at http://europa.eu.int/comm/internal_market/en/company/company/modern
[51] *See. e.g.*, Synthesis of the responses to the Communication of the Commission to the Council and the European Parliament "Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward" – COM (2003) 284 final of 21 May 2003: A Working Document of DG Internal Market, November 15, 2003, at 23. *See also*, the work of the European Foundation Centre, which produced a draft Statute for Foundations and successfully lobbied the Commission to carry out a feasibility study on a European Foundation Statute, a study which is expected to begin in late 2008; *see* http://www.efc.be/projects/eu/legal/efcefs.htm (last accessed October 30, 2007)
[52] *See* the speech of Commissioner for the Internal Market, Mr. Charlie McGreevy to the European Parliament's Committee on Legal Affairs, November 21, 2006 (expressing caution regarding the introduction of a multiplicity of European corporate forms to the effect that he was "not yet convinced about the ability of a European Foundation Statute to respond to the specific needs of foundations.") (available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/720&format=HTML&aged=1&language=EN&guiLanguage=en , last accessed November 29, 2007). *C.f.* the positive feedback given by Commission Official Nathalie Berger in support of proceeding with the plans for a European statute

III. ALTERNATIVE WAYS OF CREATING A LEGALLY ENABLING ENVIRONMENT FOR CIVIL SOCIETY ORGANISATIONS

Part II has illustrated that the legal and administrative hazards associated with operating on a cross-border basis have not been resolved for for-profit companies with the enactment of the ECS. Nonprofit organisations experiencing similar problems and charitable organisations experiencing greater difficulties (from a taxation perspective) are therefore unlikely to find that statute law is capable of creating the legally enabling environment that they seek. The search for an alternative resolution of these acknowledged difficulties begins from this realisation. And just as with Aesop's fable of the hare and tortoise,[53] what cannot be achieved directly by way of legislation often may be better (albeit incrementally) achieved judicially.

The European Court of Justice, aided in part by the European Commission, has been presented with a number of opportunities to re-interpret the Treaty in aid of nonprofit organisations, and particularly charities. From what might be viewed as inauspicious beginnings and the relatively barren soil of the founding Treaty provisions, the Court, adopting a functional approach, is re-stating the rights and duties of nonprofit organisations under EU law. A growing judicial and institutional momentum seems set to lead to legal change for charities that operate in more than one Member State. Part III traces this evolution from the initial silence of the Rome Treaty towards nonprofits, the rise of Treaty obligations on nonprofits in a number of spheres and the recent case law elaborating for the first time on the rights of nonprofit organisations under European law.

The Treaty Basis for Community Competence over Nonprofit Organizations

Historically, the Treaty of Rome was silent on the role of nonprofit organisations under EU law. It wasn't until the year 2000, with the ratification of the Treaty of Nice, that a reference to 'civil society' first appeared in the governing provisions of the Treaty.[54] The Nice Treaty amended Art 257 EC to include reference

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for Foundations at European Foundation Centre Conference, Towards a European Framework for foundations in Europe, Brussels, September 14, 2006.

[53] AESOP, AESOP'S FABLES, ACCOMPANIED BY MANY HUNDRED PROVERBS AND MORAL MAXIMS (1836, P.D Hardy, Dublin)

[54] Between 1957 and 2000 there were protocols to various Amending Treaties that did refer to charities and nonprofits organisations such as Declaration 23, Treaty on European Union, 1992 (providing, "The

to ‘organised civil society’ as one of the constituent groupings to be represented by the Economic and Social Committee, thus giving nonprofit organisations an indirect (albeit largely ineffective) voice in European affairs. But for almost 50 years prior to this the only express reference to nonprofit organisations in the Articles of the Rome Treaty was a negative one in Article 48 EC. Art 48 EC expressly excludes nonprofit bodies based in one Member State from the right to establishment in the territory of another Member State,[55] a right which is enjoyed by for-profit companies and EU workers. This difference in treatment highlights the EU’s natural preference for the facilitation of commercial entities, workers and the circulation of capital within the EU. For a Treaty founded on economic interests and corresponding rights, which created a community for many years known as the ‘European *Economic* Community,’ this initial disregard for nonprofit bodies is unsurprising. As the European Court of Justice in *Sodemare* noted:

> [Article 48 EC] . . . has the function of assimilating companies, firms and other legal persons, other than those which are non-profit-making (hereinafter normally referred to as "commercial companies"), to natural persons who are nationals of Member States, for the purposes of freedom of establishment. Thus, non-profit-making companies, firms and other legal persons do not benefit from freedom of establishment.[56]

An issue that the Court did not address in *Sodemare*, but which is of particular interest here, is whether the scope of the Article 48(2) EC exclusion should be interpreted narrowly as relating to nonprofit *establishment* rights only or whether it can be

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Conference stresses the importance, in pursuing the objectives of Article 117 of the Treaty establishing the European Community, of co-operation between the latter and charitable associations and foundations as institutions responsible for welfare establishments and services.”) and Declaration 38 of the Treaty of Amsterdam (“The Conference recognises the important contribution made by voluntary service activities to developing social solidarity. The Community will encourage the European dimension of voluntary organisations with particular emphasis on the exchange of information and experiences as well as on the participation of the young and the elderly in voluntary work.”). These declarations, however, have no legal basis in European law and thus do not provide a source of legal rights to such organisations.

[55] *See* Article 43 EU Treaty (giving rights of freedom of establishment to all natural persons and companies), which is expressly qualified by Art 48(2) which provides that nonprofit organisations are excluded (‘‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”)

[56] Case C-70/95 *Sodemare SA and Others v. Regione Lombardia* [1997] 3 C.M.L.R. 591, 604 (The court went on to note, however, that material scope of the establishment freedom was not in any way affected by this holding since “national rules which treat non-profit-making companies differently from natural persons or commercial companies are not excluded, simply by virtue of Article 58, from the scope of application of Chapter 2 of Title III of the Treaty if their effect is to restrict the freedom of establishment of the latter. Otherwise, the simple exclusion of one category of legal persons from the benefit of Treaty rights would affect the extent of the rights actually enjoyed by other categories.”

construed more broadly as indicative of a general lack of Community competence over nonprofit organisations. For its part, the Committee on Legal Affairs and Citizens' Rights of the European Parliament has chosen to interpret the exclusionary provisions of Article 48 narrowly.[57] The Fontaine Report, presented to the European Parliament in 1987, pointed to a number of other Treaty bases that could potentially provide Community competence over nonprofit organizations, such as Article 12 EC, Article 308 EC and Article 95 EC.

Most notable in this regard was Article 7 EC Treaty (now Article 12 EC), which prohibits discrimination on grounds of nationality and is applicable to states whose legislation reserves to its citizens alone the right to form or administer associations. An opportunity for the European Court to test this legal basis arose in 1998 in the case of *Commission v Belgium*[58] in which the Commission challenged the validity of two Belgian laws that prescribed associational membership. Under a 1919 Belgian law the conferral of legal personality on international associations pursuing 'philanthropic, religious, scientific, artistic or pedagogical objectives' required the executive organ of the organisation to have at least one Belgian member.[59] Similarly, a 1921 Belgian Law conferring legal personality on non-profit making associations and on institutions promoting the public interest made reliance on legal personality against third parties dependant upon three fifths of the association's members being of Belgian nationality.[60]

The Court of Justice ruled that by requiring the presence of a Belgian member in the administration of an association or a minimum, and majority, presence of members of Belgian nationality in order for legal personality of an association to be recognised, Belgium had failed to fulfil its obligations under Article 12 EC, prohibiting discrimination on the grounds of nationality.[61] The Court based its ruling on the freedom of establishment enjoyed not only by Belgian nationals but by nationals of other Member States that wished to form new associations in Belgium.[62] It followed

[57] THE FONTAINE REPORT, *supra* n.39 stated that it could not be deduced that this provision was general in scope and aimed to exclude non-profit making associations from *any* Community powers.
[58] Case C-172/98, *Commission of the European Communities v Belgium* [1999] ECR I-3999.
[59] Article 1 of the Belgian Law of October 25, 1919.
[60] Article 26 of the Law of June 27, 1921.
[61] *See supra*, n.58, at par. 14.
[62] *See supra*, n. 58, at par. 11.

that given its membership element a nonprofit *association* could not be discriminated against in terms of establishment in a Member State: to do so, would indirectly discriminate against those citizens of the EU on the basis of their nationality. A *foundation*, however, is not based on membership. Its ability to rely on Article 12 EC in support of a right of establishment is accordingly less.

The Fontaine Report did not limit the potential Treaty bases for Community legislative competence over nonprofit organizations to Article 12 EC alone. The Report put forward two other Treaty articles: Article 8A of the Single European Act (which subsequently became Art 100A EC Treaty and is currently Article 95 EC) and Article 235 EC Treaty (now Article 308 EC). These two articles – Article 95 and Article 308 – operate in different manners and therefore significance attaches to whichever is adjudged to be the correct Treaty basis for European facilitative regulation for non-profit organisations.

Article 308 EC is essentially a catch-all provision, which allows the Council of Ministers to take action to achieve the Treaty's objectives in cases in which the Treaty has not provided the Council with the necessary powers.[63] The Fontaine Report believed that the facilitation of nonprofit activity within the EU could be a Community objective in the course of the operation of the Common Market and to this end it made deliberate efforts to view the contribution of nonprofit organisations through the lens of European economic activity. In the Report, the Parliament's Committee on Legal Affairs considered that nonprofit organisations made a positive contribution to the economic life of the EC both as a direct and indirect generator of employment and as a product consumer. In this way these organisations contributed to the Community's economic activity and could thus turn to Article 308 as a relevant Treaty basis since the EC had to have jurisdiction to take action to assist nonprofit associations because "it would be incomprehensible for the association sector properly so called to be left on the sidelines on the basis of an incorrect and restrictive interpretation of the Treaty."[64]

[63] Article 308 (Nice Consolidated version) states that "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

[64] FONTAINE REPORT, *supra* n.39, at par. 60.

One of the principal difficulties in using Article 308 EC as the legal basis for nonprofit facilitation, however, is the procedure for its use: legislation with Article 308 as its legal basis must be passed unanimously by the European Council. Unanimity, however, in a Council representing 27 Member States is a rare occurrence and thus a recipe for inanition and ultimately inaction. Article 95, on the other hand, utilises the co-decision procedure with the European Parliament and requires only a qualified majority vote within Council. Lacking the catch-all quality of Article 308, Article 95 EC may only be used when the Council adopts "measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

To date there has been some controversy as to whether Art. 95, although more user-friendly, is the appropriate legal basis for the introduction of legal instruments in support of nonprofit organizations. The Statutes for European Associations and European Cooperative Societies started out with Article 95 as the legal basis.[65] The Council successfully challenged this basis with regard to the Cooperative Societies Statute in *European Parliament v Council*,[66] claiming that Art 308 EC was the correct legal basis and thus required unanimity in Council. The decision led the Commission to change the legislative bases not only for the Cooperative Societies Statute[67] but also for the Statute on European Associations. The return to unanimous voting in Council greatly lessened the chances of this statute ever being enacted and probably influenced its subsequent withdrawal by the Commission, despite the protests of the Parliament and Economic and Social Council. The Court's decision in European Parliament v Council has also led proponents of the European Foundation Statute

[65] *See, e.g.*, Council of The European Union, *Draft Council Regulation on the Statute for a European Cooperative Society (SCE); and Draft Council Directive supplementing the Statute for a European Cooperative Society with regard to the involvement of employees - Reconsultation of the European Parliament,* DRS 58 SOC 384 (Brussels, 12 September 2002).

[66] *See* Case C-436/03, *European Parliament v Council* [2006] ECR I-3733 in which the Court held that the Regulation on the Statute for a European Cooperative Society was correctly adopted on the basis of Article 308 and not on the basis of Art 95 EC, as the Parliament had sought to argue. According to the Court, "the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws of the Member States applicable to cooperative societies, but has as its purpose the creation of a new form of cooperative society in addition to the national forms."

[67] COUNCIL REGULATION (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), O.J. L 207/1, 18.08.2003.

tentatively to cite *both* Articles 95 and 308 EC as the appropriate legal bases; a combination that legally is entirely inconsistent.[68]

Treaty Obligations on Nonprofits – Labour Law, Competition Law and State Aid

Notwithstanding the narrow Treaty basis for Council or Commission competence over nonprofit organizations, the ECJ has found nonprofits to be nonetheless subject to Community law. In *Sophie Redmond Stichting v Hendrikus Bartol*[69] the Court of Justice ruled that a Dutch nonprofit undertaking financed entirely by government subsidy was subject to European labour law requirements under the Directive on the Transfer of Undertakings.[70] In his Opinion, Advocate General Van Gerven acknowledged that never before had the Court been called upon to consider the application of this Directive to non-profit organisations.[71] Nonetheless the AG, with whom the Court ultimately agreed, found that *functionally* there was nothing to prevent the application of the Directive to nonprofits on the transfer of their employees.[72]

Similarly, nonprofit organisations have also found themselves subject to Community competition rules – both in the context of cartel and monopoly proceedings and in the context of state aid.[73] To be subject to the competition rules, a nonprofit organisation

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[68] *See, e.g.,* EUROPEAN FOUNDATION CENTRE, PROPOSAL FOR A EUROPEAN FOUNDATION STATUTE, January 2005, which remains open to either Article 95 *or* Article 308 as potential legal bases for the legal instrument (http://www.efc.be/ftp/public/EU/LegalTF/european_statute.pdf) last accessed December 4, 2007. *See also* the European Foundation Project, The European Foundation: A New Legal Approach (2005), which suggests *both* Articles 95 and 308 as the appropriate legal basis for a European Foundation Statute – which one might suggest is entirely inconsistent (http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-0A000F14-F62735BC/bst_engl/The%20European%20Foundation%20-%20A%20New%20Legal%20Approach.pdf) last accessed December 4, 2007.

[69] Case C-29/91 [1992] ECR I-03189.

[70] Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses

[71] Case C-29/91, Opinion of AG Van Gerven [1992] ECR I-03189, at par. 6 -7 (commenting, "The actual text of the directive makes no distinction depending on whether an undertaking is commercial or non-commercial. . . The directive, it appears from the preamble thereto, was prompted by changes in the structure of commercial undertakings, caused by economic trends at both national and Community level. . . However, there is nothing in the wording of the directive to rule out a broad interpretation of the term "undertaking" used therein.")

[72] *Supra* n.69, par. 18 (ECJ holding that "moreover, the fact that in this case the origin of the operation lies in the grant of subsidies to foundations or associations whose services are allegedly provided without remuneration does not exclude that operation from the scope of the directive. The directive, as has already been stated, is designed to ensure that employees' rights are safeguarded, and covers all employees who enjoy some, albeit limited, protection against dismissal under national law.")

[73] C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289.

must be found to be an "undertaking;" a fact determined by whether it engages in an "economic activity," regardless of its legal status and the way in which it is financed.[74] The Court has applied a very broad test, holding that an entity engages in an "economic activity" when it offers goods or services on the market.[75] The Court has further held that the non-profit-making nature of the entity in question or the fact that it seeks non-commercial objectives is irrelevant for the purposes of qualifying it as an "undertaking."[76]

In principle, the Court of Justice has held that when organisations that perform predominantly social functions engage in non-profit making activities of a non-commercial nature these organisations will normally be excluded from the Community competition and internal market rules.[77] The Commission has interpreted this case law to mean that internal market and competition rules, as a general rule, do not apply to "non-economic activities" of organizations such as trade unions, political parties, churches and religious societies, consumer associations, learned societies, charities as well as relief and aid organizations.[78] The definition of 'economic' as opposed to 'non-economic' activity is not always clear,[79] prompting the Commission to consider at least the need for greater clarification of the rights and responsibilities

[74] C-41/90 *Höfner and Elser* [1991] ECR I-1979

[75] *See* Joined Cases C-180/98 to C-184/98 *Pavlov Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, at par. 75; *see also* C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA* [2006] ECR I-289.

[76] *See* C-244/94 *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche* [1995] ECR 1-4013, at par. 21; Joined Cases C-180/98 to C-184/98 *Pavlov Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, at par. 117 (holding that the fact that a pension fund is non-profit-making and the solidarity aspects emphasised by the fund and the governments which had submitted observations were not sufficient to relieve the fund of its status as an undertaking within the meaning of the competition rules of the Treaty.)

[77] *See* Cases C-159/91 and C-160/91 *Poucet v. Assurances Générales de France and Caisse Mutuelle Règionale du Languedoc-Roussilon, and Pistre v. Caisse Autonome Nationale de Compensation de l'Assurance Vieillesse des Artisans* (hereinafter: "*Poucet and Pistre*") [1993] ECR I-637; Case C-109/92 *Wirth v Landeshauptstadt Hannover* [1993] ECR I-6447.

[78] Communication from the Commission, Services of general interest in Europe (OJ C 17/04) 19.1.2001, at par. 30. The Communication goes on to state that "whenever such an organisation, in performing a general interest task, engages in economic activities, application of Community rules to these economic activities will be guided by the principles in this Communication respecting in particular the social and cultural environment in which the relevant activities take place."

[79] European Commission, Green Paper on Services of General Interest, COM(2003) 270 final, at par. 46 (noting that, "the evolving and dynamic character of this distinction has . . . raised concerns, in particular among providers of non-economic services who ask for more legal certainty regarding their regulatory environment.")

of nonprofit organizations performing largely social functions,[80] while leading the European Economic and Social Committee to advocate for the latter's complete immunity from Community competition rules.[81]

The potential implications for charities that are subject to the competition law rules was exposed recently in the *Italian Banking Foundations* case in which the ECJ explored the possibility that tax benefits to such organizations might qualify as state aid and thus be held incompatible with EU competition law.[82] The ECJ was asked in a preliminary reference whether Italian foundations of banking origin,[83] created by statute to be the controlling shareholders in companies engaged in banking activity upon the privatisation of Italian public sector credit institutions, could be considered to be subject to the Community rules on competition -- even where they were assigned objects of social benefit.[84] The Court distinguished between the activity of a foundation that simply makes grants to nonprofit organizations[85] and a foundation, acting itself in the fields of public interest and social assistance that uses the authorization given to it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it. Whereas the former was not an undertaking, the latter had to be so viewed since "it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or

[80] *Ibid* at par. 48.

[81] Opinion of the European Economic and Social Committee on the 'Green Paper on Services of General Interest' OJ C 80/66, 30.3.2004 (stating that, "In order to distinguish between economic and noneconomic activities, services associated with national education systems and the mandatory membership of a basic social security scheme, and services provided by not-for-profit social, charitable and cultural entities, must be exempt from competition rules and provisions relating to the internal market, but not from the principles of Community law.")

[82] *See supra*, n.75. *See also* European Antitrust Review (2006) at 77.

[83] On the history of the Italian nonprofit Banking Foundations *see* Piero Gastaldo, *Let's not forget the past – A commentary on "Italian philanthropy rediscovered"* (Summer, 2007) EFFECT 18-19.

[84] The Italian privatisation process allowed public credit institutions, including savings banks (allocating entities'), to allocate their banking concerns to public limited companies established by them and of which they remained the sole shareholders. The newly created public limited companies performed the banking activities previously carried out by the allocating entities. Under the 1990 Italian decree allocating entities (i.e., foundations of banking origin) were required to pursue aims of public interest and social assistance, mainly in the sectors of scientific research, education, art and health. *See* Opinion of A.G. Jacobs in Case C-222/04 *Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA*. [2006] ECR I-289.

[85] *Ibid*, at par. 119 ("Such an activity is of an exclusively social nature and is not carried on on the market in competition with other operators. As regards that activity, a banking foundation acts as a voluntary body or charitable organisation and not as an undertaking.")

health."[86] It would seem to follow from that decision that in areas of general interest such as education, health, science and research, where it is clear that a competing market exists, operating foundations that enjoy national tax exemptions might find themselves in conflict with EU State Aid competition rules.

Nonprofit organisations, therefore, do not enjoy a general immunity from the EU law obligations that apply to their for-profit counterparts. In the areas of labour law and competition law, nonprofits must comply with the Treaty rules. The extension of the state aid rules to cover tax exemptions to nonprofit foundations in certain circumstances, although potentially alarming for charitable organisations, follows logically from this functional approach to nonprofit entities. If the application of Treaty obligations to nonprofits is thus determined on a functional basis, it becomes necessary to consider whether the bestowal of Treaty rights is similarly accorded. The *Stauffer* case provides an important starting point in this discussion.

The extension of Treaty Freedoms to Nonprofit Organizations: The Stauffer Case

In *Centro di Musicologia Walter Stauffer v Finanzamt Munchen fur Korperschaften* (hereinafter 'Stauffer')[87] the Court of Justice was asked whether an Italian charitable foundation that owned commercial property in Munich was liable for corporation tax on that property under German tax law when comparable German charities owning comparable property were exempt. The Stauffer Foundation, established in Italy, endowed music scholarships that enabled young Swiss people to study the history of music while resident in Cremona, Italy. Under the relevant German tax law, Stauffer pursued recognized charitable objects. Moreover, the German legislation did not require promotion of these interests to be undertaken for the benefit of German nationals. In principle, the foundation should therefore have been exempt from corporation tax. However, since the foundation's seat and management were in Italy, the rental income it received in Germany was subject to tax liability. In a preliminary reference from the German Bundesfinanzhof, the Court of Justice was asked whether this finding was incompatible with the Treaty's rights on freedom of establishment or free movement of capital.

[86] *Ibid* at par. 122.
[87] Case C-386/04 *Stauffer* [2006] ECR I-8203

The Court found that the provisions governing freedom of establishment were inapplicable to the Stauffer case. The Court did not make this finding on the basis that nonprofit organizations can never avail of the establishment provisions. Rather the Court held that the concept of establishment was a broad one. It found that the right of establishment allowed a "Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons."[88] This finding advances or perhaps a clarifies the Court's findings in *Sodemare*[89] in that it does not automatically exclude a nonprofit organization from the scope of the right of establishment if that organization is an active contributor to economic and social integration in the EU.[90] Stauffer could not rely on the establishment provisions, however, because it did not have a secured permanent presence in Germany for the purposes of pursuing its activities. A German property management agent handled the services ancillary to the letting of its Munich property.

The free movement of capital provisions in Article 73 EC provided a more fruitful basis for Stauffer. Capital movement, although undefined by the Treaty, has been interpreted to include, *inter alia*, investments in real estate on a national territory by a non-resident.[91] According to Art. 73(b) EC, any restriction on capital movements between Member States is forbidden. It followed that, because German tax exemptions for rental income applied only to charitable organizations established in Germany, the legislation in principle placed charitable organizations established in other Member States but having rental property in Germany at a disadvantage and was therefore, an obstacle to free movement.[92]

To maintain the restriction, it would be necessary to show that the national law was non-discriminatory in that it was dealing with objectively different situations. The

[88] *Ibid*, at par. 18, citing Case 2/74 *Reyners* [1974] ECR 631 and Case C-55/94 *Gebhard* [1995] ECR I-4165.
[89] *See supra* n.56
[90] A finding that is quite in line with the earlier thinking of the European Parliament's Fontaine Report in 1987. *See supra* n.39.
[91] *See* Article 1 Directive 88/361. C.f. Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, pointing to the indicative albeit non-exhaustive value of the Directive's definition of capital movement and payment.
[92] *See supra*, n.87, at par. 28.

German Government, supported by the UK Government, sought to make this argument by drawing a distinction between a charitable foundation with unlimited tax liability (i.e., a charitable foundation resident in Germany) and a foundation like Stauffer, which had limited tax liability due to its non-residency status in Germany. The former, it was argued, played an active role in German society and relieved the German state of duties that it would otherwise have to carry out with consequent benefits for the State's budget. The charitable activities of Stauffer, on the other hand, had no benefits for the German people. The interveners also claimed that the conditions for the granting of charitable status varied between Member States according to each State's conception of public utility and its perception of what constitutes a 'charitable purpose'. It followed that a foundation charitable under Italian law was not in a comparable situation to a foundation charitable under German law since the requirements applicable in each Member State were likely to be different.[93]

The Court of Justice rejected both arguments. The national tax law in question did not require that the charitable objects should be carried out on the national territory as opposed to abroad. So although Member States could require a sufficiently close link between charitable foundations granted tax exempt status and the activities pursued by these foundations, it was irrelevant for the purposes of this preliminary reference whether such a link existed in this case. With regard to the comparability argument, the Court acknowledged that Member States did have a discretion when it came to conferring tax exempt status on foreign foundations. Nonetheless, this discretion had to be exercised in accordance with Community law even within the area of direct taxation in which Member States enjoyed full competence.[94] A Member State was not required to accept that an organization recognized as a charity within its Member State of origin was automatically entitled to the same status in its own territory. The Court held, however, that where a foundation recognized as having charitable status in one Member State also satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of

[93] *Ibid*., paras 33-35.
[94] *See, e.g.*, Case C-80/94 *Wielockx* [1995] ECR I-2493; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057; and Case C-513/03 *Van Hilten-van der Heijden* [2006] ECR I-0000, paragraph 36. With regard specifically to nonprofit organizations, *see* Case C-415/04 *Kinderopvang Enschede* [2006] ECR I-0000, paragraph 23.

the general public (which it is a matter for the national authorities of that other State, including its courts to determine) the authorities of that Member State cannot deny that foundation the right to equal treatment solely on the ground that it is not established in its territory.

It followed that the discriminatory restriction in Stauffer (namely, the requirement of German establishment) could only be saved if it was justified by overriding reasons in the general interest. A number of such reasons were put forward: the promotion of culture, training and education; the need for effective fiscal supervision; the need to ensure the cohesion of the national tax system; the need to protect the basis of tax revenue; and the fight against crime. All were rejected by the Court. The ECJ conceded that there were difficulties for Member States in determining whether a charitable organization established abroad actually fulfilled national law requirements on public benefit and in monitoring the effective management of these organizations. These difficulties, however were of a "purely administrative nature" and were not sufficient to justify the Member State in refusing to grant tax exemptions on the basis of the overriding importance of effective fiscal supervision. It was open to the national tax authority to require the organization to produce the necessary evidence to assist in assessment of its claim.[95] Moreover, it could call upon its sister tax authorities in other Member States to validate the information received in reviewing the claim.[96] Equally, the Court dismissed the motivation of the fight against crime as a valid basis for discrimination, noting that the fact a foundation was established in another Member State could not of itself give rise to a general assumption of criminal activity. The preclusion of tax exemptions on this basis was disproportional.[97]

The Likely Effect of the Stauffer Ruling in the Legal Enablement of Nonprofits

The ruling in Stauffer is tremendously important with regard to the legal and policy framework for the foreign funding of civil society. Stauffer establishes that in principle a charitable organization that satisfies the conditions that a Member State

[95] *See* Ineke Koele, *Cross-Border Philanthropy: Solving the "Landlock,"* (2006) 8(1) SEAL 30, 32 (discussing who should bear the burden of proof as to whether a donation qualifies for tax relief); *See also* Case C-39/04 *Laboratoires Fournier SA v Direction des vérifications nationales et internationals* [2005] ECR I-2057 (to the effect that national law preventing a taxpayer from submitting such evidence could not be justified in the name of effectiveness of fiscal supervision).

[96] Such assistance would be rendered under the Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of Member States in the field of direct taxation (OJ 1977 L 336, 15.), as amended by Council Directive 2004/106/EC (OJ 2004 L 359, 30).

[97] Citing C-243/01 *Gambelli* [2003] ECR I-13031, at par. 74.

imposes on its own charities for tax exemption cannot be discriminated against on the basis of its non-resident status.[98] The judgment forces Member States for the first time to consider whether a non-resident charity qualifies for comparable tax treatment to a resident charity under national law. Up until Stauffer, Member States were able to disregard the claims of non-resident charities for parity of treatment with resident charities through (a) reliance on national tax law and its insistence upon an organization having its seat in the Member State before being eligible for tax privileges; and (b) through reliance on the varying requirements of charity law in each country. The effect of Stauffer is that a Member State in future will be required to justify its denial of tax relief to a non-resident charity in substantive terms based on an analysis of national requirements for charitable status and an explanation of how the comparative foreign requirements satisfied by the applicant fall short. In carrying out such an analysis, the applicant's non-residence in a Member State will not be a sufficient ground *per se* for discrimination.

Notwithstanding these groundbreaking propositions for charities, procedurally the Court's methodology of reasoning has not changed. The ECJ maintains its functional approach in assessing the scope of the Treaty's freedoms. The fact that Stauffer was a charitable foundation carrying out nonprofit activity was merely incidental to the European Court's determination of the case. The ECJ focused on the activity in question – the letting of property – and viewing it as an economic activity in its own right, the Court proceeded to consider whether German tax law was compatible with the Treaty.

Substantively, this ruling augurs well for nonprofit organizations in a number of respects. First, since the term capital movement also covers donations,[99] charities established in one Member State undoubtedly will seek inclusion in national tax schemes of other host Member States that currently grant tax rebates on donations to resident charities but exclude foreign charities for reasons similar to those in Stauffer. Second, the scope of capital movement is likely to be tested in the near future. In a

[98] In this way, Stauffer builds on the earlier case of *Barbier*, which held that freedom of capital applies to gifts and comparable transactions within the EU irrespective of whether the donor or donee is carrying out economic activities that are protected by the freedoms of the EC Treaty. *See* Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* [2003] ECR I-15013.

[99] *See* Florian Becker, *Case C-386/04, Centro di Musicologia Walter Stauffer v. Finanzamt München,* (2007) 44(3) COMMON MARKET LAW REVIEW, 803 at 812.

recently filed application for a preliminary reference, *Hein Persche v Finanzamt Ludenscheid,*[100] the Court of Justice is being asked to consider whether donations of everyday goods by a national of a Member State to bodies which have their seat in a different Member State, and under the law of that Member State, are recognized as charitable, fall within the scope of application of free movement of capital (Art. 56 EC). Again the nub of this inquiry relates to taxation: *Hein Persche* is essentially asking the court to rule on whether it is compatible with Art. 56 EC for the law of a Member State to confer a tax benefit on donations to charitable bodies only if the latter are resident in that Member State. Although the full facts of the reference have yet to come before the court, it would seem that on the basis of Stauffer, if donations of goods are covered by capital neither the lack of residency nor the administrative difficulties borne by the Member State in verifying the details of the donation will be sufficient grounds for refusing tax relief if relief is granted for similar objectives in its own territory. Moreover, an express provision excluding relief on donations to non-resident charities would still require overriding reasons to justify such apparently discriminatory behaviour.

Third, the outcome of the Stauffer case has raised the profile of third sector activity in the EU and provided a welcome boost to pending claims that Member State tax regimes discriminate against nonprofits in way that is incompatible with EU law. Currently, the Commission is investigating the tax regimes of a number of member states (including Belgium, the UK,[101] Ireland,[102] Poland[103] and Portugal) in a variety of areas as they relate to charities. The extent of the tax privileges vary in detail between the different states but in general comprise of exemptions from income tax, corporate tax, capital gains tax, capital acquisition tax, stamp duty, deposit interest retention tax, inheritance tax and in many countries the ability to reclaim taxes already paid on donations received, sometimes referred to as gift tax exemption or gift aid. A common requirement for tax exemption or relief is that the charity in question be based in the country granting the tax break – as was the case in Stauffer -- and be recognised as a charity or public benefit organisation according to the laws of that country. These requirements create tax difficulties for a) donors who live and pay

[100] Case C-318/07, OJ C 247/3, 20.10.2007.
[101] Commission Press Release, IP/06/964, July 10, 2006.
[102] Commission Press Release, IP/06/1408, October 17, 2006.
[103] *Ibid*.

taxes in a different member state to their original home state (i.e., expatriates) and who want to donate to a charity in their home state; b) charities that operate and solicit funds from taxpayers in one member state but are legally established in another Member State; and c) donors who wish to give to overseas charities not registered in their home Member State. Many Member States currently implement national tax laws that allow them to discriminate in favour of domestic charities in a manner which is arguably contrary to the idea of the single market and consequently is in breach of European Law.

Prior to, but particularly post- the decision in Stauffer, the Commission has actively encouraged complaints regarding alleged Member State discrimination against foreign charities in the area of taxation exemption. In 2002, the Commission sent a reasoned opinion to Belgium seeking the modification of Flemish, Walloon and Brussels tax legislation that discriminated against foreign-based charities by granting reduced taxation of legacies and gifts to domestic charitable organisations only. All three regions amended their tax laws in light of the Commission's opinion to extend the application of the reduced rates to charities located in other Member States, thus settling the matter relating to the Flemish and Brussels legislation. The Walloon amendments,[104] however did not satisfy the Commission.[105] The reduced rates on gifts or inheritance tax do not apply when Walloon residents who never worked or lived in a particular Member States or Member States make legacies or gifts to charities in those states. The reduced rate also does not apply if a person who moved from another Member State to Belgium makes a gift or legacy to a charity in a third member state.[106] Having referred the case to the Court of Justice in 2005,[107] the Commission suspended temporarily the starting of the procedure before the ECJ in

[104] Article 60 of the Walloon "Code des droits de succession" and Article 140 of the Walloon "Code des droits d'enregistrement, d'hypothèque et de greffe" provide for a reduction of inheritance and gift taxes but only for two types of organisations: a) Organisations resident in Belgium and b) (for the application of the inheritance tax law) organisations established in the EU Member State in which the person making the legacy (the "de cujus") effectively resided or had his place of work at the time of his death, or in which he had previously effectively resided or had his place of work and (for the application of the gift tax law) organisations in the EU Member State in which the donor effectively resides or has his place of work at the time of the donation, or in which he has previously effectively resided or had his place of work.

[105] The press release reporting the Commission's referral of the infringement to the Court of Justice in July 2005 stated that the Walloon law breached Articles 12, 43 and 48 thereby basing the Commission's case on discrimination on the grounds of nationality and infringement of the freedom of establishment of salaried workers. In a subsequent press release

[106] *See* Commission Press Release, IP/05/936, July 14, 2005.

[107] *Ibid*.

2006 in the apparent understanding that the infringement still existed but that the case would be re-entered on a broader basis than just merely inheritance tax.[108]

Since the decision in Stauffer, the Commission has begun action against the UK, Ireland and now Belgium to end their discrimination against foreign charities in the area of direct tax. In each case the Commission cites the preferential tax treatment of charities established in the territory of each Member State over foreign charities as incompatible with EU law, in particular as being an obstacle to the free movement of capital, contrary to the free movement of persons since workers and self-employed persons moving to the infringing Member State might wish to make gifts to charities established in the Member State where they came from, and contrary to the freedom of establishment since foreign charities are forced to set up branches in the infringing Member State in order to benefit from the favourable tax treatment. Proceedings against infringing States were delayed during 2007 when the respondents met with the Commission to find a resolution but the ending of unsuccessful negotiations in November 2007 means that the Commission is now likely to resume proceedings against the three with new actions pending against Denmark and France.[109]

The Commission's infringement actions have borne fruit in some countries without the necessity of court action. Similar cases against Poland, the Netherlands and Slovenia will be set aside after the countries agreed to change their legislation to comply with EU principles. Given the Commission's success in these cases coupled with the strong precedent of Stauffer it is hard to see how Member States could successfully convince the ECJ that the challenged tax laws are compatible with EU law. In all cases, revenue authorities and ultimately national courts will be required in future to compare the public benefit required under national law for charitable tax exemption with the standard of public benefit provided by the activities or purposes of the foreign charity before it. Greater clarity, clear justification of over-riding reasons for treating otherwise comparable situations differently and an end to discrimination based simply on non-residency are likely outcomes. Success in these areas will

[108] Source: GIVING IN EUROPE (accessed at http://www.givingineurope.org). This supposition has been borne out by the Commission's issuance of a reasoned opinion requested Belgium to end its discrimination against foreign charities in the area of direct taxation – *see* Commission Press Release IP/06/1879, December 21, 2006.

[109] Emilie Filou, *UK faces European court over taxation of foreign donations*, THIRD SECTOR, 28 November 2007 (available at http://www.thirdsector.co.uk/channels/Finance/Article/769721/UK-faces-European-court-taxation-foreign-donations) last visited January 11, 2008.

arguably do more to facilitate philanthropy in general and cross-border giving in particular than any Council Regulation could hope to achieve.

Informal Civil Sector Efforts at Facilitation of Cross-border Activities and Donations

In the intervening period, informal mechanisms are being used to assist donors who wish to give tax-efficient donations to charities established in Member States outside the donor's country of origin. The Transnational Giving Europe Project, set up under King Badouin Foundation, is one such example.[110] The TGE Project consists of a network of large, accredited foundations in a growing number of European countries (including Belgium, France, Ireland, Germany, the Netherlands, Poland and the United Kingdom). A donor wishing to make a donation to a foreign charity in one of the participating states contacts its national foundation, which then contacts the participating partner foundation in the recipient country for an assessment of the potential donee nonprofit. If the assessment is positive, the foundation in the home country accepts the donation from the donor and issues a tax receipt in compliance with national law before transferring the donation to the partner foundation on behalf of the intended beneficiary.

The TGE Project thus enables a donor to make a charitable gift to a foreign non-profit and receive the same tax incentives that they would be eligible for when making a gift to a charity in their own country. It eliminates the need for foreign charities in participating countries to establish branches in other Member States and in the lag-time before the creation of a legally enabling environment for charities engaged in cross-border activities it provides a stop-gap measure in those countries where it operates. To date, TGE has proven particularly popular with academic institutions that solicit on donations from individuals and companies and possess a significant number of alumni in other countries.[111]

IV. CONCLUSION: THE HISTORICAL POLITICO-LEGAL RELATIONSHIP BETWEEN NONPROFIT ORGANISATIONS AND THE COMMISSION OF THE EUROPEAN UNION

[110] *See* http://www.kbs-frb.be/call.aspx?id=209842&LangType=1033 (last accessed January 13, 2008).
[111] *See*, e.g., the development pages of Oxford University at http://www.development.ox.ac.uk/ways_to_give/tax_efficient_giving/tgn.html (last accessed January 13, 2008)

The Context of Review

The relationship of nonprofit organisations with the EU is a complex one that to be understood fully must be viewed simultaneously through the three lenses of history, politics and law. Laws present a snapshot of rights and duties of various stakeholders based on past political understandings between those parties that are shaped themselves by preceding historical dealings and events. Legal reform is at its most effective when it involves an understanding of how relations between stakeholders have changed since the previous regulation (i.e., a political perspective) and an appreciation of the implications of this change for the power balance between those parties (i.e., a historical perspective).

If we apply this analysis to the treatment of civil society organisation under EU law, we find that historically, the Treaty Articles had little to say regarding the rights and responsibilities of nonprofit organisations, apart from the negative reference in what is currently Article 48 EC. This non-recognition of civil society organisations has changed, at least superficially, with the ratification of the Treaty of Nice with its specific reference to 'civil society' in the governing provisions of the Treaty.[112] The Lisbon Treaty, which has yet to be ratified by 26 Member States, appears to build further upon the legal standing of such organisations in its requirement of European institutions to 'maintain an open, transparent and regular dialogue with representative associations and civil society"[113] although the form that such participatory democracy will take (beyond the usual reference to 'consultation') and the sanctions for not respecting this charge remain unspecified.

To reconcile the historical view of nonprofit organisations under EU law (i.e., non-rights holders in an economic community) with the emerging role of nonprofit organisations today (i.e., entities that are not only subject to the rigours of EU law but are increasingly being viewed as a valuable communicative conduit between the Commission and the European demos and a sounding board for Commission initiatives) requires some understanding of the underlying political events that have brought about this change and the current political events that are likely to further define the relationship in the future.

[112] Article 257 EC.

[113] Article 8 B (2) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007).

Past Political Catalytic Events affecting the Legal Enablement of Nonprofits

Notwithstanding the lack of formal legal standing, upon which this paper has focused, certain nonprofit organizations for a long time have enjoyed strong informal policy relations with the Commission. For decades the European Commission relied largely on the field experience of development agencies and human rights groups in developing European policy in this area.[114] The European Parliament[115] and Council[116] also reaffirmed the specific and irreplaceable role of NGOs and the usefulness and effectiveness of their development operations. Indeed, the strong relations forged between human rights and development organisations enabled their successful lobbying of EU institutions to bring development work within the pillars of the Treaty and to give this field (and NGO involvement in it) a constitutional underpinning at the time of the Maastricht Treaty in 1992.[117] The success of this legal enablement of civil society in political terms may best be described as mixed. Although non-governmental organisations now are legally entitled to work alongside the Commission and Member States in the development of policy, the bringing of development assistance within the walls of the Treaty has radically changed the balance of power between the parties though perhaps not as anticipated by the NGOs. In practice, the development assistance agenda must now compete with the EU's other external relations objectives, which tend to be of an intergovernmental nature, for priority. These latter concerns thus frequently take precedence to the concerns of development organisations.[118]

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[114] DG VIII/B/2, the department in the Development Directorate General of the Commission is colloquially known as the 'NGO Unit.

[115] *See* EP Resolution of 14 May 1992 on the role of NGOs in development cooperation, June 15 1992, OJ (C 150) 273 (1992) (emphasizing in particular the key role of NGOs' work on behalf of marginal social groups in developing countries, the need to preserve the NGO's freedom of action, and the vital role of NGOs in promoting human rights and the development of grassroots democracy.)

[116] Council resolution on Community cooperation with non governmental development organisations, (May 27, 1991), Bull. EC 5-1991, point 1.3.76, underlining the importance of the autonomy and independence of NGOs in the context of development assistance in a Council Resolution on cooperation with the NGOs.

[117] In the context of non-governmental development organizations, Article 181 EC (ex Art. 130y), as inserted by the Maastricht Treaty states that: "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300."

[118] *See, e.g.*, The Convention on the Future of Europe's Final Report of Working Group VII on External Action (Brussels, 16 December 2002) CONV 459/02, which makes minimal reference to

Aside from the admittedly exceptional case of human rights organisations, other nonprofits have built informal collaborative relations with the Commission that have been used to influence policy formation and policy change. The Commission's DG for Employment and Social Affairs (DG V), for instance, courted nonprofit policy participation in its Green Paper on Social Policy in 1993.[119] A successful collaboration between DG V and social non-governmental organisations led subsequently to the Commission's establishment of the biennial European Social Forum, which provided greater opportunities for NGO/Commission dialogue. Moreover, the Commission's heightened interest in the social NGOs – albeit necessitated by the Commission's inability to achieve consensus among Member States on social policy issues[120] – provided the necessary momentum that led to the publication of a joint DG V and DG XXIII[121] Communication on the role of voluntary organizations in Europe in 1997.[122]

Given the Commission's growing reliance on non-governmental organization involvement to bridge the communication gap between the European institutions and the citizenry of Europe (often referred to as the democratic deficit but maybe more correctly defined as the accountability deficit)[123] it would be politically difficult for the Commission, on the one hand, to accept such support while, on the other, refusing to endorse, if not advocate for, a clear statement of the legal rights of these organisations.[124] Politically, a clearer statement of rights for these organisations will

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development cooperation and instead approaches development policy from a perspective of strategic interests within the broader sphere of the common foreign and security policy ('CFSP').

[119] European Commission, *Green Paper on European Social Policy*, COM(93) 551 final.

[120] This, occurring in the wake of the UK government's veto of the incorporation of a new Social Chapter in the Maastricht Treaty in 1992 resulting in political stalemate that forced the Commission to explore less controversial ways of keeping social policy on the reform agenda. One such alternative was to engage social NGOs in policy dialogue, which soon became known as "civil dialogue." *See further* Breen, Crossing borders: comparative perspectives on the legal regulation of charities and the role of state-nonprofit partnership in public policy development, Thesis (J.S.D.)--Yale Law School, 2006.

[121] DG XXIII is the Directorate General in charge of Enterprise Policy, Distributive Trades, Tourism and Cooperatives.

[122] Interview with Pádraig Flynn, former EU Commissioner for Employment and Social Affairs, in Dublin (January 11, 2005).

[123] Given the lack of representativeness among many nonprofit organisations it would be difficult for the EU to argue that the type of federated umbrella organisations with which it likes to deal are a proxy for dealing with the Union's citizens. However, the intermediary role that these organisations play, once recognised as a channel for communicating with citizens and not an alternative for so doing, is nonetheless of value to the Commission.

[124] Two recent examples of such reliance on NPOs related to the period of negotiations preceding the referenda on the ill-fated Treaty for a Constitution on Europe in 2002-2004 and the period before the

not affect the balance of power between EU institutions and such nonprofits. The Commission, thus, has nothing to lose in championing their claims before the ECJ. Those most affected by any judicial rulings in favour of greater European legal enablement of nonprofits will be the individual Member States. Those same states, who will bear the financial costs of recognising foreign charities in their own territories, are extremely unlikely to find the unanimity necessary at Council level under Art. 308 EC to pass any regulation designed to further facilitate the cross-border activities of nonprofits. If anything, national governments may be more willing to work together to redress the perception that there has been a shift in the balance of power in their relationships with nonprofit organisations.

In this regard, one final political event deserves consideration given its potential to affect the future legal enablement of civil society organisations at European level, namely, the introduction by the UN's Financial Action Task Force (FATF) of Special Recommendation VIII in 2004. Issued in the wake of the 9/11 terrorist attacks, the objective of Special Recommendation VIII is to ensure that nonprofit organizations are not misused by terrorist organisations: (i) to pose as legitimate entities; (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes but diverted for terrorist purposes. Special Recommendation VIII has provided the European Commission, a reluctant if not disinterested regulator in the past, with a political platform for coordinating the regulation of nonprofit organisations. Over the past three years, the Commission has issued draft recommendations,[125] consulted nonprofit organisations throughout

accession of the ten candidate Eastern European States in 2004, both occasions on which the Commission's professed support for the role of NGOs in ensuring democratic accountability and participatory democracy.

[125] European Commission Directorate-General Justice, Freedom And Security, Draft Recommendations to Member States Regarding a Code of Conduct for Non-Profit Organisations to Promote Transparency and Accountability Best Practices: An EU Design for Implementation of FATF Special Recommendation VIII – Non-profit Organisations (Brussels, July 22, 2005).

Europe[126] and issued a code of conduct for nonprofit organisations operating not just on a Europe-wide basis but also on a more local basis.[127]

Recently, the Commission has redefined the basis of its brief to regulate such organisations not just on the grounds of terrorist-funding but on the broader basis that the financial activities of these organisations may facilitate fraud.[128] The potential to extend its remit beyond terrorist financing was evident in the Commission's Guidelines for Member States on national level coordination structures and vulnerabilities of the non-profit sector.[129] The Commission's expressed intention remains the same: to establish common principles for the supervision of nonprofits on which national implementation can be based but that should not in any way hinder legal cross border activities of nonprofit organizations.[130] The recommended common principles make Member States responsible for effectively overseeing nonprofit activities within their territories facilitated through good national cooperation between the relevant authorities responsible for the registration of such bodies, their fundraising and banking activities, their tax exemptions and grant applications and their annual reporting requirements.

In addition to the establishment of a good infrastructure for nonprofit supervision, Member States are encouraged to promote compliance with the Commission's Code of Practice amongst nonprofits which, if successfully achieved, would lead to similar transparency and accountability goals in each Member State. The coordination of

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[126] The European Commission's Directorate General for Justice, Freedom and Security opened a consultation on 26 July 2005 on a draft Recommendation to member-states regarding a "voluntary" Code of Conduct for Non-Profit Organizations in order to promote a so-called "transparency and accountability". *See* http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_public_en.htm (last visited January 13, 2008)

[127] European Commission, The Prevention of and Fight against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector, COM(2005) 620 final (Brussels, November 29, 2005).

[128] A Commission-sponsored survey regarding the scope and extent of nonprofit financial abuse in Member States, to which the author has contributed, is currently underway. The Commission hopes that greater empirical data will enable it to better grasp the issues facing nonprofit organizations active in the EU and enable the Commission eliminate opportunities for financial fraud without unduly interfering with the diverse philanthropic endeavors undertaken by these organizations.

[129] *See supra* n. 127, at 8-9 (stating, "While the focus of the present Communication is to prevent abuse of NPOs by terrorist financing, the enhanced transparency and accountability measures will *also* help to protect organisations from other forms of criminal abuse. The Recommendation and the Framework for a Code of Conduct should therefore enhance donor confidence, encourage more giving, while preventing or at least reducing the risk of criminal abuse.")

[130] *Ibid*, at 12.

supervisory responsibilities at a national level would facilitate cooperation between relevant authorities in Member States, thus echoing the Court of Justice's vision in *Stauffer* of national authorities sharing information in the furtherance of European affairs. As between individual Member States and the EU, the Commission cites potential roles for the European Anti Fraud Office (OLAF) in assisting in co-operation and information exchange and the European Police College (CEPOL) in training senior police officers in highlighting vulnerabilities of the sector, typologies of abuse, promoting cooperation/information exchange.

From a nonprofit perspective, the Commission's recommendations are similar to those commonly issued by national charity regulators and relate to the need for a clear mission purpose for each organization to which resources are then applied; the importance of maintaining an up-to-date governing document that is publicly available; the keeping of proper books of account, the use of formal channels for transferring funds and the necessity for audit trails of funds transferred outside the host Member State and of funds transferred to any person delivering service on behalf of the nonprofit. Lacking is any mention of sanctions for non-compliance, making the Commission, at best, a fledging regulator.

If implemented in a proportional, transparent and properly resourced manner, the Commission's Guidelines will facilitate the work of nonprofit organizations throughout Europe by requiring all Member States to have in place an adequate regime for nonprofit regulation. Not alone would this regulatory initiative develop regulatory regimes in Member States where perhaps there was none in the past but it should also require all Member States of existing regimes to review their practices for clarity, efficiency and effectiveness. Implementation in this manner would assist in the avoidance of non profit abuse in line with Commission guidelines but would also provide opportunities for enhancing the type of Member State cooperation that should exist in an integrated Union. The stakes are high, however. If Member States engage only in half-hearted implementation of the European guidelines non-profits will be subjected to disparate demands regarding reporting requirements and varying national legal requirements loosely justified by reference to the Guidelines or to the fight against crime more generally. Member State non-adherence might also lead to a lack

of mutual assistance between national regulatory authorities and the consequent hampering of nonprofit activities across the Union.

The achievement of true legal enablement of nonprofits within the European Union is thus a long-term and ongoing project. Its facilitation, as this paper has strived to show, has not and is unlikely to be brought about through legislation even when specifically focused at nonprofit bodies. Paradoxically, more may be achieved in respect of the legal enablement of civil society through the Court's adoption of a functional approach towards the rights and liabilities of nonprofit organizations under the existing fundamental freedoms bestowed by the Treaty. In light of this conclusion, great care should be taken in the implementation of European policies to counter terrorism and fraud in the dealings of non-profit organizations that such policies do not become a byword for Member States' erection or maintenance of national barriers to free-movement of civil society organizations in an integrated Union.