Civil Society Regulations and Effects

The Proposal for a European Foundation Statute and Its Influence on Italian Legislation

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1. *Introduction*

The proposal for a European Foundation Statute presented by the European Commission in February 2012 is an important innovation in the framework of the law of charitable organizations.

The idea of a uniform tool in non-profit organizations is not new, but it is relatively recent.[2] In the last decade of the past century, the European Commission worked on a proposal for a Statute of a European Association (which never has been transposed into a Regulation), though the attention devoted to foundations has always been low, probably in consideration of the wide diversity of national traditions across Europe.[3] More precisely, the initial idea of the community legislator was to discipline both associations and foundations in a unique Regulation on a European Association. The preamble to the proposal for a Council Regulation on the Statute for a European Association published in 1993 was explicit in referring to both forms.[4]

In the meantime, the number of foundations and founders willing to develop transnational activities has grown significantly. Moreover, the foundations that operate across borders face legal obstacles that raise operating costs and thereby reduce the funds available to pursue their public benefit purposes. Therefore, the idea that foundations deserve special attention has become widely shared. The failure of the proposal on the European Association has contributed, too.

Several solutions have been examined by the EC.[5] The first of them is the so-called "baseline scenario," which includes ongoing initiatives in order to support cross-border activities

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[2] Since the idea of a European Foundation was first presented in 2001 by Klaus J. Hopt, it has received growing attention from legal scholars and, since 2003, from the European Commission, which first launched a feasibility study on such a Statute. Cf. K. J. HOPT, *The European Foundation: A New Legal Approach*, Cambridge University Press, 2006, p. 21.

[3] As an example of diversity, we can consider that while in some countries foundations are legal bodies, under common law foundations typically take the form of a trust which is not an organization but a relationship between property and trustees. Even the United States, where the phenomenon of foundations is highly developed (H.K. ANHEIER – S. TOEPLER (ed.), *Private Funds, Public Purpose: Philanthropic Foundations in International Perspective*, New York, 1999, p. 8: "the modern foundation is often perceived as a genuinely American invention"), in 1969 introduced a definition of this legal form through tax law, not civil law. See section 501 (c) (3) of the Internal Revenue Code, which defines negatively foundations as tax-exempt organizations.

[4] OJ n. C 236/1, 31.8.1993: "the introduction of a European form of organization should enable all associations and foundations to operate outside their own national borders."

[5] The policy options considered by the Commission are fully explained in the *Executive Summary of the Impact Assessment* accompanying the Proposal, 2012, pp. 3ff.

and giving. In the Commission's opinion, this would have a limited impact, because a Member State might still impose tax discrimination between domestic and foreign foundations or between donors. Further uncertainty might arise from the varying definitions of public utility across States.

The second option examined by the EC is an information campaign aimed at educating foundations about their prerogatives outside their national borders. In addition, a "European quality charter" could be introduced, the compliance with which would ensure the trustworthiness of the foundation. However, as a soft law instrument, this label would have a limited impact.

A greater impact would result from the simple harmonization of laws on foundations, with or without consideration of the fiscal aspects. This would mean harmonizing those requirements that foundations need to meet to register and operate abroad, such as public benefit purposes, minimum assets, registration requirements, and some aspects of internal governance. In the opinion of the Commission, this option would encounter some difficulties due to the need for changes in national laws and the difficulty of achieving compromise among Member States on harmonized definitions.

Finally, the European Commission came to the conclusion that a Statute for a European Foundation (*Fundatio Europaea*), with automatically applied non-discriminatory tax treatment, would be the most appropriate option, removing cross-border obstacles for foundations and donors and facilitating the efficient channeling of funds for public benefit purposes.

2. A possible effect: improving continental solidarity

Since its publication in 2012, the proposal has been welcomed by many scholars and institutions. The European Foundation Centre (EFC) calls the EC proposal "a major step towards having a new legal tool that will make it easier for foundations to support public-benefit causes across the EU." [6]

Such a change should be considered alongside the European legislation already developed in commercial law pursuant to article 352 TFEU, which aims at giving operators of philanthropic organizations a tool to help expand their activities outside their individual Member States.

In the field of philanthropy no less than in the market, the opening of single systems across the European dimension seems fully justified. As has been noted, since the Second World War all European Constitutions have returned the legal system to an ultimate moral order, which recognizes the fundamental human rights and the related duties of solidarity. In other words, given that the foundation of the Constitutions is the person, laws ought to encourage further continental solidarity.[7]

The European Foundation Regulation, once adopted, would as its first effect set a common core of purposes that can be considered of public benefit across Europe. The list of

[6] EUROPEAN FOUNDATION CENTRE (EFC), *Revised legal analysis of the European Commission proposal for a Council Regulation on the Statute for a European Foundation (FE)*, 2012.

[7] A. NICOLUSSI, *Europa e cosiddetta competizione tra gli ordinamenti giuridici*, in *Europa dir. priv.*, 2006, p. 90. This author refers to the European Constitutions entered into force after World War II having a moral foundation as to "Post-Auschwitz Constitutions" (*Costituzioni del dopo Auschwitz*).

purposes, which is to be considered exhaustive, is broad enough to include most of the aims that existing organizations pursue, but it is surprisingly too narrow in one respect: it does not include religion. The exclusion of religion has been rightly criticized, whereas this purpose is acknowledged in almost all Member States, whereas purposes that are not regarded as public benefits in all Member States, such as amateur sports, are included.[8] Indeed, the omission of religion appears to go against the substantive law of all Member States and the common history of our continent.

3. The leverage on national legislation

Although the European Foundation Statute would neither replace nor harmonize existing foundation laws, it undeniably would affect national legislation, once adopted as a Regulation.

It has been noted that "in addition to providing solutions to the barriers that foundations encounter in their cross-border work, a Foundation Statute would also provide further benefits to the foundations sector. The Statute would help to clarify terms and the concept of foundations as organizations with their own resources and independent governance. It would also help to develop a common definition of public benefit purpose foundation, as currently the term *foundation* is much too loosely used."[9]

3.1. The recent praxis of private foundations in Italy

One of the countries in which the term *foundation* is used too broadly is Italy. For some time there have been attempts to hybridize associations and foundations, which have been criticized in the literature. I am not referring to the forms of foundation specifically defined and regulated by law, such as banking foundations, or those resulting from the conversion of public institutions, but rather to the so-called foundations created by individuals exercising their private autonomy.

In recent years in Italy, new institutional forms between association and foundation have emerged, in the absence of a legislative framework that upholds their validity and outlines their features. As a consequence, there seems to be question as to whether non-profit organizations can continue to be categorized as associations and foundations.

The first feature of the new institutional forms is participation. This element distinguishes them from the "historical foundations" (still solely taken into account by the civil code), in which the founder establishes the purposes to be achieved, the assets, and the rules for the governance and for the assignment of annuities, and then remains aloof from the new entity. Instead, in the new foundations the founder actively participates in managing the legal body and in developing operational strategies, following a model similar to a corporate company.

The second feature is the frequent plurality of founders, which allows for interaction between public and private entities or even between individuals in order to carry out a project or pursue a goal. But the peculiar—more problematic—characteristic is that the institution is

[8] Cf. S.J.C. HEMELS, *The European Foundation Proposal: An Effective, Efficient and Feasible Solution for Tax Issues Related to Cross Border Charitable Giving and Fundraising?*, Paper for the 2012 EATLP conference Taxation of Charities, p. 13.

[9] G. SALOLE, *Why Is the European Foundation Statute Needed?*, *International Journal of Not-for-Profit Law*, vol. 11, no. 1, 2008.

conceived as open in its genetic code. It permits entry by subsequent founders with additional assets, all of whom become members of an assembly that makes decisions for the foundation.

Accordingly, this new foundation model that emerged in Italy looks structurally more like an association than a foundation. Such a hybrid, in the absence of a legislative reformation, threatens to undermine postulates underlying the Civil Code. In particular, it calls into question the criteria for differentiating between types of charities (associations and foundations) and for distinguishing charities from commercial companies.

The new form seems to render outdated the old distinction between the foundation and the association, according to which the first is a "*universitas bonorum*" and the second a "*universitas personarum*," because the foundation is presented not as current assets intended for one purpose, but rather as a collective organization formed by directors that uses the assets to achieve the purpose. Some statutes recognize that the assets can be not only current but also subject to an expectation of addition.

In addition, the dichotomy between public purpose bodies and for-profit entities appears much less marked than the tradition and the Civil Code suggest.

To be sure, the provisions of the Italian Civil Code, which refer only to the grant-making foundation, need to be reformed. But the goal ought to be, not to abolish the traditional figure of the foundation (grant-making), which remains relevant, but to make the legislation more closely match the needs of non-profit organizations.

3.2. The possible influence of the European Foundation Statute in Italy

In fact, in countries such as Italy, where legislation on foundations is considered obsolete or otherwise in need of reform, it probably would have been more effective to harmonize disciplines rather than to introduce a new legal form, which may remain poorly applied. The experience of the European Company Statute (SE) has fed skepticism about the ability of a European Foundation Statute to resolve problems of organizations that want to work abroad.[10] Although harmonization would have met resistance from many States, it would have forced the legislature to comply with the European directive, effectively changing the existing law and making it better suited to needs of the times and at the same time open to the European dimension.

In any case, a Regulation on European Foundations may also prod the legislature into modernizing the foundation. Such modernization is more necessary than ever in Italy, given the inadequacies of the law on foundations established by individuals.

In addition, the adoption of a Regulation, one that introduces the European Foundation legal figure without having to replace or modify the national organizational forms, would create a harmonizing effect within the jurisdiction of the Member States. In the process of European integration, European private law—understood in its effectiveness as a system of regulating private relationships—reflects formally different disciplines that are objectively oriented to harmonization. This means that national rules should be interpreted not only in accordance with

[10] O. B. BREEN, *EU Regulation of Charitable Organizations: The Politics of Legally Enabling Civil Society*, *International Journal of Not-for-Profit Law,* vol. 10, no. 3, June 2008, notes, "It remains difficult ... 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."

the European Community law, but also in a harmonizing manner. Harmonization of legal systems is one of the undeniable and unavoidable goals of the European Union.[11]

It is clear, therefore, that a Regulation on European Foundations would lead to a rapprochement between the legal systems of the Member States in the field of the third sector. By identifying a common core of general principles, it could foster the process of European integration in the field of philanthropy. Given this inherent ability of European law, the European Foundation Statute could be a harbinger of conceptual cleanliness, specifically in Italy.

First, regarding the current flexible use of the term *foundation*, the European Foundation could reemphasize that the association and the foundation are distinct concepts. Non-profit organizations (like commercial entities) require standard legal forms through which individuals can form distinct, autonomous legal bodies. The traditional types of organizations provide certainty in legal relations. They establish a legal entity distinct from natural persons by referring to an organizational model (the formation of contractual consent, representation, and publicity) and to a discipline (responsibility for obligations). Moreover, clear definitions of an institution's type and structure are essential for the protection of third parties who provide funding.

Second, the introduction of the European Foundation would redefine the difference between association and foundation from the point of view of their method of formation. The association is necessarily an entity formed by a plurality of subjects, whereas the creation of a foundation—through deed, testamentary disposition, or written declaration—is to be considered a unilateral act. The act remains unilateral, according to the legal doctrine, even if several subjects act simultaneously to create a foundation.[12] The wording of article 12 of the Proposal (*Methods of formation*) appears to allow this interpretation in referring to the deed and the testament. The same provision also seems to bar the foundation from subsequently accepting more subjects in the role of founders.

The requirement with respect to assets follows from that. When the entity is established, it must meet the minimum established by article 7 of the Proposal, without relying on the possibility of adding assets later. In fact, although Italian law does not currently set a minimum monetary threshold, the administrative authorities consider the adequacy of funds in the act of recognizing the institution as a legal person.

Also, whereas some clauses allow managers to change the statute of a foundation with virtually no limits, article 20 of the Proposal makes it clear that the foundation, by contrast to the association, is a stable entity with a purpose—not immovable or perpetual, but stable. The Proposal correctly distinguishes the common changes to the statute (§ 1 art. 20) from those changes that affect the purpose. The purpose "may only be changed if the current purpose has been achieved or cannot be achieved or where the current purpose(s) have clearly ceased to provide a suitable and effective method of using the [foundation's] assets" (§ 2). In any case, the decision to change the purpose must be adopted unanimously by the governing board and approved by the supervisory authority.

Defining the foundation's ability to alter its purpose would be great news for the Italian legislative scenario. Often, especially in relation to ancient foundations, the purpose is no longer

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[11] Cf. C. CASTRONOVO and S. MAZZAMUTO, *Manuale di diritto privato europeo*, vol. I, *Fonti, persone e famiglia*, Giuffré, Milano, 2007, p. 13.

[12] P. RESCIGNO, *Persona e comunità*, Cedam, Padova, 1987, p. 98.

relevant to the needs of contemporary society. Under the Italian Civil Code (art. 15), the foundation results from an act that becomes irrevocable when the institution obtains recognition as a legal entity or starts its business. Amendments to the statute are permitted only if they do not affect the original purpose. Otherwise the event of conversion must be arranged by the public authorities (art. 28 c.c.).[13]

The proposed European Foundation offers a balanced solution between, on the one hand, the need to respect the will of the founder combined with the need for stability of the institution—so that resources earmarked for a particular purpose are not diverted to a different purpose—and, on the other hand, the need to ensure that the institution can evolve to reflect changes in the needs of beneficiaries. The control by the supervisory authority gives a guarantee, to the founder and to subsequent donors, that the change strikes the proper balance.

Finally, article 34 of the Proposal (*Transparency and accountability*) is interesting for the Italian private law scholar. Currently in Italy, the Civil Code does not require non-commercial entities to keep accounting records unless they run business activities.[14] Only the tax law requires preparation of an annual report and a financial statement that provide information on the institution's management. Currently the founder, if he or she is not a member of the board of directors, has no special rights of inspection, given that article 15 of the Civil Code provides that the entity is detached from the founder. The provisions of article 34 read in conjunction with article 4 (*Disclosure*) appear to provide the transparency that is appropriate, in light of the often significant size of not-for-profit organizations. Moreover, making the accounts of a foundation accessible can increase its reliability and enhance the trust of the public, thus helping it raise funds and pursue public purposes.

[13] M. COSTANZA, *I soggetti: gli enti non commerciali*, in *Trattato di dir. civ. del C.N.N.*, diretto da P. Perlingieri, ESI, Napoli, 2012, p. 74.

[14] Art. 20, co. 1, D.P.R. 600/1973.