

STUDY

Requested by the JURI committee



A statute for European cross-border associations and non-profit organizations

Potential benefits in the current situation



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Abstract

Commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, this study provides a comparative analysis of the main laws on non-profit organizations in force in some selected European countries, before going on to discuss a potential legislative initiative of the European Union on the subject. The study sets out the different options available and concludes that the European Union should introduce a European status which, rather than being limited to non-profit organizations, should also seek to include related organizations such as those of the third sector and the social economy.

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LIST OF ABBREVIATIONS

AISBL	<i>Association internationale sans but lucratif</i> – Belgian international association without a profit purpose
AO	<i>Abgabenordnung</i> – German Fiscal Code
ASBL	<i>Association sans but lucratif</i> – Belgian association without a profit purpose
BGB	<i>Bürgerliches Gesetzbuch</i> – German Civil Code
CA	Irish Charities Act
CC	Italian Civil Code
CCA	<i>Code des sociétés et des associations</i> – Belgian code of companies and associations
CJEU	Court of Justice of the European Union
CLG	Company limited by guarantee
CRA	Charities Regulatory Authority of Ireland
CSO	Civil society organization
CTS	Italian Code of the Third Sector
EC	European Commission
EEA	European Economic Area
EESC	European Economic and Social Committee
EP	European Parliament
ESUS	<i>Entreprise solidaire d'utilité sociale</i> – French solidarity enterprise of social utility
EU	European Union
FP	<i>Fondation privée</i> – Belgian private foundation
FUP	<i>Fondation d'utilité publique</i> – Belgian public utility foundation
MS	Member State of the European Union
NPO	Non-profit organization

ONLUS	<i>Organizzazioni non lucrative di utilità sociale</i> – Italian non-profit organizations of social utility
PBO	Public benefit organization
SCIC	<i>Société coopérative d'intérêt collectif</i> – French cooperative society of collective interest
SE	Social enterprise
SEO	Social economy organization
SSE	Social and solidarity economy
SSEE	Social and solidarity economy enterprise
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TSE	Third or social economy (sector)
TSO	Third sector organization

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EXECUTIVE SUMMARY

Non-profit organizations are increasingly widespread across Europe¹. Their most common legal forms of incorporation are the association and the foundation, for which there is specific regulation in all European jurisdictions. It is found in acts of a different formal nature² and varies substantially from country to country, although common elements exist. Furthermore, associations and foundations (as well as mutuals) are not the only available legal forms of NPOs. The non-profit area is expanding due to the progressive “functional neutralization of the legal forms”, notably of companies and cooperatives, which are no longer necessarily linked to the profit and mutual purpose respectively³.

The comparative legal analysis also shows the presence, at national level, of the “public utility organization” status, which is available to NPOs pursuing purposes deemed to be of public interest. This status is identified on the basis of similar requirements in all MSs. The level of approximation of the national laws relating to the PBO status is greater than that present in the laws relating to the legal forms of incorporation of NPOs. PBOs usually enjoy the best tax treatment among NPOs and are recipients of tax-exempt donations.

In addition, new statuses of social utility have been introduced in some countries. They go beyond the classic status of public utility for two main reasons: first because they are also available to organizations characterized by the exclusive performance of business activities and secondly, because they are also available to companies that distribute limited profits to their shareholders. The most significant examples are the “third sector entity” status, adopted in Italy in 2017, and the “social and solidarity economy enterprise” status provided for by the French law of 2014.

The legislation, therefore, seems to follow a conceptual evolution over the last few decades. In scientific and public debates, attention has progressively shifted from the non-profit sector in the strict sense to wider sectors which are identified, in positive terms, by the public benefit nature of the aim pursued. Prominent examples include the interesting work recently published by a group of scholars as part of a research project on the third sector in Europe⁴ and the new United Nations’ “Handbook on Satellite Account on Non-profit” of 2018, which deals with the “third or social economy sector”, comprising both non-profit institutions and other related institutions, which are not non-profit but, like non-profit institutions, chiefly serve purposes of a social or public interest⁵.

Nor are NPOs a mysterious object at the level of EU law. The TFEU refers to them in an apparently discriminatory manner (art. 54, para. 2). The TEU, on the other hand, recognizes their fundamental role (art. 11, para. 2). NPOs are also the subject of various judgements of the Court of Justice of the EU. Some

¹ A few figures may suffice to demonstrate this: there are more than 100,000 associations in Belgium; 2 million registered associations and 5,000 foundations in France; more than 23,000 foundations in Germany; more than 10,000 registered charities in Ireland; approximately 16,000 social cooperatives in Italy.

² Examples include specific laws on associations and foundations in France; Civil Code in Germany and Italy; Code of Companies and associations in Belgium.

³ In some jurisdictions, it is explicitly stated that companies may be set up for any lawful purpose: This is the case, for example, of Ireland and Germany as regards limited liability companies. Italian social cooperatives pursue the general interest of the community (and not of their members).

⁴ Cf. SALAMON L.M., SOKOLOWSKI W., *Beyond Nonprofits: In Search of the Third Sector*, in ENJOLRAS B. ET AL. (eds.), *The Third Sector As A Renewable Resource for Europe. Concepts, Impacts, Challenges and Opportunities*, Palgrave Macmillan, 2018, p. 7 ff., where the proposal is to discuss a broader “third or social economy” sector, which includes not only “classical” non-profit organizations, but more in general all the organizations characterized by a “public purpose”.

⁵ Cf. UNITED NATIONS (2018), *Satellite Account on Non-profit and Related Institutions and Volunteer Work*, New York.

of them remove legal obstacles to their cross-border activities⁶, others put them on an equal footing with other entities under EU competition and state aid law⁷, while yet others recognize their specificities in justifying deviations from the ordinary legal regime of public procurements⁸. Nevertheless, unlike other types of legal entities – such as companies and cooperatives⁹ – NPOs do not yet have their own specific statute of EU organizational law.

Indeed, since the 1990s, the European institutions have tried to introduce EU statutes on associations, foundations and mutuals, but always without success.

The debate has been reignited in recent years. In this regard, the 2018 Resolution of the European Parliament, in which the European Commission is asked to take action to introduce a European statute for social enterprises, is of great importance¹⁰.

Is it possible today to obtain the results not achieved in the past decades? Is it finally possible to have a European statute for associations and other NPOs?

The benefits of this legislation would be enormous and of a different nature (political, social and economic), meaning that maintaining the status quo would not be desirable, although the difficulties inherent in the initiative should not be overlooked. A positive outcome may depend on the forms of this potential legislation. Three options deserve specific consideration.

The first is to reiterate the hypothesis of introducing European legal forms of association, foundation and mutual, through EU regulations similar to those on the European company and the European cooperative society. It is a difficult strategy to implement substantially for the same reasons that have led to its failures in the past. First of all, these regulations would have art. 352 TFEU as their legal basis and would therefore require unanimous decisions.

The second is to introduce the aforementioned statutes using the enhanced cooperation mechanism of art. 20 TEU¹¹. This would permit bypassing the unanimity of consensus but would lead to statutes establishing traditional legal forms of NPOs, thus failing to consider the developments in national laws.

The third option is to establish, by means of an EU directive, the legal status/label of “European third sector (or social economy) organization”¹², subject to common minimum requirements identified by the European directive itself¹³.

⁶ Cf. *Laboratoires Fournier* (C-39/04 [2005]), *Centro di musicologia Walter Stauffer* (C-386/04 [2006]), *Hein Persche* (C-318/07 [2009]), *Missionswerk* (C-25/10 [2011]), and *European Commission v Austria* (C-10/10 [2011]).

⁷ See, among many others, *Ambulanz Glöckner* (C-475/99 [2001]), where references to previous conforming decisions may be found.

⁸ See *Spezzino* (C-113/13 [2014]); *Casta* (C-50/14 [2016]); *Falck* (C-465/17 [2019]); and *Italy Emergenza* (C-424/18 [2019]).

⁹ Cf. Regulations no. 2157/2001 of 8 October 2001, on the European Company, and no. 1435/2003 of 22 July 2003, on the European Cooperative Society.

¹⁰ Cf. Resolution of 5 July 2018 with recommendations to the Commission on a Statute for social and solidarity-based enterprises (2016/2237(INL)).

¹¹ Cf. BREEN O.B., *Enlarging the Space for European Philanthropy*, A Dafne/EFC commissioned study, 16 January 2018.

¹² It is the strategy that the EP already adopted in its 2018 Resolution on social enterprises: it was based on previous work by the author of this Study: cf. FICI A. (2017), *A European Statute for Social and Solidarity-Based Enterprise*, Brussels, 2017.

¹³ These requirements might be: the private nature of the organization, regardless of the legal form of incorporation; the exclusive pursuit of public utility purposes; the obligation to use all assets for the exclusive pursuit of the purposes (remuneration of share capital possible within precise limits); the asset-lock even in the event of dissolution; the obligation to

Organizations holding the status/label would be recognized by all MSs, regardless of the country of their incorporation. Any MS would be required to grant foreign organizations holding the status the same benefits, rights and obligations as national organizations holding the status; this would also apply to taxation. For example, if a national organization, which is qualified as a "European third sector (or social economy) organization", may receive tax-exempt donations in a given MS, a foreign organization holding the same status would automatically enjoy the same benefit, without any comparability test, even if the status was acquired abroad.

The latter strategy is the most worthy of recommendation, since it appears to be the most feasible, it is satisfactory in consideration of the objectives of an EU legislation on the subject and is perfectly in line with the evolution of national laws in this field.

comply with certain organizational and transparency obligations; registration in public registers; submission to public controls.

1. INTRODUCTION

An updated study on the regulation of associations and other non-profit organizations (“NPOs”) at the European Union (“EU”) level must necessarily consider the evolution that the concept of NPO has undergone in the decades following the first attempts by the EU institutions in the 1990s to introduce European statutes on specific types of NPOs such as associations, foundations and mutuals.

This evolution is the consequence of several circumstances, including the **commercialization of many “traditional”, donative non-profit organizations**, and a shift in the nature of the relationships with the State and other public entities for the provision of welfare and other general interest services. The need to distinguish, within the general universe of NPOs, those organizations established by citizens to perform activities of general interest in view of the common good, is another, equally important, driver of this evolution.

In brief, two correlated trends may be observed: the enlargement of the scope of the organizational structures referred to as NPOs and the re-definition of the concept of NPO on new and different bases. This is mainly due to **the “crisis” of the profit non-distribution requirement** as the distinctive element of the category of organizations under investigation in the present Study.

The profit non-distribution constraint, which in the past was the essential element of identification of our organizations, seems to have lost its key role in this respect¹⁴. Indeed, a positive definition of the organizational purposes of NPOs, together with other elements, such as the nature of the activity performed, have made the element of profit non-distribution play only an ancillary role in the definition and qualification of NPOs. This has also led to a relaxation of the same requirement, which has permitted the admission into the area of NPOs even of organizations not characterized by a total prohibition on profit distribution.

As a result, in analyses of all kinds, not only legal, the focus has gradually shifted **from “non-profit organizations” to “third sector organizations” and “social economy organizations”**. These are not new denominations of the same phenomenon, but denominations evoking a different organizational substance. They are also more appropriate denominations, since the legal structures to which they refer have positive traits that characterize them beyond the profit non-distribution requirement which, moreover, might also be attenuated in some of them.

Another trend that may be observed is the **increasing “neutrality” of the company form**, which makes possible, also thanks to enabling legal provisions, the establishment of companies for a non-profit purpose. Thus, associations and foundations cease to be the only available legal forms for organizations without a profit purpose, and companies end up being increasingly included among the eligible legal forms for the acquisition of the charitable or public benefit statuses, as well as of new legal statuses, such as those of third sector organizations and social economy organizations.

As is usually the case, the enrichment of the subject under investigation is accompanied by increased complexity. The world of NPOs has become more complex because the world is ever more complex. Legal entities are established to satisfy human needs and are therefore strongly rooted in reality, even though they exist only in the realm of (and thanks to) the law. Therefore, their features change according to the changes in the economy and society.

All this affects legislation and legal studies. Current legislation on NPOs is hardly comparable to that of three decades ago, when the first attempts to introduce EU statutes on NPOs were made. Over the last

¹⁴ For one of the most successful conceptualizations of this requirement see HANSMANN H.B. (1980).

thirty years, NPO law has witnessed enormous modifications. Not exclusively in its objects, but also, and more fundamentally, in its structure. Even only a brief and general overview of the legal framework on NPOs in a selected number of EU Member States ("MS") may easily demonstrate the above.

2. AN OVERVIEW OF NATIONAL LEGISLATION ON NON-PROFIT ORGANIZATIONS

This section of the Study aims to provide a general overview of the current legislation on NPOs in a selected number of EU countries. The analysis will only focus on the main features of this legislation and the aspects thereof that are deemed more significant in light of the specific aim of this Study, i.e., to discuss a potential legislative initiative on (associations and other) NPOs at the EU level.

More precisely, the inquiry seeks to delineate the general features of national NPO laws in order to highlight the main trends and commonalities that may be found across MSs and thus employed to build a modern and consistent common European legal framework on this subject. A legal framework that, for its contents and characteristics, might also be more easily accepted by all MSs.

The selection of national jurisdictions has been conducted on the basis of several factors, including the novelty of the legislation in force; its capacity to show the state, trends and evolution of NPO law and to contribute to the apparatus for its study; its richness, originality and significance in view of the final recommendations that will be offered in the last part of this Study, with an attempt to cover different legal traditions (notably, both civil law and common law countries). This does not mean, of course, that countries and jurisdictions not specifically covered in this section of the Study have inadequate laws on NPOs or laws that are irrelevant from a comparative law perspective. However, references to further national laws and rules will be included in section 3 of this Study in so far as they are useful to corroborate the results of the comparative analysis.

2.1. Belgium

Belgium is a country in which NPOs, notably associations, play a significant role¹⁵, and the legislation concerning them has a long-standing tradition¹⁶. However, the present interest in this European jurisdiction is mainly due to the recently enacted legislation on NPOs, which is found in the new Code of companies and associations of 2019.

This brand-new law is of great significance for several reasons. The accuracy with which the subject matters are regulated helps in defining the potential scope and contents of a detailed and well-developed law on NPOs and identifying the variables to take into consideration when legislating on them¹⁷. The changes made to the pre-existing legal framework give an idea of how the legislation in

¹⁵ According to NYSENS M., HUYBRECHTS B. (2020), p. 18, “the associative sector in Belgium has been very dynamic historically, and it has become a major pillar of the Belgian society”. They further explain (see *ibidem* at p. 22): “In 2017, the number of active associations in Belgium was of 109,000, of which however only 17,000 had employed staff. The employment in these associations exceeded 350,000 full-time equivalents, representing nearly 12% of all employment (*Observatoire de l'économie sociale*, 2019)”.

According to MALHERBE F. (2020), p. 2, “Non-profit organisations occupy a key role in Belgium, particularly with regard to education, hospitals, art, culture and leisure (“non-trading” sector). Employment in that sector represents more than one-fifth of the total employment in Belgium”.

¹⁶ The first law on associations without a profit purpose dates to 27 June 1921. Mutuals were first recognized by Belgian law in 1851: cf. NYSENS M., HUYBRECHTS B. (2020), p. 22.

¹⁷ This is not to say, however, that the new Belgian law does not present ambiguities, obscurities or points that required a different drafting. It is true, for example, what DAVAGLE M. (2019) points out, namely that “*ce Code, d'une lecture fastidieuse pour celui qui ne s'occupe que d'ASBL, oblige les dirigeants à voyager à travers différents livres pour aller picorer dans ce monceau d'articles ce qui les intéresse vraiment*”.

this field may evolve. The provision of a structure such as the “international association without a profit purpose” highlights the need for providing for tailored legal forms for the cross-border association of persons.

2.1.1. Main legal forms of NPOs

The recent Code of companies and associations (“CCA”)¹⁸, which was enacted on 23 March 2019 and came into force on 1 May of the same year, is the main source of NPO law in Belgium. It replaced the Law of 27 June 1921 on non-profit associations and foundations, by incorporating, in the same Code, the regulation of NPOs and that of companies and other legal entities (including the EU types of the European Company, the European Cooperative Society and the European Economic Interest Grouping).

Another relevant act for our analysis is the Law of 6 August 1990 on mutuals¹⁹.

The CCA provides for four general types of NPOs, namely:

- the **association without a profit purpose**, or “**ASBL**” (art. 1:6, sect. 2, CAA);
- the **international association without a profit purpose**, or “**AISBL**” (art. 1:6, sect. 2, CAA);
- the **private foundation**, or “**FP**” (art. 1:7 CAA); and
- the **public utility foundation**, or “**FUP**” (art. 1:7 CAA).

All these structures have legal personality²⁰, so that the members are not personally responsible for the obligations assumed by the legal entity (art. 9:1 and 10:1 CCA). The “**de facto association**” is also provided for by the CCA as an association without legal personality regulated by the parties’ agreement (art. 1:6, sect. 1, CAA).

The CCA offers a precise definition of an association: “an association is established by an agreement between two or more persons, called members. It pursues a **disinterested purpose** within the framework of the exercise of one or more specific activities that constitute its object. It may not distribute or procure, directly or indirectly, any financial benefit to its founders, members, directors or to any other person except within the scope of the disinterested purpose determined by the articles of association. Any transaction violating this prohibition is null and void” (art. 1:2 CCA)²¹.

In a similar vein, a foundation is defined as “a legal person without members, established by one or more persons, called founders. Its assets are allocated to the pursuit of a **disinterested purpose** within the framework of the exercise of one or more specific activities that constitute its object. It may not distribute or procure, directly or indirectly, any financial benefit to its founders, its directors or to any

¹⁸ Available at <http://www.ejustice.just.fgov.be/eli/loi/2019/03/23/2019A40586/justel>.

¹⁹ Available at https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=fr&nm=1990022427&la=F.

²⁰ ASBLs and FPs obtain the legal personality by registering with the competent court, while AISBLs and FUPs by concession from a Royal Decree: see article 2:6, sects. 2, 3 and 4, CCA.

²¹ Translation by Author of the original text in French which reads: “*Une association est constituée par une convention entre deux ou plusieurs personnes, dénommées membres. Elle poursuit un but désintéressé dans le cadre de l'exercice d'une ou plusieurs activités déterminées qui constituent son objet. Elle ne peut distribuer ni procurer directement ou indirectement un quelconque avantage patrimonial à ses fondateurs, ses membres, ses administrateurs ni à toute autre personne sauf dans le but désintéressé déterminé par les statuts. Toute opération violant cette interdiction est nulle*”.

other person, except within the scope of the disinterested purpose determined by the articles of association. Any transaction violating this prohibition is null and void" (art. 1:3 CCA)²².

In the AISBL, the disinterested purpose has to be relevant at an international level (art. 10:1 CCA).

The FUP is characterized by a disinterested purpose of "a philanthropic, philosophical, religious, scientific, artistic, educational or cultural nature" (art. 11:1 CCA).

In addition, the CCA identifies **small** (art. 1:28 CCA) **and micro associations** (art. 1:29 CCA), as well as **small** (art. 1:30 CCA) **and micro foundations** (art. 1:31 CCA), on the basis of several criteria, such as the number of workers, the annual turnover and the balance sheet total. The qualification affects the regulation: among other things, small and micro associations and foundations are exempt from some obligations (such as the drafting of the "management report" of art. 3:48 CCA) and controls (such as the legal control of annual accounts according to articles 3:98 and 3:99 CCA) which all the other associations and foundations are subject to, and may also take advantage of a simplified system of accounting (see articles 3:47 and 3:51 CCA).

Whilst in general cooperative societies are societies whose "main purpose [is] the satisfaction of the needs and/or the development of the economic and/or social activities of its shareholders or of interested third parties, notably by the conclusion of agreements with them for the supply of goods or services or the execution of work within the framework of the activity that the cooperative society carries out or enables others to carry out" (art. 6:1, sect. 1, CCA)²³, the main purpose of **cooperatives accredited as social enterprises** is, rather than to provide their shareholders with an economic or social advantage in order to satisfy their professional or private needs, to generate a "**positive social impact for human beings, the environment or the society**" (art. 8:5, sect. 1, no. 1, CCA).

The other requirements for the recognition of a cooperative as a "cooperative society recognized as social enterprise" (or "**SC accredited as SE**")²⁴ are:

- that any financial benefit that it distributes, in any form, to its shareholders should not exceed the interest rate determined by a Royal Decree, on the shares effectively paid-up by the shareholders;
- that upon dissolution residual assets be allocated as closely as possible in conformity with its purpose as a recognized social enterprise.

²² Translation by Author of the original text in French which reads: "Une fondation est une personne morale dépourvue de membres, constituée par une ou plusieurs personnes, dénommées fondateurs. Son patrimoine est affecté à la poursuite d'un but désintéressé dans le cadre de l'exercice d'une ou plusieurs activités déterminées qui constituent son objet. Elle ne peut distribuer ni procurer, directement ou indirectement, un quelconque avantage patrimonial à ses fondateurs, ses administrateurs ni à toute autre personne, sauf dans le but désintéressé déterminé par les statuts. Toute opération violant cette interdiction est nulle".

²³ Translation by Author of the provision according to which "La société coopérative a pour but principal la satisfaction des besoins et/ou le développement des activités économiques et/ou sociales de ses actionnaires ou bien de tiers intéressés notamment par la conclusion d'accords avec ceux-ci en vue de la fourniture de biens ou de services ou de l'exécution de travaux dans le cadre de l'activité que la société coopérative exerce ou fait exercer".

²⁴ Accreditation as a social enterprise may also be obtained by an "accredited cooperative" pursuant to art. 8:4 CCA, in which case this cooperative (with this double accreditation) is identified as "SCES agréée" (cf. art. 8:5, sect. 2, CCA).

Mutuals are “associations of natural persons who, in a spirit of providence, mutual assistance and solidarity, have the purpose to promote physical, psychological and social well-being. They carry out their activities **without a profit purpose**” (art. 2, sect. 1, Law 6 August 1990)²⁵.

2.1.2. Institutional purpose and related aspects

Both associations and foundations pursue a “disinterested purpose” through the performance of one or more specific activities.

The pursuit of a disinterested purpose requires that no financial benefit be distributed or procured to founders, members, directors, etc., neither directly nor indirectly (articles 1:2 and 1:3 CCA).

An **indirect distribution of financial benefits** occurs when an NPO performs “any operation whereby the assets of the association or the foundation decrease or the liabilities increase and for which they either do not receive any consideration or receive a consideration which is manifestly too low in relation to their performance” (art. 1:4 CCA)²⁶.

These rules do not prevent a Belgian NPO from compensating employees, service providers and directors, if the compensation does not integrate an indirect distribution of profits according to art. 1:4 CCA²⁷. In cooperatives recognized as SEs “the office of director is unpaid, unless the general meeting of shareholders establishes a limited compensation or limited attendance fees” (art. 6, sect. 1, no. 4, Royal Decree 28 June 2019).

Furthermore, the same art. 1:4 CCA underlines that the profit non-distribution constraint does not prevent the association from providing free services to its members that are relevant to its object and fall within its purpose (e.g., an association may offer its members free access to its sport facilities if it has been set up to reach this specific objective).

The profit non-distribution constraint during the existence of the NPO is protected by an **asset-lock at its dissolution**.

An association may be dissolved by a decision of its members’ general meeting, in the cases provided for by the law or the articles of association, or by a decision of the competent court (upon request of a member, a third interested party or the public prosecutor), notably when a violation of the disinterested purpose has occurred (art.2:109-2:113 CCA).

The competent court may dissolve a foundation upon request of a founder, a beneficiary, a director, a third interested party or the public prosecutor (the Crown attorney) when, notably, a violation of the disinterested purpose has taken place (art. 2:114 CCA).

²⁵ Translation by Author of the following provision: “*Les mutualités sont des associations de personnes physiques qui, dans un esprit de prévoyance, d’assistance mutuelle et de solidarité, ont pour but de promouvoir le bien-être physique, psychique et social. Elles exercent leurs activités sans but lucratif*”.

²⁶ Translation by Author of the following provision: “*Aux fins des articles 1:2 et 1:3 est considérée comme distribution indirecte d’un avantage patrimonial toute opération par laquelle les actifs de l’association ou de la fondation diminuent ou les passifs augmentent et pour laquelle celle-ci soit ne reçoit pas de contrepartie soit reçoit une contrepartie manifestement trop faible par rapport à sa prestation*”.

²⁷ See MALHERBE F. (2020), p. 3; DENEFF M., VERSCHAEVE S. (2017), p. 333.

In all instances, the residual assets of a dissolved association or foundation may not be distributed, either directly or indirectly, to their members or directors, but shall be allocated as closely as possible in conformity with their purpose (art. 2:132 CCA)²⁸.

An almost identical provision applies in the event of dissolution of cooperatives accredited as SEs (art. 8:5, sect. 1, no. 3, CCA, and art. 6, sect. 1, no. 8, Royal Decree 28 June 2019).

The need to preserve the altruistic destination of an NPO's assets, in order to safeguard its disinterested purpose, also justifies the rules that limit an NPO's autonomy to convert into, or to merge with, an entity of a different legal form.

Thus, an association may only be transformed into a cooperative accredited as a social enterprise (articles 9:12, no. 8, and 14:37 CCA), while a foundation may not be converted into a legal entity of a different form (only the conversion of an FP into an FUP is allowed: art. 14:67 CCA).

Along the same lines, the merger and de-merger of associations by incorporation into another legal entity is possible only when the assets are allocated to other associations, foundations, universities or public law entities that pursue the same or a similar disinterested purpose (art. 13:2, sect. 1, CCA), while the merger and de-merger of foundations by incorporation into another legal entity require that assets be allocated to other foundations, universities or public law entities and maintain the same specific destination within the incorporating entity (art. 13:2, sect. 2, CCA).

For the same reasons, withdrawing members are not entitled to the reimbursement of the contributions made to the association, unless the articles of association provide otherwise (art. 9:23, sect. 3, CCA). In a similar vein, if the statutes of a foundation so provide, the contributions made by the foundation's founders may be returned to them (or their heirs) when the disinterested purpose of the foundation is achieved (art. 11:2 CCA).

In SCs accredited as SEs, in the event of resignation, the withdrawing shareholder receives, at most, the nominal value of the contributed shares (art. 6, sect. 1, no. 3, Royal Decree 28 June 2019).

2.1.3. Activities

Although Belgian NPOS are not allowed to distribute profits, they may freely conduct any commercial or industrial activity, regardless of whether these activities are exclusive, prevalent or secondary compared to non-commercial activities²⁹. This is a major change introduced by the reform of 2019, since under the previous law of 1921, non-engagement in industrial and commercial activities was one of the elements of the very definition of an association, so that associations were allowed to conduct only incidental economic activities³⁰. Currently, therefore, only the disinterested purpose identifies associations and distinguishes them from companies³¹.

²⁸ However, if the statutes of a foundation so provide, the contributions made by the founders may be returned to them (or their heirs) when the disinterested purpose of the foundation is achieved (art. 11:2 CCA).

²⁹ Cf. MALHERBE F. (2020), p. 4.

³⁰ Cf. VERRUCOLI (1985), p. 30 f. In contrast, no restrictions were provided for foundations: cf. DENEFF M., VERSCHAEVE S. (2017) p. 332.

³¹ See DE CORDT Y., CULOT H. (2019): *"les ASBL et les fondations peuvent exercer au-delà de l'accessoire, sans restriction quantitative ou fonctionnelle, des activités économiques. Ces entités se distinguent donc uniquement par leur finalité: l'enrichissement des associés pour les sociétés et la réalisation d'un but désintéressé pour les associations"*. In defining companies, art. 1:1 CCA stipulates that *"un de ses buts est de distribuer ou procurer à ses associés un avantage patrimonial direct ou indirect"*.

The performance of commercial or industrial activities is relevant under tax law since it exposes the NPOs to the application of the ordinary regime of corporate taxation (rather than the more favourable regime of the legal entities: see *infra*).

The law does not circumscribe the scope of the potential activities of associations, foundations and cooperatives recognized as SEs. Only mutuals face restrictions in this regard as they are required by law to perform specific activities (art. 3 Law 6 August 1990).

A significant limitation in the legal capacity of Belgian NPOs stems from articles 9:22, 10:11 and 11:15 CCA, which require that any (non-manual and *inter vivos*) donation to associations and foundations, whose value exceeds 100,000 EUR, be authorized by the Minister of Justice.

2.1.4. Structure and governance aspects

An association is an organization of persons. It is established by an agreement between two or more members, who do not necessarily have to make contributions to the association. Both natural or legal persons may be members of an association.

An association has (at least) two main bodies.

The general meeting of members is the supreme body of an association and is responsible for taking the fundamental decisions, such as those regarding the appointment and dismissal of directors, the approval of the annual accounts and the provisional budget, the amendments to the articles of association, the dissolution and conversion of the association (art. 9:12 CCA).

The board of directors is composed of at least three natural or legal persons (art. 9:5 CCA), appointed by the members' general meeting or, with regard to the first directors, in accordance with the act of incorporation (art. 9:6 CCA). The board of directors may be composed of only two members if the association has less than three members (art. 9:5 CCA). A sole director is not permitted.

The board of directors may perform all the tasks that are necessary or useful for the achievement of the object of the association, with the sole exception of those tasks that the law reserves for the members' general meeting (art. 9:7, sect. 1, CCA).

A foundation is a legal person without members (art. 1:3 CCA), set up by one or more founders. Its assets are allocated to the pursuit of the disinterested purpose. The foundation legal form presupposes the contributions of the founders, but no minimum contribution is explicitly imposed by law³².

A foundation has no members and therefore no general meeting. It is administered by a sole director or a body of directors. Both natural and legal persons may be directors (art. 11:6 CCA). Directors may perform all the acts that are necessary or useful for the achievement of the object of the foundation (art. 11:7, sect. 1, CCA).

The personal liability of directors for damages caused in the exercise of their tasks is limited to the amounts determined in art. 2:57 CCA.

2.1.5. Public supervision

There is no specific supervisory authority for Belgian associations and foundations. However, as is the case for other legal entities, their operations can be scrutinized by the public prosecutor (the Crown

³² Nevertheless, DENEFF M., VERSCHAEVE S. (2017), p. 329, report that *de facto* FUPs must have at least 25,000 EUR in assets to be recognized as legal persons by Royal Decree.

attorney), who has the power to request the dissolution of an association or a foundation that violates their main legal duties (art. 2:113; 2:114)³³.

On the other hand, cooperatives recognized as SEs are subject to specific supervision by the Minister of the Economy, who may even withdraw a cooperative's approval to be an SE in the event that its statutes, operations or activities no longer comply with the conditions for the approval (art. 9 Royal Decree 28 June 2019).

2.1.6. Taxation

NPOs are exempt from corporate income tax and are subject to the (more favourable) **"tax of the legal entities"** if they do not carry out profit-making operations (articles 181 and 220, Code of Income Taxes of 1992)³⁴.

Art. 182 of the Code of Income Taxes states that the following "are not considered as profit-making operations:

1° isolated or exceptional operations;

2° operations that consist in the investment of funds collected in the exercise of their statutory mission;

3° operations that constitute an activity comprising only incidentally industrial, commercial or agricultural operations or not using industrial or commercial methods".

Furthermore, there are certain associations and other NPOs that are not subject to corporate income taxation, even if they carry out profit-making operations (art. 181, Code of Income Taxes of 1992). This group of associations includes, among others, **"non-profit organizations accredited under art. 145/33"** of the same Code.

Accredited NPOs are those that may be legitimate recipients of tax-deductible donations. The accreditation (awarded by Royal Decree or Ministerial Decree for no more than six years) presupposes not only that the organization has a non-profit purpose, but also that it conducts specific activities (scientific research, assistance to certain groups of people, such as the disabled and elderly, promotion of culture, assistance to developing countries, environmental protection and sustainable development, etc.), as well as that it meets further conditions such as having the legal personality and not dedicating more than 20% of its income to general administrative expenses³⁵.

Cash donations greater than 40 EUR per year to accredited NPOs entitle donors to a tax reduction of 45% of the donated sum. The tax reduction is granted on a maximum amount per fiscal year. This maximum amount is either 10% of the net income or 397,850 EUR (amount annually indexed) per fiscal year (art. 145, sect. 1, Code of Income Taxes of 1992). For corporations, these caps are, respectively, 5% and 500,000 EUR (art. 200, Code of Income Taxes of 1992)³⁶.

Originally, the income tax deduction was only foreseen for donations to accredited NPOs located in Belgium. Further to infringement procedures issued by the EC and case law of the CJEU, the law has

³³ Cf. MALHERBE F. (2020), p. 8; DENEFF M., VERSCHAEVE S. (2017), p. 337 f.

³⁴ Cf. DENEFF M., VERSCHAEVE S. (2017), p. 339; MALHERBE F. (2020), p. 13.

³⁵ MALHERBE F. (2020), p. 18 f.; DENEFF M., VERSCHAEVE S. (2017), p. 340.

³⁶ MALHERBE F. (2020), p. 17.

been modified³⁷. **Non-profit organizations located in any of the EEA countries are eligible to procure tax benefits in connection with donations from Belgian donors, provided that these institutions are similar to eligible Belgian institutions and are recognized in their jurisdiction in a similar manner**³⁸.

NPOs are VAT taxpayers if they carry out economic activities of supplying goods or providing services in exchange for a price (art. 4, VAT Code).

There are, however, certain activities carried out by NPOs that are **VAT exempt**, including the provision of services by physical education or sport facilities to people who practise physical culture or sport activities; the provision of food and drink when performed in combination with some other particular activity, such as a charity event; the provision of services of medical practitioners and other listed healthcare professionals (art. 44, VAT Code)³⁹. Other exemptions may regard specific activities performed by specific NPOs, such as, for example, social services provided by mutuals (art. 44, sect. 2, no. 2, VAT Code).

2.2. France

The French non-profit sector consists of a very large and constantly increasing number of organizations⁴⁰.

To date, there are approximately 2 million registered associations⁴¹. There were more than 5,000 foundations at 31 December 2018, including 655 public utility foundations, 415 business foundations, 2,752 endowment funds and 1,391 sheltered foundations⁴².

The number would be even greater if one were to enlarge the scope of the sector so as to encompass social and solidarity economic organizations as recently provided for by the law introduced in 2014.

The legal framework for NPOs is both rich and complex at the same time, due to the presence of a plurality of legal statutes and particular subjects, as well as of the intricate interaction between laws that provide for specific legal forms of incorporation (i.e., legal types of entities) and laws that provide for particular statuses for those legal forms (or legal types). Recently, the picture has been further enriched by some provisions of the Law of 2014 on the social and solidarity economy and of the "Pacte" Law of 2019.

Another characteristic of this national legislation is the incisive role of public control during the entire life of the NPOs of public utility, which substantially limits their freedom⁴³. According to Katrin

³⁷ FORREST L., HOUBEN F. (2020), 20.

³⁸ MALHERBE F. (2020), p. 21.; FORREST L., HOUBEN F. (2020), 20.

³⁹ MALHERBE F. (2020), p. 16 f.

⁴⁰ Cf. DECKERT K. (2010), p. 268, pointing out that the term non-profit organization "is only an informal, non-official term often used to refer to organizations that do not distribute their profit to their members or founders. In fact, the criterion of non-distribution of profit is part of the legal definition of each entity".

⁴¹ Cf. <https://www.data-asso.fr/map>.

⁴² Cf. <https://www.centre-francais-fondations.org/fondations-fonds-de-dotation/le-secteur/les-derniers-chiffres-sur-les-fonds-et-fondations-en-france>.

⁴³ Cf. DECKERT K. (2010), p. 269, defining it "paradoxical and, from a comparative law perspective, unusual. It is characterized by a large difference in the mandatory requirements applying to the different types of nonprofits, and in its state supervision, whose degree and intensity depend on the type of nonprofit organization".

DECKERT, whilst, on the one hand “the strong role of the French state in the life of these nonprofits is justified by their general interest purpose, which must be controlled by the state because there are no owners or shareholders ... interested in the nonprofits’ (effective) control”, as well as by the fact that they “benefit from a wide legal capacity and ... from important tax advantages”, on the other hand, however, “this situation can also be explained by the state’s general mistrust of (independent) nonprofits with general interests, especially in the past: they were considered a potential competitor of the state, which, according to tradition, holds the ‘monopoly’ in the name of the public interest”⁴⁴. All this renders the public utility status “a very exclusive status that only some – very often big – nonprofits can get and keep”⁴⁵. In this regard, some innovations, like the introduction of the endowment funds, have only attenuated this effect.

2.2.1. Main legal forms of NPOs

French law contemplates two general legal forms of NPOs, which are the **association** and the **foundation**, as provided for, respectively, by the Law of 1 July 1901 on the contract of associations⁴⁶ and Law no. 87/571 of 23 July 1987 on the development of philanthropy⁴⁷.

Associations may be established by two or more (natural or legal) persons “**for a purpose other than profit sharing**” (art. 1 Law 1901)⁴⁸. Therefore, in principle, associations might even be set up to reach private economic interests as long as profit distribution does not take place.

Associations (“**declared associations**”) may or may not (“**undeclared associations**”) have legal personality⁴⁹. The procedure for obtaining the legal personality is laid down in art. 5 Law 1901. Associations acquire the legal personality following publication in the Official Journal of the notice of their establishment.

The attribution of the legal personality strongly affects the legal capacity of associations. Undeclared associations do not have legal capacity⁵⁰, while art. 6 of Law 1901 applies to declared associations, and states that declared associations may, without any special authorization, sue, receive “manual” donations as well as subsidies from the state, regions, departments or municipalities; collect contributions from its members; own and manage the premises intended for the administration of the

⁴⁴ DECKERT K. (2010), p. 270. This attitude has roots in the French Revolution: see HIEZ (2016), para. 3.

⁴⁵ DECKERT K. (2010), p. 270, which goes on to state that “compared to the strong regulation and control imposed on them, the advantages conferred on public utility associations, public utility foundations or company foundations seem disproportionately low” (*ivi* at p. 271).

⁴⁶ Available at <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006069570/>.

⁴⁷ Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT00000874956/>.

⁴⁸ See art. 1, Law 1 July 1901: “*L’association est la convention par laquelle deux ou plusieurs personnes mettent en commun, d’une façon permanente, leurs connaissances ou leur activité dans un but autre que de partager des bénéfices. Elle est régie, quant à sa validité, par les principes généraux du droit applicables aux contrats et obligations*”.

⁴⁹ As HIEZ (2016), para. 45, points out, “*la conséquence du rattachement à l’une ou l’autre catégorie consiste dans l’attribution ou non de la personnalité juridique. Ainsi, la distinction peut aussi se présenter entre les associations personnalisées et non personnalisées*”.

⁵⁰ With these precise words, HIEZ (2016), para. 317; According to the same Author (*ivi*, para. 45), undeclared associations “*ne retiennent plus guère l’attention et leur étude a surtout un intérêt historique et théorique, marginalement pratique*”.

association and the meeting of its members, as well as buildings strictly necessary for the accomplishment of their purposes⁵¹.

A wider legal capacity is enjoyed by associations declared for at least three years, which carry out one of the activities mentioned in art. 200, para. 1, lit. b), of the General Tax Code – namely, activities of a philanthropic, educational, scientific, social, humanitarian, sporting, family, cultural character, or contributing to the enhancement of the artistic heritage, the defence of the natural environment or the dissemination of French culture, language and scientific knowledge. They may also receive gifts under the conditions set out in art. 910 of the Civil Code and own and manage all buildings acquired free of charge (art. 6, para. 5-7, Law 1901). The same associations may apply for the fiscal status of **general interest organizations** pursuant to articles 200, para. 1, lit. b), and 238*bis*, para. 1, lit. a), of the General Tax Code⁵².

Public utility associations are those declared associations that are recognized as such by governmental decree (art. 11 Law 1901). The procedure is regulated in art. 8 ff. of the Decree of 16 August 1901. With this recognition, associations obtain full legal capacity (*“la grande capacité juridique”*). Indeed, according to art. 11 Law 1901, “associations recognized as being of public utility may carry out all acts of civil life which are not prohibited by their statutes”. They may also freely receive all kinds of gifts under the conditions set out in article 910 of the Civil Code.

For associations to acquire public utility status, they must meet some legal requirements and are strongly recommended to adopt a model statute approved by the Council of State⁵³. They are subject to a more incisive public control than other associations, but on the other hand, they enjoy full legal capacity and a more favourable tax regime.

The public utility status is granted only if:

- the association is of general interest, i.e., it does not carry out its activities for-profit, it is managed in a disinterested manner⁵⁴, and it does not operate for a small circle of people;
- its scope of activities goes beyond the local context;

⁵¹ It is referred to as *“la petite capacité juridique”* since the capacity to receive donations and make purchases is limited: cf. DECKERT K. (2010), p. 274.

⁵² According to HIEZ (2016), para. 48, *“une nouvelle catégorie d’association fait son chemin, quoiqu’elle ne figure pas dans la loi de 1901, et qu’elle ne constitue donc pas à proprement parler une catégorie autonome: il s’agit des associations d’intérêt général ... L’ambiguïté de la source de la catégorie des associations d’intérêt général fait qu’elle est souvent mal comprise par les acteurs associatifs, mais cette nouvelle catégorie n’en fait pas moins son chemin parmi eux et vient s’intercaler entre les deux types traditionnels”*.

⁵³ Indeed, these models are *de facto* compulsory: HIEZ (2016), para. 250. The most recent model statutes may be found here: <https://www.service-public.fr/associations/vosdroits/R34366>.

⁵⁴ The disinterested management of an association requires that:

- directors carry out their activities on a voluntary basis or be remunerated within the limits provided for by law (which are calculated in two different ways depending on the total revenues of the association, below 200,000 EUR or exceeding this amount);
- the association do not make any direct or indirect distribution of profit, in any form whatsoever;
- the members of the association and their successors in title do not hold any share whatsoever in the assets, except for the right to re-appropriate the contributions made to the association.

Cf. <https://www.service-public.fr/associations/vosdroits/F31839>.

- it has a certain minimum number of members (as an indication at least 200), an effective activity and a real associative life (that is to say, an effective participation of the majority of the members in the activities of the association);

- it has a democratic functioning and is organized in this sense by its statutes;

- it has solid financial foundations (a minimum amount of annual resources of 46,000 EUR, an amount of public subsidies less than half of the budget and positive results during the last three years).

A probationary period of operation of at least three years after the association's initial declaration to the prefecture is also necessary before applying for public utility recognition unless the resources of the association are such as to ensure its financial stability over a period of three years⁵⁵.

As regards foundations, French law only recognizes **foundations of public utility** and does not admit private (or private interest) foundations⁵⁶.

Indeed, the law stipulates that when a deed of foundation – namely, the act by which one or more natural or legal persons decide to allocate assets for the realization of **activities of general interest without a profit purpose** – aims at the establishment of a legal person, the foundation does not enjoy legal capacity until the date of entry into force of the governmental decree granting the **recognition of public utility** (art. 18 Law no. 87-571). Their legal capacity is full.

The statutes of public utility foundations can be drafted in accordance with model statutes prepared and approved by the Council of State⁵⁷. Founders must justify any discrepancy between the statutes of their foundation and these model statutes, which makes them *de facto* compulsory.

The initial endowment may not be less than 1.5 million EUR, which may be paid over a maximum period of 10 years from the date of publication of the decree granting the recognition.

Law no. 87-571 also allows the establishment of **business foundations** (art. 19). These are foundations without a profit purpose created by companies, cooperatives and other commercial bodies to conduct activities of general interest. They are set up for a determined period which may not be less than five years and may be extended by authorization of the same public authority that authorizes their establishment. Their statutes must provide for a multi-year action programme of at least 150,000 EUR (art. 19-7 Law no. 87-571). They cannot obtain the public utility status. They enjoy full legal capacity, but may not acquire or own any buildings other than those necessary for the fulfilment of their purposes (art. 19-3 Law no. 87-571).

A business foundation may not appeal to public generosity nor receives donations. It may receive donations only from employees, corporate officers, members or shareholders of the founding company or from companies of the group to which the founding company belongs (art. 19-8 Law no. 87-571).

Law no. 87-571 contemplates in its art. 20, para. 1, another form of foundation which is the **sheltered foundation** ("*fondation abritées*" or "*fondation sous égide*")⁵⁸. This is a non-independent foundation

⁵⁵ Cf. <https://www.service-public.fr/associations/vosdroits/F1131>; DECKERT K. (2010), p. 277 ff.

⁵⁶ Cf. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020a), p. 5; DECKERT K. (2010), p. 281.

⁵⁷ Cf. <https://www.service-public.fr/associations/vosdroits/R31090>.

⁵⁸ Art. 20, para. 1, states: "*Seules les fondations reconnues d'utilité publique peuvent faire usage, dans leur intitulé, leurs statuts, contrats, documents ou publicité, de l'appellation de fondation. Toutefois, peut également être dénommée fondation l'affectation irrévocable, en vue de la réalisation d'une œuvre d'intérêt général et à but non lucratif, de biens, droits ou ressources à une fondation reconnue d'utilité publique dont les statuts ont été approuvés à ce titre, dès lors que ces biens, droits ou ressources sont gérés directement par la fondation affectataire, et sans que soit créée à cette fin une personne morale distincte*".

hosted by a public utility foundation (which meets some requirements, such as having existed for three years, the ability to mobilize the necessary resources, etc.). Therefore, sheltered foundations are not autonomous legal persons enjoying legal capacity, but rather dedicated funds (within the general assets of a public utility foundation) to which the legal denomination of foundation (and the tax regime thereof) is nonetheless attributed by the law.

Finally⁵⁹, **endowment funds** were introduced by art. 140 of Law no. 2008-776. An endowment fund is a private law legal entity without a profit purpose that manages the assets received for free and uses the income from their capitalization to carry out an activity of general interest or to support a legal entity without a profit purpose in the accomplishment of its general interest activities. An endowment fund can be created by one or more natural or legal persons for a limited or an unlimited time.

Endowment funds must be declared and so they acquire legal personality in a similar manner to associations. The required minimum contribution to an endowment fund is 15,000 EUR.

Another legal form of NPO found in French law is that of **mutuals**. They are "legal persons of private law without a profit purpose" (art. L110-1 Code of mutuality)⁶⁰. They pursue one or more social and environmental objectives through the provision of either insurance services or social, health, sport, cultural services to their members and by means of the contributions paid by them (art. L111-1 Code of mutuality).

Another interesting legal form for our analysis is the **cooperative society of collective interest** (*société coopérative d'intérêt collectif*) or "SCIC" as provided for by art. 19 *quinquies* and ff. of the Law no. 47/1175 on cooperation⁶¹. It is a legal form of incorporation (a sub-type or special type of cooperative) usually included among social enterprises in the studies on this subject⁶².

A SCIC's object is the production or supply, also to non-members, of **goods and services of collective interest**, which have a social utility character. SCICs are democratically governed by their members (each of whom has only one vote in the general meeting: art. 19 *octies* Law no. 47/1175) and **limited in their capacity to distribute profits to their members**: in addition to a compulsory allocation to legal reserves, SCICs are first obliged to allocate at least 50% of their remaining profits to an indivisible reserve⁶³; they may then provide interest on the members' shares, but this may not exceed the amount available after the above mentioned compulsory allocations; in any event, subsidies and other financial resources from public authorities may not be distributed to members (art. 19 *nonies* Law no. 47/1175).

⁵⁹ In fact, French law also recognizes other particular foundations, such as scientific cooperation foundations, university foundations, hospital foundations, etc., which are, however, less diffuse in practice: cf.

<https://www.centre-francais-fondations.org/fondations-fonds-de-dotation/le-secteur/les-derniers-chiffres-sur-les-fonds-et-fondations-en-france>.

⁶⁰ The Code of mutuality is available at

<https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006074067/>.

⁶¹ Law no. 47/1175 is available at

<https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000684004/>.

⁶² Cf. PETRELLA F., RICHEZ-BATTESTI N. (2020), p. 29: "SCIC's legal form may be seen as a social enterprise, although it is rarely referred today as such in France"; FICI (2017).

⁶³ Reserves may not be used to freely augment members' shares, because art. 19 *nonies* explicitly excludes the application to SCICs of article 16, paras. 3 and 4, and 18, para. 2, of Law no. 47/1175.

The continuity between SCICs and the non-profit sector is also to be found in the possibility explicitly attributed, by law, to declared associations to convert into SCICs, provided that no reserves and funds be distributed to members or incorporated into their shares in the event of such a conversion.

While in France the term “social enterprise” is fairly new and less used than in other European countries, France has been a pioneer in the development of the concept of “social economy”, and with the adoption, in 2014, of a law dedicated to the social and solidarity economy⁶⁴, it has provided a legal basis for this term. Since then, there has been an emerging consensus on the use of the notion of “**social and solidarity economy enterprises**” (“SSEEs”)⁶⁵.

Law no. 2014-856 of 31 July 2014 defines the social and solidarity economy as an entrepreneurial and economic development mode, suitable for all areas of economic activity (production, transformation, distribution, exchange and consumption of goods or services), to which the legal persons of private law that meet the following cumulative conditions adhere:

- 1) they have a purpose other than the sole sharing of profits;
- 2) they have a democratic governance, not exclusively determined by the financial contribution of their participants;
- 3) they are managed in accordance with the following principles:
 - a) profits are mainly used for the maintenance and development of the activity;
 - b) compulsory reserves are not distributed unless the statutes provide otherwise and, in any event, only up to certain limits fixed by the law; residual assets at dissolution are disinterestedly devolved to other social and solidarity economy enterprises (art. 1-I Law no. 2014-856).

The legal persons of private law that may be recognized as enterprises of the social and solidarity economy **may have the legal form of a cooperative, a mutual, an association or a foundation, as well as of a commercial company**. However, a commercial company may only obtain the status if,

- a) in addition to the abovementioned conditions, it meets the following further conditions:
 - b) it pursues the social utility⁶⁶;
 - c) it applies the following management principles:

⁶⁴ Law no. 2014-856 is available at

https://www.legifrance.gouv.fr/loda/id/JORFTEXT000029313296?init=true&page=1&query=2014-856&searchField=ALL&tab_selection=all.

⁶⁵ PETRELLA F., RICHEZ-BATTESTI N. (2020), p. 16.

⁶⁶ Pursuant to art. 2 Law no. 2014-856, this requirement is satisfied if one of the following conditions is met:

- 1) the company aims to provide support to people in fragile conditions, including employees, users, customers, members or beneficiaries of the same company;
- 2) its objective is to contribute to the preservation and development of the social or the territorial cohesion;
- 3) its objective is to contribute to the education of citizens, in order to reduce social and cultural inequalities, in particular between women and men;
- 4) the company aims to contribute to sustainable development, energy transition, cultural promotion or international solidarity.

- at least 20% of the annual profits are allocated to a compulsory reserve denominated "development fund" until the total amount of all reserves reaches a certain percentage (as defined by the Minister in charge of the social and solidarity economy) of the amount of the share capital;
- at least 50% of the annual profits are carried forward or allocated to mandatory reserves;
- the share capital is not reduced for reasons other than losses and the necessity to continue the activity (art. 1-II Law no. 2014-856).

To qualify as enterprises of the social and solidarity economy, commercial companies must be registered in the trade and companies register with the mention of this status, which also requires that their statutes have the minimum contents provided for by decree (art. 1-III and 1-IV Law no. 2014-856)⁶⁷.

Art. 11 of Law no. 2014-856 has also introduced, in art. L3332-7-1 of the Labour Code, the accreditation as "**social enterprise of social utility**" ("*entreprise solidaire d'utilité sociale*" – "ESUS").

Accreditation as an ESUS is reserved to SSEs (within the meaning of art. 1 Law no. 2014-856) that satisfy the following cumulative conditions:

- 1) they mainly aim at pursuing one of the social utility objects mentioned in art. 2 of Law no. 2014-856;
- 2) the costs incurred in the fulfilment of the social utility objects have a significant impact on their balance sheet;
- 3) in the remunerations of workers, a certain maximum salary gap (as determined by law) is not exceeded;
- 4) the enterprise's securities, if any, are not exchanged on a market of financial instruments;
- 5) the object of social utility is mentioned in the statutes.

A special regime applies to certain subjects, among which associations and foundations of public utility are included: they only need to meet the conditions mentioned above in 3) and 4).

Finally, art. 176 of the PACTE law (*Plan d'action pour la croissance et la transformation des entreprises*), adopted on 22 May 2019, introduced in the Code of Commerce (art. L210-10 ff.) the qualification of "**mission company**" ("*société à mission*"), which may be employed by a commercial company that, in addition to the purpose of profit sharing⁶⁸, pursues one or more social or environmental purposes specified in its statutes (in which, moreover, the "*raison d'être*" of the company shall be specified within the meaning of art. 1835 of the Civil Code, to be understood as "the principles which the company adopts and for the respect of which it intends to allocate resources in the performance of its activity").

⁶⁷ Decree no. 2015-858 of 13 July 2015 requires that statutes of such companies:

- 1) define the company's purpose in accordance with art. 2 of Law no. 2014-856;
- 2) contain provisions ensuring their democratic governance, in keeping with the requirement in art. 1-I, no. 2), of Law no. 2014-856;
- 3) establish that profits are allocated in accordance with the requirement in art. 1-I, no. 3), lit. a), of Law no. 2014-856;
- 4) establish that compulsory reserves are indivisible and non-distributable in accordance with art. 1-I, no. 3), lit. b), of Law no. 2014-856;
- 5) contain provisions that implement the principles of management laid down in art. 1-II, no. 2), lit. c), of Law no. 2014-856.

⁶⁸ Indeed, art. 1832 of the French Civil Code refers to companies whose aim is to share the profits or to take advantage of the resulting savings ("*de partager le bénéfice ou de profiter de l'économie qui pourra en résulter*").

The performance of the “mission” shall be monitored by a separate body denominated “mission committee” and is subject to verification by an independent external body.

2.2.2. Institutional purpose and related aspects

French law does not precisely define the purpose of associations, or rather it does so only in negative terms: It must be a purpose other than profit sharing (“*un but autre que de partager des bénéfices*”). Profit sharing is the ordinary purpose of companies according to art. 1832 of the Civil Code. Hence, whilst associations are not barred from making profits through their activities, they may not distribute their potential profits to the members, although, on the other hand, they are free to reach any other potential objective, even of a private interest nature.

Although the wording is different, since in this instance the legislator speaks of a “non-profit purpose” (“*but non lucratif*”), the same purpose is substantially ascribed to foundations and mutuals. However, foundations are always of public utility and they must aim “*à la réalisation d'une œuvre d'intérêt général*”, which contributes to their differentiation from ordinary associations.

However, the purpose of public utility associations assumes the contours of a **disinterested purpose** (and not only “*non lucratif*”) considering the prohibitions that these associations face, such as those regarding the management criteria that must be followed to acquire the status, including the express prohibition to distribute profits directly or indirectly, in whatever form.

While a full prohibition on profit distribution characterizes associations and foundations, a **blended purpose connotes the statuses of a social and solidarity economy enterprise and of a social enterprise of social utility**. Profit sharing must not be the exclusive purpose of an organization for it to be included in these legal categories. On the contrary, **its primary aim must be of social utility**. And this aim is safeguarded by obligations concerning the allocation of profits and the use of the assets.

The profit non-distribution constraint is also only limited in the regulation of SCICs and is supported by mandatory rules on the allocation of profits.

The profit non-distribution constraint during the existence of the NPO is protected by an **asset-lock at the time of its dissolution**.

The residual assets at dissolution, minus only the members’ contributions, may not be distributed to the members of an association (art. 15 Decree 16 August 1901).

Stricter rules apply to public utility associations and to foundations.

All their residual assets upon dissolution, including those contributed by members and founders, must be disinterestedly devolved to one or more entities pursuing a similar purpose, which must be public, or recognized as being of public utility, or benefiting from the capacity to receive donations in accordance with article 6 of the Law of 1 July 1901 (see the model statutes for associations and foundations of public utility), public entities or public utility entities performing analogous activities (art. 19-12 Law no. 87-571), other endowment funds or public utility foundations (art. 140-VIII Law no. 2008-776).

The asset-lock at dissolution also applies to social and solidarity economy enterprises. In their case, their residual assets shall be disinterestedly devolved to other social and solidarity economy enterprises.

2.2.3. Activities

An association can undertake activities that generate profits, even on a regular basis. Therefore, the profit-related constraints faced by associations concern the distribution of profits, rather than their generation through an economic activity⁶⁹.

Foundations must conduct a general interest activity, and they may also do so in an entrepreneurial manner which may generate profits⁷⁰.

However, as we will notice later, the volume of commercial activities in comparison to non-commercial activities affects the tax regime of the NPO.

2.2.4. Structure and governance aspects

While an association is a group of persons (two or more natural or legal persons) united to reach a common goal, a foundation is created (by one or more founders) to allocate assets for a determined purpose. The diverse legal nature explains the differences in the governance of associations and foundations.

French law does not enter in great detail into the topic of the governance of associations and foundations; here, a leading role is played by the model statutes for public utility associations and foundations approved by the Council of State.

A public utility association's structure comprises a **general meeting of members**, which is responsible for taking fundamental decisions such as those regarding the election (by a secret ballot) of directors, the approval of annual accounts and budget, the amendments to the statutes and the dissolution of the association, and a **board of directors** composed of a minimum of 6 to a maximum of 24 members, as determined by the members' general meeting, which manages and administers the association in accordance with the strategic guidelines deliberated by the members' general meeting. The board of directors elects, from among its members (by secret ballot), an **executive committee** ("*bureau*") comprising at least three members (including a president and a treasurer), but no more than one third of the directors. The executive committee examines all matters submitted to the board of directors and monitors the execution of its deliberations.

A public utility foundation may have two different organizational structures (one-tier or two-tier). One with a **board of directors** composed of a fixed number of members (between 9 and 15), divided into at least three categories ("*collèges*") of founders, qualified persons, and either institutional partners or *de iure* members; and another with a **management board** (composed of 3 to 5 members) appointed and supervised by a **supervisory board** (composed of a fixed number, between 9 and 15, of members) divided into at least three "*collèges*" (of founders, qualified persons, and either institutional partners or *de iure* members). The management board administers the foundation in accordance with the strategic guidelines and action plans deliberated by the supervisory board. The supervisory board also has the power to approve the annual accounts and budget.

Regardless of the model of administration, representatives of the state are always present and exert a considerable influence on the affairs of the foundation.

⁶⁹ Cf. DECKERT K. (2010), p. 273.

⁷⁰ Cf. DECKERT K. (2010), p. 281.

Indeed, a public utility foundation must have either a **commissioner of the government** (designated by the Minister of the Interior) or a **“collège” of de iure members representing the general interest** within either the board of directors or the supervisory board, depending on the system of administration that has been adopted.

When the foundation’s statutes provide for the presence of a commissioner of the government, the commissioner attends the meetings of the board of directors or of the supervisory board in an advisory capacity. They verify the foundation’s compliance with its statutes and purpose, the public utility character of its activity, the regularity of decisions, and the good management. In the event that they consider a deliberation to be contrary to one of these principles or likely to compromise the proper functioning of the foundation, the commissioner may request a new deliberation, which has to be approved by 2/3 of the board. The commissioner also has the power to request the inclusion of an item on the agenda of the meeting, to visit the foundation’s premises and to access all the documents deemed useful for the exercise of their mission.

When the foundation’s statutes do not provide for the presence of a commissioner of the government, the foundation must have a **“collège” of de iure members**, which must represent at least 1/3 of the members of the board (of directors or supervisory, depending on the system of administration). This **“collège”** is composed of the Minister of the Interior or their representative, the supervising Ministers or their representatives, representatives of local authorities or other public subjects.

The business foundation is administered by a board of directors composed of a maximum of 2/3 of the founders or their representatives and staff representatives, and of at least 1/3 of qualified persons in its fields of intervention. Directors exercise their function free of charge (art. 19-4 Law no. 87/571).

The endowment fund is administered by a board of directors of at least three members appointed, the first time, by the founder(s). The statutes provide for the composition of the board as well as the conditions for appointment and renewal of directors (art. 140-V Law no. 2008-776).

2.2.5. Public supervision

In France, there is **no specific public authority** to exercise control over all NPOs. Public control is, however, in principle, both very extensive and intensive at all stages of an NPO’s life. This is certainly true for organizations recognized as being of public utility and notably for foundations.

Controls already take place during the recognition process of the public utility status, for which a long and complex administrative procedure has to be followed⁷¹. The request, accompanied by various documents, must be sent to the Ministry of the Interior. If the request is considered admissible, the Ministry collects the opinions of the ministries concerned by the activity of the association and then of the Council of State on the draft recognition decree, which is then issued by the Government and published in the Official Journal⁷².

As already pointed out, there are also model statutes (drafted by the Council of State) that associations and foundations of public utility are strongly recommended to adopt in order to be granted the status. Amendments to the statutes must also be approved by the Ministry of the Interior⁷³.

⁷¹ Cf. DECKERT K. (2010), p. 278.

⁷² Cf. <https://www.service-public.fr/associations/vosdroits/F1131>.

⁷³ Cf. <https://www.service-public.fr/associations/vosdroits/F1131>.

Every year, a public utility foundation must send a report on the activity, the budget, and its annual accounts certified by an audit to the Prefecture, the Ministry of Interior and the Ministries interested in its activities.

The *in itinere* control over public utility foundations is also carried out either by the Commissioner of the Government or by the *de iure* members of the board (board of directors or supervisory board depending on the system of administration) who, moreover, co-administer or co-direct the foundation in their quality as board members.

Finally, the recognition of public utility may be withdrawn if the foundation loses the requirements for the status, in which case (as previously mentioned) the foundation has to be dissolved and must devolve its residual assets in a disinterested manner.

2.2.6. Taxation

NPOs may carry out profit-making economic activities, even on a regular basis, regardless of whether they are purpose-related or not, but this may have tax consequences⁷⁴.

Pursuant to articles 206, para. 1 *bis*, and 267, para. 7, no. 1, of the General Tax Code, an NPO is exempt from both corporate income tax and VAT on its operations if:

- it is **managed disinterestedly**⁷⁵;
- the profit-making activity ("*activité lucrative*") that it conducts **does not compete with the commercial private sector**, because it is performed with different methods to those employed in the commercial sector (**test of the "4P"**)⁷⁶;
- the profit-making activity is **marginal**, considering the total revenues of the NPOS, so that its non-profitable activities remain predominant.

If all these conditions are met, only amounts in excess of 72,000 EUR are subject to taxation⁷⁷.

⁷⁴ Here, qualification of an NPO under tax law does not necessarily coincide with that under organizational law. Indeed, the French tax administration underlines that "*l'assujettissement aux impôts commerciaux d'une association qui réalise des activités lucratives n'est pas, à lui seul, de nature à remettre en cause sa situation juridique, au regard de la loi du 1er juillet 1901 relative au contrat d'association dès lors que, notamment, sa gestion reste désintéressée. La soumission d'une association aux impôts commerciaux, du fait de la qualification de son activité comme lucrative au sens fiscal du terme, est, en droit, sans incidence sur les agréments, habilitations ou conventions qui sont susceptibles de lui être délivrés au titre d'une réglementation particulière. De même, l'octroi de concours publics aux organismes concernés reste soumis aux dispositions qui leur sont spécifiques*". Cf. <https://bofip.impots.gouv.fr/bofip/2358-PGP.html/identifiant=BOI-IS-CHAMP-10-50-10-20-20170607>.

⁷⁵ We have already presented and discussed this requirement: see footnote 40. The tax authority provides detailed analysis of the limits within which the management can be considered to be disinterested and an indirect distribution of profits can be considered to exist: cf.

<https://bofip.impots.gouv.fr/bofip/2358-PGP.html/identifiant=BOI-IS-CHAMP-10-50-10-20-20170607>.

⁷⁶ The tax administration applies the rule of the "4P", which are – in order of importance – "Product", "Public", "Price", and "Publicity". The premise of the argument is that the fact that an NPO acts in a field of activity where also companies of the lucrative sector operate does not *ipso facto* determine its subjection to taxation. Exemption for "absence of competition" shall therefore be evaluated considering whether the activity of the NPO is of social utility (the "Product"); the characteristics of the users (also in light of the conditions and the context in which the services are provided) (the "Public"); whether the price is determined so as to allow the public to access the services (the "Price"); whether the NPO advertises its services like commercial companies do. For further information see <https://bofip.impots.gouv.fr/bofip/2358-PGP.html/identifiant=BOI-IS-CHAMP-10-50-10-20-20170607>.

⁷⁷ Cf. <https://www.service-public.fr/associations/vosdroits/F31838>.

Donations and contributions to non-profit organizations may be tax-exempt under certain conditions and within certain limits.

For them to be eligible for tax-exemption, their recipients must be the organizations mentioned in articles 200 and 238 *bis* of the General Tax Code; this list includes public utility associations and foundations, business foundations, general interest organizations (including endowment funds), endowment funds that use the resources donated or contributed in support of public utility associations or foundations.

Tax exemption is, for individuals, 66% of the contribution within the maximum limit of 20% of the taxable income, while for legal entities it is 60% of contributed amounts up to 2 million EUR and 40% for the amounts exceeding this threshold within the maximum limit of 20,000 EUR or 0.5% of the annual turnover. When the amount of the donation exceeds the threshold for exemption, the exceeding part may be carried forward over the next five years⁷⁸.

As for donations to foreign organizations located in the EU, they may benefit from this tax exemption only if they are “approved”, which requires that they pursue objectives and have characteristics similar to the eligible organizations located in France.

2.3. Germany

In Germany there are close to 23,200 independent foundations, 20,000 to 40,000 charitable corporations and non-independent foundations, and almost 600,000 associations⁷⁹. Germany exhibits a very strong tradition of voluntary associations, especially those established for the common good, rather than for the benefit of their members⁸⁰. In the last few decades, there has also been a substantial increase in the number of foundations⁸¹.

The regulation of traditional NPOs – i.e., associations and foundations – which is embodied in the prestigious Civil Code of 1896 (“BGB”), is not as detailed and sophisticated as in other jurisdictions, nor has it been substantially amended over time. This is probably due to the fact that, in principle, any legal type of entity (including a shareholder company) may be employed for a non-profit purpose and that the neutrality of the legal forms characterizes the fiscal regime of “public benefit organizations” which, in our opinion, represents, from a comparative point of view, the most remarkable trait of German NPO law.

2.3.1. Main legal forms of NPOs

The legal forms traditionally employed in Germany to establish an entity without a profit purpose are associations and foundations, although, in fact, the law does not explicitly stipulate that they must have a non-profit purpose, nor defines them accurately. The use of the limited liability company (“*Gesellschaft mit beschränkter Haftung*” – GmbH), particularly for a public benefit purpose, is increasingly diffuse⁸².

⁷⁸ Cf. CORNILLEAU A. (2020), p. 21.

⁷⁹ RICHTER A., GOLLAN A.K. (2020), p. 2.

⁸⁰ VON RAVENSBURG N.G. *ET AL.*, (2018), p. 19.

⁸¹ ZIMMER, A. *ET AL.* (2016), p. 9.

⁸² Cf. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020b), p. 1.

The BGB makes a distinction between **“non-commercial associations”**, “whose object is not commercial business operations” (sect. 21 BGB), and **“commercial associations”**, “whose object is commercial business operations” (sect. 22 BGB)⁸³. The two categories of associations each acquire the legal personality in a different manner (the former by registering with the competent court; the latter by concession of the “Land” in which they have their head office).

The registered non-commercial associations of sect. 21 of the BGB add to their name the additional element **“eingetragener Verein”** or **“eV”**, which means “registered association” (sect. 65 BGB).

It is also permitted to establish, without any form of *ex ante* registration, **associations without legal personality**: they are governed by the provisions on partnership, and when a transaction is entered into with a third party in the name of such an association, the persons acting on its behalf are personally and jointly liable as debtors (sect. 54 BGB). The legal capacity of the associations without legal personality is disputed: the prevailing view is that they cannot acquire real estate or other registered goods⁸⁴.

Foundations (“Stiftungen”) are also not defined by their own particular law, which is found in sects. 80-89 BGB.

Foundations are awarded the legal personality by the competent public authority of the “Land” in which they have their head office. The legal personality is awarded only if the long-term and sustained achievement of the object of the foundation appears to be guaranteed and if the object of the foundation does not endanger the common good. Therefore, even if a specific minimum amount of assets is not explicitly prescribed by law for a foundation’s recognition, the competent authorities usually require assets from 50,000 to 100,000 EUR⁸⁵. A foundation may be established for a limited period of time, but not less than ten years (sect. 80 BGB).

There is no specific legal register for foundations⁸⁶.

German law also allows the establishment of **foundations without legal personality**. In reality, however, they are not autonomous legal subjects, but separate funds entrusted to individuals or legal entities, which explains why they are also known as **“non-independent foundations”**⁸⁷. They are frequently used by other NPOs with legal personality to obtain specific tax privileges⁸⁸.

Limited liability companies may be set up by one or more persons for any lawful purpose (sect. 1, Limited Liability Companies Act) and, in fact, they have been widely used (also by associations as their subsidiaries) for the pursuit of a non-profit purpose, also thanks to the fact that LLCs are also eligible for the public benefit status and the tax benefits thereof⁸⁹.

No *ad hoc* legislation on social enterprise exists in Germany.

⁸³ All translations from German are official translations of the BGB found on the website of the Ministry of Justice at https://www.gesetze-im-internet.de/englisch_bgb/index.html.

⁸⁴ VON HIPPEL T. (2017), p. 384; BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (2016), p. 13.

⁸⁵ RICHTER A., GOLLAN A.K. (2020), p. 7.

⁸⁶ VON HIPPEL T. (2017), p. 390.

⁸⁷ VON HIPPEL T. (2010), p. 203 f.; VON HIPPEL T. (2017), p. 384; RICHTER A., GOLLAN A.K. (2020), p. 6.

⁸⁸ Cf. VON HIPPEL T. (2010), p. 204.

⁸⁹ Cf. VON HIPPEL T. (2010), p. 204.

2.3.2. Institutional purpose and related aspects

The purpose of associations and foundations is not defined by German law in positive terms. This has led to the opinion that they may pursue any lawful purpose and, in particular, as regards associations of sect. 21 BGB, an **“ideal” purpose**, meant as a purpose not implying economic business operations, i.e., the carrying out of a commercial activity. Consequently, non-commercial associations are often referred to as **“ideal associations”** (*Idealvereinen*)⁹⁰.

The law does not provide for an asset-lock upon an NPO’s dissolution. In the case of dissolution or removal of legal personality, an association’s assets are devolved to the persons specified in the articles of association, as identified by the general meeting or another body if the articles of association so provide. Assets might even be allocated to the members of the association (sect. 45 BGB). A similar rule applies to foundations (sect. 88), so that residual assets might be returned to the founder if a foundation’s charter so were to stipulate⁹¹.

2.3.3. Activities

As previously noted, a strong link exists between the purpose of non-commercial associations and their activity: from their having an “ideal” purpose, it is argued that they may not freely perform economic activities involving the exchange of goods and services (even if solely with their members in a sort of pure “internal” market).

More precisely, the wording of sect. 21 BGB is prevalently interpreted in the sense that the possibility for non-commercial associations to conduct economic activities is limited to those **economic activities functionally subordinate to their “ideal” purpose** (e.g., a sport club running a restaurant in its clubhouse remains an “ideal” association, because the economic activity is only a subordinate secondary purpose in relation to the main purpose, which is the promotion of sport)⁹². The **“privilege of the subordinate purpose”** also allows an association to engage in subordinate economic activities through a subsidiary company⁹³.

In contrast, foundations do not face any constraint with regard to the possibility of running economic activities⁹⁴.

2.3.4. Structure and governance aspects

An association is a membership organization composed of natural and/or legal persons, who do not necessarily have to make contributions to the association (sect. 58, no. 2, BGB). The *intuitus personae* nature of membership clearly emerges from sect. 38 BGB, according to which “membership is not transferable and not heritable. The exercise of membership rights cannot be entrusted to another person”.

⁹⁰ Cf. VON HIPPEL T. (2017), p. 387; BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (2016), *Leitfaden zum Vereinsrecht*, p. 10, available at https://www.bmfv.de/SharedDocs/Publikationen/DE/Leitfaden_Vereinsrecht.pdf?__blob=publicationFile&v=14.

⁹¹ Cf. VON HIPPEL T. (2017), p. 386.

⁹² Cf. BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (2016), p. 10 f.

⁹³ VON HIPPEL T. (2017), p. 387.

⁹⁴ Cf. VON HIPPEL T. (2017), p. 385.

Non-commercial associations of sect. 21 must have at least seven members in order to be registered (sect. 56 BGB). After registration, the number of members may decrease but not fall below three, otherwise the association is deprived of the legal personality (sect. 73 BGB). These provisions do not apply to non-registered associations without legal personality, which may therefore have less than seven founding members.

An association must have at least two bodies: the **general meeting of members** and a **board of directors**, composed of one or more members (sects. 26 and 28 BGB).

The members' general meeting is responsible for fundamental decisions, such as those regarding the appointment and dismissal of directors (sect. 27 BGB), the amendments to the articles of association (sect. 33 BGB), the dissolution of the association (sect. 41 BGB).

The board of directors is in charge of the management of the association.

A foundation is an organization without members, set up by a founder through an endowment transaction that contains the dedication of assets and a charter providing the name, the seat, the object and the assets of the foundation, as well as the composition of its board (sect. 81 BGB).

The only board required for foundations is a board of directors, composed of one or more directors; the founder may also have a seat on this board⁹⁵.

If the members of the board of directors or special representatives act free of charge, or if they receive remuneration for their activity which does not exceed 720 EUR per year, they are liable towards the association for damage caused in performing their duties only in the case of intent or gross negligence (sect. 31a BGB).

2.3.5. Public supervision

The BGB does not provide for a specific system of supervision of associations, while foundations are supervised by the authority that grants them the legal personality, in accordance with the law of the competent "*Land*"⁹⁶.

PBOs are supervised by the competent tax authority to verify the ongoing compliance with the tax exemption requirements in sect. 51 ff. AO.

2.3.6. Taxation

The German Fiscal Code ("AO") contains an entire chapter dedicated to the "**tax-privileged purposes**", aimed at providing tax privileges to any organization/corporation ("*Körperschaft*") – either a company, an association, a foundation, or a pool of assets⁹⁷ – that **pursues directly and exclusively public benefit, charitable or religious purposes** (sect. 51(1) AO)⁹⁸.

An organization serves a public benefit purpose "**if its activity is dedicated to the altruistic advancement of the general public in material, spiritual or moral respects**". An advancement of

⁹⁵ VON HIPPEL T. (2010), p. 202, 218.

⁹⁶ See for greater details VON HIPPEL T. (2010), p. 216 ff.

⁹⁷ Natural persons and partnerships without legal personality are, however, not eligible for this status: cf. VON HIPPEL T. (2017), p. 393, footnote 40.

⁹⁸ All translations from German are official translations of the AO found on the website of the Ministry of Justice at https://www.gesetze-im-internet.de/englisch_ao/index.html.

the general public does not subsist “if the group of persons benefiting from such advancement is circumscribed, for instance by membership of a family or the workforce of an enterprise, or can never be other than small as a result of its definition, especially in terms of geographical or professional attributes” (sect. 52(1) AO).

Public benefit organizations (“PBOs”) are thus identified by the fiscal German legislator on the basis of several requirements, regardless of the legal form of incorporation, which may even be that of a company⁹⁹. All these requirements shall be met by an organization (regardless of its legal form of incorporation) to acquire and maintain the PBO status. Accordingly, the law stipulates that “the actual management of the organization shall be directed towards **the exclusive and direct achievement** of the tax-privileged purposes and shall conform to the provisions on the requirements for tax privileges contained in the statutes” (sect. 63(1) AO).

The first requirement regards the purpose that the organization shall pursue. According to sect. 52(2) AO, **public benefit purposes** are considered the advancement:

- 1) of science and research;
- 2) of religion;
- 3) of public health and of public hygiene, in particular the prevention and control of communicable diseases, also by hospitals within the meaning of section 67, and of epizootic diseases;
- 4) of assistance to young and old people;
- 5) of art and culture;
- 6) of the protection and preservation of historical monuments;
- 7) of adult education and vocational training including assistance for students;
- 8) of nature conservation and of landscape management within the meaning of the Federal Nature Conservation Act and the nature conservation acts of the *Länder*, of environmental protection, of coastal defence and of flood defence;
- 9) of public welfare, in particular of the purposes of the officially recognized voluntary welfare associations (section 23 of the VAT Implementing Ordinance), their subsidiary associations and their affiliated organisations and institutions;
- 10) of relief for people persecuted on political, racial or religious grounds, for refugees, expellees, ethnic German repatriates who migrated to Germany between 1950 and 1 January 1993, ethnic German repatriates migrating to Germany after 1 January 1993, war victims, dependents of deceased war victims, war disabled and prisoners of war, civilian war disabled and people with disabilities as well as relief for victims of crime; the advancement of the commemoration of victims of persecution, war and disaster victims; the advancement of the tracing service for missing persons;
- 11) of life saving;
- 12) of fire prevention, occupational health and safety, disaster control and civil defence as well as of accident prevention;

⁹⁹ Public benefit limited liability companies are increasingly diffuse. They can use the abbreviation “gGmbH” instead of “GmbH”, where the first “g” means “*gemeinnützig*” (public benefit).

- 13) of internationalism, of tolerance in all areas of culture and of the concept of international understanding;
- 14) of the protection of animals;
- 15) of development cooperation;
- 16) of consumer counselling and consumer protection;
- 17) of welfare for prisoners and former prisoners;
- 18) of equal rights for women and men;
- 19) of the protection of marriage and the family;
- 20) of crime prevention;
- 21) of sport (chess shall be considered to be a sport);
- 22) of local heritage and traditions;
- 23) of animal husbandry, of plant cultivation, of allotment gardening, of traditional customs including regional carnival, of the welfare of servicemen and reservists, of amateur radio, of aeromodelling and of dog sports;
- 24) of democratic government in the territory of application of this Code; this shall not include endeavours which are solely in pursuit of specific individual interests of a civic nature, or which are restricted to the local government level;
- 25) of active citizenship in support of public-benefit, charitable or religious purposes.

Moreover, other purposes not included in the (already rather) long list presented above may be declared of public benefit by the fiscal competent authority if they satisfy the public benefit test in sect. 52(1) AO.

The second requirement regards the manner in which the advancement has to be provided, namely, altruistically (sect. 55 AO). The **altruistic pursuit of a public benefit purpose** presupposes that no economic, commercial or gainful purposes are served by the organization and, in particular, that the following conditions are met:

- 1) the funds of the organization may be used only for the purposes set out in the statutes. Members or partners (members for the purposes of these provisions), as well as founders, donors and their heirs (in the case of foundations) may receive neither profit shares nor in their capacity as members any other allocations from the funds of the organization. The organization may use its funds neither for the direct nor for the indirect advancement or support of political parties;
- 2) on termination of their membership or on dissolution or liquidation of the organization, members may not receive more than their paid-up capital shares and the fair market value of their contributions in kind;
- 3) the organization may not provide a benefit for any person by means of expenditure unrelated to the purpose of the organization or disproportionately high remuneration;
- 4) where the organization is dissolved or liquidated or where its former purpose ceases to apply, the assets of the organization in excess of the members' paid-up capital shares and the fair market value of their contributions in kind may be used only for tax-privileged purposes (dedication of assets). This requirement shall also be met if the assets are to be assigned to another tax-privileged organization or to a legal person under public law for tax-privileged purposes;

5) subject to section 62 (which under certain conditions permits the allocation of funds to reserves), the organization shall in principle use its funds promptly for the tax-privileged purposes set out in its statutes. The use of funds for the acquisition or creation of assets serving the purposes set out in the statutes shall also constitute an appropriate use. Funds shall be deemed to have been used promptly where they are used for the tax-privileged purposes set out in the statutes by no later than two calendar or financial years following their accrual.

The third requirement is **exclusivity**, which is satisfied if the organization pursues only the public benefit purposes set out in its statutes (sect. 56 AO).

The fourth requirement is **directness**, which is met if the organization itself pursues the public benefit purposes (sect. 57 AO). In fact, however, there are several instances in which the requirement may be satisfied in an indirect manner. This happens, for example, when the organization acts through an auxiliary person or holds and manages shares in another tax-privileged organization (sect. 57(4) AO).

Sect. 58 AO lists a series of activities whose exercise does not negatively affect the PBO status. For example, the status would not be compromised by an organization assigning part of its funds, surpluses or gains to another tax-privileged organization or to a legal person under public law to be used for tax-privileged purposes (sect. 58(2) and (3) AO); by a foundation using a part not exceeding one third of its income for the appropriate upkeep of the donor and his or her near relatives, to maintain their graves and to honour their memory (sect. 58(6) AO); by an organization holding social events which are of secondary significance in comparison with its tax-privileged activities (sect. 58(7) AO); or by a sport association promoting paid, in addition to unpaid, sporting activities (sect. 58(8) AO); etc.

In a similar vein, sect. 62 AO allows a PBO to allocate all or part of its funds to reserves, within certain conditions and time limits (after a given period of time reserves must be dissolved and the funds used for pursuing the purposes) so as to prevent resources from being accumulated rather than used to reach the objectives of public benefit.

For an organization to obtain the status of a PBO, its statutes shall present certain minimum contents as determined by sects. 59-61 AO.

PBOs are recipients of several tax exemptions under German law.

They are **exempt from corporate income tax** (sect. 5(1), no. 9, Corporate Income Tax Act). The exemption applies to the income from the "ideal" sphere of a PBO (memberships fees; donations; etc.), from the "passive" management of its assets (e.g., bond interests), and from **purpose-related economic activities**¹⁰⁰. By way of contrast, **purpose-unrelated economic activities** are subject to corporate income taxation if they generate total annual income including VAT that exceeds 35,000 EUR (sect. 64(3) AO).

Purpose-related economic activities are those activities that are directed towards achieving the public benefit purpose of a PBO as set out in its statutes, provided that this purpose can be achieved only by way of such activities, and these activities do not enter into competition with non-privileged activities of the same or similar type to a greater extent than necessary for achieving the public benefit purpose (sect. 65 AO). Moreover, there are some activities that are *per se* considered by law purpose-related,

¹⁰⁰ According to sect. 14 AO, "'Economic activity' shall mean an independent sustainable activity from which revenue or other economic benefits are derived and which comprises more than mere asset management. The intention to realise a profit shall not be required. As a rule, an activity shall be deemed to constitute asset management where assets are utilised, e.g., by investing capital assets to earn interest or by renting or leasing immovable property".

such as, for example, old people's homes, old people's residential and nursing homes, convalescent homes and services for the provision of meals (sect. 68 AO).

Some public benefit activities are **VAT exempt**, including health-related, educational, cultural and scientific activities. If an economic activity is subject to VAT, PBOs apply a **reduced VAT rate** (7%) if the activity is purpose-related, while the ordinary VAT rate applies to their purpose-unrelated economic activities¹⁰¹.

Donations to public benefit organizations allow donors (both individuals and corporations) to obtain tax benefits. Their donations may be deducted up to a certain amount, which is 20% of the total income for individual donors (sect. 10b(1) Income Tax Act) and 20% of the total income or 0.4% of the sum of gross revenues and salaries per year for corporate donors (sect. 9(1) n. 2, Corporate Income Tax Act)¹⁰².

Since 2000, contributions to the endowment of foundations (including non-independent ones) with the status of PBOs enjoy an additional tax relief. An individual donor (not a corporation) can deduct up to 1 million EUR from personal income tax over ten years (sect. 10b(1a), Income Tax Act)¹⁰³.

Following the CJEU's Persche ruling of 27 January 2009, the German legislator has adopted provisions enabling the **deduction of donations also in favour of foreign entities established in an EU or EEA country**. This is possible on the condition that foreign entities comply with the PBO requirements in German tax law (section 10b, Income Tax Act). The German taxpayer bears the burden of proof, which, in fact, makes it very difficult for them to enjoy this tax break¹⁰⁴.

2.4. Ireland

In Ireland, the non-profit sector has grown significantly in the last 25 years.

BENEFACTS – a social enterprise established in 2014 as a non-profit company to transform the accessibility and transparency of Ireland's non-profit sector – states, in its 2020 Report on the subject, that the Irish non-profit sector consists of almost 33,000 organizations, out of which almost 10,000 are incorporated companies and more than half unincorporated associations¹⁰⁵.

The Charities Regulatory Authority ("CRA") reports that there were 10,514 registered charities at the end of 2019, 715 more than at the end of 2018. Of these charities, 44.3% are incorporated companies, 49.7% unincorporated bodies, and 6% trusts. Their charitable purposes are: 30.2% advancement of education; 7.5% advancement of religion; 8.7% relief of poverty or economic hardship; 53.6% other purposes of benefit to the community (the residual category includes, as we shall see, 12 sub-categories)¹⁰⁶.

¹⁰¹ Cf. RICHTER A., GOLLAN A.K. (2020), p. 11.

¹⁰² Cf. STANITZKE A. (2020), p. 22.

¹⁰³ Cf. VON HIPPEL T. (2010), p. 210; RICHTER A., GOLLAN A.K. (2020), p. 12.

¹⁰⁴ STANITZKE A. (2020), p. 22.

¹⁰⁵ The mentioned report is available at <https://www.benefacts.ie/insights/reports/2020/>.

¹⁰⁶ Cf. Charities Regulator, "Annual Report 2019", p. 10 f., available at <https://www.charitiesregulator.ie/media/1947/charities-regulator-annual-report-2019.pdf>.

In general, non-profit organizations lack a specific legal framework in Ireland. In fact, in this (common law) jurisdiction **there are no *ad hoc* legal forms for the incorporation of an entity with a non-profit aim**. This is probably due to two main factors:

- the fact that, in principle, **any legal form, including a company¹⁰⁷, may be used for a non-profit purpose**; and
- the presence of **an attractive legal status, that of a “charity”**, which may be acquired, also to obtain tax breaks, by organizations acting for a non-profit (*recte*, a public benefit) purpose regardless of their legal form of incorporation.

The above may also justify the lack of a tailored legal form for social enterprises, although the concept of SE is well-known and specific policies for SE promotion have been recently enacted by the Irish government¹⁰⁸. Indeed, those who wish to establish an SE in Ireland may make use of any legal form and register their entity as a charity, since the charitable status is equally independent from the legal form of the entity’s incorporation. Thus, the overwhelming majority of SEs are structured as companies limited by guarantee (CLGs), often combined with the charitable status¹⁰⁹.

For the aforementioned reasons, although not all the Irish NPOs are set up for the public benefit (nor are they required to do so) and there is a considerable number of NPOs that are not registered as charities, **the legislation on non-profit organizations substantially coincides with that on charitable organizations**, and this legislation will, in fact, be the only subject of our national focus.

The legislation on charities has ancient roots and its own characteristics¹¹⁰. Ireland has experienced “a perennial cycle of statutory and non-statutory regulation of the nonprofit sector”, whose major waves, at the statutory level, occurred in 1844, 1961 and 2009¹¹¹. Self-regulation emerged in the early 2000s in key areas such as fundraising, governance and accountability. However, although it has also attracted attention from abroad, the success of self-regulation, in terms of implementation rates, has been rather limited¹¹².

The presence of the CRA, which was established in 2014 pursuant to the Charities Act of 2009, and is in charge not only of the registration of charities but also of their regulation, protection and promotion, is undoubtedly one of the major peculiarities of this jurisdiction. The CRA has also assumed the role of supporting best practice by way of issuing guidelines, like those on fundraising in 2017¹¹³, and codes of conduct, like the Governance Code of 2018¹¹⁴. In this way, the CRA has succeeded where self-regulation has not.

¹⁰⁷ “A company may be formed for any lawful purpose”: sect. 17(1), Companies Act 2014.

¹⁰⁸ Cf. O’SHAUGHNESSY M. (2020), p. 21 ff.

¹⁰⁹ Cf. O’SHAUGHNESSY M. (2020), p. 26.

¹¹⁰ Cf. O’CONNOR J.C, MCGRATH H. (2020), p. 2.

¹¹¹ BREEN O.B. (2017), p. 45.

¹¹² Cf. BREEN O.B. (2017), p. 49 ff.

¹¹³ Available at <https://www.charitiesregulator.ie/media/1083/guidance-for-fundraising-english.pdf>.

¹¹⁴ Available at <https://www.charitiesregulator.ie/media/1609/charities-governance-code.pdf>.

2.4.1. Main legal forms of NPOs

As already observed, in general Irish NPOs may assume any legal form (unincorporated associations, incorporated or unincorporated trusts, companies, friendly societies, industrial and provident societies, etc.)¹¹⁵. The same is true of charitable organizations¹¹⁶.

Charitable organizations are now provided for and regulated by the **Charities Act of 2009** ("CA"), which entered into force in 2014¹¹⁷.

All charitable trusts, bodies corporate and unincorporated bodies of persons that meet the requirements established by the CA and are not "**excluded bodies**" (sect. 2 CA) may be registered as charities. The list of excluded bodies comprises political parties, trade unions or representative bodies of employers, and chambers of commerce, among others.

Therefore, incorporating in a specific legal form is not required for the acquisition of the charitable status, so that **charities may have any legal form**. The company form, notably **the company limited by guarantee (CLG), is increasingly used to set up a charitable entity** under the CA, especially following the reform of this particular company type, which took place in 2014 with the new Companies Act¹¹⁸.

Indeed, the CLG is a type of company which may be formed for any lawful purpose (sect. 1174(1) Companies Act 2014) and is characterized by the absence of share capital (sect. 1172 Companies Act 2014) and therefore of shareholders in the strict sense, as a company's constituency whose main interest is sharing its profits. In addition, CLGs have legal personality (so that their members enjoy a limited liability) and may even be set up by only one person offering a guarantee of only 1 euro¹¹⁹. A charitable CLG is exempt from the obligation to use the words "company limited by guarantee" as parts of its name (sect. 1180(1) Companies Act 2014).

The status of charities is acquired by registration with the relevant Register maintained by the CRA (sect. 39(3) CA). Registration is possible only for organizations meeting the legal requirements and which are therefore charitable organizations according to the Charities Act (sect. 39(8) CA). Only the registered organizations qualify as charities and are allowed to use this legal denomination (sect. 46(5) CA)¹²⁰, while non-registered organizations would be guilty of an offence if they were to do so (sect. 46(2) CA). Registration is not compulsory for NPOs, but NPOs that are not registered as charities would

¹¹⁵ Cf. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 3: "Unincorporated associations are popular in part because they are relatively easy to form. An unincorporated association is a membership-based organization, created by the oral or written agreement of its members. Its governing instrument, usually termed its constitution or rules, is normally interpreted according to contract law. The association does not ordinarily have legal personality and thus cannot enter into legal relations in its own right. Members are jointly and severally liable for the association's debts".

¹¹⁶ See INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 2.

¹¹⁷ Available at <https://revisedacts.lawreform.ie/eli/2009/act/6/revised/en/html>.

¹¹⁸ Available at <http://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/print>.

¹¹⁹ Cf. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 4; O'CONNOR J.C, MCGRATH H. (2020), p. 6.

¹²⁰ In fact, registered charities are not only allowed, but obliged to use the denomination of "charity". Sect. 46(7) CA stipulates: "A registered charitable organisation shall, in all public documents and such other publications as may be prescribed, including on television or the internet, state in legible characters (a) that it is a registered charitable organisation, and (b) provide such other information as may be prescribed, including the names of the charity trustees and the address of its principal office".

be limited in their activity: they may not advertise on its behalf, invite member of the public to give money or other property to it, or accept a gift of money or property on its behalf (sect. 41(2) CA).

The charitable status does not *per se* guarantee any tax benefit (sect. 7(1) CA). For that purpose, charities must register with the Revenue Commissioners to obtain the “**charitable tax-exempt status**” and be assigned a “CHY reference number”, which indicates their eligibility for charitable tax exemption¹²¹. The Revenue Commissioners are not bound by the determinations of the CRA.

2.4.2. Institutional purpose and related aspects

Registered charitable organizations are required to promote a “**charitable purpose only**”. Charitable purposes are the following (sect. 3(1) CA):

- (a) the prevention or relief of poverty or economic hardship;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) any other purpose that is of benefit to the community.

The residual category *sub* (d) includes the following 12 (sub-)purposes (sect. 3(11) CA):

- the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability,
- the advancement of community development, including rural or urban regeneration,
- the promotion of civic responsibility or voluntary work,
- the promotion of health, including the prevention or relief of sickness, disease or human suffering,
- the advancement of conflict resolution or reconciliation,
- the promotion of religious or racial harmony and harmonious community relations,
- the protection of the natural environment,
- the advancement of environmental sustainability,
- the advancement of the efficient and effective use of the property of charitable organisations,
- the prevention or relief of suffering of animals,
- the advancement of the arts, culture, heritage or sciences, and
- the integration of those who are disadvantaged, and the promotion of their full participation, in society.

However, **all charitable purposes must also be “of public benefit”** (sect. 3(2) CA). This happens when the purpose is intended to benefit the public or a section of the public and when, in a case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit (sect. 3(3) CA).

¹²¹ This number does not coincide with the number obtained by charities registering with the CRA: cf. INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 7.

The **public benefit purpose shall also be the exclusive purpose of the organization**¹²². In this regard, not only does the law underline that a charity shall pursue “only” a charitable purpose, but it also explicitly states that a charity “**is required to apply all of its property (both real and personal) in furtherance of that purpose**” (sect. 2 CA). Under tax law, a charity cannot accumulate funds for a period in excess of two years without permission¹²³.

A charity's resources may be used in the operation and maintenance of the body, including in remuneration and superannuation of staff members (sect. 2 CA), but this may be done only on the condition that remuneration be reasonable, ancillary and necessary pursuant to sect. 3(3) CA.

Along the same lines, sect. 89(3) stipulates that “any sum or sums payable to a relevant person under an agreement shall not exceed what is reasonable and proportionate having regard to the service provided by the relevant person pursuant to the agreement”, otherwise the agreement is null and void (sect. 89(11) CA).

Although Irish law does not use these words, but concentrates on the destination of a charity's assets, a registered charitable organization is **a pure non-profit organization**. The profit non-distribution constraint also characterizes, in principle, the stage of its dissolution. Indeed, “where a charitable organisation is dissolved, the property, or proceeds of the sale of the property, of the charitable organisation shall not be paid to any of the members of the charitable organisation without the consent of the Authority, notwithstanding any provision to the contrary contained in the constitution of the charitable organisation” (sect. 92 CA). However, “under the doctrine of *cy près*, as applied either by the CRA or upon application to the High Court, such property must be transferred to another charitable institution or institutions whose main objectives are similar to those of the dissolving body, or, failing that, to some other charitable body”¹²⁴. A clause to this effect in the charity's governing instrument is also required for tax exemption¹²⁵.

2.4.3. Activities

Provided that they advance their charitable purpose, charities do not face restrictions regarding the activities that they may perform (with the exceptions of those activities typical of the “excluded bodies”, like political activity), and therefore these activities may or may not be economic.

However, the economic nature of the activity may be relevant under tax law. To qualify for tax-exemption, profits must be applied solely to the purposes of the charity and in addition one of the two following conditions must be met:

- either the trade is exercised in the course of the actual carrying out of a primary purpose of the charity (e.g., a hospital charging fees for the health care services provided), or
- the work in connection with the trade is mainly carried out by beneficiaries of the charity (sect. 208 Taxes Consolidation Act 1997).

“Economic activities that would not otherwise qualify may nonetheless fall under the trading exemption if they are ancillary to pursuing the charity's primary purpose. Examples include a theatre

¹²² Of course, a charity may pursue more than one purposes of public benefit.

¹²³ Cf. BREEN O.B. (2020a), p. 10.

¹²⁴ INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 8. Cf. also <https://www.cof.org/sites/default/files/Common%20Requirements%20Charities%20Regulator%20Revenue.pdf>.

¹²⁵ *Ibidem*.

selling food and drink to its patrons, or a hospital selling papers, flowers, and toiletries to patients and visitors. The Revenue Commissioners make determinations on a case-by-case basis in these circumstances”¹²⁶.

2.4.4. Structure and governance aspects

In general, in the Charities Act 2009 there is no detailed regulation of a charity’s governance, which is in line with the fact that charities may have different legal forms. Thus, the governance of a charity mainly depends on the legal form of incorporation. The Charities Act (as well as the applicable tax law) concentrates more on a charity’s transparency and accounting, imposing upon a charity’s trustees a wide number of related duties¹²⁷, rather than on its governance. The CRA partially compensates for this through its Code of governance of 2018¹²⁸.

Some prescriptions are found in tax law in order for a charity to access tax breaks. A registered charity, regardless of its legal form, must have at least three “trustees” (a company’s directors also fall within this notion) who are not related to each other and who are independent of one another¹²⁹.

Under tax law, directors are not allowed to receive any remuneration other than the refund of their expenses¹³⁰.

2.4.5. Public supervision

The CRA is the specific supervisor of Irish charities. Its general functions include ensuring and monitoring compliance by charitable organizations with the charity regulation (sect. 14(1)(g), CA).

To this end, the CRA may appoint one or more persons “to investigate the affairs of a charitable organisation and to prepare a report thereon”. These persons are referred to as “inspectors”, and they have particularly incisive powers (sect. 64 CA). The CRA itself has specific powers of investigation and sanctioning (sections 68-69, 73 CA).

The CRA can also apply to the High Court for the suspension or removal of any charity trustees or staff of a charity or prevent the sale of property as a result of misuse, misconduct or mismanagement¹³¹. The decisions of the CRA can be appealed to a Charity Appeals Tribunal, specifically established to deal with these matters.

¹²⁶ INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 9.

¹²⁷ Cf. O’CONNOR J.C, MCGRATH H. (2020), p. 13. Cf. also

<https://www.cof.org/sites/default/files/Common%20Requirements%20Charities%20Regulator%20Revenue.pdf>.

¹²⁸ The Code of Governance provides support to charity trustees to meet their legal duties, but it is not a definitive statement of the law (see legal disclaimer on p. 2).

¹²⁹ Cf. O’CONNOR J.C, MCGRATH H. (2020), p. 6; BREEN O.B. (2020a), p. 4 f. Cf. also <https://www.cof.org/sites/default/files/Common%20Requirements%20Charities%20Regulator%20Revenue.pdf>.

¹³⁰ Cf.

<https://www.cof.org/sites/default/files/Common%20Requirements%20Charities%20Regulator%20Revenue.pdf>.

¹³¹ Cf. O’CONNOR J.C, MCGRATH H. (2020), p. 11.

2.4.6. Taxation

As already observed, the charitable status does not itself award any specific tax benefit to registered charities. For that purpose, charities must obtain the charitable tax-exempt status and a CHY number pursuant to the Taxes Consolidation Act 1997. As a result, tax law affects a charity's features, imposing on them further requirements that reinforce their already strong public benefit identity that derives from their organizational law. The main ones have already been previously highlighted in this Study.

The income of tax-exempt charities is **exempt from income tax** (sect. 208 Taxes Consolidation Act 1997).

Charities are not *per se* exempt from VAT, but many activities that are VAT-exempt may be relevant for charities¹³². Tax-exempt charities are entitled to a refund of a proportion of their VAT costs under a VAT Compensation Refund Scheme introduced by the Minister for Finance in 2018¹³³.

Donations are eligible for tax benefit only if their recipients are "**designated charities**" (within the more general category of "approved bodies"), which requires, among other things, at least two years of tax-exempt status. The designation is valid for up to five years and, upon expiration, may be renewed¹³⁴.

Donations are eligible for tax benefit only if they exceed the minimum amount of 250 EUR per year and are within the limit of 1 million EUR per year. However, if there is a connection between the donor and the recipient charity (i.e., the donor is an employee or a member of the charity), tax relief is limited to 10% of the individual's total income per year.

To be deductible, a donation must also satisfy the following conditions:

- it is in the form of money;
- it is not repayable;
- it does not confer any direct or indirect benefit upon the donor or any person connected with the donor; and
- it is not conditional on, or associated with, or part of an arrangement involving the acquisition of property by the designated charity, otherwise than by means of gift, from the donor or any person connected with the donor.

Individual donors do not get tax benefits, but the recipient charity can claim a refund of tax paid on that donation. The relief is calculated by grossing up the donation at the specified rate, which is currently 31%. The amount of the refund cannot be more than the amount of tax paid by the donor for the same year.

Corporate donors can claim a tax deduction as if the donation were a trading expense. Therefore, the relief corresponds to the corporation tax rate, which is currently 12.5%.

¹³² E.g., the purchase of appliances for use by disabled persons: see INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 15.

¹³³ Cf. O'CONNOR J.C, MCGRATH H. (2020), p. 16; INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 15.

¹³⁴ INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2020c), p. 13.

2.5. Italy

According to the National Institute of Statistics, there were almost 360,000 active NPOs in Italy at 31 December 2018. Their number has been constantly increasing over the last decades. Indeed, the same Institute reported only 235,000 active NPOs at the end of 2001.

Of these 360,000 NPOs, 85% are recognized or non-recognized associations, 4.4% social cooperatives, 2.2.% foundations, 8.4% NPOs established in another legal form (social enterprises, mutuals, etc.).

Of these 360,000 NPOs, more than 60,000 were, at the same date, registered in the list of entities that have applied for the “five per thousand”, a support measure in favour of NPOs that we will present later in this Study.

The Italian legislator has always shown great interest in NPOs, especially those devoted to social utility purposes, such as assistance to persons in need. This has led to a large-scale production of special laws on the subject, which started immediately after the unification of Italy.

Law 3 August 1862 no. 753 meticulously regulated “*opere pie*”, namely, charitable institutions and other legal entities having the purpose of helping disadvantaged persons, assisting them, providing education to them, initiating them into professions, arts or crafts¹³⁵.

Law 15 April 1886, no. 3818, introduced “**mutual aid societies**”, whose main purpose was to offer their members a subsidy in cases of illness or inability to work or old age, as well as to help the families of deceased members.

Along similar lines, in the 1990s there was a new wave of special laws on individual NPOs, such as “**voluntary organizations**” (Law no. 266/1991), “**social cooperatives**” (Law no. 381/1991) and “**associations of social promotion**” (Law no. 383/2000), among others¹³⁶. Of particular importance in that period is Legislative Decree no. 460/1997, which introduced specific tax measures in favour of “non-profit organizations of social utility”, known as “**ONLUS**” from the Italian acronym. Legislative decree no. 155/2006 on “**social enterprises**” further enriched the already broad and complex Italian legal framework.

Some of these special laws, like those on social cooperatives of 1991 and on social enterprises of 2006, became models for foreign legislators since many countries followed Italy in introducing similar laws on these subjects¹³⁷.

The myriad of special laws was certainly not able to help the development of what was already known at the time as the “third sector”, which was the main reason why, in 2017, a legislative decree (no. 117/2017) introduced the “**Code of the third sector**” (“**CTS**”)¹³⁸, which, by repealing preceding laws, reorganized the entire area on new and different bases, without, however, breaking the connections with the past.

On the other hand, the Italian Civil Code of 1942 overlooked and still overlooks NPOs, providing a very bare regulation of the two general legal forms of NPOs in Italy, which are the association and the foundation.

¹³⁵ Cf. ZAMAGNI V. (2000).

¹³⁶ Cf. VACCARIO C., BARBETTA G.P. (2017), p. 445 ff.

¹³⁷ See, for references, FICI A. (2017) and FICI A. (2020b).

¹³⁸ Available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2017-07-03:117>.

2.5.1. Main legal forms of NPOs

The two main general legal forms of NPOs in Italy are **associations** and **foundations**. Their regulation is found in articles 14-42 *bis* of the Civil Code ("CC"). Presidential Decree no. 361/2000 lays down the procedure by which they acquire the legal personality.

While foundations must have legal personality to exist as such, associations ("**recognized associations**") may or may not ("**non-recognized associations**") have legal personality. The majority of Italian associations are associations without legal personality. This is due to the fact that non-recognized associations have the same legal capacity as recognized ones and, moreover, enjoy more organizational autonomy than recognized associations, being directly subject only to a few provisions of the CC (articles 36-38), one of which stipulates that they are regulated by their members' agreements. On the other hand, the persons who act in the name and on behalf of the non-recognized association are also personally and jointly liable for the association's obligations (art. 38 CC). The legal personality of associations and foundations is therefore necessary only for excluding the liability of their directors and legal representatives for the entity's debts (so called "perfect patrimonial autonomy"). However, the procedure for obtaining the legal personality is lengthy and the requirements for its concession are stringent (associations must have minimum assets of around 40,000 EUR, while foundations' assets vary from 60,000 to 120,000 EUR approximately), so that most Italian associations prefer to act without legal personality (foundations do not have any alternative, since the legal personality is necessary for their very existence). As we shall see, this situation is different for third sector organizations, which may acquire the legal personality in a different manner and with lower minimum assets.

Less than 30 articles of law are dedicated by the CC to associations and foundations, which are not even defined therein. In contrast, greater attention is given to NPOs acting for the social utility, for which a specific optional status has been recently introduced by an *ad hoc* legislation, the **status of "third sector organizations"** ("TSO")¹³⁹.

Pursuant to the Code of the third sector (art. 4), the status of TSOs may be acquired only by organizations that:

- are incorporated as recognized or non-recognized **associations** or as **foundations**;
- are **independent from the "excluded entities"**, i.e., they are not directed or controlled by those entities that may never acquire the status of TSO, namely, public entities, political parties, trade unions, professional associations, associations representing economic categories, and representative organizations of employers;
- exclusively or mainly carry out **one or more activities of general interest**;
- have a **non-profit purpose and exclusively pursue civic, solidaristic and social utility purposes**;
- are **registered in the single national register of the third sector** ("RUNTS").

The law identifies the **activities of general interest** that an organization has to perform in order to obtain the status of TSO. It provides a long list of activities that, for that purpose, are deemed to own this nature (art. 5 Legislative decree no. 117/2017). This list includes the following activities:

- a) social services;

¹³⁹ Cf. FICI (ed.) (2018).

- b) health services;
- c) socio-health services;
- d) education, instruction, and professional training;
- e) services aimed at safeguarding and improving the conditions of the environment and the prudent and rational use of natural resources, as well as the protection of animals and prevention of stray animals;
- f) services for the protection and enhancement of the cultural heritage and the landscape;
- g) university and post-university training;
- h) scientific research of particular social interest;
- i) organization and management of cultural, artistic or recreational activities of social interest, including activities, also editorial, for the promotion and dissemination of the culture and the practice of voluntary work and of activities of general interest;
- j) radio broadcasting of a community nature;
- k) organization and management of tourist activities of social, cultural or religious interest;
- l) extra-curricular training aimed at the prevention of early school leaving and academic and educational success, at preventing bullying and at combating educational poverty;
- m) instrumental services to third sector entities rendered by entities composed of not less than 70% of third sector entities;
- n) development cooperation;
- o) fair trade;
- p) services aimed at the insertion or reintegration into the labour market of disadvantaged workers and persons;
- q) social housing, as well as any other temporary residential activity aimed at satisfying social, health, cultural, training or working needs;
- r) humanitarian reception and social integration of migrants;
- s) social agriculture;
- t) organization and management of amateur sports activities;
- u) charity, distance support, free sale of food or products, or provision of money, goods or services in support of disadvantaged people or of activities of general interest;
- v) promotion of the culture of legality, peace between peoples, nonviolence and unarmed defence;
- w) promotion and protection of human, civil, social and political rights, as well as the rights of consumers and users of activities of general interest, promotion of equal opportunities and mutual aid initiatives, including time banks, and joint purchasing groups;
- x) handling of international adoption procedures;
- y) civil protection;
- z) requalification of unused public assets or assets confiscated from organized crime.

TSOs are also allowed to perform **activities “other” than those of general interest** (which, as said, must be carried out exclusively or at least prevalently), but only on the condition that they are provided for by their statutes, and are secondary and instrumental (art. 6 Legislative decree no. 117/2017).

The status of TSO is acquired from the day of the registration in the RUNTS. Applications are examined by the (national and regional) public offices of the RUNTS, which authorize the registration in the presence of the requirements for an organization's eligibility as a TSO. The status is maintained as long as registration persists. De-registration may depend either on an organization's free choice or on the authority's decision after having ascertained that the organization has lost the necessary requirements for qualification or has violated the various rules regarding the organization and management of a TSO contained in the same Code.

By **registering in the RUNTS, third sector organizations may also acquire the legal personality**. To that end, they must be incorporated by a notarial deed and have minimum assets at the time of registration of 15,000 EUR, if associations, or 30,000 EUR, if foundations. When assets decrease by more than 1/3, the aforementioned minimum shall be reconstituted.

The Code of the third sector recognizes **seven sub-types (or sub-statuses) of third sector organizations**, which are:

- 1) voluntary organizations;
- 2) associations of social promotion;
- 3) philanthropic entities;
- 4) social enterprises, including social cooperatives;
- 5) associative networks;
- 6) mutual aid societies;
- 7) other entities of the third sector.

Each sub-type of TSO has its own characteristics¹⁴⁰. The **RUNTS is divided into seven sections**: one for each sub-type (or particular status) of TSO. An organization wishing to acquire the status of TSO must indicate, while applying for registration, the section of the RUNTS in which it wants to be registered (it is possible to be registered in only one section, except for the associative networks, which may be registered in two sections).

Among the sub-types of Italian TSOs, **the social enterprise warrants and requires special attention**, because it has particular characteristics relative to all other types of TSOs, of special relevance for the aims of this Study¹⁴¹.

Social enterprises find their particular regulation in a formally separate act, namely Legislative decree no. 112/2017 which is, however, to be considered a substantial part of the Code of the third sector, notwithstanding the formal separation¹⁴². Compared to the other sub-types (or sub-statuses) of TSO it is a *sui generis* sub-type (or sub-status) mainly because:

¹⁴⁰ Differences among sub-types mainly regard the activities performed and the way in which they are performed: cf. FICI (ed.) (2018), p. 91 ff.; FICI (2020a), p. 31 ff.

¹⁴¹ Cf. FICI (2020a), p. 43 ff.

¹⁴² Available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2017-07-03:112/vig=>.

- SEs acquire the status by registering in a specific section of the Register of enterprises (rather than in the RUNTS);
- SEs perform the activities of general interest in an entrepreneurial way, i.e., they sell the services rather than provide them for free; in addition, SEs may be characterized, rather than by the performance of a general interest activity, by the working integration of disadvantaged persons and workers, who shall be at least 30% of an SE's total workforce;
- not only associations and foundations, but **also companies of whatever type (including cooperatives) may acquire the status of social enterprises**; the status is also available to companies composed of only one shareholder, provided that the single shareholder is not an individual, a public entity or a for-profit organization, which are the **"excluded entities"** in the specific field of the social enterprise (they may not acquire this status);
- companies (with the status of) SEs may remunerate members' shares within certain limits;
- SEs are subject to specific governance requirements and a specific form of public control.

Social cooperatives of Law no. 381/1991 are now recognized as *de iure* social enterprises (art. 1, para. 4, Legislative decree no. 112/2017), of which they constitute the most diffuse typology. Like SEs, social cooperatives must either perform an activity of general interest ("social cooperatives of type A") or provide the working integration of disadvantaged persons ("social cooperatives of type B"). Social cooperatives are SEs with a democratic structure given that cooperative law imposes the rule "one member, one vote" in the members' general meeting.

Finally, it is worth mentioning that the legal status of TSO, as provided for by the Code of the third sector (and by Legislative decree no. 112/2017 as specifically regards SEs), **will replace the legal status of ONLUS**, as provided for by Legislative decree no. 460/1997. The latter decree is still in force, but the Code of the third sector provides for it to be repealed once the tax rules regarding TSOs are approved by the European Commission¹⁴³. The status of ONLUS has several traits in common with the new status of TSO. An ONLUS is also characterized by the performance of certain activities of general interest for non-profit and solidaristic goals. The status of ONLUS may be acquired by associations, foundations and social cooperatives, whereas companies are excluded.

Law no. 208/2015 introduced into the Italian legal system the status of **"benefit company"**, which may be assumed by a company (including a cooperative) that, in carrying out its economic activities, pursues, in addition to the aim of distributing profits, one or more aims of common benefit, and operates in a responsible, sustainable and transparent manner vis-à-vis individuals, communities, territories and the environment, cultural and social heritage, entities and associations as well as other stakeholders. "Common benefit" means the pursuit of one or more positive effects, or the reduction of negative effects, for the company's benefited stakeholders¹⁴⁴.

2.5.2. Institutional purpose and related aspects

The CC does not define associations and foundations, still less their institutional purpose. However, the prevailing opinion is that both associations and foundations may have **any lawful purpose other than profit sharing**. This follows from the fact that companies are assigned a specific purpose by art. 2247

¹⁴³ More precisely, from the fiscal year following that in which the authorization is issued.

¹⁴⁴ Cf. <https://www.societabenefit.net/wp-content/uploads/2017/03/Italian-benefit-corporation-legislation-courtesy-translation-final.pdf>.

CC, which is the distribution to members of profits generated by an economic activity. Therefore, having to be kept distinct from companies, associations and foundations could not have the same purpose as companies, and so they are considered NPOs, in the limited sense that they are not allowed to distribute profits to their founders and members.

Therefore, since their purpose is not positively defined by law, and provided that no distribution of profits take place, associations and foundations may, in principle, pursue either the public or the private benefit.

The legislator's approach to TSOs is completely different.

Not only have TSOs to act for a non-profit purpose, but **they must also exclusively pursue civic, solidaristic and social utility purposes** by undertaking, at least prevalently, one or more general interest activities.

In order to ensure and safeguard their purpose, the law prescribes that **the assets of a third sector organization, including any profits, income, proceeds, revenues however denominated, must be used to carry out the statutory activity for the exclusive pursuit of civic, solidarity and social utility purposes** (art. 8, para. 1, CTS).

For that purpose, **a non-profit organization is barred from distributing, directly or indirectly, profits and operating surpluses, funds and reserves, however denominated**, to founders, associates, workers and collaborators, directors and other members of the corporate bodies, also in the case of withdrawal or any other hypothesis of individual dissolution of the associative relationship (art. 8, para. 2, CTS).

The law goes on to identify some situations that are deemed to integrate, under any circumstances, an **indirect distribution of profits and assets** by an NPO (art. 8, para. 3, CTS). These hypotheses are:

- a) the payment to directors, auditors and all those who hold an organizational role, of an individual remuneration not proportionate to the activity carried out, to the responsibilities borne and to the specific competences, or in any case higher than that provided in entities operating in the same or similar sectors and conditions;
- b) the payment to dependent or self-employed workers of wages or payments 40% higher than those established, for the same qualifications, by the collective agreements referred to in Article 51 of Legislative Decree 15 June 2015, no. 81, except for proven necessities relating to the need to acquire specific skills for the purpose of carrying out certain activities of general interest (those referred to in art. 5, para. 1, letters b), g) and h), CTS);
- c) the purchase of goods or services for considerations that, without valid economic reasons, are higher than their normal value;
- d) the sale of goods and the provision of services, under more favourable conditions than those of the market, to shareholders, associates or participants, to founders, to the members of the administrative and control bodies, to those who in any capacity work for the organization or are part of it, to persons who provide gifts to the organization, to their relatives within the third degree and to their relatives in law within the second degree, as well as to the companies directly or indirectly controlled or connected by them, exclusively by reason of their quality, unless such sales or provisions constitute the object of the activity of general interest performed by the TSO;
- e) the payment to persons other than banks and authorized financial intermediaries, of interest rates, due on loans of all kinds, four points higher than the annual reference rate.

The same non-profit purpose characterizes social enterprises which are, however, allowed, albeit only if established in the company form (including the cooperative form), to remunerate the members' paid-up shares up to a certain extent. **Companies recognized as social enterprises may allocate a share of less than 50% of their annual profits, after deduction of the losses accrued in previous years, to the distribution, also as free shares or free financial instruments, of dividends to shareholders, not exceeding in any event the maximum interest of postal bonds, increased by 2.5 points relative to the paid-up capital** (art. 3, para. 3, lit. a), Legislative decree no. 112/2017).

An asset-lock also operates upon a TSO's dissolution, in which case its residual assets must be devolved to other TSOs, subject to the positive opinion of the competent office of the RUNTS. The acts of devolution of residual assets concluded in the absence or in contrast with the office's opinion are null and void (art. 9 CTS).

The same happens when an entity is cancelled from the RUNTS and thus loses the status of TSO, although in this event the assets to be devolved are only those accumulated during the time of its presence on the RUNTS (art. 50, para. 2, CTS). However, a stricter rule applies to SEs: if they are de-registered and lose their status, they must devolve all their assets disinterestedly, following the deduction, in the case of social enterprises in the company form, of the members' paid-up shares (art. 12, para. 5, Legislative decree no. 112/2017).

2.5.3. Activities

Associations and foundations, notwithstanding their functional characterization, may, in principle, perform any kind of activity, including commercial activities that generate profits (i.e., profit-making activities). Given the non-distribution constraint, if profits are generated by the commercial activity, they may not be distributed to founders and members.

TSOs are bound by the requirement to undertake, at least prevalently, activities of general interest. The performance of other activities is restricted. However, no restrictions in general exist with regard to the manner in which the activities of general interest are to be conducted. Thus, these activities might also be commercial, and even exclusively or predominantly so. Yet, some TSOs, such as voluntary organizations, may perform only secondary commercial activities. The exact opposite is true of SEs: they are identified by the very performance of commercial activities of general interest.

In any event, as will be highlighted later, the volume of commercial activities in comparison to non-commercial activities affects the tax regime of NPOs and TSOs.

2.5.4. Structure and governance aspects

Associations are member-based organizations established for a common goal to be achieved together, while foundations are organizations without members set up to guarantee the destination of assets to a pre-determined purpose. This structural difference influences their governance.

Associations shall have at least a general meeting of members and a board of directors, while in foundations the presence of the latter organ is sufficient. The governance aspects of associations and foundations are not, however, well developed in the CC.

By way of contrast, the governance of TSOs is better defined by the CTS.

Associations recognized as TSOs shall have a members' general meeting and a board of directors (a sole director is not admitted). They must also, in the cases mentioned in art. 30 CTS, appoint a supervisory board (also monocratic).

Pursuant to article 31 CTS, foundations recognized as TSOs shall have a board of directors (even a sole director is admitted) and a supervisory board (also monocratic).

The governance of companies recognized as SEs (and therefore as TSOs) depends on their legal form. There are, however, some common rules applicable to all SEs regardless of the legal form of incorporation. Thus, for example, all SEs must have at least a supervisory board (also monocratic) and involve their workers, users and other stakeholders in the management in accordance with guidelines provided for by the Ministry of Labour and Social Affairs. In this regard, it is significant that in SEs of a larger size, stakeholders shall be entitled to appoint at least one member of the board of directors and one member of the supervisory board (art. 11 Legislative decree no. 112/2017).

As already observed, as long as the single shareholder is not an individual, a for-profit entity or a public entity, even one-member companies are eligible for the SE status.

2.5.5. Public supervision

Some powers of control over foundations are attributed by the CC (and by Presidential Decree no. 361/2000) to the public authority that recognizes foundations¹⁴⁵. The same public authority shall also approve the amendments to the statutes of foundations and recognized associations, as well as any extraordinary operation (conversion, merger and de-merger).

TSOs are subject to a **specific form of public supervision** carried out by the Ministry of Labour and Social Affairs and by the national and regional offices of the RUNTS in which TSOs are registered.

Supervision is designed first of all to verify the presence of the requirements for an entity's registration in the RUNTS (and therefore for the acquisition of the status of TSO) and secondly to ensure adherence to the applicable legal rules during the entity's existence. If irregularities are found and they are not remedied, the entity is cancelled by the RUNTS and loses its status as a TSO.

Significantly, the CTS provides that supervision with regard to their members and affiliated bodies may be delegated to associative networks of TSOs composed of at least 500 TSOs operating in at least 10 Italian regions. The same associative networks may draft **model statutes** for their associated or affiliated TSOs which, if approved by a decree of the Ministry of Labour and Social Affairs, allow their registration in the RUNTS in an automatic and faster way.

2.5.6. Taxation

Legal entities other than companies (such as associations and foundations) are, in principle, subject to corporate income tax. They receive specific consideration in Presidential Decree no. 917/1986¹⁴⁶, which in its art. 73, para. 1, makes a distinction between

a) those that have (lit. b) ("**commercial entities**") and

¹⁴⁵ Cf. VACCARIO C., BARBETTA G.P. (2017), p. 456 ff.

¹⁴⁶ Available at

<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1986-12-22:917>.

b) those that do not have as their main or exclusive object the carrying out of commercial activities (lit. c) ("**non-commercial entities**")¹⁴⁷.

While "commercial entities" are treated as companies, "non-commercial entities", although not being tax-exempt in any event, are recipients of specific provisions that may fully or partially lead to this result.

Some **activities** performed by non-commercial entities, although **substantially commercial in their nature**, are, **however, considered "non-commercial" under tax law**, so that profits generated by these "non-commercial activities" are not taxed.

"Non-commercial" is "the supply of services not falling under article 2195 of the Civil Code provided in compliance with the institutional purposes of the entity, without specific organization, and in exchange of considerations that do not exceed the directly attributable costs" (art. 143, para. 1, Presidential decree no. 917/1986).

"Non-commercial" is also the activity carried out, in conformity with its institutional purposes, by an association with its associated members, if the activity is not provided in exchange for a specific consideration (art. 148, para. 1 and 2, Presidential decree no. 917/1986). However, for some associations (including those of social promotion and of amateur sport), even activities performed with their members in exchange for a specific consideration are considered "non-commercial" (art. 148, para. 3, Presidential decree no. 917/1986), but these associations must meet some specific requirements (art. 148, para. 8, Presidential decree no. 917/1986), including the prohibition to distribute, even indirectly, profits or surpluses as well as funds, reserves or capital during the life of the association, unless the distribution is required by law, and the obligation to allocate the assets of the entity, in the event of its dissolution, to another association with a similar purpose.

In addition, there are some **revenues that are, in any event, tax-exempt**, namely:

a) sums from public fund-raising carried out by a non-commercial entity occasionally, including through the provision of goods of modest value or services to the sponsors, during celebrations, anniversaries or awareness campaigns (art. 143, para. 3, Presidential decree no. 917/1986);

b) contributions paid by public administrations to a non-commercial entity under certain agreements or accreditation schemes for social purpose activities exercised in conformity with the institutional purposes (art. 143, para. 3, Presidential decree no. 917/1986);

c) contributions paid by the members, if they are not provided in exchange for the provision of a service (art. 148, para. 1, Presidential decree no. 917/1986).

Any commercial activity of non-commercial entities is subject to taxation, in which case non-commercial entities may enjoy a particular **flat tax regime** provided for by article 145 of Presidential decree no. 917/1986.

In order to demonstrate their nature as non-commercial entities and to pay the taxes on commercial activities (but also to obtain the deduction of VAT paid on purchases¹⁴⁸), **non-commercial entities are required to keep separate accounts for any commercial activity exercised** (art. 144, para. 2, Presidential decree no. 917/1986).

¹⁴⁷ According to art. 73, para. 4, Presidential decree no. 917/1986, "main object means the activity essential to directly achieve the primary purposes indicated by the law, by the act of incorporation or by the statute".

¹⁴⁸ See art. 19 *ter* of Presidential decree no. 633/1972.

Regardless of any provision in their statutes, **non-commercial entities lose this fiscal status** if they mainly carry out commercial activity for an entire tax period (art. 149, para. 1, Presidential decree no. 917/1986). There are some parameters that may be employed to conduct this evaluation, namely:

- a) the prevalence of fixed assets relating to the commercial activity, net of amortization, over those relating to other activities;
- b) the prevalence of revenues from commercial activities over the normal value of the sales or services relating to the institutional activities;
- c) the prevalence of income from commercial activities over those from institutional activities (i.e., contributions, subsidies, gifts and membership fees);
- d) the prevalence of the negative components concerning the commercial activity over the remaining expenses.

In conclusion, associations and foundations may be classified, under tax law, either as commercial entities or as non-commercial entities, depending on the volume of commercial activities in relation to non-commercial ones. As non-commercial entities they may be fully tax-exempt (if they do not carry out commercial activities or carry out activities qualified as "non-commercial") or only partially tax-exempt (they are subject to corporate tax only with regard to their commercial activities).

For **associations and foundations with the status of ONLUS** pursuant to Legislative decree no. 460/1997, the carrying out of the institutional activities for the pursuit of the solidarity purposes is not considered to be a commercial activity, so that corporate tax does not apply. Moreover, the income from related activities (to institutional ones) does not fall within the taxable profit (art. 150 Presidential decree no. 917/1986).

The dichotomy between "commercial entities" and "non-commercial entities", which is a peculiarity of Italian tax law, is also employed by the CTS to determine the taxation of TSOs. Indeed, **third sector organizations (other than social enterprises) may be "commercial" or "non-commercial"** depending on the relationship between the volume of non-commercial activities and that of commercial activities (art. 79 CTS). Non-commercial TSOs may opt for a specific tax treatment regarding the income from their commercial activities. This fiscal regime is not yet in force, since it is currently subject to the authorization of the European Commission¹⁴⁹.

Social enterprises are "commercial entities" by definition, even when they have the legal form of associations or foundations. However, their particular law provides that **the profits re-invested by them in the activity do not constitute taxable income** (art. 18 Legislative decree no. 112/2017). This measure is still not in force since it is subject to the authorization of the European Commission. However, the same rule already applies to social cooperatives of Law no. 381/1991.

VAT does not apply to non-commercial activities of non-commercial entities (art. 4, para. 3, Presidential decree no. 633/1972¹⁵⁰).

There are **some services** (such as socio-health services or home assistance of disabled persons and other disadvantaged people) that, if **provided by an ONLUS, are VAT-exempt** (art. 10, para. 1, n. 27

¹⁴⁹ Still to be requested by the Italian Government. Cf. FICI (ed.) (2018), p. 155 ff.

¹⁵⁰ Available at

[https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1972-10-26:633%21vig=.](https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1972-10-26:633%21vig=)

ter, Presidential decree no. 633/1972). This provision will in future apply to non-commercial TSOs rather than to the entities with the ONLUS status¹⁵¹.

A **reduced VAT rate** (5% rather than 22%) applies to social cooperatives of Law no. 381/1991 that provide specific health, socio-health, assistance and educational services (Table A), Part II *bis*, no. 1, Presidential decree no. 633/1972).

Furthermore, there are some **services**, usually provided by NPOs or TSOs, such as, for example, those pertaining to kindergartens or retirement homes for the elderly, whose provision is **exempt from VAT** (art. 10, para. 1, n. 21, Presidential decree no. 633/1972).

30% of the amount of cash donations or the value of in-kind **donations to non-commercial third sector organizations may be deducted** from the gross income tax of individuals, for a total amount, in each fiscal year, not exceeding 30,000 EUR (art. 83, para. 1, CTS).

Cash or in-kind **donations to non-commercial third sector organizations may be deducted** from the total net income of individuals, legal entities and companies within the limit of 10% of the total declared income (art. 83, para. 2, CTS).

When declaring their income for the purposes of tax payment, any individual may decide to allocate to TSOs (as well as to other entities with similar purposes and public bodies) **5 per thousand** of the income tax due for the preceding year¹⁵².

¹⁵¹ Pursuant to art. 89, para. 7, lit. b), CTS, which will enter into force beginning from the fiscal year following that in which the authorization of the European Commission for the new tax regime of TSOs is granted.

¹⁵² On this measure, known as “5 per thousand”, see Legislative decree no. 111/2017, available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2017-07-03:111:vig=>.

For further information, cf. SEPIO (G.) 2020.

3. SYNTHESIS AND COMPARATIVE ANALYSIS

The comparative legal analysis conducted thus far has shown that **the national legal frameworks regarding NPOs are not uniform across Europe** and are rather complex. At the same time, despite the variety of national approaches to this particular category of organizations, **there are some major shared features in the current national laws** that make it (at least) possible to develop a common European strategy in this field. To this end, we have endeavoured to summarize the results of our investigation in a list of points that might serve as a useful basis for an attempt to develop a common strategy of this nature.

3.1. Associations and foundations as the main legal forms of NPOs

Associations and foundations are **the ordinary legal forms of non-profit organizations almost everywhere in Europe**¹⁵³. Their particular regulation is found in sources of a different formal nature, including the Civil Code (Germany and Italy), *ad hoc* special laws (France), an *ad hoc* Code where they co-exist with companies and other types of organizations (Belgium).

In addition to the jurisdictions specifically examined in the previous section of this Study, reference can also be made, to support this conclusion, to Hungary¹⁵⁴ and the Netherlands¹⁵⁵, Poland¹⁵⁶, the Czech Republic¹⁵⁷, and Spain¹⁵⁸, among many others¹⁵⁹.

Although shared definitions of an association and a foundation do not exist (and there are even countries, like Italy, that do not define them at all), there is, however, a **common basic conception**. An association is a grouping of two or more natural and/or legal persons established for a purpose other than sharing the potential profits from an economic activity. A foundation is set up by one or more natural and/or legal persons to dedicate certain assets to the on-going pursuit of a specific purpose other than profit-sharing. The prevailing patrimonial facet of foundations is confirmed by the presence in some jurisdictions (like France and Germany) of non-independent foundations (lacking autonomous legal capacity) which are treated as foundations in several respects (notably under tax law)¹⁶⁰.

The presence of a common understanding of associations and foundations should not, however, lead to overlooking the **dissimilarities among the applicable national laws**, which are numerous and

¹⁵³ Mutuels should be added to the list: on this subject, at the EU level, cf. PANTEIA (2012).

¹⁵⁴ Where associations and foundations are provided for and regulated in the Civil Code of 2013: cf. HARTAY E. (2017); INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2021).

¹⁵⁵ Where associations and foundations are provided for and regulated in the Civil Code: cf. VAN DER PLOEG T.J. (2010), p. 231.

¹⁵⁶ Where associations and foundations are provided for and regulated in two different special laws: cf. KRAJEWSKA A., MAKOWSKI G. (2017); INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2019).

¹⁵⁷ Where associations and foundations are provided for and regulated in two different special laws: cf. RONOVSÁ K. (2010).

¹⁵⁸ Where associations and foundations are provided for and regulated in two different special laws, respectively Law no. 1/2002 and Law no. 50/2002.

¹⁵⁹ Cf. for further references RUTZEN T. *ET AL.* (2009); EUROPEAN FOUNDATION CENTRE (2015); EUROPEAN CENTER FOR NOT-FOR-PROFIT LAW (2018); CENTER FOR NOT-FOR-PROFIT LAW (2019).

¹⁶⁰ In some jurisdictions, however, hybrid foundations, which have traits common to associations, are recognized. This is the case, for example, of Italian "foundations of participation", in which initial founders and subsequent "founders" (more precisely, endowers) sit in an internal board that, given its powers, resembles an association's general meeting of members. "Open foundations" in Central and Eastern Europe constitute a similar model: cf. RUTZEN T. *ET AL.* (2009).

concern several aspects, including registration, minimum assets requirements, governance, conditions and procedures for acquiring the legal personality, and supervision, among many others.

Associations and foundations are structured differently (which justifies their different governance, since a general meeting of members would make no sense in foundations) but both act for a **non-profit purpose**.

Therefore, **associations and foundations are non-profit organizations in the strict and traditional sense**, since they are not geared towards the distribution of profits, but rather are subject to a profit non-distribution constraint which, however, does not prevent them from conducting profit-making economic activities involving the sale of goods and services (although some restrictions may be found in the national legislation, like in Germany with regard to non-commercial associations). On the contrary, the comparative analysis reveals a trend towards enlarging the scope of the activities allowed to associations, including economic activities previously prohibited to them, as the recent reform of the Belgian law of associations clearly demonstrates. In countries like Denmark, the fundamental economic role of foundations (they own some of the largest domestic corporations)¹⁶¹ has led to the adoption of an *ad hoc* law on “commercial foundations”, which is different from that on ordinary foundations¹⁶².

In conclusion, in current national laws on the organizations which are the subject of this Study, **“non-profit” is the purpose (in terms of non-distribution to founders, members, directors, etc., of potential profits from the activity), rather than the activity carried-out to reach that purpose, which may therefore be a profit-making economic activity**¹⁶³. In any event, the performance of economic activities may affect the taxation of associations and foundations.

The prohibitions and the obligations that the non-profit purpose entails – including those shaping the “asset-lock”, i.e., the obligation to allocate profits and surpluses for the exclusive pursuit of the purpose, the prohibition regarding the “indirect” distribution of profits, the obligation to disinterestedly devolve the residual assets upon the entity’s dissolution – are not always explicitly laid down by organizational law, but mostly by tax law for the purpose of configuring certain tax-exempt associations and foundations (as we shall see later). Belgium represents an exception in this regard, as its brand new CCA addresses these aspects (i.e. the indirect distribution of profits and the devolution of residual assets at dissolution), and it does so in an accurate and sophisticated way, independently from the issue of taxation.

Whilst the purpose of associations and foundations may be uniformly reconstructed in “negative” terms as a “non-profit purpose”, on the other hand, **a general consensus definition of what this purpose is in positive terms does not exist**, and this is particularly the case with regards to its nature of public benefit. There are jurisdictions completely silent on this point (like Italy), others that speak of a “disinterested purpose” but at the same time admit both “private” and “public utility” foundations

¹⁶¹ Cf. DELOITTE (2018).

¹⁶² Cf. FRIIS HANSEN S. (2010).

¹⁶³ According to VAN DER PLOEG T.J. *ET AL.* (2017), p. 261 f., what civil society organizations have in common is the non-distribution constraint: “they are not permitted to distribute profits or other surplus resources to their founders, members, directors or other officers”. This does not imply that they should be barred from conducting economic activities. On the contrary, “generating income is fundamental to the[ir] sustainability”. Therefore, according to the Authors, CSOs should be allowed to generate income through economic activities, including those non-related to the purpose and purely aiming at generating income for the organization.

On this specific point, cf. European Center for Not-for-Profit Law (2015).

(like Belgium), yet others (like, for example, France, Poland¹⁶⁴, Spain¹⁶⁵, and the Czech Republic¹⁶⁶) that make a distinction between associations (which can be either “private” or “public utility”) and foundations (necessarily of “public utility”)¹⁶⁷.

3.2. The development of non-profit companies

Associations and foundations are the traditional legal forms of non-profit organizations in Europe, but they are not the only ones. Among the other possible forms, that of the company, including a cooperative, is developing everywhere in Europe, although in different forms depending on the jurisdiction and the model of legislation in force. This is also due to enabling legislation that detaches the company form from the necessary pursuit of profits for distribution to shareholders and facilitates its creation and operations, as compared to associations and foundations to which more restrictive provisions usually apply.

The **functional neutrality of the company form** (in many jurisdictions, like Ireland and Poland¹⁶⁸, companies may be set up for any lawful purpose; in others, like Hungary, it is explicitly foreseen that they may also be non-profit¹⁶⁹; non-profit companies have existed in Sweden and Nordic countries for several decades due to enabling legislation¹⁷⁰) and the simplicity of its establishment (even only by one member with one euro of capital) and functioning, have thus led to an increasing number of non-profit companies in several countries. This is particularly true of countries (like Germany and Ireland) in which an NPO (or, more precisely, a public benefit) status exists and represents the core of the legislation on this matter.

The **growing use of the company form in the non-profit sector** may also be attributed to the increasing adoption, by national legislators, of laws introducing legal statuses (such as those of social enterprise in Belgium and Italy, and of SSEE in France) in which the requirement regarding profit non-distribution is relaxed, becoming partial rather than total¹⁷¹. Given that associations and foundations are legal forms characterized everywhere by a total profit non-distribution constraint (they are “pure NPOs”, as previously noted), the company legal form represents the only solution for those wishing to establish an organization that, while pursuing social utility purposes, might partially remunerate their

¹⁶⁴ In Poland only foundations (and not associations) are subject to a public benefit requirement: cf. KRAJEWSKA A., MAKOWSKI G. (2017), p. 489 f.; INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2019), p. 4.

¹⁶⁵ Cf. PIÑAR MAÑAS J.L., PEÑALOSA ESTEBAN I. (2017), p. 532.

¹⁶⁶ Cf. RONOVSÁ K. (2010), p. 385, 389 f.

¹⁶⁷ As VAN DER PLOEG T.J. (2009), p. 9, puts it, “NGOs vary more with respect to their possible purposes in Europe, than one would perhaps think. A general characteristic of them is that they may not distribute the eventual profit to the establishers, board members, members etc. This is called: the non-distribution constraint”.

¹⁶⁸ Cf. CIEPIELEWSKA-KOWALIK A. (2020), p. 34 ff.

¹⁶⁹ See art. 9/F Law no. V of 2006 and HARTAY E. (2017), p. 419; INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (2021).

¹⁷⁰ The Swedish Companies Act provides (in chapter 3, sect. 3) that if a company's activities have a purpose other than the generation of profits for distribution to shareholders, this shall be stipulated in the company's statutes. Since 2006, it is also possible to establish private companies limited in the payment of dividends (chapter 32). Their name has to contain the designation “svb”. Cf. HEMSTRÖM C. (2010), p. 743 f.; GIERTZ M. (2017), p. 552 f.

¹⁷¹ There are several national laws in the EU providing for social enterprises in the company form or for a status of social enterprise which is also available to companies: among the most recent laws are the Luxembourg Law of 12 December 2016, Latvian Law of 12 October 2017, Slovakian Law no. 112/2018, Bulgarian Law no. 240/2018.

equity investment. This is also viewed by legislators as a vehicle for encouraging risk-capital investment in the non-profit sector.

An additional explanation for the growth of companies in the non-profit sector is their instrumental use, as subsidiaries, of pure NPOs like associations and foundations. In fact, the possibility to set up one-member companies engaging in economic activities in the interest of the parent NPO justifies the presence of many limited liability companies with the public benefit status in Germany.

Evidently, as we shall also observe later, all this changes the anatomy of the non-profit sector, particularly when companies owning the relevant status are permitted to distribute their profits, even though only partially.

3.3. Different models of legislation: legal forms of incorporation and legal statuses for NPOs

The comparative analysis reveals the existence, usually also in the same jurisdiction, of **two general models of non-profit organization laws**:

- a) **laws that provide for specific forms of incorporation** for non-profit organizations, the main ones of which are, as already observed, the association and the foundation¹⁷²; and
- b) **laws that provide for a public benefit status** (or similar statuses) acquirable by organizations that, regardless of the legal form of incorporation (association, foundation, and frequently also company¹⁷³, etc.), meet certain legal requirements, including (but not limited to) the prohibition on profit distribution.

The second model may be found even in jurisdictions in which the laws providing for specific legal forms of incorporation are detailed, modern and finely structured (like in Belgium). **The second model is increasingly acquiring centrality**, to the point that, in some countries (such as Germany, Ireland and Italy), **non-profit organization law ends up, de facto, coinciding with the law providing for the status**. The status may be relevant only under tax law (as happens, for example, in the Netherlands¹⁷⁴) or at a more general level (e.g., as happens in Italy, also in the relationships with public bodies for the joint provision of welfare services to citizens). There are even countries, like Spain, that not only have organizational laws on associations and foundations, but also several special laws establishing specific statuses for organizations of public/social utility¹⁷⁵.

¹⁷² As already mentioned, laws on mutuals should be added to this list. In contrast, we cannot include company law in this hypothesis, even in the case in which it allows the establishment of companies for any lawful purpose. In fact, in this latter case, the company is not a specific, tailored legal form for non-profit organizations, but a “neutral” legal form that may be adopted either to establish a non-profit organization or, as mostly happens, a for-profit organization.

¹⁷³ Here, generalization is not possible, however, because there are jurisdictions in which companies are not allowed to assume the public benefit status. This is the case, for example, of the Netherlands: cf. RUSSELL R.W.L. (2020), p. 9.

¹⁷⁴ Cf. VAN DER PLOEG T.J (2010), p. 234 f.

¹⁷⁵ In Spain, there are the following statuses: social economy entities (Law no. 5/2011), entities of the third sector of social action (Law no. 43/2015), non-profit entities of social utility eligible for a specific tax regime (Law no. 49/2002).

Formally, the laws that provide for the status may be tax laws (e.g., in Belgium, Germany, and the Netherlands¹⁷⁶) or organizational laws (e.g., in Italy, Hungary¹⁷⁷, Poland¹⁷⁸, the Czech Republic¹⁷⁹). In any event, one of the main objectives of the laws providing for the status is to furnish support, with measures of various kinds (including tax measures), for the organizations that own it. In this regard, they are not “neutral” laws as in contrast are, in general, those providing for legal forms of an NPO’s incorporation.

The status may have different denominations in each country (accredited NPOs, public benefit organizations, third sector organizations, charities, etc.), although in cross-country studies it is commonly referred to as “**public benefit status**” and the organizations that own it are denominated “**public benefit organizations**” (“**PBOs**”)¹⁸⁰. Although the status is based on different requirements depending on the jurisdiction, in this instance **the similarities among jurisdictions**, at least in the general approach to the subject and in the way in which the contours of the status are delineated by law, **abound and seem to outweigh the differences**.

In general, as the comparative analysis demonstrates, the status is obtainable by organizations set up in different legal forms, not only of an association or a foundation, but frequently also of a company, even a shareholder company with only one member. The status is also available to unincorporated entities like the non-independent foundations largely diffuse in France and Germany.

The laws providing for a public benefit (or an equivalent) status do not confine themselves to requiring that the PBO be without a profit purpose but are also particularly precise in regulating this aspect.

The non-profit purpose is assisted by a real **asset-lock** which implies that **the public benefit organization must use its profits and assets exclusively for the fulfilment of its public benefit purpose**. This requirement entails prohibitions such as that of remunerating workers, directors and other board members in a disproportionate and unreasonable manner.

In the national legislation previously examined, one may find meticulous provisions dealing with the issue of the “**indirect distribution of profits**” to avoid the evasion of the profit non-distribution constraint. For the same reasons, the law obliges PBOs to **devolve their residual assets at dissolution in a disinterested manner**, since appropriation at this stage of the entity’s assets by founders, members, directors, etc., would constitute an *ex-post* distribution of profits¹⁸¹.

Finally, conversions and other extraordinary operations (mergers and de-mergers) of PBOs are either prohibited (as happens, for example, for Belgian FUPs) or subject to restrictions in order to ensure that assets remain dedicated to a purpose of public utility¹⁸². In general, these entities may only convert into

¹⁷⁶ Cf. cf. VAN DER PLOEG T.J (2010), p. 234 f.

¹⁷⁷ See Hungarian Law no. CLXXV/2011.

¹⁷⁸ See Polish Law of 24 April 2003.

¹⁷⁹ See Czech Law no. 258/1995 Coll.

¹⁸⁰ Cf. MOORE D. *ET AL.* (2008); RUTZEN T. *ET AL.* (2009).

¹⁸¹ Cf. RUTZEN T. *ET AL.* (2009), stating that “assets of a public benefit foundation must generally remain dedicated to their public benefit goals and may not be distributed to founders after termination”

¹⁸² Cf. RUTZEN T. *ET AL.* (2009): “Laws in many countries, however, provide limitations on transformation. For example, while associations may be free to split into either associations or foundations, foundations may merge with or split into only other foundations (due to concern over protecting the foundation’s property and the concern that in some countries foundations are, by definition, PBOs, while associations may be organized for either mutual-benefit or public-benefit purposes). Albania, the Czech Republic, Estonia, and Slovakia forbid the transformation and merger of foundations (as well as centers and public

other entities that might guarantee the same destination for the assets (e.g., from an association to a cooperative social enterprise, as happens in Belgium, France and Italy), and these operations must be authorized or approved by the public authority that supervises them.

The public benefit status requires not only (and indeed not especially) that organizations be non-profit, but (rather and primarily) that they **exclusively pursue the public benefit**, more precisely, a purpose qualified as such by legislators. National laws thus provide lists of public benefit purposes (like in Germany and Ireland) or activities of general interest that must be carried out by an organization to obtain and maintain the status (like in Italy)¹⁸³.

The law may also contemplate **governance requirements** (such as that of appointing a supervisory board, of publishing special reports on the activity carried out to accomplish the mission, etc.), imposed on the entity for ensuring compliance with the requirements of the status, thereby preventing potential violations of the applicable law¹⁸⁴.

Normally, the entities in possession of the status (or, at times, like in France and Ireland, only a portion of them, formed of organizations that meet further requirements) are **recipients of a favourable tax treatment**. The status is delineated by the law with the sole intention of awarding tax breaks to this group of organizations¹⁸⁵. One of these measures is the **eligibility for tax-privileged donations**, which exists in all countries specifically examined in this Study, although, of course, its detailed regime varies depending on the jurisdiction¹⁸⁶. In this regard, one innovative measure is the “five per thousand” which exists in Italy and similar initiatives in other countries¹⁸⁷.

Public supervision of PBOs is a key point of their regulation, since it is considered indispensable to avoid abuses of the status to the detriment of donors, volunteers, public entities supporting these organizations, and of the public image and perception of PBOs and NPOs at large. Specific rules, as well as specific supervising authorities, do exist in some countries, but in this regard the situation is greatly diverse among EU MSs¹⁸⁸.

benefit companies) into associations and vice-versa. More importantly, public benefit organizations are generally restricted from transforming into mutual benefit organizations or for-profit organizations, for public benefit organizations must use their assets (including public support) to address public benefit goals”.

¹⁸³ Cf. RUTZEN T. *ET AL.* (2009), stating that “to qualify as a ‘public benefit status’ organization, an association or foundation (or other NPO legal form) must be principally dedicated to public benefit purposes and activities”. Cf., also for additional references, MOORE D. *ET AL.* (2008).

¹⁸⁴ Cf. also MOORE D. *ET AL.* (2008).

¹⁸⁵ Cf. VAN DER PLOEG T.J. *ET AL.* (2017), p. 298.

¹⁸⁶ See also RUTZEN T. *ET AL.* (2009), according to which “virtually all of the countries in the region grant at least some benefits to donors for contributions that they make to certain NPOs”. Useful tables depicting the tax treatment of individual and corporate donors in the EU Member States may be found in VON HIPPEL T. (2014), p. 22 ff.

¹⁸⁷ Cf. RUTZEN T. *ET AL.* (2009): “several countries (Hungary, Lithuania, Poland, Romania, and Slovakia) have enacted innovative laws that allow taxpayers to designate 1-2% of their paid taxes to be distributed to qualifying NPOs of their choice”.

¹⁸⁸ See for further references MOORE D. *ET AL.* (2008); RUTZEN T. *ET AL.* (2009).

3.4. Beyond the non-profit in the strict sense: public benefit, third sector, and social economy organizations

On closer inspection, **the laws that provide for a public benefit (or a similar, though differently denominated) status are not specifically laws on non-profit organizations, but rather laws on organizations that pursue a public benefit purpose**, carry out activities of general interest (or of social utility), and are managed and organized in view of their institutional objective. Of course, PBOs are also non-profit, but only as a consequence of their pursuing a primary purpose of public interest. This makes PBOs different from ordinary associations, foundations and other entities that, according to their particular laws, are simply non-profit and not characterized by the pursuit of a particular (social or public benefit) purpose, as well as by a structure devoted to it.

Hence, from a legal perspective, **the non-profit sector and the public benefit sector do not coincide and do not fully overlap**. The former is broader than the latter. The latter is more specific than the former. The profit non-distribution constraint that characterizes the non-profit sector is only an element of qualification, and not even the most important, of the public benefit sector. Indeed, the prohibition on profit distribution is simply the logical corollary of a PBO's duty to exclusively pursue public benefit purposes, which requires the allocation of all its assets and resources for this specific aim.

If the main characteristic of a PBO is the exclusive pursuit of a public interest purpose, then one may understand not only why there are some national laws (such as those in Germany and Ireland) that explicitly allow companies, including shareholder companies, to acquire the status of PBOs (or an equivalent national status however denominated), but also why there are some other **national laws that also allow access to this status to companies that remunerate, within certain limits (by paying dividends or in another way), the capital paid by their members**.

In fact, when the capital provided by shareholders is remunerated within precise and reasonable limits pre-established by the law, remuneration does not represent a distribution of profits to shareholders, but only a **fair compensation for the contribution of a factor of production**. If it were not so, the law should equally not allow a PBO, for example, to pay its workers and directors, since even this compensation would contradict its exclusive public benefit purpose.

Therefore, a limited distribution of profits to shareholders or, more precisely, **a limited remuneration of the capital provided by shareholders** – as usually permitted by the *ad hoc* national legislation on social cooperatives and social enterprises¹⁸⁹ – **should be deemed compatible with the public benefit organization status**. It is, moreover, a measure capable of attracting equity investments, especially from “ethical” investment funds or other institutional investors interested in the development of the public benefit sector, including foundations undertaking practices of so called “venture philanthropy”¹⁹⁰. It does not compromise the fulfilment of the public interest purpose but, on the contrary, it may reinforce it. Indeed, there is nothing that makes it possible to state, *ex ante*, that organizations that limitedly remunerate the share capital are less oriented towards the public interest, less capable of pursuing it or more prone to abusing their status and the benefits thereof.

¹⁸⁹ See, for references to these laws in EU MSs, FICI A. (2017) and FICI A. (2020b).

¹⁹⁰ The possibility to obtain a return on equity investments may overcome some legislative barriers that foundations face in implementing venture philanthropy/social investments, such as that of some national laws requiring a preservation of the value of the endowment: cf. BREEN O.B. (2018), p. 28 f.

If this holds true, then one may understand how subjects like the French and Italian social cooperatives, the Italian companies that qualify as social enterprises, and the French companies that qualify as SSEEs, are able to share the same legal status (as TSOs in Italy and as SSEEs in France) with organizations (like associations and foundations) to which a full prohibition on profit distribution applies¹⁹¹.

In other words, a limited remuneration of the capital provided by the members (in organizations such as companies and cooperatives which have a share capital) should be considered theoretically compatible with the public benefit status, provided that, of course, all the other requirements of the status are met, beginning with the exclusive pursuit of a public benefit purpose.

Therefore, laws such as Italian Legislative Decree no. 117/2017 on TSOs and French Law no. 2014-856 on SSEEs expand the sector without, however, changing its underlying logics, principles and values. Of course, this also applies to any other jurisdiction that has relaxed the requirement of profit non-distribution, but on the other hand does not imply that more severe jurisdictions (like Germany and Ireland), which have not followed the same path, are in error.

If the above holds true, one can grasp the **“crisis” of the profit non-distribution constraint** as the ordering criterion of the public benefit status and understand the **conceptual and terminological transition from the non-profit sector to the third sector or the social economy sector**, which is taking place not only in the law and legal theory, but also in many other fields and contexts. Three recent set of circumstances seem to confirm that unequivocally.

In an important book published in 2018, entitled *“The Third Sector As A Renewable Resource for Europe”*, which summarizes the findings of the Third Sector Impact (TSI) project funded by the European Union’s Seventh Framework Program (FP7), one of the co-editors, Bernard Enjolras, after having pointed out in the introduction that **“the third sector in Europe lacks a clear identity** and there is no clear-shared understanding across Europe and within the European Union regarding what exactly the third sector is and what its role is in the European public space”, clarifies that the goal of the book is providing a better understanding of the third sector¹⁹².

In the next chapter, bearing the evocative title *“Beyond Nonprofits: In Search of the Third Sector”*, Lester Salamon (another co-editor of the Book) and Wojciech Sokolowski, begin their essay by underlining that “existing diversity of views over whether something that could appropriately be called the ‘third sector’ actually exists in different parts of the world and, if so, what it contains”, that “the ‘third sector’, and its various cognates [i.e. social economy, civil society and social entrepreneurship], is probably one of the most perplexing concepts in modern political and social discourse”¹⁹³, and that the same sector is identified using different terms “including civil society sector, nonprofit sector, voluntary sector, charitable sector, third sector and, more recently, social economy, social enterprise and many more”¹⁹⁴.

Therefore, they propose to discuss a broader **“third or social economy” sector (“TSE sector”)**¹⁹⁵, which includes not only “classical” non-profit organizations – namely, the organizations “governed by

¹⁹¹ Two countries had already enacted laws on the social economy before France, thus introducing the legal status of social economy organizations, namely, Spain (Law no. 5/2011) and Portugal (Law no. 30/2013): cf. FAJARDO GARCÍA G. (2018) and MEIRA D. (2013). Differences between these laws and French law on the same subject do exist: cf. MACÍAS RUANO A.J., PIRES MANSO J.R. (2019).

¹⁹² ENJOLRAS B. (2018), p. 4.

¹⁹³ SALAMON L.M., SOKOLOWSKI W. (2018), p. 10.

¹⁹⁴ SALAMON L.M., SOKOLOWSKI W. (2018), p. 11.

¹⁹⁵ SALAMON L.M., SOKOLOWSKI W. (2018), p. 15.

binding arrangements prohibiting distribution of any surplus, or profit, generated to their stakeholders or investors"¹⁹⁶ and thus corresponding to the organizations covered by the well-known *United Nations Handbook on Non-profit Institutions in the System of National Accounts* of 2003 – but, more in general, all the organizations characterized by a “public purpose”, that is, “undertaken primarily to create public goods, something of value primarily to the broader community or to persons other than oneself or one’s family, and not primarily for financial gain; exhibiting some element of solidarity with others”¹⁹⁷.

This leads the Authors to consider the TSE sector composed of not only NPOs, but also mutuals, cooperatives and social enterprises, or at least some of them, and specifically those that, although they distribute some surpluses generated by their activities are, by law or custom, “significantly limited” in the extent of this distribution¹⁹⁸.

The conclusion of this authoritative analysis is that to be considered part of the TSE sector, entities must be:

- **Organizations, whether formal or informal**
- **Private**
- **Self-governed**
- **Non-compulsory** and
- **Totally or significantly limited from distributing any surplus they earn to investors, members or other stakeholders**¹⁹⁹.

For the last requirement to be met, “organizations must be prohibited, either by law, internal governing rules, or by socially recognized custom from distributing either all or a significant share of the profits or surpluses generated by their productive activities to their directors, employees, members, investors or others”²⁰⁰.

More precisely, the determination that an organization has a significant limitation on profit distribution is founded by the Authors on the following four (cumulative) indicators²⁰¹:

¹⁹⁶ SALAMON L.M., SOKOLOWSKI W. (2018), p. 18.

¹⁹⁷ SALAMON L.M., SOKOLOWSKI W. (2018), p. 25. According to DEFOURNY J., NYSSENS M. (2016), p. 1547, “The attempt made by L.S. Salamon and S.W. Sokolowski to propose an extended conception of the third sector, beyond typical non-profit institutions, represents a significant progress at various levels. Most importantly, it takes into account some rules and practices that are found in some cooperatives, mutuals and social enterprises. By doing so, the boundaries of the third sector are moved, thus allowing the inclusion not only of non-profit institutions but also of some social economy organizations as conceptualized in many countries, especially across Europe and Latin America”.

¹⁹⁸ SALAMON L.M., SOKOLOWSKI W. (2018), p. 33.

¹⁹⁹ SALAMON L.M., SOKOLOWSKI W. (2018), p. 33.

²⁰⁰ SALAMON L.M., SOKOLOWSKI W. (2018), p. 36. The Authors go on explaining that “This attribute distinguishes TSE sector organizations from corporations, which permit the distribution of surpluses generated to their owners or shareholders. TSE organizations may accumulate surplus in a given year, but that surplus or its significant share must be saved or plowed back into the basic mission of the agency and not distributed to the organizations’ directors, members, founders or governing board. In this sense, TSE organizations may be profitmaking but unlike other businesses they are nonprofit-distributing, either entirely or to a significant degree”.

²⁰¹ SALAMON L.M., SOKOLOWSKI W. (2018), p. 37 ff.

a) **explicit social mission** (“to be considered in-scope of the TSE sector, an organization must be bound by law, articles of incorporation, other governing documents or settled custom to the pursuit of a social purpose”);

b) **no distribution of more than 50% of surplus;**

c) **capital lock** (prohibition on the distribution of the retained surplus and any other assets owned by the organization to its owners, directors or other stakeholders, in the event of the organization’s dissolution, sale or conversion to “for-profit” status”);

d) **no distribution of surplus in proportion to capital invested or fees paid** (which, however, “does not apply to payment of interest on invested capital so long as the interest does not exceed prevailing market rates or rates on government bonds”)²⁰².

The TSE sector, as delineated by Salamon and Sokolowski, is a non-legal attempt to qualify the same category of organizations that we have sought to identify in this Study, based on the existing European national legislation. The results are not identical but similar. They are certainly so with regard to the centrality of the public purpose in the identification of in-scope organizations and the conviction that the profit non-distribution constraint is only an element of identification and not even the most important element.

The research activity culminated in the book *“The Third Sector As A Renewable Resource for Europe”* illustrates the increased frequency with which larger organizational sectors, such as **the third sector and the social economy sector, are gaining centrality over the pure non-profit sector in research and the public debate.**

If this holds true, it does not come as a surprise, therefore, that the new United Nation’s Handbook on Satellite Account on Non-profit of 2018, conceived of as an update of the well-known Handbook on Non-profit Institutions in the System of National Accounts of 2003, takes a broader approach and offers comprehensive methodological guidance for creating a coherent satellite account on what is called **the third or social economy (TSE) sector, which embraces non-profit institutions and other related institutions**, including eligible cooperatives, mutual societies and social enterprises. **Related institutions are not non-profit institutions but, like non-profit institutions, chiefly serve social or public purposes and are not controlled by government.** They take a variety of organizational forms, such as cooperatives, mutual societies, social enterprises and non-stock (or benefit) corporations. The related institutions that the Handbook recommends for inclusion in the TSE sector satellite account fall within the scope of the sector even if they distribute some profit to the units that establish, control or finance them, **provided that such profit distribution is “significantly limited”**. That constraint is consistent with the principle that the primary purpose of the entities concerned is serving the public good and not generating income or profit for the units that establish, control or finance them²⁰³.

²⁰² According to DEFOURNY J., NYSENS M. (2016), p. 1550 f., “To reflect the ‘public purpose’ of TSE organizations by better combining key features from both the non-profit and the social economy approaches, we would therefore suggest to keep the authors’ first three criteria and to transform the fourth one so as to avoid the above contradiction and to have four compulsory criteria that are easily observable characteristics: (i) Pursuing a legally binding social mission; (ii) Operating under a ‘asset lock’; (iii) Being prohibited from distributing more than 50 % of profits; and (iv) Limiting by a clearly defined cap the interest that may be paid on capital shares ... In our view, the “public purpose” dimension, combined with relaxing the non-profit distribution constraint, represents an original and interesting avenue to enlarge the third sector conceptualization strictly based on non-profit institutions”.

²⁰³ Cf. UNITED NATIONS (2018).

Finally, it is worth highlighting that the recipients of the most recent policies of the European Commission are **not non-profit organizations, but social enterprises and social economy organizations**. They are seen as a fundamental factor of job creation, inclusive and sustainable growth and labour market integration (particularly for people furthest from the labour market), industrial development and of enabling reskilling and upskilling. They are appreciated for their contribution to social innovation and inclusion, as well as because they complement the public provision of social services, including care services; they allow workers and citizens to devise innovative bottom-up initiatives and to pursue social and environmental objectives through alternative business models; they have a considerable potential for creating fair development models and decent jobs outside of the EU, especially in the developing partner countries.

Following the Social Business Initiative of 2011, the EC announced, in its Communication on “A Strong Social Europe for Just Transitions”²⁰⁴, an **action plan for the social economy** to enhance social investment and social innovation and boost the potential of social enterprises to create jobs, including for those furthest from the labour market. The 2021 Commission work programme set the publication date of the action plan in the last quarter of 2021. Consultation of citizens and stakeholders is currently taking place to receive input for the action plan.

In conclusion, the TSE sector, as described above, may increasingly become the new term of reference for legislators wishing to recognize and promote private non-profit organizations that exclusively or primarily pursue social objectives.

3.5. Out-of-scope organizations

However, although attenuated, the criterion of the prohibition on the distribution of profits cannot be completely eliminated. For an entity to assume the public benefit status (or a similar status, however denominated), profit sharing cannot ever constitute the primary purpose of the entity and not even, properly speaking, its secondary purpose, but solely, as we have previously sought to explain, a means to implement an entity's exclusive or main public benefit (or social utility) purpose. It follows that companies that do not prioritize a public benefit purpose but limit themselves to taking it into consideration while primarily serving a for-profit purpose in the interest of their shareholders should, in any case, be deemed to be outside the scope of the public benefit status (or third sector status, social economy status, etc.). This should be the correct conclusion²⁰⁵ with regard to “**benefit companies**” (like those provided for by Italian Law), “**mission companies**” (like those provided for by French Law), or similar typologies of companies, however denominated, inspired by US models²⁰⁶. If anything, given the social relevance they have in any case, they might constitute an autonomous sector of organizations of social interest (a sort of “**fourth sector**”), which is, however, distinct from the sector examined in this Study.

²⁰⁴ See EUROPEAN COMMISSION (2020).

²⁰⁵ Even though, admittedly, there may be hypotheses which are difficult to evaluate, such as that of the French ESUS status which, however, has characteristics that seem to make it compatible with the public benefit status understood in a broader perspective.

²⁰⁶ On which see BRAKMAN REISER D. (2014).

4. ON A EUROPEAN LEGAL STATUTE FOR ASSOCIATIONS AND NON-PROFIT ORGANIZATIONS

At the EU level, a specific legal statute for non-profit organizations does not exist.

However, **legal persons that are “non-profit making” are mentioned in art. 54(2) TFEU** (formerly art. 48 TEC)²⁰⁷. Since it seems to exclude NPOs from the scope of the fundamental freedoms of the EU, this provision has sparked a heated debate²⁰⁸, partly stifled by some judgements of the CJEU that have attenuated the provision’s potential negative impact on an NPO’s fundamental freedoms in the EU and obliged several MSs to adapt their national laws regarding NPOs to these protective judicial interpretations of EU law.

Indeed, in a group of key judgements, the CJEU²⁰⁹ “has developed a general **non-discrimination principle**, according to which an EU-based foreign PBO is entitled to hold the same tax-privileged status as a national PBO, provided that it can be shown to be comparable to a national PBO”²¹⁰.

More precisely, it stems from these judgements that:

- “It is at the discretion of Member States whether or not they wish to provide for tax privileges for PBOs and their donors. Similarly, Member States are in principle free to determine the relevant conditions

²⁰⁷ Art. 54, para. 2, TFEU (ex 48 TEC), reads: “Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘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”.

²⁰⁸ Cf. LOMBARDO S. (2013).

²⁰⁹ Cf. *Laboratoires Fournier* (C-39/04 [2005]): “Article 49 TEC precludes legislation of a Member State which restricts the benefit of a tax credit for research only to research carried out in that Member State”.

Centro di musicologia Walter Stauffer (C-386/04 [2006]): “Article 73b of the EC Treaty, in conjunction with Article 73d of the EC Treaty, must be interpreted as precluding a Member State which exempts from corporation tax rental income received in its territory by charitable foundations which, in principle, have unlimited tax liability if they are established in that Member State, from refusing to grant the same exemption in respect of similar income to a charitable foundation established under private law solely on the ground that, as it is established in another Member State, that foundation has only limited tax liability in its territory”.

Hein Persche (C-318/07 [2009]): “Where a taxpayer claims, in a Member State, the deduction for tax purposes of gifts to bodies established and recognised as charitable in another Member State, such gifts come within the compass of the provisions of the EC Treaty relating to the free movement of capital, even if they are made in kind in the form of everyday consumer goods. Article 56 TEC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit”.

Missionswerk (C-25/10 [2011]) “Article 63 TFEU precludes legislation of a Member State which reserves application of succession duties at the reduced rate to non-profit-making bodies which have their centre of operations in that Member State or in the Member State in which, at the time of death, the deceased actually resided or had his place of work, or in which he had previously actually resided or had his place of work”.

European Commission v Austria (C-10/10 [2011]): “by authorising the deduction from tax of gifts to research and teaching institutions exclusively where those institutions are established in Austria, the Republic of Austria has failed to fulfil its obligations under Article 56 TEC”.

²¹⁰ VON HIPPEL T. (2014), p. 8.

and requirements. It is theoretically also permissible for the beneficiary circle, namely the recipients of the support of the PBO, to be limited to domestic citizens or to persons living within the domestic territory. Member States are in particular not obliged to automatically grant a status equivalent to that of a domestic PBO to a foreign EU-based PBO recognized as holding tax-privileged public-benefit status in its country of origin.

- However, limits to the scope of discretion of the Member States are established by the fundamental freedoms of the Treaty on the Functioning of the EU:

- It is not permitted that foreign EU-based PBOs and their donors are excluded from eligibility for tax privileges if, *seat aside*, they fulfil all requirements of the national public-benefit tax law.

- It is not permitted that a (domestic or foreign EU-based) PBO is required to undertake its philanthropic activities in the Member State which grants the tax privilege unless there are compelling objective reasons for this. Such reasons do not, for example, exist in the case of the promotion of science as a public-benefit purpose; Member States must not restrict tax benefits for donors of gifts made to domestic universities or laboratories.

- It is necessary in cross-border cases that Member States carry out a comparability test to determine whether or not a foreign EU-based PBO meets the requirements of national tax law. Such tests are to be carried out by the national authorities and courts of the Member State concerned.

- Within the framework of the comparability test the competent national authorities may require the foreign PBO, and/or as relevant its donors, to provide any documentation they deem useful for the carrying out of the comparability test²¹¹.

Notwithstanding the above, research on this specific point has shown that **the non-discrimination principle established by the ECJ has not yet been implemented in the text of the national laws of all the MSs**, and that **the comparability test remains a barrier to cross-border philanthropy**, as there is no formal or uniform approach to it (no two countries have the same procedures and there are even countries in which no procedure stated by law exists) and the burden of proof lies with the PBO or the donor claiming the tax-incentive. The comparability test is "lengthy, costly and accompanied by a certain level of legal uncertainty"²¹². The existing differences among national laws in the requirements for a PBO's recognition (as also shown by our comparative analysis) contribute to this result.

To overcome this serious obstacle to European cross-border philanthropy, legal scholars recommend various strategies, ranging from the simplification of the national procedures for comparability, by adopting effective regulations to this purpose, such as those existing in Luxembourg and the Netherlands²¹³, to the adoption of international treaties that would enable a foreign-based PBO's tax-privileged status to be automatically recognized in the jurisdictions of all the contracting countries²¹⁴.

Of particular relevance to our analysis is the authoritative recommendation regarding the establishment of model statutes that reflect the requirements that a PBO should meet in order to be eligible for the tax-privileged public-benefit status throughout the EU²¹⁵.

²¹¹ In these terms VON HIPPEL T. (2014), p. 12 f.

²¹² VON HIPPEL T. (2014), p. 9.

²¹³ BREEN O.B. (2018), p. 48 f.; BREEN O.B. (2020), p. 10.

²¹⁴ Cf. VON HIPPEL T. (2014), p. 9.

²¹⁵ VON HIPPEL T. (2014), p. 9.

Meanwhile, the CJEU continues defending NPOs and philanthropic activities against national legal restrictions that might hamper their cross-border capacity. In a recent case²¹⁶, the CJEU stated that: “by adopting the provisions of the Law No. LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad, which impose obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and which provide for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary has introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union”²¹⁷.

Another area in which the CJEU’s contribution to EU NPO law is evident is competition and state-aid.

On the one hand, the CJEU has repeatedly stated that **the non-profit purpose of an organization does not preclude its possible classification as an undertaking (or economic operator) within the meaning (and for the effects) of competition law**, since the notion of economic activity consists in offering goods or services in a given market, regardless of the purpose pursued by the organization, its legal status, and the way in which it is financed²¹⁸.

On the other hand, in another group of important judgments, the Court recognized the specificities of NPOs by stating that national laws favouring certain types of non-profit organizations in contractual relations with public bodies for the provision of certain services (such as emergency services and ambulance emergency services) can be considered, under certain conditions, compatible with EU public procurement law²¹⁹.

In EU Constitutional law, the role of civil society and its organizations is acknowledged by art. 11(2) TEU, pursuant to which “the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”. Accordingly, art. 300(2) TFEU provides that “the Economic and Social Committee shall consist of representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio-economic, civic, professional and cultural areas”²²⁰.

²¹⁶ *European Commission v. Hungary*, C-78/18 [2020].

²¹⁷ The 2017 Hungarian law in question required Hungarian NGOs that received more than 24,000 EUR of foreign funding in a given year to register as a “foreign funded organisation”, to display this status on their website, and to report the details of each donor to the court of registration.

²¹⁸ Cf., among many others, *Ambulanz Glöckner* (C-475/99 [2001]), where references to previous conforming decisions may be found.

²¹⁹ Cf. the following CJEU cases: *Spezzino* (C-113/13 [2014]); *Casta* (C-50/14 [2016]); *Falck* (C-465/17 [2019]); and *Italy Emergenza* (C-424/18 [2019]).

In the well-known *Sodemare* case (C-70/95 [1997]) the CJEU had already stated that “articles 52 and 58 of the EC Treaty do not preclude a Member State from allowing only non-profit-making private operators to participate in the running of its social welfare system by concluding contracts which entitle them to be reimbursed by the public authorities for the costs of providing social welfare services of a health-care nature”.

²²⁰ On this specific subject see ARATÒ K. (2010); VERSTEEGH C.R.M. (2017); DIVJAK T., FORBICI G. (2018); STRATULAT C. ET AL. (2020); EESC (2020).

Under EU VAT tax law, the non-profit nature of the organization may be relevant in presence of other conditions for the purpose of granting (or rather, of limiting the concession of) tax-exemptions for certain activities of public interest (art. 133 Council Directive no. 2006/112/EC of 28 November 2006)²²¹.

The EP has recently approved a **resolution calling on the EC to introduce at the Union level an EU Statute for European “social and solidarity-based enterprises”**²²². The EC had already launched, in its Social Business Initiative of 2011, an Action Plan to support social enterprises in Europe. SEs were considered within EU Regulation no. 1296/2013 on the “EaSI” and EU Regulation no. 346/2013 on the “EuSEF”²²³. A new Action Plan for the social economy is expected for the fourth quarter of this year²²⁴.

Even this brief overview may be sufficient to demonstrate that non-profit organizations, civil society organizations (sometimes also referred to as third sector organizations) and social and solidarity-based enterprises (sometimes also called social enterprises or social economy organizations) are therefore not unknown at the EU level and ignored by the EU institutions, but are, on the contrary, the subject of specific case-law, recipients of *ad hoc* policy initiatives, and actually involved in the institutional life of the EU pursuant to enabling legal provisions. The fact remains, however, that EU organizational law does not consider them at all, and as a result **they are, and can only be, creatures of their national laws**.

And yet, the state of the art could have been different had the numerous attempts to introduce EU statutes on NPOs not failed. Indeed, the proposed statutes for European associations, foundations and mutuals – the first official proposal on associations dates back to 1991²²⁵; that on foundations was made

²²¹ These organizations are identified by art. 133 as follows: “(a) The bodies in question must not systematically aim to make a profit, and any surpluses nevertheless arising must not be distributed, but must be assigned to the continuance or improvement of the services supplied;

(b) those bodies must be managed and administered on an essentially voluntary basis by persons who have no direct or indirect interest, either themselves or through intermediaries, in the results of the activities concerned;

(c) those bodies must charge prices which are approved by the public authorities or which do not exceed such approved prices or, in respect of those services not subject to approval, prices lower than those charged for similar services by commercial enterprises subject to VAT;

(d) the exemptions must not be likely to cause distortion of competition to the disadvantage of commercial enterprises subject to VAT”.

²²² See European Parliament Resolution of 5 July 2018 with recommendations to the Commission on a Statute for social and solidarity-based enterprises (2016/2237(INL)).

²²³ EaSI stands for “European Union Programme for Employment and Social Innovation”. The programme ran from 1 January 2014 to 31 December 2020, with the aim “to contribute to the implementation of Europe 2020, including its headline targets, Integrated Guidelines and flagship initiatives, by providing financial support for the Union’s objectives in terms of promoting a high level of quality and sustainable employment, guaranteeing adequate and decent social protection, combating social exclusion and poverty and improving working conditions” (art. 1, Reg. no. 1296/2013). EuSEF stands for “European social entrepreneurship funds”. The Regulation “lays down uniform requirements and conditions for managers of collective investment undertakings that wish to use the designation ‘EuSEF’ in relation to the marketing of qualifying social entrepreneurship funds in the Union, thereby contributing to the smooth functioning of the internal market. It also lays down uniform rules for the marketing of qualifying social entrepreneurship funds to eligible investors across the Union, for the portfolio composition of qualifying social entrepreneurship funds, for the eligible investment instruments and techniques to be used by qualifying social entrepreneurship funds as well as for the organisation, conduct and transparency of managers that market qualifying social entrepreneurship funds across the Union” (art. 1, Reg. no. 346/2013).

²²⁴ Cf. COM(2020) 14 final of 14.1.2020 on a “Strong Social Europe for Just Transitions”, p. 6 f. A public consultation on the subject is taking place just while writing these lines.

²²⁵ An EU statute on associations was first recommended in Nicole Fontaine’s “Report on Non-Profit Making Associations in the European Community” of 8 January 1997, followed in the same year by a Resolution of the EP. The first proposal was

in 2012²²⁶; the first proposal on mutuals is of 1992 and a new draft proposal was discussed more recently²²⁷ – were not successful, despite the considerable efforts of the EU institutions and despite the stakeholders' groups pressing for their approval.

Particular attention, as already observed in this Study, is now being given by the EC to the social economy and the organizations that form this sector, but in this regard no concrete legislative proposals have so far been advanced.

Is it possible to remedy this situation? And, first of all, is it advisable to do that?

The answer to the second question can only be positive. Indeed, **an EU regulation of non-profit organizations would bring significant political, social and economic benefits**, whereas **maintaining the *status quo*** and relying only on (albeit) important decisions of the CJEU and soft law instruments, **is a policy perspective whose limits, in terms of benefits, have already been highlighted by the most careful legal doctrine**²²⁸.

There are a number of reasons for this conclusion which have already been highlighted over time by EU institutions, stakeholders and scholars dealing with this topic, and which do not need any further explanation here, such as:

- promoting civil society as the engine of participatory democracy;
- enabling the engagement of citizens and building a citizen-led Europe;
- favouring actors that help to rectify major labour market imbalances;
- favouring actors that are able to promote good and stable jobs, even in times of economic crises;
- making free movement effective by removing legal obstacles to cross-border activities of national NPOs;
- encouraging transnational initiatives of public benefit by citizens and NPOs²²⁹;

presented by the EC on 18 December 1991. A second amended proposal was put forward in 1993. It attracted criticism by some MSs, notably Germany, Denmark and the United Kingdom. The proposal was officially withdrawn by the EC in 2005. After public protest against this decision, both the EESC in 2006 and the EP in 2011 pushed for the adoption of a European statute for associations. The withdrawal in 2015 of the proposed European Foundation Statute led the EC to maintain that the endorsement of such an initiative by the Council seemed unlikely at that time. The EESC has revisited this point, once again calling upon the Commission to take actions in this regard. Cf. WOFFEN T. (2018) for greater details and references.

²²⁶ The EC officially withdrew the proposal for a European foundation statute in 2015 after 8 MSs (Austria, Denmark, Estonia, Germany, the Netherlands, Portugal, Slovakia and the UK) rejected it. The proposal was preceded by an important feasibility study: cf. HOPT K.J. *ET AL.* (2009).

²²⁷ The first proposal was officially withdrawn in 2006. Activities on the subject resumed in 2010. Two studies on mutuals were then commissioned: cf. GRIJPSTRA D. *ET AL.* (2011) and PANTEIA (2012). The EP adopted a specific resolution in 2013. The EC launched a public consultation in 2013. Since then, there has been no news on the EC website. While AMICE – the association of mutual insurers and insurance cooperative in Europe – talks on its website about a draft regulation sent to inter-services consultation in April 2014.

²²⁸ cf. HOPT K.J. *ET AL.* (2009), p. 4: “Under the status quo model some improvements, though only minor ones, are feasible. The ECJ will probably develop a general non-discrimination rule as regards tax law barriers, and some of the civil law barriers may be regarded as infringements of the EC Treaty in future ... Nevertheless, it will be hard to reduce the current costs significantly: The very fact that 27 Member States are involved creates a substantial level of complexity by the number of possible combinations ... So the main part of the costs will remain even if we follow a very optimistic approach”.

²²⁹ Cf. HOPT K.J. *ET AL.* (2009), p. 1: “There are legal barriers to cross-border activities of foundations of the Member States both in civil law and in tax law. As in company law, most of the barriers can be overcome, but this leads to compliance costs which will often be higher than they would be in company law, given that the legal and personal environments vary (foundation

- providing incentives for more corporate giving and corporate social responsibility;
- promoting cross-border philanthropy²³⁰;
- favouring collaboration among national NPOs, the grouping of them, as well as transnational mergers and acquisitions;
- promoting the understanding and increasing the visibility of NPOs at the EU level;
- favouring *de facto* approximation of national NPO laws²³¹;
- uniting European citizens and fostering social cohesion;
- achieving (also in light of the objective of pluralism of the enterprise legal forms)²³² equal treatment of NPOs with respect to organizations (such as companies and cooperatives) for which supranational legal forms have already been provided by EU law²³³.

Another (hopefully contingent) aspect that must be added to this list of good motivations is the recent pandemic crisis, which has highlighted the fundamental role of NPOs in guaranteeing not only social cohesion, but the very survival of communities²³⁴.

Returning to the first question, namely the feasibility of this legislation, in our opinion, it strongly depends on its general characteristics.

Just as we have already ruled out maintaining the *status quo* as a recommendable strategy, we must also immediately exclude the feasibility of another “extreme” strategy²³⁵, namely the harmonization of the law of non-profit organizations in the Member States of the EU. **Full harmonization is unrealistic for several reasons**, including the enormous work that this process would require in consideration of the substantial differences among European national laws and the plurality of legal forms to be harmonized (associations, foundations, mutuals); the fact that this strategy would not be accepted either by the Member States or by the stakeholders themselves²³⁶; and finally, the new attitude of MSs towards harmonization, as seen in the most recent debate on the development of European company law²³⁷.

and tax laws of the Member States seem to have more legal uncertainties inter alia because of much less case law and fewer specialised lawyers, and because board members of foundations may be less experienced in legal issues). The calculable cost of barriers against cross-border activities of European foundations ranges from an estimated € 90,000,000 to € 101,700,000 per year. Additionally, there are incalculable costs (costs of foundation seat transfer, costs of reduplication, psychological costs, costs of failure, etc.) which are certainly higher”.

²³⁰ As already highlighted in the main text, although the jurisprudence of the CJEU has helped to facilitate cross-border philanthropy, national legislation continues to be a difficult obstacle to overcome.

²³¹ This is a potential side-effect already highlighted in the process of revision of SCE Regulation no. 1435/2003: see FICI A. (2010).

²³² On this point, see the Opinion of the EESC “on the diverse forms of enterprise” of 1 October 2009.

²³³ We refer, of course, to Regulations no. 2157/2001 of 8 October 2001, on the European Company, no. 1435/2003 of 22 July 2003, on the European Cooperative Society, and no. 2137/1985 of 25 July 1985, on the European Economic Interest Grouping.

²³⁴ Cf. OECD (2020); TAGEO V. ET AL. (2021).

²³⁵ Cf. HOPT K.J. ET AL. (2009), p. 4.

²³⁶ See already mentioned as regards foundations HOPT K.J. ET AL. (2009), p. 7.

²³⁷ The EU strategy regarding company law has changed following the Action Plan of 2003 (COM(2003) 284 final), which was based on the 2002 Report from the High Level Group of Company Law Experts. Harmonization started to be considered not

The fact that the EP, in recently invoking a European regulation on social enterprises, has not even considered the path of harmonization seems to be very significant in this regard²³⁸.

In conclusion, once the two opposite extremes are excluded (i.e., the maintenance of the *status quo* and the harmonization of national laws), three available options remain, one of which seems to be the most feasible and the most worthy of recommendation at the moment, namely the creation, through an EU directive, of a European status for NPOs.

4.1. Creating supranational legal forms of NPOs through regulations

The creation of supranational legal forms of NPOs through *ad hoc* EU regulations (similar to those that have introduced other types of organizations in the past, namely, the European Economic Interest Grouping in 1995, the European Company in 2001, and the European Cooperative Society in 2003) has been the unsuccessful strategy pursued by the EU institutions over recent decades. Is it possible to propose it again? Would that make sense, and would it have any chance of success?

Indeed, no one could deny that, in principle, the adoption of such EU statutes would be beneficial and would meet the expectations of all the stakeholders²³⁹. These statutes would provide specific optional EU legal vehicles for NPOs, which would be recognized in all MSs without replacing their national law counterparts. These additional pan-European legal forms of NPOs would appear to overcome all the existing legal barriers to cross-border operations, ensure a level playing field for NPOs, promote NPOs and their activities, improve their public image and visibility, serve as models for national legislators thus promoting indirect approximation of national laws, etc.

In reality, as has already been observed and is known to all, **this strategy has already failed with respect to all types of non-profit organizations (associations, foundations and mutuals)²⁴⁰, and there are no new elements such to exclude the possibility that the failures that have occurred so far do not happen again.**

On the contrary, today, the general climate seems even more hostile to their introduction than it was in the past. This is also due to the fact that it has now been ascertained with sufficient certainty that, as they are currently designed, European laws introducing organizational legal forms of EU law do not achieve their primary purpose, i.e. to be used by interested citizens and organizations, especially when

as an end in itself, but as an instrumental good valued for its capacity to improve the efficiency of business functioning. This has led to a minimalist approach to EU company law: harmonization directives should be adopted only as far as they are useful for firms, and they should mainly concentrate on cross-border issues in the name of subsidiarity. Furthermore, the new approach should involve increased use of default rules and options, so that EU law might enable, rather than constrain, national legislatures. Similarly, EU legislation should concentrate on parties' freedom to select the applicable law in order to foster competition among MSs to improve their national laws, avoid national business migration (passive competition) and attract foreign businesses (active competition). The expectation is that this strategy will lead to greater cohesion of national company laws, although following a different route, which is bottom-up rather than top-down as in the case of directives. This new strategy – proposed by the EC – certainly reflects a less optimistic view of European integration, one in which MSs are reluctant to undergo top-down harmonization and EU institutions have thus to explore indirect ways of harmonizing or approximating national laws, with uncertain success and results. Cf. recently ENRIQUES L. (2017).

²³⁸ Cf. EUROPEAN PARLIAMENT (2018).

²³⁹ Cf. GJEMS-ONSTAD O. (1995); CHARRAD K. (2014).

²⁴⁰ The European Private Company proposed by the EC in 2003 and subsequently abandoned must be added to this (already rather) long list.

national laws are not sufficiently harmonized. The study on the implementation of EU Regulation no. 1435/2003 on the European cooperative society was key to understand it²⁴¹.

Introducing a European legal form that (by virtue of several references) would, in reality, be strongly regulated by national laws and would not enjoy its own taxation, means introducing a legal form that no one uses, leading to preference being given to the homologous forms set out in national law²⁴².

Furthermore, the same reasons that explain Member States' resistance to the harmonization of national laws, could also determine their resistance to the introduction of pan-European legal forms (which would compete, also from a cultural point of view, with national legal forms)²⁴³. If this is true, **the unanimity necessary for the purpose of introducing these statutes, on the basis of art. 352 TFEU²⁴⁴, remains, if not impossible, very difficult to obtain²⁴⁵**, also because unanimity should concern not only one, but a plurality of legal forms of NPOs. It is significant that, as already observed in this Study, **when the EP recently called for specific EU legislation on social enterprises, it did not recommend the adoption of an EU regulation similar to those that already exist²⁴⁶**.

But there is more. Regardless of the intentions of the MSs, there would be concrete difficulties to be overcome.

Indeed, this strategy should include not just one, but several European statutes, and should certainly include those of the European association, the European foundation and the European mutual. Indeed, it would not be desirable to approve a single statute, for example that of associations, whilst neglecting the others. For each legal form, common contents should then be identified on which all MSs should agree, which is certainly not an easy task. The differences in the way MSs regulate the pertinent organizational forms are significant and this is true for all the legal forms that would be involved in this process (associations, foundations and mutuals).

On an even more general level, this strategy would risk excluding from the European non-profit sector not only the non-profit companies variously recognized by national laws, but also those organizations

²⁴¹ Cf. FICI (2010).

²⁴² With regard to the failure of the European Cooperative Society in this regard, see Cf. FICI (2010).

²⁴³ This negative attitude has even prevented the revision of existing EU organizational law which needed revising, such as Regulation no. 1435/2003 on the European Cooperative Society: cf. FICI (2010).

²⁴⁴ Art. 352(1) TFEU so reads: "1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

²⁴⁵ As Professor Breen notes, "If one starts from the premise of this less than ideal infrastructure, it is perhaps not so surprising that building new structures reliant on this same infrastructure can be quite challenging. The past thirty years have seen numerous unsuccessful attempts to create new European legal vehicles to facilitate cross-border philanthropy. Amongst those failures have been proposals for the European Association, the European Foundation, and the European Mutual Society (twice). In each of these instances, the process of their adoption has either been officially suspended or interrupted. The common factor shared by all these initiatives, which also led in each case to their downfall, has been the reliance on Art 352 TFEU (or Art 308 EC) as the legal basis for their promulgation": cf. BREEN O.B. (2018), p. 13. Cf. also VERSTEEGH C.R.M. (2017), p. 59: "the desire to introduce a law that allows a minimum form of harmonization for CSOs is understandable, but it is also virtually infeasible".

²⁴⁶ Cf. EUROPEAN PARLIAMENT (2018), where on the contrary it is stated that "in light of this diversity of legal forms available for the creation of social and solidarity-based enterprises across Member States, there is no consensus in the European Union at this point in time for setting up a specific form of social and solidarity-based enterprise".

that some national laws put together with (pure) non-profit entities within broader organizational categories of public interest, such as those of “third sector entities” and “social economy entities”. It would therefore not be in keeping with the times to reduce the “new” European non-profit sector to the “traditional” non-profit sector merely based on the non-distribution of profits. Legislation and science, legal and non-legal, have made significant progress in this regard, as we have already tried to explain in this Study²⁴⁷. It has been demonstrated, on the one hand, that entrepreneurial activity can be oriented in the public interest, and on the other hand, that companies that distribute profits to a limited extent can serve the public interest as effectively, and in certain cases even more effectively than more traditional entities based on a full constraint on profit distribution, the prevalence of voluntary work and the predominant gratuitousness of their action.

In short, in order to keep up with the times and not be already anachronistic, European legislation should take these recent developments into account. **Proceeding according to legal forms is not only complex from a practical point of view, but probably also counterproductive from a theoretical and systematic point of view.** There is therefore a clear need to proceed in another way.

4.2. Using the mechanism of enhanced cooperation

The undeniable difficulties inherent in the use of regulations based on art. 352 TFEU, and therefore on the unanimous consent of all Member States, have encouraged a scholar to suggest another legal basis for the adoption of the same regulations, namely art. 20 TEU, which provides for the “enhanced cooperation” mechanism. The use of this procedure would lead to the **adoption of one or more regulations establishing European legal forms of non-profit entities only in the participating Member States**, which must be at least nine in number.

The application of art. 20 TEU is subject to several conditions: enhanced cooperation must aim to further the objectives of the Union, protect its interests and reinforce its integration process; it must be open at any time to all Member States; the decision authorising enhanced cooperation must be adopted by the Council “**as a last resort**” once it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole; enhanced cooperation must be politically supported by the EC, approved by a majority vote in the EP and by a qualified majority in the Council.

As regards the impossibility of applying art. 352 TFEU in this matter, we can limit ourselves to referring to Professor Breen’s compelling opinion. She argues that: “It would be fair to say that the EU treaties have made it difficult to date to develop bespoke legal vehicles to advance philanthropy per se on a pan-European basis. Civil Law and Common Law differences matter when it comes to drafting enabling regulation for philanthropy. Although there is EU level consensus and recognition of the substantial contribution made by institutionalised philanthropy to European goals and the important role played by public benefit foundations in enhancing and facilitating a more active involvement of citizens and civil society in the European project, harnessing that macro consensus and turning it into unanimous agreement on new legal tools to support philanthropy is difficult. The different philanthropic traditions that co-exist across the 28 EU Member States mean that there is no single accepted definition of philanthropy, or legal or reporting structure. Moreover, differences in history and culture, economic and political conditions, and taxation rules between not only common law and civil law member states but also between states of the same legal tradition make the promulgation of non-profit regulation

²⁴⁷ Cf. *supra* para. 3.4.

extremely complex and challenging in the absence of a more enabling legal basis than Art 352 currently provides"²⁴⁸.

However, there are two possible objections to this solution.

First, if the application of art. 352 TFEU is certainly difficult, if not impossible, as we, also, have previously pointed out, there might, however, be other routes to explore, which might exclude the nature of the enhanced cooperation mechanism as a "last resort" for this specific purpose.

Second, is the result that would be obtained really the most desirable and the best available?

Indeed, as already stated, statutes introducing European legal forms of non-profit organizations do not seem to us to be the most appropriate for aligning EU law with national laws. As explained in this Study, national legislation has evolved in a specific direction. National legislators are increasingly inclined to adopt laws that recognize statuses of public utility or social utility, and to make this statuses available not only to associations, foundations and non-profit organizations in the strict sense, but also to companies, cooperatives and legal entities that perform economic activities (social enterprises), as long as they meet common requirements including, notably, the exclusive pursuit of a public interest purpose and the asset lock, which do not prevent remuneration within specific limits and conditions of the share capital provided by the members.

An EU legislation based on the legal form of incorporation would therefore not only be difficult or only to a limited extent feasible, but also not entirely focused on the actual interests of the MSs, the evolution of the legislation regarding the non-profit sector and the developments in the cultural and scientific approach to this subject.

4.3. Creating a common European legal status for NPOs through a directive

A different path that could be followed is the one already recommended by the author of this Study in other previous work on social enterprises²⁴⁹ and shared by the EP in its recent resolution of 2018 calling on the EC to introduce, at Union level, a "European Social Economy Label" to be awarded to enterprises based on the social economy and solidarity²⁵⁰.

²⁴⁸ BREEN O.B. (2018), p. 17.

²⁴⁹ Cf. FICI (2017), p. 36 ff, adapting to the particular subject matter of social enterprises (taking into consideration the characteristics of national laws on this subject) the 2014 proposal for a directive on the *societas unius personae* or single-member private limited liability companies: COM(2014) 212 final, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=&uri=CELEX:52014PC0212>.

²⁵⁰ Cf. EUROPEAN PARLIAMENT (2018), point 39: "Requests the Commission to submit, on the basis of Article 50 of the Treaty on the Functioning of the European Union, a proposal for a legislative act on the creation of a European Social Economy Label for enterprises based on the social economy and solidarity, following the recommendations set out in the Annex hereto".

Cf. also the preceding EP resolution on Social Business Initiative of 20 November 2012, par. 28: "[The EP] Calls on the Commission and the Member States to consider the feasibility and desirability of developing a 'European social label' to be awarded to social enterprises to ensure better access to public and socially innovative procurement without infringing any competition rules; suggests that enterprises bearing such a label should be monitored regularly regarding their compliance with the provisions set out in the label"; and the opinion of the EESC on 'Social entrepreneurship and social enterprise' of 26 October 2011, par. 3.6.1: "The Commission should consider a European social enterprise 'label' which would increase awareness and recognition, and build trust and demand. A first step should be a study, initiated by the Commission and carried out in cooperation with social enterprises, of existing labels and other certification systems already in place in many Member States".

The idea is to adopt, with art. 50 TFEU as its legal basis²⁵¹, **a directive establishing a European status/qualification/label for non-profit organizations** which all MSs would be obliged to introduce into their national legal systems²⁵².

This European label should, of course, be optional and should only be awarded to private organizations that, regardless of the legal form of incorporation (i.e., be it an association, a foundation, a mutual, a company, etc.), satisfy certain common minimum requirements as defined by the EU Directive (taking into consideration the existing national legislation on non-profit organizations), however leaving each country the possibility to add further requirements or to lay down stricter requirements than those established by the EU directive²⁵³.

The label should be valid in all MSs. Any organization using the label would therefore automatically be recognized as a European non-profit organization in all MSs and would enjoy **the same legal treatment** (as regards benefits, rights and obligations) in any MS as organizations governed by national law in possession of the same status. This would also apply to the issue of taxation, which implies that an organization bearing the European label would receive the same tax benefits in a country other than that of incorporation as the national organizations owning the label. Therefore, for example, if national organizations bearing the European label were allowed to receive tax-exempt donations pursuant to national tax law, **foreign organizations that possess it would also be allowed to receive the same benefit in that country, automatically and without the need to carry out a comparability test**²⁵⁴. This would lead to the cessation of the arbitrary tax treatment of NPOs in Europe, which the comparability test, although it constitutes significant progress (for which the CJEU is to be thanked), still fails to prevent, due to the absence of formal criteria or the existence of disadvantageous procedures for those claiming the tax benefit in most MSs.

This EU statute would therefore not introduce a new European legal form for the incorporation of NPOs, but an EU status (or qualification or label) that entities established under national law can acquire in order to be so recognized at the Union level (before the EU institutions) and in national jurisdictions other than the one of incorporation. Rather than a supranational legal entity (such as the European Company of Regulation no. 2157/2001 or the European Cooperative Society of Regulation no. 1435/2003), this would be a status which is relevant at the EU level, provided for by all national laws of MSs on the basis of common requirements. For the reasons outlined above, the **cross-border value of the European status** would make it possible for an entity to overcome the legal barriers that currently constrain the non-profit sector in Europe, without the need to create supranational legal forms.

²⁵¹ Whose para 1. reads: "In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives".

²⁵² Of course, MSs might also decide to automatically extend this European status to organizations possessing an equivalent national status, the requirements of which are compatible with those that shape the European status.

²⁵³ However, the expectation is that, in order not to prejudice national non-profit entities as compared to foreign entities, Member States will not make use of this option.

²⁵⁴ In this way, EU law would not touch the subject of taxation, which is the exclusive competence of the MSs, but would concentrate on the non-discrimination of foreign entities compared to national ones. Clearly, a MS could decide not to provide any tax relief in favour of (national or foreign) entities owning the European status, but in this way it would, without any reason, damage national law entities and expose itself to competition from other legal systems (national entities could, in fact, decide to establish or transfer their headquarters abroad).

4.3.1. What status? Towards a European “third or social economy” sector

For the latter strategy to be implemented, an answer to a preliminary question must be given, namely, which European status should be provided for by the directive?

One hypothesis might be to introduce a European status of non-profit organizations in the strict and more traditional sense, namely, a status aimed at all organizations acting for a non-profit purpose, in other words, that are subject to a full profit non-distribution constraint.

However, as we have already pointed out in this Study, the non-profit requirement is a loose requirement which, per se, does not make it possible to evaluate the social utility of the entity that owns it, so that it cannot be automatically stated that a non-profit entity is also a socially useful entity or a civil society organization pursuing the public utility. Within the category of non-profit entities, public utility organizations and organizations that have private purposes, including economic ones, coexist. If European legislation, such as that discussed so far in this Study, has as its main objectives the promotion of civil society as an essential driver of European democracy, as well as the advancement of cross-border philanthropy and cross-border initiatives of public benefit, then the European status that it should introduce could not simply be that of a non-profit organization. Rather, it is necessary to go in search of a status which, going beyond the non-profit aspect, can grasp the essential elements of the organizations to be recognized and promoted in light of the objectives of the legislative initiative on the subject.

Therefore, the European status in question could be that of a public benefit organization. There are several reasons that support this conclusion, including those set out below.

First, the fact that the PBO status is provided for in almost all MSs, with the aim of embracing all the organizations that, regardless of the legal form of incorporation, pursue a public benefit purpose and are subject to an asset-lock and other legal requirements, also pertaining to their governance.

Second, the fact that, although differences do exist, there are, however, several commonalities in the way in which national laws regulate the PBO status, certainly with regard to the general criteria of eligibility of an organization as a PBO, which are the same almost everywhere.

Third, the fact that PBOs (and not NPOs per se) are recognized almost everywhere in Europe as the sole legitimate recipients of a preferential tax treatment, also with regard to tax-exempt donations. This means not only that they are recognized by MSs for their contribution to the public good, but also that they are the sole organizations potentially subject to tax discrimination at the European level. Therefore, EU legislation which wishes to handle the issue of the arbitrary tax treatment of civil society organizations in Europe should concentrate on PBOs rather than on mere NPOs.

However, once it has been asserted that the potential European status should concern PBOs and not simply NPOs, a further question arises, namely, whether it is possible and useful to go even further by expanding the status to make it similar to the statuses of third sector organizations and social economy organizations which exist in some European jurisdictions.

This would substantially lead to including in the potential European status, social enterprises, social cooperatives and other social economy organizations established as companies (or cooperatives) which equally pursue the public benefit, even if authorized by law to distribute part of their profits to their shareholders.

There are at least three reasons why expanding the scope in said direction is recommendable.

The first is that this would be consistent with a legislative trend found in several EU MSs such as, for example, France, Italy and Spain.

The second is that this would make it possible to support and promote a larger number of organizations that act in the public interest. The fact that some of them are partially allowed to distribute profits is not decisive, since the recognition of a limited interest on the capital paid by shareholders should actually be considered a fair remuneration for the contribution of a necessary factor of production, rather than profit distribution.

The third is that this would make it possible to coordinate this potential legislative initiative with other initiatives already promoted by the European Parliament, specifically with that on social and solidarity enterprises which was the subject of its Resolution of 5 July 2018²⁵⁵. Indeed, it would not make much sense to separate the destinies of social (and solidarity) enterprises and other organizations of public utility if there is the concrete possibility of involving them in the same legislative initiative.

In conclusion, the EU statute (in the form of a European Directive based on art. 50 TFEU) should provide for either a narrower status/label of **“European Public Benefit Organization”** or a broader status/label of **“European Third (or Social Economy) Sector Organization”**. For the reasons mentioned above, the latter is the option most worthy of recommendation.

4.3.2. The requirements for the acquisition and maintenance of the status

As regards the **requirements on which the status/label of “European Third Sector (or Social Economy) Organization” should be based**, drawing inspiration from the national laws in force on the subject, the EU legislator should at least provide for the following:

- a) the nature of a **private entity** (neither formally public nor substantially controlled by public entities or other “excluded entities” as identified by the EU directive introducing the status)²⁵⁶, **regardless of the legal form of incorporation**, which may therefore be that of an association or a foundation or even that of a cooperative or a company, depending on the country of incorporation²⁵⁷;
- b) the **exclusive pursuit of public benefit (or social utility) purposes**²⁵⁸; the EU statute should provide a list of purposes/activities of public utility/general interest²⁵⁹;
- c) the use of all resources, including annual profits and operating surpluses, for the exclusive pursuit of the public benefit purposes (**“asset-lock”**)²⁶⁰; however, within specific limits, the remuneration of the capital contributed by shareholders (in organizations that are incorporated as shareholder companies) should be authorized by law, for the same reasons for which reasonable and proportionate

²⁵⁵ Cf. EUROPEAN PARLIAMENT (2018).

²⁵⁶ In Ireland, for example, the list of “excluded bodies” comprises political parties, trade unions or representative bodies of employers, and chambers of commerce, among others (sect. 2 CA). In Italy, “excluded entities” for this purpose are public entities, political parties, trade unions, professional associations, associations representing economic categories, and representative organizations of employers (art. 4, para. 2, CTS).

²⁵⁷ Examples include Italian social cooperatives, French SCICs, Belgian social cooperatives accredited as social enterprises, German limited liability companies holding the status of PBOs, Irish CLGs registered as charities, Italian commercial companies recognized as social enterprises, French commercial companies recognized as SSEEs.

²⁵⁸ German and Italian law are very clear in this regard: the exclusivity of the purpose of German PBOs and Italian TSOs is laid down respectively in sect. 56 AO and in articles 4, para. 1, and 5 CTS. See also sect. 3(1) Irish CA.

²⁵⁹ Long lists of public benefit purposes are, for example, found in sect. 52(2) AO in Germany, in art. 5, para. 1, CTS in Italy, and in sections 3(1) and 3(11) CA in Ireland.

²⁶⁰ This is explicitly stipulated, for example, by art. 8, para. 1, of the Italian CTS; sect. 2 of Irish CA); and sect. 55 of German AO.

remuneration of directors and workers is normally allowed by national laws²⁶¹; the asset-lock entails prohibitions regarding "indirect" ways of profit distribution²⁶² and also applies to the dissolution of the entity²⁶³;

d) provisions which require the recipients of the status, in order to make their behaviour consistent with their purpose, to be subject to certain **governance and/or transparency measures**, such as the appointment of an internal supervisory body or the publication of a special report documenting how the public benefit purpose has been fulfilled²⁶⁴;

e) **registration in public registers**, which is necessary for ensuring certainty, especially in countries other than that of incorporation, about the possession of the status and for the purposes of public control²⁶⁵;

f) provisions regarding **public controls** aimed at ascertaining the requirements for the acquisition and maintenance of the status (also in order to protect the legal label and preserve its intrinsic value). Member States would exercise such controls on the basis of common guidelines provided by the EU directive introducing the status²⁶⁶.

The cross-border element (such as being composed of people or organizations from at least two different MSs), present in the regulations establishing European legal forms (European company, European cooperative society, etc.), would not be required here. This is because the status would be a status of national law, although with a European (cross-border) value. The absence of this requirement facilitates the acquisition of the status and its development across Europe.

The EU directive should leave the freedom to MSs, in transposing this directive, to provide for stricter or additional requirements. However, as already pointed out, this would not affect the legal capacity in a given MS of foreign organizations that have acquired the status in their own countries. In fact, given the European value of this status/label, in any event each MS would be obliged to recognize these foreign entities. Therefore, introducing stricter or additional requirements would limit only national law entities and not foreign entities as well (thus acting as a deterrent against this practice).

²⁶¹ A recommendable rule on the limited remuneration of the capital is that provided by Italian law with regard to companies holding the status of social enterprises: see art. 3, para. 3, lit. a), Legislative decree no. 112/2017.

²⁶² See, for example, art. 1:4 of Belgian CCA, and for a list of cases in which an indirect distribution of profits is presumed to occur, art. 8, para. 3, Italian CTS.

²⁶³ See for references to national laws *supra* para. 2.

²⁶⁴ For example, Italian TSOs must, in certain cases, appoint a supervisory body and draft and publish a "social balance sheet".

²⁶⁵ An example is the new Italian RUNTS.

²⁶⁶ The involvement of representative organizations in this process should also be evaluated. Good practices already exist in some countries.

5. CONCLUSIONS AND FINAL RECOMMENDATIONS

The organizations covered by this Study need a European legal framework capable of supporting and promoting them. This is an aspect that no one could doubt given the positive contribution of these organizations to Europe, its people, communities and institutions. This is particularly true in times of crisis, such as the serious one that the pandemic is generating today. In the current situation, promoting the organizations considered in this Study is not only necessary, but also urgent.

As Bernard Enjolras states, “In a time of social and economic distress and enormous pressures on governmental budgets, the third sector and volunteering represent a unique ‘renewable resource’ for social and economic problem-solving and civic engagement in Europe, not as an alternative to government, but as a full-fledged partner in the effort to promote European progress”²⁶⁷.

The reasons that motivate the need for legislative intervention are also those that lead us to believe that going beyond the classic non-profit sector, focusing on the aspect of the public interest purpose, and including organizations, such as those in the third sector or the social economy, in the initiative, even if not all are fully non-profit, is the most appropriate strategy.

The above would also make it possible to overcome the difficulties inherent in approving an EU legislation concerning the individual legal forms of non-profit organizations. By way of contrast, establishing a European status that includes all organizations contributing to the public good is a feasible task, because similar statutes already exist in national jurisdictions. The only problem could be that of identifying the indicators or requirements for the European status, which can, however, be solved by following the tendency which has emerged at the national level to go beyond the non-profit sector in the strict and formal sense, and to create a European status of third sector or social economy organizations.

In this Study, after having analysed and compared the national legislation on NPOs, or rather on public benefit organizations in some EU countries, and after having discussed the current role of NPOs in EU legislation, as well as the history of failed attempts to introduce specific statutes for these organizations, we have come to the conclusions which we now present in the form of precise final recommendations, referring the reader to the previous pages of this Study for the reasons that explain the proposals that follow.

- 1) An EU legal statute for non-profit organizations should be introduced.**
- 2) This EU statute, to be introduced by an EU directive based on art. 50 TFEU, should establish a new legal status or label, that of “European Third Sector (or Social Economy) Organization”.**
- 3) The EU statute should identify the requirements for the acquisition and maintenance of this European status/label in accordance with those employed by national legislation. In particular, the status should only be made available to:**
 - a. Private organizations which, regardless of the legal form of incorporation,**
 - b. exclusively pursue public benefit purposes,**
 - c. operate under an “asset-lock” regime (capital remuneration is allowed only to a limited extent), even at the time of their dissolution,**

²⁶⁷ ENJOLRAS B. (2018), p. 4.

- d. are subject to specific governance and transparency obligations,**
 - e. are registered in a specific register, and**
 - f. are subject to public control to verify their compliance with the qualification requirements.**
- 4) This EU directive should provide for the obligation for all Member States to introduce this European status and to grant all organizations holding the status the same treatment, also under tax law, regardless of their country of incorporation (and without the need to check comparability).**
 - 5) The EU directive might authorize Member States to identify, in transposing the directive, more stringent or additional requirements for the qualification.**
 - 6) The EU directive should establish common guidelines that all Member States should follow when exercising control over the national organization holding the European status.**

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ANNEX

Table 1: Laws on non-profit organizations and other related organizations in some EU countries

Country	Law	Subject
Belgium	Code of Companies and Associations of 2019	Associations without a profit purpose (ASBL)
		International associations without a profit purpose (AISBL)
		Private foundations (FP)
		Public utility foundations (FUP)
		Cooperatives accredited as social enterprises
	Law 6 August 1990	Mutuals
	Code of Income Taxes of 1992	Non-profit organizations accredited under art. 145/33
	Law 1 July 1901	Associations
		Public utility associations
	Law no. 87/571 of 23 July 1987	Public utility foundations
		Business foundations
		Sheltered foundations
	Law no. 2008-776 (art. 140)	Endowment Funds

France	Code of Mutuality	Mutuals
	Law. No. 47/1175 (art. 19 <i>quinquies</i> ff.)	Collective interest cooperative societies (SCIC)
	Law no. 2014-856 of 31 July 2014	Social and solidarity economy enterprises (established in any legal form, including that of a company)
	Labour Code (art. L3332-7-1)	Social enterprises of social utility (ESUS) (established in any legal form, including that of a company)
	General Tax Code (art. 200, para. 1, lit. b, and 238 <i>bis</i> , para. 1, lit a)	General interest organizations
Germany	Civil Code of 1896	Non-commercial/ideal associations
		Commercial associations
		Foundations
	Fiscal Code (sect. 52 ff.)	Public benefit organizations (established in any legal form, including that of a company)
Ireland	Charities Act of 2009	Charities (established in any legal form, including that of a company)
	Civil Code of 1942	Associations Foundations

Italy	Code of the Third Sector of 2017	Third sector organizations, including: <ul style="list-style-type: none">- Voluntary associations- Associations of social promotion- Philanthropic associations and foundations- Mutual aid societies- Social enterprises (established in any legal form, including that of a company)- Social cooperatives
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Source: The Author

Table 2: Towards an EU legislation on NPOs: potential strategies

Option	Comment
Maintaining the status quo	It would not permit enjoying the benefits of a European legislation on this matter
Harmonization of national laws	It is unrealistic for several reasons
Creating supranational legal forms of associations, foundations and mutuals by one or more regulations based on art. 352 TFEU	It is unlikely and not in keeping with the evolution of national laws in this field
Using the mechanism of enhanced cooperation (art. 20 TEU) to create supranational legal forms of non-profit organizations	It requires demonstration that application of art. 352 TFEU is impossible
Creating the legal status of “European Third Sector/Social Economy Organization” by an EU directive based on art. 50 TFEU	It is the most feasible option and in line with the evolution of national laws

Source: The Author

Table 3: The requirements for the status/label of “European Third Sector/Social Economy Organization”

Requirement	Aim
A private organization which, regardless of the legal form of incorporation,	<p>To make the status exclusively available to organizations that are not public or controlled by public entities</p> <p>To make the status available to organizations established in any legal form (therefore, not only to associations and foundations, but also to companies)</p>
exclusive pursues public benefit (or social utility) purposes,	<p>To distinguish the organizations holding the status from all the others (i.e., for-profit, pure mutualistic, merely non-profit organizations)</p>
operates under an asset-lock regime	<p>To ensure and safeguard the effective pursuit of the public benefit purpose</p> <p>Remuneration of the capital (in companies holding the status) should however be admitted within specific limits</p>
is subject to specific governance and transparency obligations,	<p>To make behaviours consistent with the purpose</p>
is registered in a specific register, and	<p>To ensure certainty, especially in countries other than that of incorporation, about the possession of the status and for the purposes of public control</p>
is subject to public control	<p>To ascertain the requirements for the acquisition and maintenance of the status. Members States would exercise such controls on the basis of common guidelines provided by the EU directive introducing the status</p>

Source: The Author

Commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, this study provides a comparative analysis of the main laws on non-profit organizations in force in some selected European countries, before going on to discuss a potential legislative initiative of the European Union on the subject. The study sets out the different options available and concludes that the European Union should introduce a European status which, rather than being limited to non-profit organizations, should also seek to include related organizations such as those of the third sector and the social economy.

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