THE ETHICS OF RECIPROCITY IN THE LIGHT OF THE GERMAN AND THE ENGLISH CHARITABLE SECTOR AND EMERGING TRENDS IN EUROPEAN PHILANTHROPIC GOVERNANCE

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LÜCK, Nina C. The ethics of reciprocity in the light of the German and the English charitable sector and emerging trends in European philanthropic governance. *International and Comparative Law Review*, 2013, Vol. 13., No. 2, pp. 67–83. DOI: 10.1515/iclr-2016-0071.

Abstract: The lively debate about European cross-border donations and the European philanthropic landscape that has been started has seemingly reached a slight standstill since the global financial crisis and austerity plans are dominating the every day discussion.

However, the European non-profit sector remains an area that is of crucial importance for the European labour market, the European Research Area, and most importantly, the participation of European civil society which directly influences questions of citizenship and European identity. The paper will compare the origin and legal framework of the English and the German charitable foundations and link it to the EU's third sector where the European Foundation Centre (EFC) as a key representative for civil society actors in the non-profit area and the Commission play a pivotal role in the establishment of a European Foundation Statute (FE) that is meant to facilitate cross-border donations and non-profit activities throughout the EU. In the concluding part, the wider meaning of a strong third sector in the EU will be analysed.

Keywords: History of charities, European cross-border donations, European non-profit sector, Participation and civil society, Origin and legal framework of charitable foundations in England and Germany, European Foundation statute (FE)

I. Introduction

The aim of this paper is to give a general idea of emerging trends in the European philanthropic discussion.¹ In order to illustrate the bullet points of this debate, some basic features of charitable foundations established under German private law will be analysed as well as the English counterpart. In a follow-up study in 2015, the Czech charity sector will be included in the comparative study.

1 I am grateful to comments from my lovely colleagues Dr. Isabelle Rueda and Dr. Andreas Rühmkorf and from James Mc Veigh who never gets tired of correcting my English.

Close attention will be paid to the ongoing promotion of a European Foundation Statute that has – as of today – not been formally enacted. Originally an initiative by civil society actors across Europe that gathered under the umbrella of the European Foundation Centre², the idea of a European Foundation (FE) has been put on the Brussels agenda as early as 2004 which led to the publication of a feasibility study on a European Foundation Statute in 2009³. However, whilst there remain strong supporters and good arguments in favour of a European Foundation Statute in order to facilitate philanthropic cross-border activities, a near “implementation” of the proposal for the Council Regulation on the Statute for a European Foundation does not seem likely in economically tight times across Europe. Even though being on the Brussels agenda, the necessary proposal changes are not top priority during the age of austerity. Nevertheless, it is understood that the Greek EU presidency will make some final remarks on the FE review procedure this spring.

The European third sector is a relatively young area which cannot be completely understood without the history of giving or the history of acting for a good cause in EU member states. The member states’ history of charitable foundations or, to be more precise, the idea behind them, dates back to ancient times and was very closely related to clerical rules. In this paper, the German and the English charity landscape will be looked at and compared with regard to origin, legal foundations and current numbers and figures. A link to the European landscape will be drawn as both countries do not only have a vibrant third sector, their charitable foundations also engage in cross-border activities which the proposed Council Regulation is intended to facilitate.

In conclusion, an assessment of the European debate on philanthropic governance will be made that shows that there are both strong non-governmental and institutional voices that advocate an enhanced non-profit sector on a European level which facilitates addressing current tasks. Finally, it will show what can be expected from the non-profit sector in times of austerity in the future.

II. Comparison

The English and the German landscape of charitable foundations will be analysed and compared. In addition, the “supra-national third sector” and the European third sector will be looked at. Particular attention will be paid to the development and history of charitable foundations (II.1), fields of activity, numbers and figures (II. 2) and finally, the legal framework for charitable foundations in Germany, England and beyond (II.3).

2 http://www.efc.be/programmes_services/resources/Documents/EuropeanStatuteUpdated.pdf (last accessed on 4/2/2014)

3 http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf (last accessed 2/2/2014)

1. History

Whereas the European Union (EU) as a relatively young and supra-national entity has only begun to engage in the philanthropic sector in the Nineties, both England and Germany demonstrate a long tradition of acts of benevolence dating back to ancient times. From the medieval period, there was a predominance of church engaged in asking wealthier people for donations as “consideration” for entering the kingdom of heaven. With ongoing secularisation and industrialisation, a more class-based philanthropy came along with looking after the less fortunate. Whereas both countries faced economical constraints in the 20th century with two World Wars bringing about termination to a flourishing charity sector, the post-war era shows a gradual and then a steady increase of charitable foundations with both countries choosing a different legal framework however.

a. The development of German *Stiftungswesen*

The history of German *Stiftungsrecht* (law of charitable foundations) can - by admittedly a very rough classification⁴ - be grouped into four phases.

The first phase embraces the ancient world until the late Middle Ages up to the era of enlightenment.

The Codex Justinianus that was issued by the Eastern Roman Emperor Justinian I between 529-534 contained provisions that related to dispositions by will that were done for *piae causae*, a charitable purpose.

The second phase lasts from the era of enlightenment until the 19th century. As enlightenment went along with ongoing secularisation, charitable foundations that were closely connected to the Church gradually ceased to exist. The provisions⁵ concerning charitable foundations in the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) dating from 1900 bear witness to the fact that governmental recognition or approval is needed to set up charitable foundations. While the liberal 19th century provides a foundations-friendly environment, the late days of the Weimar Republic faced another wave of disappearance of charitable foundations caused by economic depression and inflation.

During the Third Reich charitable foundations faced arbitrary and forced annulment or misappropriation. It should be noted that the Jewish population in Germany had a very sophisticated and exemplary system of charities that supported youth, health and economy - in particular of Eastern European Jews that

4 For a detailed analysis please see Liermann, *Geschichte des Stiftungsrechts*, 2. Aufl. 1963 who groups the history of charitable foundations into seven phases with subphases. 1.) the ancient times before Christ; 2.) Christian antiquity; 3.) the Early Middle Ages; 4.) the High Middle Ages; 5.) the Late Middle Ages; 6.) the Era of Enlightenment and Secularisation; 7.) 19th and 20th Century

5 §§80-88 BGB

had come to Germany fleeing from the growing anti-Semitism elsewhere.⁶ The legal “technique” for the annulment of charitable foundations that were either set up by Jewish citizens or that had the purpose of supporting Jewish people, was to interpret §87 of the German Civil Code in a way that was in line with the *Rassengesetze*⁷ (racial laws). When the arms industry was in dire need for more capital, all German foundations faced “rededication”, no matter by whom they were set up and for what purpose.

The charity landscape in the fourth phase of post-war Germany faced an unassertive beginning as post-war reconstruction took place throughout the country. However, gradually, charitable foundations were set up again when the German economic miracle (*Wirtschaftswunder*) brought back enormous wealth to many people.

b. The development of charitable foundations in England

England’s third sector history shows some similarities with the German development, but also some notable differences. The main epochs of English charity law are the medieval period, the time from reformation to restoration, the Victorian era, the Industrial Revolution and the age of the modern welfare state.

Until the late Middle Ages, social welfare was provided by basically three groups: lords and feudal manors, by the merchant and craft guilds, and by the church.⁸ The principle of *piae causae* applies to the Roman Catholic Church in England at that time as well and clerics encouraged wealthier people to give away a considerable amount in order to facilitate their acceptance in the kingdom of heaven.⁹ However, the wealth the church gained via its system of selling of indulgences and the like came to an end in the wake of Reformation and was replaced by aristocracy’s personal almsgiving and a newly emerging merchant class. The Tudor seizure of 1603 coincided with a secularisation of charity activities. A proof of this secularisation is the Statute of Elizabeth of 1601 which aimed at an improved “management” of charities by addressing administrative shortcomings. The 1601 Statute was part of the Poor Laws, a body of legislation that sought care for the poor, the aged, the sick and children. The 1601 act lasted until it was replaced by the 1853 Charitable Trust Act that also set up the Charity Commission for England and Wales which - until today - is the central non-ministerial government body to register, administer and to regulate charities, as well as monitoring the entire third sector. During the 18th and 19th century,

6 The underlying principles of Jewish activities were the “Zedakah” (justice) and the “Gemi-lut Chessed” (grace of charity) alongside with the principle to help foreigners and peregrine people.

7 Rawert/Ajzensztejn, p.180.

8 Cf. Leat, in: Schlüter/Then/Walkenhorst (2001), p. 269

9 For a detailed analysis of the historical background see Luxton, p. 3-12.

merchants and industrialists continued to engage in charitable activities as it was understood that workers' achievements would be more effectively in the long run when health, nutrition, childrens' education and working conditions improved.¹⁰ In the years from 1890 until 1915, vast networks of private charities developed, especially in London, Manchester and Liverpool. Furthermore, rural areas also offer examples of this new understanding. The Industrial Sites Saltaire and New Larnak (Scotland) that have both been designated UNESCO world heritage sides show how their founders, Sir Titus Salt (1803-1876) and industrialists David Dale (1739-1806) and Robert Owen (1771-1858) set up mills close to rivers and provided not only what could then be seen as adequate housing for their workers, but also extended charity to the workers' families¹¹. Dale and Owen provided schools for the workers' children, the possibility for workers to take sick leave and continued pay, and later on established even cultural events on the mill's premises. Titus Salt, whose mill fabricated Alpaca wool and Russian Donskoi wool, also built a church, a park, baths, hospitals, schools and places for adult learning. Both Industrial Sites have been deemed to "provide physical evidence of a model for a New Moral World" and be an "outstanding example of mid 19th century philanthropic paternalism" by UNESCO¹².

In the 20th century, the number of charitable foundations grew considerably in England and to a bigger extent than in Germany. This is partly due to the lesser capital that is required to set up a foundation and also to the less strict legal rules that charities must be set up under. Under English law, there is a relative discretion which legal form to choose, whereas the German legal framework provides by and large only the pattern of §§ 80-88 of the German Civil Code (with small exemptions that have played a minor role). With the arrival of the welfare state in the 1940's that brought about a governmental fundament for health, education and various social welfare instruments, the voluntary sector and the public sector existed next to each other with the voluntary sector concentrating on child-care and the elderly. The 1978 Wolfenden Committee Report emphasized the importance of the cooperation of the public and the voluntary sector,¹³ an aspect which is of as crucial importance today as it was then.

c. The European philanthropic landscape

Over the years, the European philanthropic landscape has developed into a considerable market factor in the European economy which is one noteworthy aspect. The other important element of cross-border charity activity is the effect that it has on European identity and European citizenship. Third sector activities in general are deemed to foster participation and democracy which must be seen

10 Cf. Leat, supra 7.

11 For further information see <http://whc.unesco.org/en/statesparties/GB/> (last accessed on 2/2/2014)

12 <http://whc.unesco.org/en/statesparties/GB/> (last accessed on 2/2/2014)

13 Cf. Anheier, p. 31

as pivotal in times of austerity and the financial crisis where a growing number of people across the European Union both in “net contributing” and “net receiver” member states question the legitimacy of transferring sovereignty to Brussels.¹⁴ Across the EU, there are about €110,000 public benefit purpose foundations whose assets amount to more than €350,000 billion and their annual expenditures to €83 billion with both figures being lower end estimates.¹⁵ The picture of charitable foundations is diverse in number. In some EU member States there are over 10,000 charitable foundations¹⁶ whilst in other member states there are below 200.¹⁷ One might assume that the number of foundations is dependant on the wealth of a country but the correlation is rather a different one. Firstly, the number of charitable foundations has to do with the “climate” a member state provided in the past (both legally and politically) and secondly, it has to do with other forms that civic engagement might take. In some countries, where a tradition of charitable activities and a strong sense of community combined with an ethos of helping each other exist, the legal form of charitable foundations might not be the instrument chosen.¹⁸ All in all, the last two decades have provided a foundation-friendly climate across Europe with an increase of 40%¹⁹. Moreover, third sector activities contribute substantially to the EU labour market that has faced difficult conditions for some five years. The non-profit stakeholders²⁰ that are the key actors in the third sector, have the potential to influence the EU labour market as well. There are an estimated 1 million employees in the third sector across the EU and a further million volunteers. Given the fact that a lot of funding and grant-making involves the science sector and enables people to work in diverse working groups and labs in countries other than their country of origin, cross-border third sector activity also directly influences the competitiveness of the European Research Area in a positive way.

2. Current numbers, figures and fields of activities

Both the German and the English third sector play a pivotal economic role and contribute largely to the European philanthropic landscape that was described above.

14 Current surveys by EUROBAROMETER which is organised by the Commission's Directorate General for Communication reveals that Euroscepticism is growing: Both the credibility of the EU has been declining and the EU's image is continuing to be negative. Surprisingly, Brussels officials manage to read numbers in the opposite way. http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_first_en.pdf (last accessed 6/2/2014)

15 See feasibility study at: http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf (last accessed on 2/2/2014)

16 Such as Hungary, Germany, Romania, Spain and Sweden.

17 Estonia, Ireland, Latvia and Slovenia.

18 Such as in Ireland and Latvia, for example.

19 http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf (last accessed 4/2/2014)

20 Such as donors, volunteers, trustees, employees and beneficiaries.

a. Germany

In Germany, there are some 12,000 independent foundations with charitable status (and 20,000 altogether) nowadays with the year 2007 being the year where the number of new charitable foundations exceeded 1000 a year for the first time.²¹

The charitable purposes range from parochial to benevolent and scientific purposes and those purposes are covered by tax exemptions under §§ 51–68 of the German *Abgabenordnung* (AO), the general tax statute.

There are “capitals of charitable foundations” such as hanseatic cities like Hamburg,²² where there has been traditional wealth by old merchant families and there are *Länder* that host over 3,700 charitable foundations such as Nordrhein-Westphalia whereas the new *Länder* in general are only beginning to develop a “*Stiftungslandschaft*” (foundation landscape) due to 40 years of GDR government. Whereas setting up a charitable foundation in Germany used to be an almost exclusive “activity” of wealthier citizens in their Seventies or Eighties, it is now something that is also closely connected to grassroot movements and civil society, especially with the new form of community foundations (“*Bürgerstiftung*”) that emerged in the Nineties and that allow groups of (often local or regional) residents to collect money amongst each other to reach the minimum capital required to set up a foundation (50,000 Euros).²³ Those *Bürgerstiftungen* often have a charitable purpose closely connected to the city or region that the founders live in and that they would like to improve. The *Bürgerstiftung* of the city of Weimar for example emphasises civil society as a pivotal criterion for democracy and aims at improving Weimar’s future by a functioning community that supports local projects for children, youth, the elderly, people with a migration background and projects in arts, culture, environmental protection and sports.²⁴ All in all, the understanding is that of an active, integrated and inclusive community that actively shapes democracy. The German *Stiftungssektor* continues to grow despite the economic crisis and remaining low interest rates.²⁵

21 http://www.stiftungen.org/fileadmin/bvds/de/Presse/Grafiken__Zahlen__Daten/Stiftungserrichtungen_1990-2012.pdf (last accessed on 2/2/2014)

22 Hamburg currently has over 1000 charitable foundations which is the biggest number in absolute figures. Measuring the number of foundations in relation to 100,000 residents, the city of Schweinfurt leads with 104 foundations, followed by Würzburg (89), Frankfurt/Main (77), Oldenburg (72) and Hamburg (70).

23 Von Strachwitz, in: Schlüter/Then/Walkenhorst (2001), p. 138.

24 <http://www.buergerstiftung-weimar.de/idee/> (last accessed on 4/2/2014)

25 [http://www.stiftungen.org/de/news-wissen/news/detailseite-news.html?tx_leonhardtdyncontent_pi1\[cat\]=1&tx_leonhardtdyncontent_pi1\[mode\]=top1&tx_leonhardtdyncontent_pi1\[id\]=3890](http://www.stiftungen.org/de/news-wissen/news/detailseite-news.html?tx_leonhardtdyncontent_pi1[cat]=1&tx_leonhardtdyncontent_pi1[mode]=top1&tx_leonhardtdyncontent_pi1[id]=3890) (last accessed 4/2/2014)

b. England

Whilst there are some 12,000 charitable foundations in Germany as of today, England and Wales count over 160,000 charities – in the broad sense. Part of the reason why the number is so significantly higher in England and Wales is owed to the fact, that in Germany, setting up a charitable foundation follows relatively narrow and abstract rules and involves a long process between the *Stifter* that set(s) up the foundations and the *Stiftungsaufsicht* (the ministerial body) which grants charitable status. Moreover, German charitable foundations are seen as “independent and autonomous estate for eternity”. In England, registering a CIO with the Charity Commission (or a charity that has a different legal form) is a relatively unbureaucratic procedure that takes a couple of minutes and can be done online. Processing can be expected within 30 days of sending off the registration application.²⁶

Charities are not seen as something that lasts eternally but for as long as there are trustees or members that engage in it. Measured by the strict elements that are constitutive for German charitable foundations, one would estimate that England and Wales have 9000 charitable foundations.²⁷ They thus make up for roughly 10% of the total voluntary sector income.²⁸ The charity sector in England is one of growth and charitable foundations are active in the areas of relief of poverty, advancement of education, social welfare and culture, health, and support of children, young people and students to name but a few. Their key principles are:

- flanking the welfare state and stepping in for the areas neglected by it;
- pump-priming, small grant to attract further funding in a snowball effect;
- innovation;
- emergency funding; and
- unpopular causes and risk taking.²⁹

As in Germany, there are manifold fiscal incentives but there is also governmental control in return.³⁰ The Charity Commission is the central supervisory body and deals with the registration process, fulfilment of requirements and monitoring. The Charity Commission also does a lot of third-sector research. All in all, it ensures transparency, accountability and capacity building.³¹

26 <http://www.charitycommission.gov.uk/frequently-asked-questions/faqs-about-registering-a-charity/how-long-does-it-take-to-register-a-charity/> (last accessed 6/2/2014).

27 See Feasibility Study on a European Foundation Statute, p. 19 that can be viewed under http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf (last accessed 4/2/2014)

28 Ibid

29 Leat, in: Schlüter/Then/Walkenhorst (2001), p. 270.

30 For an elaborate analysis see Luxton, pp. 29 ff.

31 See Luxton, pp. 422 ff.

c. European charity activities

On the European level, the European Commission moved from what was perceived as civil dialogue to the concept of civil society³² and nowadays promulgates that foundations foster the sense of citizenship and solidarity.³³

It is widely recognized now that the third sector plays a pivotal role for a stable democracy as the “demos” strives for inclusion and participation.³⁴ Charitable Foundations are also seen as intermediary organisations that spark participation and representation.³⁵ Via the multi-level character of European civil society, the democratic deficit is likely to be addressed more adequately than by further institutional reforms. Strengthening the legal framework of European civil society activates that European issues are discussed at grassroot level and therefore it brings about a more legitimate European governance.³⁶ As legal requirements vary considerably from member state to member state, the European Commission³⁷ adopted a lowest common denominator of the legal framework in all EU member states. According to this:

- a foundation is an independent entity (with own legal personality in general);
- it has no formal membership;
- it is overseen by governmental authority;
- it serves a public benefit purpose; and
- it has a founder who set up the foundations's statute, determined its purpose and provided an endowment.

This very broad definition is not more than a working definition as it fails to embrace the particularities in the charity sector in a few member states. In Italy, for example, there is something like a “participatory structure” (membership), whereas in Cyprus, Malta, the United Kingdom and Ireland the term “foundation” usually refers to a grant-making institution while there is no specific legal form which will be shown below (3.).

The third sector is not only a very lively field of civil society action in the European Union, it also has a significant impact on the EU labour market and on cross-border mobility in various forms.

32 “Civil dialogue” as understood by Commission terminology was mainly labour law related and focused on the dialogue of social partners until the late Nineties.

33 See http://europa.eu/rapid/press-release_IP-12-112_en.htm?locale=fr (last accessed 6/2/2014)

34 The underlying principle for this being the “no demos – no democracy thesis”.

35 Schauhoff, npoR 2013, p. 128.

36 Smismans, 2003, p. 489

37 Commission staff working paper, impact assessment, accompanying the document “Proposal for a Council Regulation on the Statute for a European Foundation”, Brussels, 8.2.2012; SWD (2012) 1 final, p. 6.

The Commission therefore identified a number of obstacles that foundations encounter when engaging in cross-border activities.

One obstacle is the uncertainty about administrative procedures and tax provisions – an aspect which led to the ECJ's preliminary ruling in the 2006 *Stauffer* decision which is outlined below. Very often, time-consuming and costly procedures are inflicted upon charitable foundations that seek the same benefits as domestic foundations. In addition to that, there is huge legal uncertainty as for the recognition procedure and the costs involved which thwarts the principle of economical allocation of resources, a pivotal principle of non-profit governance.³⁸ Alongside the procedural aspects, foundations from another member state are less known in the member state they are active in which causes confidence problems that result in fewer donations. As those obstacles are likely to decrease the scope of cross-border funding within the EU, the Commission deemed supranational initiative necessary whilst emphasising that the national legal framework stays autonomous due to a lack of legal base for Brussels.³⁹ At the same time, the Commission emphasizes the mutual interdependence between a strong intra-EU third sector and European citizenship, European identity, participation and the European economy.⁴⁰

As far as the judiciary on cross-border donation activity is concerned, the case *Stauffer*⁴¹ was of central importance. The case concerned a charitable foundation being active in Italy and Switzerland with a purpose in the field of classical stringed instruments and musical history that had been set up under Italian law. The foundation gained regular revenues by renting out premises in Germany. There were no offices in Germany and the administration for rental was done by an external German private company. The foundation sought tax exemption from the German corporate enterprise statute (*Körperschaftsteuergesetz*) as this exemption is granted to organisations with a charitable status. The case that reached the European Court of Justice via preliminary ruling had been pending in front of German courts until the German federal fiscal court referred it to Luxembourg. The ECJ answered that member states were not obliged to grant charitable status to an organisation that had been founded according to another member state's law but that it was indeed in line with treaty provisions to grant charitable status to an organisation that fulfilled all the requirements to be granted charitable status under domestic law, apart from the domestic seat. The assessment whether all other provisions (apart from the seat) were fulfilled stayed of course a matter for domestic courts. In the *Persche* case,⁴² the ECJ fur-

38 Lück, p. 66, 72f.

39 Commission Press Release: Proposal for a Regulation on the Statute for a European Foundation (FE), 8.2.2012; Memo/12/79

40 http://europa.eu/rapid/press-release_IP-12-112_en.htm?locale=fr (last accessed 6/2/2014)

41 C-386/04 Centro di Musicologica Walter Stauffer vs. Finanzamt München für Körperschaften

42 C-318/07 Hein Persche vs. Finanzamt Lüdenscheld

ther stated that tax allowance was also to be granted if the cross-border giving took place in another member state. Both the *Stauffer* and the *Persche* case illustrate that the European judiciary is sensitive towards national provisions that, in effect, impede cross-border donations.

3. The legal framework for charitable foundations

The legal framework provided for charitable foundations is probably the most profound difference that the German and the English charity landscape reveal.⁴³ While the German civil code and the additional *Landesstiftungsgesetze* prove a low regulation density – measured by German standards – they still provide a strict set of rules and a narrow legal form in particular for the prototype of a German *Stiftung* established under private law. In England, there is no specific legal form for a charity, even with a new form having been set up recently, the charitable incorporated organisation (CIO). However, both countries provide a fruitful environment for charitable organisations.

a. The German *Stiftung* under private law

The German charitable foundation (*Stiftung*) is governed by sections 80–88 of the German Civil Code (BGB) that provides a relatively strict set of rules as far as the legal construction is concerned. In order to set up a charitable foundation in Germany, the foundation must have a constitution (*Satzung*) that stipulates the following:

- the name of the foundation (§81 I S.3 Nr. 1 BGB);
- the registered office (§81 I S.3 Nr. 2 BGB);
- its purpose (§81 I S.3 Nr.3 BGB);
- its capital and (81 I S.3 Nr.4 BGB); and
- its management board (§81 I S.3 Nr. 5 BGB).

However, the management board (*Vorstand*) is the only mandatory organ of the German *Stiftung* which follows from § 81 I Nr. 5 BGB. Something like a supervisory board is entirely optional but nowadays seen as good practice.⁴⁴ The foundation can be set up by private individuals (in any number), associations, business entities or public bodies. The German charitable foundation has no members or trustees like the CIO under English Law. The beneficiaries of a German charitable foundation can be individuals, called “*Destinatäre*”. Common example for such beneficiaries would be a graduate getting a PhD grant from a charitable foundation, an artist being financed for a project, a woman with a migrant background getting financial support to enable her to enter the labour market (language courses, PC training etc.) The charitable purpose mentioned

⁴³ Cf. Schauhoff, npoR 2013, p.129.

⁴⁴ Cf. Lück, p. 165.

in § 81 I Nr. 3 BGB I is defined in §52 I of the Fiscal Code (*Abgabenordnung*) and covers a broad range from the support of research, of arts, landscape preservation and environmental protection, help for asylum seekers, the promotion of consumer protection, of equality between women and men, of sports, caring for the youth and the elderly, and many more. §53 AO extends the charitable purpose to the support of people that need help because of their physical or mental condition and §54 AO adds parochial purposes such as the maintenance of churches and the fulfilment of ecclesiastical aims such as taking care of the elderly or of people with disabilities. This wide range of purposes that leads to tax allowances faces constitutional barriers. No statutory purpose or activity is allowed that contravenes basic principles of the German Constitution (*Grundgesetz*) or that promotes extremist ideas and proves contradictory to the idea of friendly relations amongst the nations and the principles of international understanding.⁴⁵

Due to the federal structure in Germany, the rules in §§80-88 BGB are flanked by 16 *Landesstiftungsgesetze* that might have a similar outlook in various aspects but that might also differ from one another considerably, for example as far as the competencies of the ministerial body are concerned or the degree of segmentation and precision of the accounting rules.

In general, the *Landesstiftungsgesetze* provide more detailed rules on the ministerial body the charitable foundation is accountable to, on a register of charitable foundations under the *Landesstiftungsgesetz*, the registering process, the rights and duties of the charitable foundation, the appointment of the managing directors, changing the purpose or the foundation's constitution, some side provisions on local and parochial foundations and finally provisions concerning the dissolution of the foundation which happens only in the cases of the purpose having been achieved or making no sense anymore or in the case of insolvency.

b. The English legal framework for charities

The English legal framework for charities reveals a completely different picture than the German one which by and large stems from the different legal traditions. While in Germany, the *Stiftung* as such can be set up under private or public law (which follows from § 89 BGB) and while it can be legally dependent or independent – the English legal framework is much broader and there is less “regulation density”.

Under the 1993 Charities Act,⁴⁶ activities for a charitable cause required no specific legal form and there existed no legal form which amounted to an exact equivalent of the organisational concept of “foundation” in civil law countries.⁴⁷

45 §51 III German Fiscal Code (AO).

46 The 1993 Charities Act was replaced by the 2011 Charities Act.

47 Hopt/Walz/v. Hippel/Then, p. 33

In England such as in most other common law countries, the basic requirement for a charitable institution in order to be recognised as such was and is to have an exclusively charitable purpose and to be administered for public benefit.

The different legal forms range from an unincorporated association, a company limited by guarantee /charitable company, a (charitable) trust to a charitable incorporated organisation.

While the trust is governed by a will or trust, the unincorporated association is governed by a constitution of rules. The trustees serve as a decision-making board and membership is possible. Both the trust and the unincorporated association leave trustees with liability.

In a company limited by guarantee, the trustees face only limited contractual liability. Registration takes place both with the Companies House and the Charity Commission.

Since 2012 a new legal form for charities exists, the so-called charitable incorporated organisation (CIO). The CIO was created as a response to requests from people active in the charity sector to have a new structure for non-profit activities. The legal framework is set out in the 2011 Charities Act and in particular the two flanking regulations and an order.⁴⁸ However, what remains noteworthy from a civil law perspective is that there is no statute under common law that sets out rules for all legal forms that have a charitable purpose such as for example the German *Abgabenordnung* would do for the status “*Gemeinnützigkeit*” (charitable purpose). The reason for this certainly is that under common law, the charitable purpose is even more perceived as a status rather than a specific legal form.

The governing document for a CIO is a constitution, trustees and members are safeguarded from personal liability, the CIO has legal personality and it has to be registered with the Charity Commission, which is an independent government department. The Charity Commission registers charities and is responsible for ensuring that charities act in line with legal requirements. It also grants charitable status to organisations. Unlike Germany, where the recognition of a *Stiftung* and overseeing whether charitable foundations act in line with the legal provisions, remains within the competencies of the *Länder* due to Germany's federal structure, the Charity Commission is responsible for all CIOs within England and Wales. The Scottish and Northern Irish counterparts are the Office of the Scottish Charity Regulator (OSCR)⁴⁹ and the Charity Commission Northern Ireland.⁵⁰ The main legislative body for England and Wales is the Charities Act of the year 2011 that replaced large parts of the preceding Charities Acts and

48 The Charitable Incorporated Organisation (General) Regulations 2012 (General Regulations), the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulation 2012 (Dissolution Regulations) and the Charity Tribunal (Amendment) Order 2012.

49 <http://www.oscr.org.uk/> (last accessed on 4/2/2014)

50 <http://www.charitycommissionni.org.uk/index.aspx> (last accessed on 4/2/2014)

there are of course no such instruments as “regional statutes” as you would find with the German *Landesstiftungsgesetze*.

c. The European dimension

On EU level, the European Foundation Centre (EFC) that was established in 1989 plays a key role in the promotion of a European Foundation (Fundatio Europaea, FE) with the third sector having responsibility and initiative being a request made by academia.⁵¹ The EFC is a Brussels-based membership association of foundations and corporate founders. It has some 230 members which are national foundations or associations.⁵² Its goal is to strengthen the European philanthropic landscape and funding as this is seen as a fostering element of European Civil Society and beyond. Despite the fact that charity law as such remains within the EU Member States’ competence as part of their social and cultural policy,⁵³ the European Commission, in joint action with the EFC, has been the frontrunner in not only welcoming a harmonised approach to charitable foundations in the EU, but also in developing a statute for a European Foundation that is not to replace the existing national frameworks but to complement and flank it in order to facilitate trans-national funding initiatives.⁵⁴ The concrete legal basis for the regulation is Art. 352 TFEU which serves as the legal basis when no other provision grants powers to EU institutions to legislate.⁵⁵ Moreover, the EFC’s main organ, the Annual General Assembly of Members issued “Principles of Good Practice” during its summit in Prague as early as the year 1994. Those principles deal with third sector’s transparency and accountancy, with best practices towards the beneficiaries and improving public relations and they underline the idea of creating an environment within the EU that is friendly and welcoming towards foundations.⁵⁶ In addition to that, the EFC has started to set up a data base for the European third sector and to this end closely works together with universities, research institutes, associations,

51 Cf. Weitemeyer, npoR 2009, p. 35; Schauhoff, npoR 2013, p.130.

52 The UK is represented with 11 members, amongst them, for example the Wellcome Trust, the Charities Aid Foundation, the Community Foundation for Northern Ireland or the Nuffield Foundation. Germany is represented with 24 members such as the Volkswagen Foundation, Maecenata, the Academy of European Law Foundation or the Stifterverband für die Deutsche Wissenschaft e.V.. Membership in the EFC is also open to non-EU members with countries such as Israel, Jordan, Senegal and Panama having one member each and the United States being represented with 17 members.

53 As stipulated in Art. 4 II b TFEU, there is shared competency in the field of social policy and Art. 6 lit.c TFEU allows the Union to “carry out actions to support, coordinate or supplement the actions of the Member States” in the area of culture.

54 Cf. Cranshaw, DZWIR 2013, p. 299; Schauhoff, npoR 2013, p. 129.

55 Art. 352 TFEU has been confirmed to be the right legal basis by the ECJ in cases concerning the European Economic Interest Group, the European Cooperative Society and the European Company.

56 The Principles that have been revised in 2013/2013 can be found under <http://www.efc.be/about/Pages/Code-of-Practice.aspx> (last accessed 4/2/2014)

ministerial bodies and individuals. In 2012, the European Commission released the proposal for a European Foundation Statute – a process that has been initiated and shaped by the EFC. Despite several shortcomings in the proposal,⁵⁷ the fact that the European Commission has put the strengthening of cross-border activities of public benefit purpose foundations on its agenda in economically difficult times, leads into the right direction. The EU cannot function without its citizens' support in the long run. Supporting its citizens' initiatives in the third sector directly influences the perception of "us" being the European Union instead of "them" (in Brussels). The core of the FE is its charitable purpose.⁵⁸ The term charitable purpose is a very wide one and is defined by each EU member states' provisions that are related to tax law. Art. 9 of the proposal stipulates that the FE has legal personality in all EU member states even though the acceptance procedure is of course determined by national law(s). In order to be granted the legal status "FE", the foundation must either act in at least two member states or provide cross-border activity as a purpose in its constitution. A notable difference to the idea of eternal existence under German Law is that the FE can be limited in time.⁵⁹ The minimum capital for the FE is €25,000 according to Art. 7 of the proposal which is what some German *Ländergesetze* would require as well (others require €50,000). In England, as seen above, less capital is required. The basic requirements of the FE are a name, a registered office (seat), a board of management, the mentioned capital and a constitution. The management board must consist of at least three members and is the only compulsory organ for the FE. Further provisions deal with optional organs (and in case they are established their rights and duties towards the management board), with conflict of interest, remuneration of members of organs and of external auditors, financial accounting rules, transparency, liability of the organs, changes to the constitution, termination and insolvency of the FE. In line with good European spirit, the proposal also addresses diversity aspects and employees' representation. The control of legality embraces the compliance with the national rules applicable, the FE's constitution and the Regulation. All in all, it has to be noted that the EFC's activities and the Commission's proposal are work in progress.⁶⁰ Whilst the proposal aims to address all aspects that can arise with cross-border non-profit activity, it reveals some inconsistencies, which are to be addressed and resolved in the future. It has to be stressed again though that trans-national charitable activity and funding are at the very heart of civil society and are one way of encouraging individuals to understand themselves

57 Cf. Jakob, npoR 2013, p. 5 who regrets that the chance to design a modern and intelligent statute for European Foundations had not been realised and doubts that the current proposal can be adopted without changing several of its shortcomings.

58 Art. 5 FE

59 The proposal allows a limitation for as little as two years which is a strong point of criticism as most charitable purposes cannot be reached within such a short time.

60 Cf. Jakob, npoR 2013, p. 2

as European – an understanding which is needed more now than maybe ever before.

III. Conclusions

1. Both England and Germany host an active and diverse environment for charitable foundations. The philanthropic culture in both EU member states reveals some differences, especially as far as the legal framework is concerned which is a consequence of the common law tradition (England) and a classical civil law country (Germany). Regardless of their legal forms and the regime they are established under, foundations make a profound contribution to the development of a strong civil society and a stable democracy.

2. The history between the development of the German and the English charity sector shows some similarities and some differences. Both the similarities and the differences are embedded in the larger context of the political and social development, the element of class consciousness, but also cultural and religious factors. In both countries, a strong and independent philanthropic sector exists that cooperates with the public sector. In both countries, the culture of giving and the ethics of reciprocity contribute to an active civil society.

3. There is fertile ground for both the existence and the persistence of charitable foundations in general. The preconditions for non-profit activities in civil society are not only prosperity, political and economical stability, but also providing a legal framework that facilitates setting up charitable foundations which are designed with longevity in mind. The Council draft regulation for a European Foundations Statute is - despite its various shortcomings that need to be addressed - a first step in the right direction. Adopting the improved regulation is a signal for donors and civil society across Europe that their activities and initiatives are respected and valued.

4. The global instability through the financial crisis, the credit crunch and the banking crisis had a detrimental effect on the sustainability of charitable foundation's assets and wealth which was triggered off by low interest rates. While large foundations face a greater diversification in their investments, smaller foundations were and are still struggling. It has proven sensible for all foundations not to change investment principles over night but stay calm in times of instability and take into account lower margins of gains and dividends in order to secure the foundation's very existence. However, all in all, the sector continues to grow.

5. In England, Germany and across the European Union the knowledge and publicity about third sector activities needs improving by various means and in different environments. Such outreach can happen in schools, at churches, at youth clubs, in sports centres and hospitals to name but a few. The importance

of an enhanced knowledge about this form of engaging into community life is that it is one form of participation and actively shaping democracy. Moreover, even though altruistic behaviour is never isolated from an egoistic motivation, (not only young) people need role models and see examples of the possibility to make a change in society by one's individual activity.

IV. Bibliography

- Anheier, Helmut K.: *Nonprofit Organizations. Theory, management, policy.* 2005, Routledge.
- Cranshaw, Friedrich L.: *Fundatio Europaea, Europäische Stiftung – Förderung grenzüberschreitender Tätigkeit durch ein neues europäisches Rechtsinstrument*, in: *DZWIR* 2013, 299–316.
- Hopt, Klaus J./W. Rainer Walz /Thomas von Hippel /Volker Then: *The European Foundation, A new legal approach.* Gütersloh, 2006.
- Jakob, Dominique: *Der Kommissionsvorschlag für eine Europäische Stiftung (Fundatio Europaea) – Streifzug durch eine europäische Kulissenlandschaft?*, in: *npoR* 1/2013, S. 1–5.
- Lück, Nina: *Die Anwendbarkeit des Corporate Governance Kodex auf Stiftungen*, Berlin, 2008.
- Liermann, Hans: *Geschichte des Stiftungsrechts*, 2002 (unveränderter Nachdruck der 1. Auflage von 1963).
- Luxton, Peter: *The Law of Charities*, 2001, Oxford University Press.
- Rawert, Peter and Andrea Ajzensztejn: *Stiftungsrecht im Nationalsozialismus – Eine Untersuchung unter besonderer Berücksichtigung der jüdischen und paritätischen Stiftungen*, in: von Campenhausen/ Kronke: *Stiftungen in Deutschland und Europa*, Düsseldorf 1998.
- Schlüter, Andreas, Volker Then and Peter Walkenhorst: *Foundations in Europe. Society, Management and Law*, 2001, London.
- Schauhoff, Stephan: *Für ein europäisches Gemeinnützigkeits- und Stiftungsrecht als Basis für eine europäische Zivilgesellschaft*, in: *npoR* 3/2013, pp. 128–130.
- Smismans, Stijn: *European Civil Society: Shaped Discourses and Institutional Interests*, in: *ELJ* 9/2003, 482–504.
- Weitemeyer, Birgit: *Probleme grenzüberschreitend tätiger Stiftungen und deren Lösung*, in: *npoR* 2/2009, S. 29–35.