

Contribution to EC Consultation on a proposal for a legislative initiative on Cross-border activities of associations

28 October 2022

1. Introduction

We welcome the call for evidence and public consultation that the European Commission launched this August on a proposal for a legislative initiative on cross-border activities of associations.

This follows the European Parliament legislative initiative resolution with recommendations to the Commission on a Statute for European Cross Border Associations and non profit organisations including two legislative proposals: a regulation to create the legal form of European Association and a directive harmonising minimum standards for non profit organisations. We have already had the opportunity to comment on the European Parliament proposal through a [joint submission](#) with Philea, Social Services Europe and ECNL.

We also welcome the [study on the legal frameworks and landscapes for associations in the 27 Member States](#) just published by the European Commission that outlines the diversity of national frameworks for associations, the size and development of the sector and some of the barriers that associations face in their cross border activities.

Civil Society has been long campaigning for a legal framework for civil society organisations (A European Association Statute), and more specifically non profit organisations working for the public benefit (or public good) whether these are associations, promoting participation in decision making or holding governments and institutions at all levels accountable, or service providers or public benefit foundations.

As societal challenges have a European or even global dimension, we witness the increase of activism crossing borders and connecting people. It is therefore critical that EU policies can support transnational cooperation among civil society organisations focusing for the common good.

Action in this area is particularly relevant as underlined by the Rule of law 2022 report because of the lack of compliance of the legal framework with civic freedoms, or as part of discussions within the action plan on social economy. In addition, recent studies¹ have shown the

¹ For instance: <https://thirdsectorimpact.eu/>

importance and the potential contribution of civil society organisations as the third sector between public and private and the obstacles it faces because of the inadequacy of the legal framework both at national and at EU level.

We also believe that this proposal should be the basis of a broader approach to civil society at EU level. Only such a comprehensive approach would provide an adequate response to the objectives identified in the call for evidence: to enable associations and the public to fully benefit from a) the freedoms of the single market and b) their fundamental rights under the Charter of Fundamental Rights of the EU (in particular, freedom of expression and information, freedom of assembly, and freedom of association). The single market approach will not address all challenges faced by civil society organisations. It is therefore critical to complement the proposal with other policy measures as part of a long term approach towards civil society.

The call for evidence and the public consultation are a welcome first step to engage with civil society in the shaping of legislation. According to international law, it is critical that civil society organisations are closely involved in the definition and decision of all measures to review, update or develop legislation and measures affecting them. Moreover Treaty provisions as part of article 11.2 provide for EU institutions to “maintain an open, transparent and regular dialogue with *representative associations and civil society*”.

2. What are the barriers that civil society organisations face?

Many civil society organisations operate in the internal market irrespective of the fact that they perform “economic activities” or not.

Both organisations focusing on advocacy and service provisions encounter barriers. Many associations and foundations hesitate to engage in activities in other EU countries because of the legal and fiscal uncertainties. This has been further exacerbated as a consequence of the pandemic, but also of further restrictive legislative or administrative rules enacted at national level, which are sometimes also derived from the misapplication of EU legislation.

These are main areas that we have identified through consultation of our members and a survey where CSOs face obstacles :

a) Recognition of legal personality:

Public benefit foundations and associations registered in one Member State as the legal personality are not always recognised abroad. Several member States require the creation of a branch as a condition to operate in another country.

Moving the seat of an organisation abroad is a challenge as there are no legal provisions in most countries, and this entails legal uncertainties. Even if the country of transfer recognises the legal personality of the organisation, the country of origin may deny the transfer of assets (for instance an organisation tried to move its seat and assets between Sweden and Belgium, but was met with the resistance of the Swedish authorities).

Cross-border merger of foundations and associations is much more difficult as it is for companies.

b) Relocation of employees and volunteers

Many civil society organisations point out that they face challenges in relocating their employees in another country due to the existence of different rules. Due to the important administrative burden, many associations give up this possibility from the onset.

Furthermore this leads to inconsistent working conditions across countries within the same association. For instance in Belgium it is not possible to grant paid leaves to the staff during the first year of employment. Because of the fact that associations rely on subsidies, and are generally only engaging in a limited way in commercial activities, it is often not possible to compensate for these differences, as compared to private actors.

Relocation of employees is particularly challenging for people that are living in the EU or in Europe, but do not hold a residence permit of the country. Work permits are easier to acquire in certain EU countries but not in others creating discrimination for job applicants. As many civil society organisations organise activities outside of the EU, these restrictions are problematic. This is also preventing talent from entering the EU.

Particularly problematic is the possibility to “hire” volunteers in another country as national frameworks for volunteering differ according to countries or are not in place. Civil society organisations have advocated for a long time for quality principles for volunteering².

c) Organisations of activities in another country

These are some of the obstacles that were reported to us:

- *General administrative issues*: when extending activities to new countries, it is difficult to understand registrations and legal requirements, which generates a lot of administrative burden instead of focusing on core tasks/goals of the association. As there is no

² https://issuu.com/european_volunteer_centre/stacks/32a3dac0beb846728c4398ac11d016c6

automatic recognition between the Member States, bureaucratic procedures need to be repeated in each country in which the organisation aims to operate. These procedures, although often similar, are never the same. Moreover, currently, rules are further developed at the regional and/or local level, thus adding one more layer of complexity. The administrative procedures and requisites to be met in each country need to happen in the local language (which in the case of some regions may not even be the national language of the country). As a result of the Covid-19 pandemic we have witnessed a multiplicity of very diverse requirements including between regions of the same countries that created additional hurdles for associations to cooperate across EU countries and organise activities.

- Sometimes *legislative requirements prevent cross-border activities*. For instance change of statutes in Belgium require holding a general assembly in the country while it is the practice of international associations such as AISBL to organise these meetings in different EU countries where members are based.
- *Requirements for certified staff* according to national legislation of the country where the activity is taking place (e.g. in France), for instance in the case of youth camps (involving minors) held in another country is creating a discrimination in employment/volunteering.
- The need to have a *VAT number* in the country where the activity is organised to have invoices issued in the name of the organisation is obliging organisations to rely on a local partner for re-invoicing. Partners have then to make advance payments and deal with all the administrative burden.
- Many organisations face difficulties when having European Solidarity Corps *volunteers and Erasmus+ interns* from non-EU countries as they need a visa. Regularly visas are denied due to restrictive or incorrect interpretations of the rules. For interns it is even more difficult. As an example, one organisation was required by relevant authorities in Brussels to pay the Erasmus+ intern coming from Serbia the minimum wage for employees (1800 EUR) while in Brussels the minimum wage for trainees is around 900 EUR. The organisation in particular appealed and fortunately won the case, but this is not the case in most cases as civil society organisations and youth organisations do not usually possess enough resources to actively engage in such bureaucratic and burdensome processes beyond their existing responsibilities.
- *Audits and taxation rules* for NGOs receiving public funding (e.g. via EU projects) are very hard, time-consuming, and often disproportionate in comparison to the amount of funding received.
- *Criminalisation of solidarity*: when associations provide humanitarian support to asylum seekers or immigrants they are often confronted with harassment by enforcement bodies or legal procedures. This is particularly challenging when volunteers or staff from other EU (or non-EU) countries are involved.
- Restrictions to *advocacy campaigns* conducted *online*. For instance the localisation feature of social media often does not permit associations to reach out effectively in

other EU countries with targeted ads besides where the organisation is based or is running an activity - it is also an implication from an EU legislation currently under review. Associations have to find alternative ways to rely on mobilising their members across member states, but this solution does not work for all types of campaigning necessarily.

- *Brexit* has caused additional problems for organisations to organise activities in the UK and vice versa.
- *Strategic lawsuits against public participation* (SLAPPs, defamation claims) brought against an association from another country.

d) Access to bank accounts or financial services

As a consequence of incorrect transposition or overly restrictive interpretation of EU anti-money laundering and counterterrorism legislation, many banks apply derisking practices to civil society organisations. We have several instances of bank accounts blocked or denial of provisions of banking services to NGOs (transfer of funds, credit cards, etc).

Opening and running bank accounts as an international NGO registered in Belgium is extremely complex. It requires not only official documentation from the official Gazette but also written confirmations from multiple members of the Board who would have access to the account. This is often problematic as in many cases, the Executive Board lives in different EU countries and is not available to quickly provide handwritten signatures. Moreover, bank services are risk averse, often also not well-versed in the guiding legislation which leads to either misinformation that prolongs procedures, or unnecessary red tape. Moreover, when non-EU nationals are in key positions of Boards (e.g. President or Vice-President), they usually cannot be added to the banking system.

Banks also increasingly question direct payments that non-profit associations receive from abroad because of the AML, including funding support. Also, it is not possible to make payments in countries where sanctions are enforced leading to the interruption of programmes including those benefiting disadvantaged public.

We have received information of two banks closing different bank accounts of non-profit associations in Belgium based on bank derisking. One was linked to the payment of one staff trip in a third country and the other one because of a mismatch between the data in the official gazette and the Ultimate Beneficiary Ownership Register, due to delays in the Official Gazette publication by the Commercial Court. The bank did not even warn the organisation about the problem or ask them for further information.

e) Restrictions to foreign funding

Receiving funding from abroad has been difficult for organisations e.g. in Hungary because of legislation introduced in the past years (the now-defunct 2017 Law on Foreign Funded NGOs and the 2018 Immigration Tax Law). Notably, the immigration law imposes the collection of a tax on foreign donations in case of specific organisations. Although this legislation has in practice never been applied, it still discouraged foreign funders to operate in Hungary as they are wary of potential repercussions. Also, organisations having a long standing relations with funders had to put a lot of effort into clarifying the legal situation and risked losing their funding.

f) Fiscal issues

Despite ECJ rulings confirming the non-discrimination principle and the free flow of capital, there are still rules in place which provide that non-resident foundations (and their donors) are denied all or some tax benefits which domestic legislators have granted to resident foundations and their donors. It is still difficult for associations to ensure that donors from abroad receive the same tax treatment as donors from the country of establishment of the organisation. Some organisations have to find solutions through partnerships with NGOs of the same country as the donor. This clearly limits opportunities for fundraising and also the freedom of private donors.

We were also alerted to the application of the inverted VAT rules, leading to uncertainty or double taxation.

When organising activities or events in another country and asking a participant fee, there are legal uncertainties as to the application of VAT.

Moreover, preferential VAT rates to associations providing services to disadvantaged people have been challenged by EU authorities in a context where NGOs are facing numerous challenges as a result of the economic consequences of the pandemic and of the Russian invasion of Ukraine.

g) Undue consequences of AML/CT EU legislation transposition

In addition to bank derisking certain aspects of money laundering and terrorism financing policies are limiting the operating space for philanthropy and civic space. Even though not required by the EU Directives, certain countries consider non-profit associations and foundations as quasi obliged entities requiring more strenuous reporting requirements, without clearly identified risks.

h) Competition rules

Associations have reported problems as regards diverging interpretation of EU competition rules at national level.

One organisation organising exchanges with youth has faced problems in a EU country (Finland) because of the strict interpretation of the travel directive, so their members were considered as travel agencies and to avoid distortion of competition they were required to pay VAT on the youth mobility programmes offered.

j) State aid rules

Several associations across Member States struggle with the exceptions to state aid rules whether these are group exemptions, the implementation of the *de minimis* aid rule, and in the context of the services of general economic interest, which creates a lot of legal uncertainties.

These exceptions are, however, unfulfilling as they fail to protect civil society organisations in various ways – either because their domain is not included in the group exemptions, the *de minimis* rules do not cover the operation of bigger non-profit organisations, or the particularity of their economic activities is not covered by the very strict and exhaustive SGEI rules. In short, we currently lack a comprehensive solution for non-profit organisations in Europe – and as long as non-profit organisations are put on the same level as genuine enterprises, this will continue to be the issue.

We also believe that the creation of a new legal form would also help to avoid competition issues between the public good sector and the private sector.

k) Procurement

The last EU directive provides for social and environmentally responsible public procurement provisions although the possibility to use the lowest price procedure *de facto* limits this procedure. Associations and other social economy actors are often put in a situation of unfavorable competition with market actors. The existence of reserved procurement for instance in the area of disadvantaged workers does help to meet this imbalance, but does not solve the problem. Furthermore, procurement is not always the best mechanism to fund services by associations, as it is not tailored to the functioning of civil society organisation.

Furthermore, because of the lack of clarity on their status, civil society organisations tend to be captured by public procurement rules (especially when they receive a certain percentage of public funding) which means that obligations for public authorities may also be applied, creating important red tape particularly if thresholds at national level are set at a low level and the organisation is small or heavily relies heavily on volunteers.

l) Restriction to activities because they are considered 'political'

In recent years several Member States have introduced provisions that introduce restrictions to civil society organisations to their advocacy activities.

As an example the decision of tax authorities in Germany to remove charitable status from certain NGOs involved in public campaigning, provisions in the Electoral Act in Ireland, clauses in public grants preventing advocacy or other forms of pressure on CSOs requiring to abstain from advocacy or watchdog activities); Laws and policies on disinformation such as the 2018 'Holocaust law' in Poland that induce censorship as well as intimidation, including the use of criminal law to obstruct free speech, as well as the change to the criminal code in Hungary and Spain in 2020 all currently enforced).

This issue has also been addressed in the European Commission 2022 rule of law report.

m) Harassing inspections by state authorities in order to limit the activities of organisations as part of the criminalisation of solidarity or their watchdog role.

For further information on barriers to public benefit foundations: [2021 Comparative highlights of Foundations Laws](#)

3. Who should be covered by the proposal?

One key question that the proposal should address is who should be covered by the legislation. There is currently no clear definition of non-profit civil society organisations at EU level. The European Court of Auditors has already underlined this issue in its special report on the funding of NGOs by the EU. **We would recommend therefore to use a definition in the proposal that corresponds to the objectives of the proposal.**

We understand that there is a preference to limit the proposal to non profit associations, however we call on the European Commission to extend the target of the proposal, while

redefining it. We believe that **the proposal should both include non profit associations and foundations working for the general interest or the public good**. We would like to avoid using the term “public benefit” as in some countries only a limited number of associations have this legal status linked to the possibility to apply for fiscal deductions to donations. Civil society organisations working for the public interest or the common good would include both those focused on advocacy or service provision as defined in their mission statement and they should be fully non-profits, so if associations have members, these should also be non profit organisations working for the public good.

In many countries the distinction between foundations and associations is not that clear, and there is a risk of excluding potentially a number of organisations, for instance foundations that are not grant making and have a modus operandi very similar to associations. There is also a complementarity between non profit associations/NGOs and public benefit foundations as they are both working for the public good, and they have the same non profit redistribution obligations. Also if internal market obstacles for associations are removed, while they remain for grant giving foundations, this will have an impact on the ability of associations to operate.

4. Content of the proposal - Policy Response

We would like to respond to the three questions and options that are described in the consultation:

Option 1) A new legal form for associations allowing for recognition in all Member States to fully benefit from the single market

- a) European Statute for Associations – establishing a new legal form at EU level*
- b) Establishing an additional legal form for associations in national law enabling mutual recognition for operating across borders in the EU*

We support the creation of a new legal form that would allow public benefit non-profit associations and foundations to be recognised in all Member States with limited formalities such as registration. This could be done both at European level as proposed by the European Parliament or at national level. In this second case we have already a precedent regarding for profit companies with the creation of the single member private limited liability companies.

Such a proposal would allow non-profit entities to have their legal personality fully

recognised in the different EU countries, so as for instance to be able to move their seat or merge with another association or foundation.

In certain countries where democracy is under pressure and legal registration is made difficult for NGOs as a means of obstruction, having the possibility to establish a branch or an European network could be a useful option in the context of the existence of a new legal form.

We also believe that the proposal should allow for maintaining the diversity of legal traditions at national level, as long as they are in compliance with fundamental rights and in particular civic freedoms, and be based on a system of mutual recognition.

Should the proposal for a new legal form include the wider non-profit sector within a public benefit purpose, **it would also further facilitate the recognition of the existence of a third legal form next to for profit and public entities**. As outlined before in section 2, several NGOs, public benefit foundations face uncertainties and issues linked to the implementation of EU competition and internal market legislation as well as fiscal measures because of their hybrid nature between public and private. This prevents them from fully providing non-profit services and activities to the public. However, it is important to make the application for such recognition easily available to all existing organisations that (in theory) meet the criteria of public interest, and do not involve the need to re-register an organisation or create a whole new one.

We would also **suggest for the future EC proposal to contribute to a better implementation of the non-discrimination principle with regard to philanthropy taxation** or taxation of donations through a code of conduct or a blue print guidance to Member States on how to better implement the non discrimination principle with regard to the tax treatment of foreign EU-based public benefit organisations and donors.

Finally the system for mutual recognition should be as simple as possible and based on a simple and user friendly multilingual online registration tool, so as to avoid any unnecessary red tape. Also it should be based on clear objective criteria not leaving any space to the unjustified exclusion of associations/foundations legally recognised in other countries.

Option 2) Harmonising common minimum standards for cross-border operations in the EU

In addition to establishing a new legal form, we would be in favour of developing

minimum standards to guarantee the fundamental rights on which this new legal form would be based.

We see this not as an alternative, but rather as a complementary measure to the first option, if possible within the same legislative proposal.

Such benchmarks would be wide in scope and define key principles on which national law should be developed in full respect of civic freedoms, while maintaining the diversity of national traditions. In addition to the Charter of Fundamental Rights³, and the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴, Freedom of Expression⁵, Association and (peaceful) Assembly⁶ have been defined in International law and in instruments and opinions guiding their implementation.

These benchmarks would relate to the different freedoms such as the right of association, right of assembly and right of expression. They should cover key elements such as the registration of an association, governance, the profit non-distribution and independence, notably from public authorities at all levels, rules for assembly, freedom of expression including online and offline space. They should also safeguard the civil sector from excessive or misinterpreted legislation e.g. in terms of the definition of “political” activities or funding from abroad which are contested issues in some Member States. Moreover, they should clarify the rules for cross-border relocation, mergers, etc. as described above.

They should rather create general, but legally binding guidance and avoid defining overly specific rules such as role of responsibilities of different governing bodies, or limit the mission of associations to specific policy areas or to service provision, or establish undue powers of surveillance of the activities of associations/public benefit foundations, or creating unnecessary administrative requirements.

It is also critical that the proposal would include a non-regression clause, so that more favourable legislations to associations/foundations would be maintained, and that it would contribute to an upward convergence.

³ Articles 11 and 12

⁴ https://www.echr.coe.int/Documents/Convention_ENG.pdf (articles 10 and 11)

⁵

<https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/international-standard>

⁶

<https://previous.ohchr.org/EN/Issues/AssemblyAssociation/Pages/InternationalStandards.aspx>

These benchmarks should also be applicable at EU level so as to ensure that EU legislation is also shaped and reviewed in accordance to these principles as well as to prevent undue consequences on civic freedoms of the implementation or transposal of EU legislation into national law as for instance with the anti-money laundering or counterterrorism directive.

We also suggest that existing (and future) EU programmes support mutual learning and training on the development and revision of national frameworks. This would also contribute to the implementation of the country specific recommendations under the rule of law cycle.

Option 3) An EU information campaign, with strengthened cooperation among Member States

[As a non-legislative initiative, this would not involve legal action. It could include raising the awareness of targeted entities of their rights and obligations when operating cross-border in the EU, as well as strengthened cooperation between the Member States, including providing better access to information for targeted entities.]

We believe that this approach would be insufficient in itself to tackle the obstacles that public benefit non-profit associations and public benefit foundations face as regards internal market freedoms.

However, such an information campaign could accompany the implementation of a future legislation.

As mentioned before, we also believe that mutual learning and exchange among Member States and with civil society organisations would be very useful in this field and we would welcome for instance an annual meeting gathering relevant public authorities at national and EU-level and representative platforms of civil society organisations to review implementation.

We also believe that this very welcome initiative should be accompanied by other measures from the European Commission that would be part of an overall roadmap to support civil society and the promotion of civic freedoms both at national and EU level. This would follow the conclusions of the report on the implementation of the Charter of fundamental rights to be published in December which will be dedicated to civic space and the development of a package on the Defence of Democracy in the EU.

Part of this could be a Communication on the role of public benefit civil society organisations in EU democracy with initiatives to recognise, empower, protect and support.

These could include guidelines on civil dialogue at EU level, which would complement those on consultations, contact points in the different DGs on civil society coordinated by the Secretariat General and liaising with the EC Vice President in charge of civil society, an impact assessment mechanism on civic space, an alert mechanism for breaches of civic freedoms on the basis of similar mechanism being develop for the media, etc. (see [CSE Proposal on the European Package for the Defence of democracy](#)).

5. Nothing about civil society without civil society

As mentioned before, Civil society organisations should be actively involved in all matters concerning them.

We welcome this consultation as part of a structured dialogue with civil society in all the next steps from the preparation of the proposal, up to decision making.

6. Who we are

Civil Society Europe (CSE) is the coordination of civil society organisations (CSOs) at EU level. It brings together 22 European platforms and networks of CSOs, among the most representative organisations representing citizens in the areas of education, environment, culture, Social inclusion, health, civic participation and volunteering, transparency, international cooperation, youth, antiracism and disability, working towards regenerating the European project around the shared values of Equality, Solidarity, Inclusiveness and Democracy. Our main objectives: to facilitate and enable dialogue between European civil society organisations and policy-makers and help strengthening CSOs in their activities and relations with the institutions.



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