

# **Civil society input on the proposed Directive on European cross-border associations (ECBA)**

*Input coordinated by Civil Society Europe and supported by: Alzheimer Europe; European Civic Forum; Samaritan International; European Students' Union; Philea; Ökotárs - Hungarian Environmental Partnership Foundation; Human Rights Cities Network; CEDAG; European Fundraising Association, COFACE.*

**The above mentioned civil society organisations are pleased to provide the following policy input to the proposed Directive on European cross-border associations (ECBA):**

## **General policy input:**

- We welcome the proposed Directive for the establishment of an ECBA as a way to support the operations of civil society organisations transnationally, and at the European level.
- We also welcome the Directive proposal as it formally recognises non-profit associations and further promotes their statute (including governance, membership, funding, etc.), and it acknowledges the fundamental feature of non-profit purpose (“asset lock”).
- The ECBA has the potential to become a benchmark also for national legislation on the establishment and operations of non-profit organisations.
- While foundations as legal entities can create an ECBA, the ECBA proposal does not effectively cover foundations and does not provide for the creation of a European Cross-border Foundation. Therefore, in the future, a specific legislative initiative, similar to the ECBA, should also be proposed for foundations.
- For the ECBA Directive proposal to be effective, it has to ensure that non-EU based people or associations (and other non-profit legal entities) can be members of an ECBA and hold leadership positions.
- We welcome the strong element of mutual recognition and equal/non-discriminatory treatment of the ECBA. While taxation is not covered by the Directive proposal, we expect that at the national tax law level Member States could consider that foreign-based ECBAs will be considered comparable to local/resident ECBAs and hence donors giving to an ECBA registered abroad would receive the same tax incentive as if they were giving to a local ECBA.
- The guarantees against arbitrary restrictions based on ‘public interest’ should be strengthened.
- We welcome that the proposed Directive is not overly prescriptive, in order to be flexible enough to adapt to the different national situations and the diversity of non-profit organisations. Simplifying administrative procedures is key to ensure the smooth implementation of the Directive at the national level. Hence, the “only once principle” should be reinforced.
- Point to be clarified: Conversion of an association into an ECBA (articles 17, 18, 19). Due to the fact that the founding members of an ECBA can only be from EU Member

States, how will the conversion to an ECBA of an association with members both inside and outside of the EU work, in order not to lose the non-EU members upon conversion?

- Point to be clarified: Article 4.2 and cross-border operations of ECBAs. Based on art. 4.2 and on art. 4.4, if an ECBA registered in Member State A operates in Member State B, will it operate based on the rules applicable to the closest legal form of the home country (MS A) or of the operating country (MS B)? To give an example: an ECBA registered in MS A is given the status of public benefit association, as that is the closest national form as identified per art. 4.4 of the Directive. However, in MS B, ECBAs are not automatically given the status of public benefit association, as that is not the national form identified in MS B to fulfil the art. 4.4 of the Directive. If the ECBA established in MS A operates in MS B, will it be considered as holding the title of public benefit association (as would be applying MS A's rules) or not (as would be applying MS B's rules)?

## Proposed amendments to the Directive

### Amendment 1

#### Recital (27)

<i>Original Text</i>	<i>Amended Text</i>
<p>Articles 52, 62 and 65 TFEU and relevant case law also apply to ECBAs. These TFEU Articles provide for the justification of measures restricting the freedom of establishment, freedom to provide services and free movement of capital on grounds including public policy, public security and public health. Furthermore, the concept of 'overriding reasons in the public interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law. Measures by Member States that are liable to hinder or make less attractive the exercise of those Treaty freedoms should be permitted only where they can be justified by objectives listed in the Treaty or by overriding reasons in the public interest recognised by Union law. While no exhaustive definition exists, the Court of Justice has recognised that justifications are possible on various grounds such as public policy, public security and public health, the maintenance of order in society, social policy objectives, the protection of the</p>	<p>Articles 52, 62 and 65 TFEU and relevant case law also apply to ECBAs. These TFEU Articles provide for the justification of measures restricting the freedom of establishment, freedom to provide services and free movement of capital on grounds including public policy, public security and public health. Furthermore, the concept of 'overriding reasons in the public interest' to which reference is made in certain provisions of this Directive has been developed by the Court of Justice in its case law. Measures by Member States that are liable to hinder or make less attractive the exercise of those Treaty freedoms should be permitted only where they can be justified by objectives listed in the Treaty or by overriding reasons in the public interest recognised by Union law. While no exhaustive definition exists, the Court of Justice has recognised that justifications are possible on various grounds such as public policy, public security and public health, the maintenance of order in society, social policy objectives, the protection of the</p>

<p>recipients of services, consumer protection, the protection of workers, provided that the other conditions are met. Such measures need, in any event, to be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective.</p>	<p>recipients of services, consumer protection, the protection of workers, provided that the other conditions are met. <b>As many associations address or work in the listed subjects</b>, such measures need, in any event, <b>to be preceded by a risk assessment and be appropriate and proportionate</b> for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective.</p>
<p><i>Reasoning:</i> many of the justifications listed are issues in which associations are engaged or active, and without additional guarantees Member States may over-implement the directive and restrict or deny the registration of an ECBA claiming overriding public interest.</p>	

**Amendment 2**  
**Recital (45)**

<i>Original Text</i>	<i>Amended Text</i>
<p>The dissolution of an ECBA may be involuntary by decision of the competent authority of the home Member State of the ECBA, as a last resort, only where an ECBA does not respect its non-profit purpose, where its activities constitute a threat to public order, or where the members of the executive body of an ECBA have been convicted of a particularly serious criminal offence or the ECBA itself has been convicted of a criminal offence, if national law allows for this possibility. In this case, the competent authority should communicate to the ECBA a formal notice of its concerns and hear the ECBA in order to give the ECBA the opportunity to reply</p>	<p>The dissolution of an ECBA may be involuntary by decision of the competent authority of the home Member State of the ECBA, as a last resort, only where an ECBA does not respect its non-profit purpose, where its activities constitute a threat to public order, or where the members of the executive body of an ECBA have been convicted of a particularly serious criminal offence or the ECBA itself has been convicted of a criminal offence, if national law allows for this possibility. Such a decision <b>should be preceded by a risk assessment in line with standards of necessity and proportionality as outlined by International law and the EU Charter of Fundamental rights.</b> In this case, the competent authority should communicate to the ECBA a formal notice of its concerns and hear the ECBA in order to give the ECBA the opportunity to reply. <b>The decision should be subject to an independent judicial review pending finalisation.</b></p>
<p><i>Reasoning:</i> many of the justifications listed are issues in which associations are engaged or active, and without additional guarantees Member States may over-implement the directive and restrict or deny the registration of an ECBA claiming overriding public interest.</p>	

### Amendment 3

#### Article 3.3

<i>Original Text</i>	<i>Amended Text</i>
Member States shall ensure that an ECBA shall carry out or have in its statute the objective to carry out activities in at least two Member States and have founding members with links to at least two Member States, either based on citizenship or legal residence in the case of natural persons, or based on the location of their registered office in the case of legal entities.	Member States shall ensure that an ECBA shall carry out or have in its statute the objective to carry out activities in at least two Member States and have founding members with links to at least two Member States, <b>based</b> on citizenship or legal residence in the case of natural persons, <b>and in the case of legal entities based either</b> on the location of their registered office, <b>or on the citizenship or legal residence or location of the registered office of their members.</b>
<i>Reasoning:</i> This amendment would also allow European networks of European organisations that operate cross-borders, but have their seat in the same Member State, to become an ECBA.	

### Amendment 4

#### Article 6.1

<i>Original Text</i>	<i>Amended Text</i>
(a) prescribed by law; (b) justified by overriding reasons in the public interest; (c) appropriate for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained.	(a) prescribed by law; (b) justified by overriding reasons in the public interest; <b>and</b> (c) <b>necessary and proportionate</b> for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained
<i>Reasoning:</i> The amendment will clarify that the three conditions are cumulative, as DG GROW intended according to our talks, and ensure that Member States do not over-implement the directive and restrict or deny the registration of an ECBA claiming overriding public interest.	

## Amendment 5

### Article 7.2

<i>Original Text</i>	<i>Amended Text</i>
Member States shall ensure that only natural persons that are Union citizens or legally resident in the Union and legal entities with a non-profit purpose established in the Union, through their representatives, may be members of the executive body of an ECBA. The executive body of an ECBA shall be composed of a minimum of three persons.	<b>The executive body of an ECBA shall be composed of a minimum of three persons.</b>
<i>Reasoning:</i> The limitation to have only EU citizens or residents in the executive body would create a two-tiered system of membership within the ECBA, which would deter many current European organisations to convert in ECBA, as many of them have members in the wider Europe. Furthermore, art. 3 already regulates the provision that ensures the link between the ECBA and the EU territory as scope of activity, without overregulating the composition of the executive body.	

## Amendment 6

### Article 8.0

<i>Original Text</i>	<i>Amended Text</i>
-	<b>Notwithstanding the criteria for the constitution of an ECBA as laid out in art. 3.1, the membership criteria of an ECBA are regulated by its Statutes.</b>
<i>Reasoning:</i> Such an amendment would clarify the implicit meaning of article 3.1 in differentiating between the 'founding members' that can establish an ECBA, and all other members. Such an article is important as many European organisations have members both inside and outside of the EU, and not recognising that would be a severe disincentive for them to convert into an ECBA. It would also ensure that, when transposing the Directive, the Member States would not add any additional membership criteria (partially redressing a lack of that in art. 6). This amendment would be the first paragraph of article 8, with the current paragraphs therefore becoming artt. 8.2 and 8.3.	

## Amendment 7

### Article 8.1

<i>Original Text</i>	<i>Amended Text</i>
Member States shall ensure that each member of an ECBA has one vote.	Member States shall ensure that each member of an ECBA has one vote, <b>unless differently specified in the Statutes.</b>
<i>Reasoning:</i> The amendment gives a 'default option', but allows the flexibility needed for those organisations that are made of legal entities. Such a solution is also implemented by the Belgian Law on associations and societies ( <a href="#">Code des sociétés et des associations</a> , art. 9:17).	

## Amendment 8

### Article 12.2

<i>Original Text</i>	<i>Amended Text</i>
(a) prescribed by law; (b) justified by overriding reasons in the public interest; (c) appropriate for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained.	(a) prescribed by law; (b) justified by overriding reasons in the public interest; <b>and</b> (c) <b>necessary and proportionate</b> for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained
<i>Reasoning:</i> The amendment will clarify that the three conditions are cumulative, as DG GROW intended according to our talks, and ensure that Member States do not over-implement the directive and restrict or deny the registration of an ECBA claiming overriding public interest.	

## Amendment 9

### Articles 13.2

<i>Original Text</i>	<i>Amended Text</i>
(a) prescribed by law; (b) justified by overriding reasons in the public interest; (c) appropriate for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained.	(a) prescribed by law; (b) justified by overriding reasons in the public interest; <b>and</b> (c) <b>necessary and proportionate</b> for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained
<i>Reasoning:</i> The amendment will clarify that the three conditions are cumulative, as DG GROW	

intended according to our talks, and ensure that Member States do not over-implement the directive and restrict or deny the registration of an ECBA claiming overriding public interest.

**Amendment 10**  
**Articles 14.2**

<i>Original Text</i>	<i>Amended Text</i>
(a) prescribed by law; (b) justified by overriding reasons in the public interest; (c) appropriate for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained.	(a) prescribed by law; (b) justified by overriding reasons in the public interest; <b>and</b> (c) <b>necessary and proportionate</b> for ensuring the attainment of the objective pursued and do not go beyond what is necessary in order for it to be attained
<i>Reasoning:</i> The amendment will clarify that the three conditions are cumulative, as DG GROW intended according to our talks, and ensure that Member States do not over-implement the directive and restrict or deny the registration of an ECBA claiming overriding public interest.	

**Amendment 11**  
**Article 23.3**

<i>Original text</i>	<i>Amended text</i>
f) a report explaining the safeguards for creditors and employees, if applicable under Union or national law.	f) a report explaining the safeguards for creditors and employees, if applicable under Union or national law. <b>The preparation of such a report must not impose excessive administrative burden.</b>
<i>Reasoning:</i> preparing such a report may cause unnecessary administrative burdens in the absence of more precise or detailed guidance regarding its content and criteria for its approval.	

**Amendment 12**  
**Article 25.5**

<i>Original Text</i>	<i>Amended Text</i>
Member States shall ensure that the decision referred to in paragraph 4 of this Article is reasoned, subject to effective judicial review, and does not take effect while judicial review is	Member States shall ensure that the decision referred to in paragraph 4 of this Article is reasoned, subject to <b>independent judicial review</b> , and does not take effect while judicial

pending-	review is pending.
<i>Reasoning:</i> To safeguard from Member States over-implementing the directive and resorting to involuntary dissolution of the ECBA, there should be an independent judicial review process.	

### Amendment 13

#### Article 25. 2

<i>Original Text</i>	<i>Amended Text</i>
Member States may provide for the involuntary dissolution of an ECBA only on the basis of one of the following reasons: (a) non-compliance of the ECBA with the non-profit purpose; (b) a serious threat to public order or public security caused by the activities of the ECBAs;	Member States may provide for the involuntary dissolution of an ECBA only on the basis of one of the following reasons: (a) non-compliance of the ECBA with the non-profit purpose; (b) a serious threat to public order or public security caused by the activities of the ECBAs, <b>provided that it is preceded by a risk assessment in line with standards of necessity and proportionality as outlined by International law and the EU Charter of Fundamental rights.</b>
<i>Reasoning:</i> There is a concern that some Member States may over-implement the directive and resort to involuntary dissolution of the ECBA with the justification of maintenance of 'public order'. See UN General Comment - <a href="#">CCPRCGC34.doc (un.org)</a> <a href="#">Article 54</a> of the EU Fundamental Rights Charter states "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."	

### Amendment 14

#### Article 27.1

<i>Original Text</i>	<i>Amended Text</i>
Each Member States shall designate the competent authority ('competent authority') responsible for the application of this Directive.	Each Member States shall designate an <b>independent</b> competent authority ('competent authority') responsible for the application of this Directive.
<i>Reasoning:</i> To safeguard the right to freedom of association, the competent authority should be independently selected in order to exercise its role without state influence.	