Questions & Answers on the European Cross-Border Associations (ECBA) Directive

September, 2024

This document aims to answer key questions, raised in discussions with some Member States, about the proposal for a Directive on European Cross-Border Associations by the European Commission, as well as the European Parliament legislative resolution on the proposed Directive which was adopted in its first reading. It provides a factual understanding of the ECBA Directive from the perspective of civil society actors.

This document was prepared by the informal coalition on the European-Cross Border Associations Directive, coordinated by Civil Society Europe with contributions from the European Civic Forum (ECF), the European Students' Union (ESU), the Philanthropy Europe Association (Philea), Social Services Europe (SSE) and the European Council of Associations of General Interest (CEDAG). For any questions, please contact matteo.vespa@civilsocietyeurope.eu.

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Introduction

In September 2023, the European Commission (EC) published a proposal to "improve the functioning of the internal market of non-profit associations by laying down measures coordinating the conditions for establishing and operating European cross-border associations (ECBAs)"[1]. The proposal aims to facilitate the effective exercise of freedom of movement of non-profit associations operating in the internal market in the EU.

Civil society and the non-profit sector have been following with great interest the process of the establishment of a European Cross-Border Association (ECBA) directive, as an important step for the creation of the 'Single Market for the Public Good'[2], which could pave the way to discuss other issues, such as a legal instrument for foundations. In particular, a broad coalition of civil society and non-profit organisations (NPOs) is contributing to the legislative process of the ECBA Directive with the aim of getting it approved, as they have done before in relation to the initiative taken and the work done by the European Parliament.

We welcome the Directive as it formally recognises cross-border non-profit associations[3] and supports citizens and legal entities to effectively organise their action at the transnational and European levels, ensuring mutual recognition and equal treatment vis-a-vis national associations across the EU, while providing enough flexibility to adapt it to the variety of associations and national models. The proposal constitutes an effective tool for citizens as well as legal entities to organise their cross-border activities.

We support the position of the European Parliament (EP) in the first reading, as it carefully balances internal security concerns with guarantees on the respect of the rule of law and fundamental rights, clarifies some points that were implicitly present (but not clearly stated) in the original proposal for the European Commission, adapts the original proposal to the reality of the already existing European civil society organisations, and paves the way for further steps to establish a 'single market for the public good'. We, therefore, support the adoption of the Directive, in a form as close as possible to the first reading of the European Parliament.

1. General questions on the European Cross-Border Associations Directive

Will a Directive on European Cross-Border Associations bring any European added value compared to the current situation?

The proposed ECBA Directive would likely increase the cross-border activities of those non-profit organisations already engaging in such endeavours and would incentivise others who would like to operate cross-border but are currently discouraged by the

[1] Proposal for a Directive of the European Parliament and of the Council on European cross-border associations, p. 1.
[2] For a more detailed position on the Directive, please refer to the joint submission for the consultation by AIM, CSE, PHILEA, SEE, SSE and CEDAG.
[3] It also recognises for the first time in EU legislation non-profit associations and, as one fundamental feature, their non-profit purpose (realised by means of an "asset lock"), as set out in Article 1.

hurdles to follow suit. According to the study commissioned by the European Commission, associations already operating across borders are estimated at 200,000 and 320,000, employing between 114,000 and 140,000 full-time employees and contributing around 5.7-7.0 billion euros[4] to the EU Gross Domestic Product (GDP). Furthermore, the study estimates that potentially 340,000 to 360,000 associations are not currently engaged in cross-border activities, but would like to should barriers to cross-border mobility be removed[5]. This is confirmed by the everyday experience of many non-profit organisations, which face barriers such as the difficulty to transfer their seat across borders and the recognition of their legal personality in the other Member States[6]. Based on the policy option chosen by the EC (additional national legal form for cross-border purposes), the same study estimates a total cost reduction of at least 770 million euros, and the generation of an additional 170,000 associations operating across borders, resulting in an increase of 3.8 billion euros in estimated gross value added and an estimated additional employment of 70,000 units[7].

Is the legal basis for the ECBA Directive appropriate for the proposed aim?

The legal basis is Art. 50(1), 50(2) and 114 of the Treaty on the Functioning of the European Union (TFEU). Art. 50(1) and 50(2) TFEU serve as the legal basis for measures that facilitate the exercise of the right of establishment of associations engaging in economic activity and their mobility. Art. 114 TFEU serves to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. The main objection to that comes from art. 54 TFEU, which states that freedom of establishment is not enjoyed by "legal persons governed by public or private law [...] which are non-profit making". At first sight, it would look like non-profit organisations are not covered by the freedom of establishment,

However, the jurisprudence of the Court of Justice of the European Union (CJEU) and the national legislation on non-profit organisations point to a different interpretation. There is a difference between 'non-profit making' and 'non-profit purpose'. 'Non-profit making' organisations do not produce profits, 'non-profit purposed' organisations may produce profit as long as it is not redistributed among their members. Furthermore, the CJEU has recognised that the right to form associations falls within the freedom of establishment, therefore, recognising associations as economic actors within the single market[8], which has also been recognised by the VAT Directive of 2006 which included NPOs as potential VAT payers[9]. Therefore, all the CJEU judgments on the mobility of companies apply to associations when they are economically active[10].

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[4] Study supporting an impact assessment on cross-border activities of associations, p. 61-63.
[5] Study supporting an impact assessment on cross-border activities of associations, p. 64.
[6] Some of them, plus others related to the foundations' sector, are illustrated in Removing Obstacles to Cross-Border Philanthropy: The Time Is Now.
[7] Study supporting an impact assessment on cross-border activities of associations,, p. 267-268.
[8] CJEU 29 June 1999 ECLI:EU:C:1999:335 (Commission v. Belgium).
[9] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.
[10] Study supporting an impact assessment on cross-border activities of associations, p. 111.

In that sense, in all the national legislations of the EU Member States (except for Luxembourg), there is no explicit ban for non-profit organisations to undertake any economic activities[11]. Non-profit organisations across the EU Member States are allowed to make profits, but not to redistribute them to their members. As seen in the previous question, there are barriers to the freedoms of establishment, movement and operations in the single market for non-profit organisations, which impede them from economically operating across borders in the EU or operating under the same conditions as for-profit/commercial enterprises, i.e., on a level playing field.

Therefore, a Directive that establishes a new, partially harmonised legal form which allows associations to make a profit, but not to distribute to their members, is in line with both the EU Treaties and the CJEU jurisprudence, as well as the commonly shared concept of 'non-profit organisation' in the EU Member States[12]. The ECBA Directive is hence covered by Art. 50(1), 50(2) and 114 TFEU because the ECBAs as well as most NPOs can engage in economic activities as long as they do not redistribute the profit to their members, therefore being 'non-profit purposed'.

Does the proposed ECBA Directive create a new European legal form?

The proposed Directive does not establish a new European legal form, similar to e.g. a Societas Europaea (European Company) or the European Cooperative Society, which were in fact established by a regulation[13]. The proposed ECBA Directive foresees the establishment of a new **national** legal form in each Member State, which has some harmonised features (regulated by the Directive). The other issues of the ECBAs are regulated by the same rules as the most similar legal form to the ECBA (or, under the EP proposal, as the most used one). This allows to combine the need to have minimum harmonised features for the ECBAs across the single market, while at the same time preserving the specificity and traditions of the different national non-profit ecosystems. Therefore, the ECBA Directive would create a new national legal form added to the existing national legal framework. It may naturally partially differ from existing national legal forms since some of its features are defined by the Directive.

2. ECBA and national legislations

Is there a risk of 'window-shopping' across national legislations to establish an ECBA?

From a legal point of view, if it is recognised that non-profit organisations are economic entities, then they should enjoy freedom of establishment and movement across the single market. With this perspective, the risk of 'window-shopping' is not different from that of other economic entities operating in the single market. Furthermore, citizens and legal entities seeking to form a European-level umbrella organisation can already now decide in which country to establish the new entity, taking into consideration the more favourable conditions

[11] Study supporting an impact assessment on cross-border activities of associations, p. 24-29.
[12] For a more detailed explanation, see Study supporting an impact assessment on cross-border activities of associations, p.29-31, 110-111.
[13] COUNCIL REGULATION (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company; Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) .

provided by certain member states' NGO laws. If such a risk persists, therefore, it is disconnected from the proposal of introduction of the ECBA Directive.

However, from a concrete point of view, the risk of 'window-shopping' is minimal. Most people and associations do not have the human and financial resources or are interested in investing in an analysis of the benefits and disadvantages of the different legal systems to establish an association that does not distribute profits. What is more likely to happen is that founding members would choose to establish their seat in the place of one of their main offices (which could be located either in the main place of their activities, e.g. Vienna, or in the place where one of the founding members provides resources for the ECBA's office, or, in case of conversions or mergers, in the place where the previous association had their headquarters), or in one of the countries of origin of the members, either because someone takes up the work to register the ECBA, or because they know their legal system more than the other members from other countries. In all these cases, reasons of convenience other than 'window-shopping' in search for the 'best deal' apply.

How would it work for national systems without specific legislation on non-profit associations?

According to the study commissioned by the European Commission, three countries do not have specific legislation for non-profit associations: Denmark, Ireland and Sweden[14]. In all these countries, however, associations do exist, in several typologies[15]. **According to the original EC's proposal on the ECBA, the Member States shall identify the most similar legal form in their national legislation and notify the Commission, including the national rules that apply to that legal form (Art. 4). That should also allow cases where jurisprudence, case law and other non-NPO specific legislation apply to be registered, once the legal form is identified**. Indeed, in some cases the process of identifying the legal form and the applicable rules might be more complex: therefore, the EP added the possibility to adopt the most used legal form by NPOs in the country (instead of the most similar one to the ECBA), and prescribed the involvement of stakeholders, including non-profit associations, in defining which legal form is the most suitable.

How would it work for systems where the recognised non-profit associations do not have full legal personality and legal capacity?

According to Art. 5 of the proposed Directive, ECBAs have full legal personality and capacity. This principle can guide also in the choice of the national form to regulate the other aspects of an ECBA (as per Art. 4), especially in national frameworks where not all the legal forms enjoy full legal personality and capacity. However, if the possession of the full legal personality and capacity becomes the main one to select the national form as per Art. 4, this could lead to choosing a legal form which is little used by national associations. For that reason, the EP proposes to allow also the most used legal form to be the national form of reference as per Art. 4, and to consult stakeholders, including non-profit associations, on which form to choose. Of course, at the moment where the chosen national legal form would be one without full legal personality and capacity, the ECBAs established in those Member States would have legal personality and capacity. This is because the ECBA is an additional

[14] Study supporting an impact assessment on cross-border activities of associations, p. 16-18.
[15] See Comparative legal analysis of associations laws and regimes in the EU, p. 134-142, 214-233, 375-384.

national legal form which has some harmonised features at the EU level (including the legal personality and capacity), while for all the other elements it follows the chosen national legal form as per Art. 4. Furthermore, since it is cross-border in nature (thanks to its founding members and, in the EP version of the text at Art. 6(2ba), thanks to its Statutes via a description of its cross-border dimension), it will not compete with other national legal forms for associations which operate only within the Member State.

How would it work for systems that require a notary for the establishment of an association?

In some countries, a notary deed might be required for the establishment of certain types of associations. The proposed Directive, in its current form, does not seem to require (or allow the request by the competent authority of) a notary deed. In fact, Art. 18(1) explicitly states that only the documents listed in the article can be requested by Member States to register an ECBA, and the notary deed is not included in the list. The exceptions are only allowed for engaging in particular activities (Art. 12), or when the competent authority requires more information when they have a duly substantiated concern that the objectives described in the statutes of the ECBA would contravene Union law or provisions of national law compliant with Union law (Art. 18(3)).

Does the proposed Directive impact on issues such as donations, public benefit, taxation and labour relations?

According to the European Commission, the proposed Directive does not seek to regulate certain areas of law pertinent to ECBAs in the internal market, in particular taxation, employment law, competition, intellectual property, anti-money laundering and insolvency. The proposed Directive applies a general principle of equal treatment (Art.9): in any aspect of their operations, ECBAs shall not be treated less favourably than the identified national legal form as per Art. 4. It will be up to the national tax laws to determine the tax treatment of the ECBA as well as potential tax incentives for individual and corporate donors taking into account EU law and jurisprudence. To this, it has to be added that EU legislation or jurisprudence has already taken into account some specific cases, e.g. the treatment of cross-border donations[16]. Beyond that, the proposed Directive has some features regarding these topics.

On donations, the proposed Directive states that all Member States shall ensure that ECBAs have free and non-discriminatory access to funding from a public source (Art. 13(1)), and that no authorisation or approval by Member States authority can be required as a condition for receiving grants or donations from public or private funders within the Union (Art. 15(f)). Beyond that, it specifies strict requirements for a Member State to impose limitations to the ECBAs' ability to provide or receive funding, including donations, from any lawful source (Art. 13(2)).

Regarding public benefit, the original text of the EC does not mention this issue. One reason for this non-mention is that the concept and term "public benefit" in many EU Member States

[16] See Commission staff working document on non-discriminatory taxation of charitable organisations and their donors: principles drawn from EU case-law.

is linked to questions of taxation (which are not covered by the ECBA proposal). When the national legislation foresees additional requirements (or a further application) to acquire a preferential tax status (e.g. public benefit), the EP common position allows, as a derogation, restrictions to the economic activities of ECBAsn if they are needed to access such status (Art. 15(g)). Furthermore, the EP version requires from the EC, upon five years of the Directive entering into force, to consider amending the Directive to harmonise at the EU level the transparency requirements, recognition and granting of the public benefit status (Art. 29 (1.g)).

Regarding taxation, no particular mention is found in the proposed Directive.

On labour relations and labour rights, the proposed Directive, notwithstanding more favourable legislation in force at the national or EU levels, provides the right of information for employees and the duty by ECBAs to write a report on employees' safeguards upon the transfer of the ECBA's legal seat from one country to another (Art. 23(1, 3.f)). The EP version of the text states that the constitution of an ECBA shall not be used to undermine workers' or trade union rights, representation, consultation or working conditions, in accordance with applicable EU and national law as well as collective agreements (Art. 4(4a)). All these points should be reflected in the ECBA to fully guarantee all individual and collective labour rights of staff of ECBAs.

ECBAs and security

Does the proposed Directive foresee guarantees against fraud, money laundering and terrorism financing?

The proposed Directive does not seek to regulate money laundering or terrorism financing, which already have specific legislation. However, he proposed Directive states that persons who have been convicted for or are subject to measures that prohibit their activity in a Member State in connection with money laundering, associated predicate offences, or terrorist financing cannot be a founding member of an ECBA (Art. 3(1.b-c)), nor be part of the executive body of an ECBA (Art. 7(3)). Furthermore, they can be a reason for the involuntary dissolution of an ECBA (Art. 25(c)). Therefore, further provisions on the above mentioned aspects would neither have an added value nor be necessary as the matter is already covered through the EU legislation and implementing rules at the national level.

It has to be underlined that non-profit associations are not at higher risk of fraud, money laundering or terrorism financing, so a request to have more stringent measures on any of these topics for ECBAs would discriminate against a type of economic actor within the single market without a grounded opinion. **The EU already has strong anti-money laundering and terrorism financing legislation**[17].

Regarding fraud, the proposed Directive does not allow the transfer of office when insolvency is pending (Art. 22(4.c)); the EP text strengthens the guarantees for creditors, especially in case of the transfer of the office to another Member State, applying the same rules that apply to firms (Art. 23(1a)).

[17] Anti-money laundering and countering the financing of terrorism at EU level.

How would it work if a national authority different from the country of establishment of an ECBA finds reasons to limit its activities or to proceed with an involuntary dissolution?

The authorities of a Member State different from the country of establishment can limit the sources of funding from outside the European Union, the establishment, provision or receival of services and the freedom of movements for goods, as well as require an ECBA to make a declaration, provide information, or request or obtain authorisations for engaging in particular activities. This can happen in cases where it is prescribed by law, justified by overriding reasons of public interest, and proportionate with the objective pursued (Art. 12-14). The EP version of the text allows Member States to limit the sources of funding in cases where the Member State can prove that the ECBA flagrantly and repeatedly breaches the values of the European Union enshrined in Article 2 TEU through its activities (Art. 13(2.b)). Such acts do not require the consent of the Member State where the ECBA is established.

Involuntary dissolution can be executed only by the authorities of the Member State where the ECBA is registered (Art. 25(1)). However, Art. 28 prescribes administrative cooperation among Member States for the application of the Directive. I**t is envisageable, therefore, that when a Member State finds evidence of operations in their Member State that could make grounds for an involuntary dissolution (listed in Art. 25(2)), they can relay them to the authority of the competent Member State**.

Can an ECBA that was dissolved by the authorities in a country be reconstituted in another country?

No, it cannot. The reconstitution of a dissolved ECBA in another country would mean that there is a legal and asset continuity between the dissolved ECBA and the newly established one: Art. 26 of the Directive explicitly states that the dissolution of an ECBA entails the liquidation of its assets and its redistribution to a NPO or a local authority in order to carry out activities similar to those (legitimate) that were pursued by the dissolved ECBA. Furthermore, if some of the members of the dissolved ECBA have been convicted for serious criminal offences, they cannot be in the governing body of the ECBA and, in case of conviction for or being subjects to measures linked with money laundering, associated predicate offences, or terrorist financing, they cannot found a new ECBA. Other further limitations would go beyond what is already required from other economic actors in the EU, and go against the freedom of establishment of NPOs as economic actors within the single market, as well as freedom of association protected by the Treaties and the Charter of Fundamental Rights of the European Union.

Conclusions

Taking into account the original European Commission's proposal for a Directive on ECBAs, as well as the legislative resolution on the proposal adopted by the European Parliament, the present document shows that:

- The proposed ECBA Directive would bring a European added value compared to the current situation by establishing a new national legal form with common European characteristics in the 27 national legislative frameworks, by using an apt legal basis.
- The risks of 'window shopping', fraud, money laundering or terrorist financing are taken into account as ECBAs are subject to the same rights and obligations that the other economic actors in the single market are subject to.
- The Member States have important instruments to limit the activities of ECBAs in case of security concerns, and can even request its dissolution, which entails liquidation of its assets, via the principle of administrative cooperation.
- The lack of a specific national legislation on non-profit associations or the lack of full legal personality and capacity in registered associations are not obstacles to implementing the Directive, nor will the Directive compete as a legal form with the other national legal forms for non-profit associations.
- At large, issues such as donations, public benefit, taxation, labour relations and labour rights are already regulated by other national and EU rules, therefore, the Directive does not have a major impact on it.
- The current text does not seem to allow the intervention of notaries in the establishment of an ECBA: in case where the legislator would wish the possibility for notaries to have a role, in line with the traditions of each Member State, it would be needed to change the text of the Directive, for instance by amending Art. 18(1).

In conclusion, civil society supports the adoption of this Directive, in a version close to the one approved by the European Parliament in first reading, as it would bring a European added value to the current situation, unlock the potential of civil society across the EU and establish an important step towards finally creating the 'single market of the public good'.