

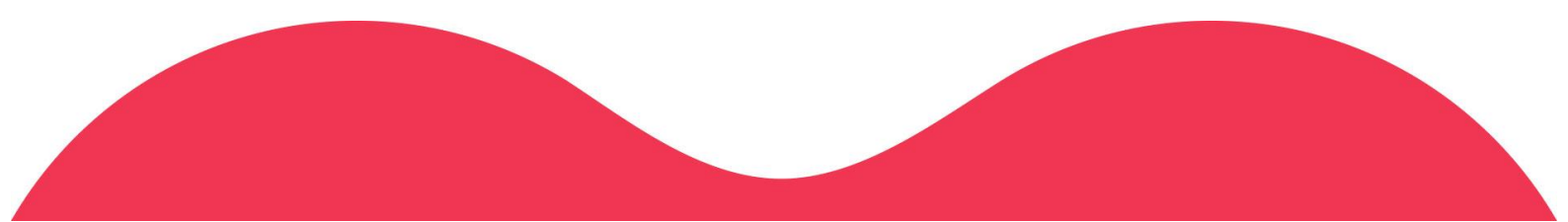
European Cross-border Associations (ECBA) Directive

Response to the Opinion of the Council's Legal Service (CLS-Opinion) on the Legal Bases of Articles 50 and 114 TFEU of the proposed ECBA-Directive

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Contents

A. INTRODUCTION.....	3
B. ANALYSIS.....	3
I. Harmonisation and new legal forms	3
1. Background	3
2. Findings of the CLS-Opinion	4
3. Response.....	4
II. Inclusion of economically inactive associations	5
1. Background: non-distribution constraint and economic activity	5
2. Findings of the CLS-Opinion	6
3. Response.....	6
III. The carve-out in Article 54 (2) TFEU.....	7
1. Background and findings of the CLS-Opinion	7
2. Response.....	8
C. CONCLUSION.....	14
Contact.....	14

A. INTRODUCTION

On 5 September 2023, the Commission submitted a [proposal for a Directive on European Cross-Border Associations \("ECBA-Directive"\)](#). The proposal is based on Articles 50 and 114 of the Treaty on the Functioning of the European Union ("TFEU").

On 7 January 2025, the Legal Service of the Council of the European Union ("CLS") delivered an [opinion to the Working Party on Company Law on the subject of the legal bases of the proposed ECBA-Directive \("CLS-Opinion", Interinstitutional File: 2023/0315\(COD\)\)](#).

The CLS-Opinion addresses three questions regarding the appropriateness of the legal bases:

- I. Harmonisation as a means to create the new legal form ECBA in national law;
- II. The inclusion of economically inactive associations; and
- III. The effect of the carve-out of non-profit-making legal persons contained in Article 54 (2) TFEU.

Regarding question (I), the CLS-Opinion considers the proposed directive to be an appropriate way to create the ECBA as a national legal form by means of harmonisation based on Articles 50 and 114 TFEU (with a caveat), rather than a supranational form that would require a regulation based on Article 352 TFEU. Regarding the second question (II), the CLS concluded that the legal bases do not support the entire envisioned scope, in particular the inclusion of economically inactive associations. In response to the third question (III), the CLS found that the carve-out needs to be understood in its broadest, literal meaning.

The reasoning within the CLS-Opinion seems stringent, but only on first sight. One must object both to the findings regarding (II) and the exclusion of economically inactive associations and the findings in (III) regarding literal approach to the carve-out of Article 54 (2) TFEU rather than the prevailing functional and systematic approach.

B. ANALYSIS

I. Harmonisation and new legal forms

1. Background

The Commission has taken a new approach to creating legal forms in national law by basing the ECBA-Directive on Articles 50 and 114 TFEU. The importance of this new approach can hardly be overstated. If the ECBA-Directive succeeds, it would open the door to other enabling harmonisation efforts in the non-profit area (e.g. a similar directive for foundations; or other directives similar to those in the for-profit area, for example a directive similar to [Directive \(EU\) No. 2019/2121](#) on cross-border conversions, mergers and divisions; or even a comprehensive directive on standards for non-profit-organisations similar to the [Company Directive \(EU\) No. 2017/1132](#)).

In the past, new legal forms had been created on the supranational level by means of a regulation based on Article 352 TFEU, such as the European Company (SE, Societas Europaea), the European Cooperative (SCE, Societas Cooperativa Europaea) and the European Economic

Interest Grouping (EEIG). Article 352 TFEU requires a unanimous decision of the Council. Previous attempts¹ regarding the European Association (EA) and the European Foundation (EF) had failed because a unanimous decision could not be achieved with a growing Council of now 27 members.

The new approach based on Articles 50 and 114 TFEU would only require a qualified majority and therefore represents a realistic chance – and possibly also a last chance – to create supplemental harmonised rules for the non-profit sector in the EU.

2. Findings of the CLS-Opinion

Regarding the harmonisation of new legal forms, the CLS-Opinion concludes from the content of the ECBA-Directive that the centre of gravity of the proposed ECBA legal form is indeed at the national level rather than the supranational level (para 11 CLS-Opinion). Therefore, Articles 50 and 114 TFEU provide appropriate legal bases.

However, the CLS-Opinion further contains a caveat because it identified a certain legal risk (para 12) in the ECBA's ability to transfer its seat without dissolution or the creation of a new legal person according to Article 22 (2) ECBA-Directive. Such ability had previously been named as one aspect indicating a supranational dimension of a legal form in the judgment of the ECJ regarding the legal basis of the statute for the European Cooperative SCE (C-436/03 SCE, para 42).

3. Response

The general finding that the ECBA can be created by means of harmonisation in national law based on Articles 50 and 114 TFEU is conclusive and stringent.

Regarding the caveat, the comparison to the case of the SCE-Regulation is flawed. There are fundamental differences between the SCE-Regulation and the ECBA-Directive in its intended functioning and content. The SCE-Regulation was intended to regulate the legal form of the SCE at the supranational level and to be directly applicable (Article 288 (2) TFEU): The ECBA-Directive will still require a transformation of all its provisions into the respective national law (Article 288 (3) TFEU). This point has also been acknowledged in the CLS-Opinion (para 13).

Within the reasoning of the ECJ judgment regarding the legal basis of the European Cooperative SCE (C-436/03 SCE, para 42), the aspect regarding the transfer of seat had only been named as one aspect among others to indicate the supranational character of the SCE. Nowadays, the transfer of the seat without dissolution cannot be considered anymore to provide a "supranational element". This is because the more recent Directive No. 2019/2121 on cross-border conversions, mergers and divisions, which is also based on Article 50, specifically enables Member States to provide national rules for cross-border conversions of national for-profit-companies without dissolution and without the creation of a new legal person.

In addition, while the wording regarding the transfer of the seat of Article 22 (2) ECBA-Directive ("*shall not result in the dissolution of the ECBA or the creation of a new legal person*") is very similar to Article 7 (1) of the SCE-Regulation ("*shall not result in the winding-up of the SCE or in the creation of a new legal person*"), the conditions for the transfer of the registered office of

¹ [Breen, "Enlarging the Space for European Philanthropy", 2018](#), p. 11-17.

both legal forms are different. The ECBA-Directive, unlike the SCE-Regulation, enables Member States to reject the transfer of the registered office based on national law. According to Article 23 (5) (d) ECBA-Directive, the competent national authority is entitled to reject the transfer of the registered office, if the objectives described in the statutes of the ECBA would contravene national law. This indicates the respect for national law by the ECBA-Directive.

As a matter of fact, because the Member States will be required to implement the ECBA-Directive into national law to create a new harmonised legal form, there will still be 27 different national legal forms of ECBA. This is also indicated by the fact that the French and Polish language versions of the ECBA-Directive already diverge from a uniform "ECBA"-acronym, which will be different in different Member States (in French, "ATE" for "*association transfrontalière européenne*"; in Polish, "EST" for "*europajskie stowarzyszenie transgraniczne*"), which is different from the unified and Latin abbreviation used in the case of European cooperatives "SCE".

II. Inclusion of economically inactive associations

1. Background: Non-distribution constraint and economic activity

The ECBA-Directive establishes a non-distribution constraint in Article 3 (2) ECBA-Directive. This means that Member States shall ensure that an ECBA shall have a non-profit purpose and any profits of an ECBA shall be used exclusively for the pursuit of its objectives without any distribution among its members.

ECBAs are allowed to engage (inter alia) in economic activities according to Article 5 (2) ECBA-Directive, but it does not explicitly require them to do so. According to Article 14 ECBA-Directive, every ECBA will be allowed to provide services and to exercise the free movement of goods. Furthermore, the Member States must not prohibit ECBAs from carrying out economic activities, and the economic activity can even be its primary activity according to Article 15 (g) ECBA-Directive.

These principles set out in the ECBA-Directive follow a concept of non-profit-organisations which has developed over the past decades and can be considered a standard by now.² The ECBA-Directive includes the non-distribution constraint at its centre while enabling non-profit-entities to be economically fully active. This definition had emerged in the second half of the last century, as very clearly expressed for example in Hansmann Yale L.J. 89 (1980), 835 (838). It has been embraced by numerous jurisdictions inter alia in the 2019 Belgian Code of Companies and Associations as well as in German case law³ regarding associations in 2017. It acknowledges the fact that many non-profit-organisations must be able to engage in economic activity, even on a large scale and as their primary activity (e.g. providing social services), as long as they have implemented a non-distribution constraint and use the profits to further pursue their non-profit purpose.

² A. Fici, W.J.M. van Veen & B. Van Baelen a.o., "Study supporting the impact assessment on cross-border activities of associations", European Commission 2023, p. 25 et seq.

³ BGH NJW 2017, 1943, "Kita-Beschluss" = "Kindergarden-Decision".

2. Findings of the CLS-Opinion

The CLS-Opinion finds that the proposal for the ECBA-Directive does not explain why economically inactive associations are included within the scope (para 15). As possible justifications from ECJ-case law, the CLS-Opinion names *legal certainty* or the *risk of circumvention*.

3. Response

Legal certainty requires the inclusion of all associations, irrespective of whether they (immediately) engage in economic activities or not.

To start with, engaging in economic activity is (rightly so) not a required information to be added into the statutes of an ECBA according to Article 6 (2) (b) ECBA-Directive ("a detailed description of its objectives and a statement of its non-profit purpose"). Typically, the statutes require the statement of the non-profit-purpose and ways to achieve them, but do not necessarily require specifying whether it is achieved by taking a certain (cost-based) fee or payments for certain services or goods.

The CLS-Opinion does not take into consideration that due to the provisions in the ECBA-Directive, every ECBA will be able to take up economic activities at any point in time after its establishment (see Article 3 (2), Article 14 and Article 15 (g) ECBA-Directive). It is very common that associations may decide to carry out an economic activity only sometime after its founding (e.g. starting to provide services such as seminars or workshops in their respective field of activity). Therefore, there is a reason to include economically "not yet" active associations in order to spare them the legal uncertainty of whether a certain type of activity is covered by the ECBA-Directive or not. If this is not included, then ECBAs that temporarily cease an economic activity would be likewise left in the dark about their fate.

Furthermore, the CLS-Opinion does not consider that the definition of "economic activity" by the European Court of Justice (ECJ) in the context of the freedoms of the common market has been defined in a *very broad manner*, in particular also with respect to non-profit-activities (para 29 of the CLS-Opinion is incorrect):

In *Commission v Hungary* (C-179/14 – Erzsébet vouchers), the ECJ held that "services" may not be interpreted restrictively (para 152). According to the settled case law of the Court, it essentially means "services...normally provided for remuneration" (para 153). There is no need for the person providing the service to seek to make a profit (para 154). Moreover, it is immaterial who pays the provider for the service. Article 57 TFEU does not require that the service provided be paid for by those who benefit from it (para 155 and previously already in *Smits Peerbooms* C-157/99, para 57). Even where profits from an activity must be used exclusively for certain public interest objectives, this is not sufficient to deprive it of its economic character (para 157).

In *Pfotenhilfe Ungarn e.V.*, (C-301/14), a charitable association based in Germany transported stray dogs from Hungary to Germany to then find new pet owners for them. A cost-based remuneration ("Schutzgebühr") was only paid by the ultimate pet owners after the dogs had already been transported. The court found that such transportation of the dogs shall be considered an economic activity, even though the remuneration was only paid later and by a party other than the actual receiver of the transportation service.

In *Steymann* (C-196/87 – Bhagwan association) the ECJ held that even activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect quid pro quo for genuine and effective work (para 14, upheld in *Congregación de Escuelas Pías Provincia Betania* C-74/16).

And according to the ruling in *Jundt*, (C-281/06), a teaching activity carried out across borders in a different Member State in a quasi-honorary non-profit capacity was considered within the scope of the freedom of services and therefore considered an “economic activity” (C-281/06, para 39). The Member State where the teacher resided even had to apply its benefit of tax exemption to the quasi-honorary remuneration (C-281, para 58). This shows that in terms of legal certainty, it is necessary not to make any exclusions regarding “economic activities” as they are interpreted very broadly and also include those carried out in the context of charitable activities. The economic activity does not even have to be significant.⁴

In addition to providing more legal certainty, there is an efficiency argument to be made: cross-border-associations that start engaging in economic activity are spared the process of a second registration. All efforts nowadays point towards easing (digital) registration and moving towards the “once-only-principle” for registrations in order to reduce costs and increase efficiency. The exclusion, according to the CLS-Opinion, of economically – not yet – active associations would mean that these would have to register as a different legal form and only upon taking up economic activity being able to register as an ECBA.

Lastly, the CLS-Opinion does not consider that certain types of associations are already excluded from the scope of the ECBA-Directive. According to Article 3 (1) a) ECBA-Directive: trade unions, political parties, religious organisations and associations of such entities cannot be founding members of an ECBA.

III. The carve-out in Article 54 (2) TFEU

1. Background and findings of the CLS-Opinion

The carve-out in Article 54 (2) TFEU existed already in Article 48 (2) TEC (Treaty establishing the European Economic Community) with the Treaty of Rome negotiated in 1957.

>The English language version of Article 54 (2) TFEU reads:

“ ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, **save for those which are non-profit-making.**” [Emphasis added]

⁴ See also Haas/Hessert in Schimke/Dauernheim/Schiffbauer, Vereins- und Verbandsrecht, 15. Aufl. 2024, Kapitel 19, Rz. 17; Weitemeyer, NZG 2012, 1001, 1002.

>The French language version of Article 54 (2) TFEU reads:

“Par sociétés, on entend les sociétés de droit civil ou commercial, y compris les sociétés coopératives, et les autres personnes morales relevant du droit public ou privé, à l’exception des sociétés qui ne poursuivent pas de but lucratif.” [Emphasis added]

The CLS-Opinion divides its argumentation, and regarding the carve-out, it first considers the effect of the carve-out in Article 54 (para 22-31 CLS-Opinion) and then specifically the meaning of “non-profit-making” in Article 54 (2) TFEU (para 32-44 CLS-Opinion).

It considers the carve-out in Article 54 (2) TFEU “save for those which are non-profit-making” to be read in a literal meaning (para 24 of the CLS-Opinion), synonymous with “non-profit-purpose”, meaning a legal person with a profit-distribution-constraint (para 35). It further argues that the meaning of “economically active” would render the carve-out a dead letter because the economic activity was already a requirement under the material scope of Article 49 TFEU (para 33), which had to be distinguished from the personal scope specified in Article 54 TFEU.

Also, the CLS-Opinion points to ECJ-decisions in the area of procurement law, where a distinction had also been made on the basis of the purpose of certain entities.

Lastly, the CLS-Opinion acknowledges that it does not follow that a legal act under Articles 50 and 114 TFEU could never regulate persons excluded from the personal scope of these freedoms, but it may be necessary to regulate them on an ancillary basis.

2. Response

The reasoning in the CLS-Opinion regarding the definition “non-profit-making” in Article 54 (2) TFEU contradicts the prevailing view in ECJ case law, as well as in national judgments⁵ and the vast majority of opinions expressed in academia⁶.

⁵ German Federal Court of Finance in 2016 (Bundesfinanzhof, BFH, ECLI:DE:BFH:2016:U.251016.IR54.14.0); Administrative Court of Augsburg in 2018 (VG Augsburg, ECLI:DE:VGAUGSB:2018:1114.AU4K18.1400.00.).

⁶ A. Fici, W.J.M. van Veen & B. Van Baelen a.o., *Study supporting the impact assessment on cross-border activities of associations*, European Commission 2023, p. 31; Lombardo, *Some reflections on the Freedom of Establishment of Non-profit Entities in the European Union*, European Business Organization Law Review 14: 225-263, p. 263; See i.a. the following leading handbooks: W.J.M. van Veen, 'Grensoverschrijdende fusie, splitsing en omzetting', in: B. Snijder-Kuipers/G.J.C. Rensen, *Handboek notarieel ondernemingsrecht, vereniging, coöperatie en onderlinge waarborgmaatschappij*, Deventer: Wolters Kluwer 2019, p. 327 et seq.; M.J. Kroeze (m.m.v. H. Beckman & M.A. Verbrugh), *Mr. C. Assers Handleiding tot beoefening van het Nederlands Burgerlijk Recht, 2. Rechtspersonenrecht, Deel I, De Rechtspersoon*, Deventer: Wolters Kluwer, 2021/236 and 459; Dijk/Van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij*, 8th edition, Deventer: Wolters Kluwer 2021, par. 1.4; See also i.a. C.R.M. Versteegh in: T.J. van der Ploeg/ W.J.M. van Veen/C.R.M. Versteegh (eds.), *Civil Society in Europe, Minimum norms and optimum conditions of its regulation*, Cambridge University Press 2017, p. 47. G.J.C. Rensen, 'Grensoverschrijdende omzetting van een vereniging', *WPNR* 2016/7129; comprehensively also Benedikt, *Europäische Gemeinnützigkeit*, 2020, pp. 68-87; Weslack, *Europäisches Internationales Vereinsrecht*, pp. 77-92; Arnold, *FS Robbers*, pp. 955, 959; to be published shortly: W.J.M. van Veen, *Enterprise foundations in European law, An exploration of judgments of three European courts pertaining to freedom of establishment and fundamental freedoms for enterprise foundations and their initiators*, F. Möslin & A. Sanders, 'Corporate Asset Locks: A Comparative and European Perspective', *French Journal of Legal Policy*, dec. 2023, p. 65-66, and in 'Vermögensbindung und Europäisches Gesellschaftsrecht', *Juristen Zeitung* 19/2022, p. 925, with further references. K. Werner Lange and S. Sabel, 'Nachfolgeplanung unter Einsatz ausländischer Stiftungen' (2014) 6 ZStV 201, 204; B. Weitemeyer, in German Civil Code, § 80 (9th edn, 2021) para. 314-319.

a) Wording

The exception in Article 54 (2) TFEU reads differently in the different language versions, of which none can be considered superior to the others. The CLS-Opinion points particularly to the French language version “à but non lucratif” (para 33), the language in which the negotiations in 1957 were predominantly conducted. This French language version emphasises the finality of the purpose and therefore supports this literal understanding, so that the carve-out would exclude all non-profit-organisations irrespective of their economic activity. However, the English language version “non-profit-making” rather suggests that the focus is not on the final use of profits, but the *activity* of profit-making itself, hence the economic activity.

One has to take into consideration that the [Italian](#) (“ad eccezione delle società che non si prefiggono scopi di lucro”), the [German](#) (“mit Ausnahme derjenigen, die keinen Erwerbszweck verfolgen”), the [Spanish](#) (“con excepción de las que no persigan un fin lucrativo”) and the [Portuguese](#) (“com exceção das que não prossigam fins lucrativos”) language versions also contain wording which suggests an understanding similar to the French version of “à but non lucratif”. Furthermore, the CLS-Opinion (para 24) correctly points out that in the negotiation documents, non-profit-associations (“associations à but non lucratif”) are explicitly mentioned.⁷ This makes the English language version an outlier.

Therefore, the wording supports the literal understanding of the CLS-Opinion. However, the following systematic arguments and the purpose of the exception make a functional understanding more convincing.

b) Systematic arguments

i. Narrow interpretation as an exception

Considering at the function of the carve-out within the provision of Article 54 (2) TFEU, one can see that it provides an exception (“save for those...” / “à l’exception”). As an exception, it has to be interpreted strictly (*Panayi C-646/15*, para 27). The CLS-Opinion does the exact opposite. It has given *the exception* its broadest possible meaning.

ii. Distinction between personal and material scope

The CLS-Opinion considers that there has to be a clear distinction between the personal scope (Article 54) and the material scope of Article 49. However, the decision cited by the CLS-Opinion is one where a distinction was made on the *national level* with respect to certain social services that *must* be performed by *non-profit organisations* (*Sodemare C-70/95*, para 34). If that condition is not met, these legal entities can also not invoke the freedom to provide services (*ibid*, para 49). However, the definition of “non-profit-making” does not follow from this and it is still necessary to determine autonomously what its meaning shall be in the context of Article 54 (2) TFEU. The CLS-Opinion focuses on the non-distribution constraint, which is part of the inner workings of the legal entity according to national law. This is not a good solution. National law may provide for entities that have a non-distribution constraint but still provide for member-friendly liquidation rules at the same time, which would allow the distribution of remaining

⁷ Conference intergouvernementale: Historique des articles 52 à 58 du traité instituant le CEE, CM3, No. 0230, p. 55.

funds to its members under certain conditions (see for example Section 45 para 3 of the German Civil Code). The scope of the application of the freedom of establishment should rather be determined by focusing on the outward activities. This is also more coherent with respect to the application of other freedoms of the inner market and other EU legislation, as will be demonstrated in the following section.

iii. Systematic coherence with other TFEU freedoms and EU legislation

The European Court of Justice (ECJ) has repeatedly held that non-profit-entities can invoke other freedoms of the common market (see already above II. 3.) and are also subject to EU legislation in other fields such as competition law. To exclude non-profit-entities entirely from the freedom of establishment would be inconsistent. It would mean to deprive them of an integral freedom of the common market while they are at the same time obliged to adhere to many of its responsibilities (e.g. in competition law, anti-money-laundering law, data protection, etc.) and face many additional obstacles⁸ in their main activities. In the absence of corresponding *enabling* harmonisation efforts, they cannot enjoy the benefits of the common market. The CLS-Opinion recognises the “asymmetry in the fundamental freedoms” (para 30) and simply attributes it to the “Treaty drafters’ choices” (para 30) without considering the possibility of balancing such asymmetry with a more fair and functional interpretation of the carve-out of Article 54 (2) TFEU.

➤ Freedom of establishment

With respect to the freedom of establishment, in *Commission v. Kingdom of Belgium* (C-172/98), the ECJ had to decide on the permissibility of a nationality requirement for officers of Belgian law non-profit-associations. In the Opinion of the Advocate General Cosmas, the problem of the carve-out in Article 54 TFEU (former Article 58 ECT) was raised. The Advocate General considered it to be applicable for non-profit associations:

“The second paragraph of Article 58 of the EC Treaty could be set against the above approach. Under that provision, the companies or firms covered by the right of establishment, which is set out in Article 52, are not to be understood as including those which ‘are non-profit-making’. However, in accordance with the prevailing view in Community law, the notion of a profit-making objective, as a purely Community law concept, must be construed broadly. Even legal persons whose main objective is not to increase their profits are covered by the right of establishment in so far as they participate in economic life.”

In the subsequent decision of the court, the freedom of establishment was applied without even raising the question. The EFTA Court held in the joined Cases E-3/13 and E-20/13 (*Fred. Olsen and Others and Petter Olsen and Others*, para 99) similarly that it depends on the circumstances of the case whether “another” entity – in this case a trust – can invoke freedom of establishment.

➤ Free movement of capital

Most notably, the ECJ has held in a number of decisions that the freedom of the free movement of capital can be invoked by non-profit entities and in the case of cross-border donations, inter

⁸ See also [Plantamura, Surmatz, Forrest, Paquot, Removing Obstacles to Cross-Border Philanthropy, 2024](#).

alia in *Cf. Laboratoires Fournier* (C-39/04); *Centro di musicologia Walter Stauffer* (C-386/04); *Persche* (C-318/07); *Missionswerk* (C-25/10); *Commission v Austria* (C-10/10) and *Commission v. Hungary* (C-78/18 – “transparency law”).⁹

➤ **Freedom to provide services**

As pointed out above in the cases of *Pfotenhilfe Ungarn e.V.* (C-301/14, transportation of stray dogs), *Jundt*, (C-281/06, honorary teaching activity across borders) and others, many non-profit-entities can invoke the freedom to provide services.

➤ **Competition law and state aid law**

A functional approach was also taken with respect to competition and state aid law. The case of [Cassa di Risparmio di Firenze \(C-222/04\)](#) was concerned with the admissibility under state aid law of tax concessions for non-profit Italian banking foundations that hold shares in banking companies and other companies. The ECJ ruled that the term “undertaking” covered any entity carrying out an economic activity, irrespective of its legal form and the way in which it is financed. From this, it concluded that the management of shareholdings by a foundation with a charitable/public-benefit purpose could also constitute an economic activity.

The same follows by implication from *Wellcome Trust* (C-459/19) to (charitable) trusts. *Wellcome Trust* was found not to be economically active; however, that was not on account of its (not-for-profit) purpose or legal form, but on account of the fact that it was explicitly forbidden to be involved in the management of the company in which it held the shares (C-459/19, para 35).

➤ **Public procurement directive**

The CLS-Opinion cites two cases of the ECJ, in which a literal approach to non-profit organisations was applied in the context of the public procurement directive. These are [Italy Emergenza Cooperativa Sociale \(C-213/21\)](#) and [C-214/21](#)) and [Falck Rettungsdienste und Falck \(C-465/17\)](#). However, first of all, one can see from the other cases cited above that these are rather the exception than the rule. Also, one needs to consider the intended purpose of the carve-outs in the procurement law directive. The carve-outs aim to shield certain associations from competition with respect to certain important public services. According to Article 10 (h) of the Directive 2014/24/EU on public procurement, the directive shall not apply to public service contracts for:

“(h) civil defence, civil protection, and danger prevention services that are provided by **non-profit organisations or associations** [...]” [Emphasis added]

The ECJ has interpreted this particular carve-out widely in these cases. It is, however, not necessary to apply the same wide approach to the carve-out of Article 54 (2) TFEU in the context of the freedom of establishment. This is because the freedom and the ECBA-Directive are enabling provisions. In order to give this freedom its maximum possible extent, the carve-out in Article 54 (2) TFEU should be interpreted narrowly.

⁹ See also [Removing Obstacles to Cross-Border Philanthropy: The Time Is Now](#), p. 5.

iv. Interpretation of Article 54 (2) TFEU in light of Article 12 Charter of Fundamental Rights of the European Union (CFR)

The scope of the carve-out in Article 54 (2) TFEU should also be defined in light of the fundamental right to associate of Article 12 Charter of Fundamental Rights (CFR). The ECJ has to consider justifications to restrictions of freedoms of the inner market in light of fundamental rights (see for example *ERT* C-260/89, para 43 regarding a radio and television monopoly with respect to Article 10 ECHR freedom of expression). The EU adopted the CFR in the year 2000, and it came into effect in 2009. The CFR is on equal footing with the TEU and TFEU. It requires both EU institutions and the Member States to apply the CFR with respect to EU law.

Article 12 CFR contains the right to associate. According to the [official explanations](#), “the meaning of the provisions of paragraph 1 is the same as that of the ECHR, but **their scope is wider** since they apply at **all levels including European level**.” [Emphasis added] (Official Journal of the European Union C 303/17 - 14.12.2007). This is because the wording of Article 12 CFR differs from the wording of Article 11 European Charter of Human Rights (ECHR) insofar as Article 12 CFR provides the right to associate explicitly “on all levels”. The right to associate typically also includes the right to form associations and register them as a legal entity (ECHR, *Ramazanov v Azerbaijan*, 44363/02, 1 February 2007, para 54). On the national level, it typically also includes the right to move the seat of the association. From this it follows that the obligations of the EU under Article 12 CFR and the right to associate at “all levels” must naturally also include the right of mobility of the seat of such an association within the EU. In light of Article 12 CFR, the ECBA-Directive is an instrument capable of filling this gap. Therefore, the exclusion in Article 54 (2) TFEU must be interpreted in its most narrow sense. As civic space is shrinking in various EU countries, the ECBA-Directive and the possibility to move their registered offices would provide a lifeline for associations in Member States where associations are under threat.

c) Purpose (Telos) of the exclusion then and now

After considering the systematic arguments that point towards a functional definition, one should consider the purpose of the carve-out on its own. The purpose of the carve-out of Article 54 (2) TFEU is not entirely clear because the purpose is not expressly explained in the negotiation documents. However, it seems likely that there were certain assumptions at the time of its drafting in 1957 of which some have proven to be false or undergone an evolution of thinking regarding the role and functioning of non-profit-entities. While looking at possible reasons for the exclusion of non-profit-entities from the freedom of establishment, this may also answer the question of whether the functional approach would render the carve-out of Article 54 (2) a dead letter.

i. Economic considerations: Unfair advantages in competition with for-profit-entities

One of the assumptions may have been that non-profit organisations would have an unfair advantage when competing with for-profit entities because of cross-subsidisation by donations or tax advantages. However, this reasoning cannot justify the exclusion in its entirety. Firstly, as already pointed out, non-profit-associations are able to carry out services across borders and do

charitable funding across borders. They are also subject to competition law. Moreover, the EU integration has evolved beyond a mere economic project. In a decision of the Administrative Court of Augsburg in 2018¹⁰, this evolution of concepts had been considered with respect to the restriction of Article 54 (2) TFEU:

*“The restriction [of Article 54 (2) TFEU] has the function of avoiding distortions of competition. Distortions of competition would be feared if non-profit organisations were able to compete with private market participants in economic life. This is because these institutions run the risk of having unjustified competitive advantages due to cross-subsidisation (Forsthoff in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, 64th ed. May 2018, Art. 54 para. 5). However, it is questionable whether this regulatory concern (still) justifies generally denying private non-profit organisations the right to invoke these freedoms. Apart from the fact that non-profit organisations participate to a not inconsiderable share in economic life, it should also be pointed out that the European integration project is no longer limited to the economy, but takes a more comprehensive approach. Finally, it should be borne in mind that the free movement of capital, [...], is in any case open to non-profit organisations. It would therefore be inconsistent to generally deny those organisations the right to the freedom of establishment and freedom to provide services. On the other hand, it is precisely the activities of religious or ideological groups affect sensitive areas of the of the Member State's legal system, which as such are not subject to the integration programme. Therefore, market freedoms should not be the yardstick for the recognition or freedom of activity of religious or philosophical groups. These considerations should be taken into account by a cautious reading of the reservation. Accordingly, private non-profit organisations are not generally to be denied the right to invoke the freedoms, but if the core issue is the recognition or freedom of activity of religious or of religious or ideological groups (Forsthoff in Grabitz/Hilf/Nettesheim, The Law of the European Union, 64th ed. May 2018, Art. 54 para. 6). Therefore, the purpose of profit-making **must be interpreted broadly** [...]” [Emphasis added]*

ii. Considerations regarding national public affairs, public services and religion

A second group of assumptions that may already have played a role at the time of drafting is that non-profit-entities are closely linked to the national public, political, cultural and religious life of a Member State (e.g. lobby and interest groups as well as political and religious associations) and should therefore not fully enjoy the freedom of establishment. Also, many Member States provide public services, in particular within their social security systems with local non-profit-associations. For such considerations, there is also an indication to be found in the negotiation documents because they are mentioned in the context of “public functions” and “public services” (see Conference intergouvernementale: Historique des articles 52 à 58 du traité instituant le CEE, CM3, No. 0230, p. 55, translated from the French):

*“The provisions of this Article shall not apply to **activities** which may involve the exercise, even occasionally, of a **public function** or office, or those inherent in the **performance of a public service, or to non-profit-making associations** governed by public or private law, which remain subject to national regulations.” [Emphasis added]*

¹⁰ VG Augsburg, ECLI:DE:VGAUGSB:2018:1114.AU4K18.1400.00.

Also, such a view can be supported to a limited extent by the fact that Article 4 (2) TEU states that the Union shall respect the national identities, inherent in their fundamental structures, political and constitutional, and also respect their religious associations according to Article 17 TFEU (see also *Freikirche C-372/21* but more liberal when it comes to the provision of services *Steymann C-196/87* – Bhagwan association).

Therefore, certain non-profit-entities may still fall under the scope of the carve-out of Article 54 (2) TFEU and not render the carve-out a dead letter as claimed by the CLS-Opinion. The ECBA-Directive however has already considered such sensitive areas. According to Article 3 (1) a) ECBA-Directive, trade unions, political parties, religious organisations and associations of such entities cannot be founding members of an ECBA. Also, according to Article 23 (5) (d) ECBA-Directive, the national authorities are also entitled to reject the transfer of the registered office, if the objectives described in the statutes of the ECBA would contravene national law.

This being said, it should be pointed out that such considerations may only justify exceptions to a very limited and varying extent. This is because the concepts and roles of non-profit entities in the European Union are further evolving over time and lines between for- and non-profit entities as well as at the national and European level are becoming more permeable and interconnected: Many of the functions that had previously (in 1957) been performed strictly as a public service are not restricted anymore to public or non-profit entities. At the same time, with the introduction of the citizenship of the EU in Article 9 TEU and the inclusion of the civil society dialogue in the EU democratic process in Article 11 para 2 TEU, there is a shift to provide more liberties to non-profit entities as part of a common European civil society and part of European public and democratic life. The wide scope of the freedom of association in Article 12 CFR (“all levels” including the European level) is also an indication of such shift. The position taken here is that it is most consistent with previous ECJ case law to interpret the carve-out in its most narrow sense in order to realise both the freedom of establishment and the fundamental right of association to their greatest possible extent.

C. CONCLUSION

Legal certainty requires the inclusion of associations in irrespective of whether they have taken up any economic activity yet. One also needs to consider that economic activity as defined by the ECJ, is a very broad concept, in particular with respect to non-profit-entities.

Non-profit-entities can also invoke the freedom of establishment. Contrary to the CLS-Opinion, the carve-out in Article 54 (2) must be interpreted in its most narrow sense including only such sensitive areas as already identified by the ECBA-Directive.

In the absence of harmonisation efforts, associations cannot enjoy the benefits of the common market in a comparable manner as for-profit entities. The ECBA-Directive is a first step to fix this blatant imbalance, remove barriers and to realise both the freedom of establishment and the fundamental right to associate across borders.

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