

EC Proposal for a Directive on European Cross-Border Associations (COM(2023) 516 final), Brussels, 05.09.23

Reply by SSE to the EC Call for Evidence (28 February 2024)

[Social Services Europe](#) (SSE) is a **network of eight European umbrella organisations** – comprising [Caritas Europa](#), [CEDAG](#), [E.A.N.](#), [EASPD](#), [EPR](#), [Eurodiaconia](#), [FEANTSA](#) and the [Red Cross EU Office](#) [*N.B.: The Red Cross EU Office is not signing this SSE reply*] – **representing over 200,000 not-for-profit social and health care organisations**. We are active in a sector employing over 11 million people, of which about half are employed by social economy organisations.

On 10 February 2022 SSE issued the [SSE Position and Briefing Note “Statute for European Cross-Border Associations and Non-Profit Organisations”](#). On 28 October 2022 SSE submitted a [response](#) to the EC Call for Evidence on an EC proposal for a legislative initiative on cross-border activities of associations. On 6 January 2023 SSE has also contributed to the impact assessment study on cross-border activities of associations.

SSE co-signed the [“Joint Civil Society Position Paper on the European Parliament Proposal for a European Association Statute”](#) with CSE, PHILEA, CEDAG and the European Center for Not-For-Profit Law (10 February 2022). SSE has co-signed two letters with CEDAG, CSE and PHILEA to Commissioner Breton (4 May 2023 and 20 July 2023). For this call for evidence, SSE has also co-signed a **joint reply** with AIM, CEDAG, CSE, PHILEA and SEE [*N.B.: To be submitted in the next days*].

The following response refers to the EC Proposal for a Directive on European Cross-Border Associations (COM(2023) 516 final) of 5 September 2023 and contains references to the related [EP JURI Committee Report adopted on 13 February 2024](#).

1) Positive elements

- SSE welcomes the proposed Directive for the establishment of a European Cross-Border Association (ECBA) and consider that this legislative initiative can pave the way for future similar legal initiatives for other legal entities such as foundations.
- The ECBA can help unlock the potential of and can support the essential contributions of civil society organisations (CSOs) – including not-for-profit providers of social services¹, being also part of the social economy² – to our democratic societies across Europe.

¹ More than a third of the (estimated) 13.8 million paid jobs in the social economy is in the sector of social services.

² As acknowledged by the proposed Directive (p.1), non-profit organisation associations are indeed the predominant form of the social economy and one of the pillars of social economy entities with mutual benefit societies, cooperatives, and foundations. The Directive thus also has the potential to develop the potential and diversity of social economy entities.

- SSE believes that it can be an important tool to support and mobilise transnationally citizens' collective engagement notably through all non-profit organisations, including foundations and mutuals, and in particular non-profit associations in the public and general interest in a variety of societal areas.
- SSE recognises that it can be a helpful instrument to support the transnational operations of CSOs, through non-profit associations and a model for future similar legislation for foundations or mutual benefit societies.
- The ECBA legal form will also facilitate cross-border activities of European non-profit associations and foundations, such as European federations, networks, and other transnational activities of non-profit organisations, including for European projects and for cooperations of associations in border regions.
- SSE welcomes the pragmatic and anticipatory approach taken by the European Commission (EC) in addressing the European Parliament Resolution of 17 February 2022 that allows – from an internal market perspective – to recognise European non-profit organisations.
- SSE is delighted to see that the proposal for a Directive formally recognises at the first time at the EU level, non-profit associations³ and acknowledges the fundamental feature of their non-profit purpose (“asset lock”)⁴, as set out in Article 1. Another positive feature of the legislative proposal is that it promotes the statute of non-profit associations, covering key aspects such as governance, membership, funding, etc. Hence, the Directive recognises that in non-profit associations and organisations, profits must be reinvested in line with their objectives as a means a means for reinforcing the aim of public benefit and cannot be redistributed for private interests or to managers or shareholders.
- SSE welcomes the logic of mutual recognition used and the equal/non-discriminatory treatment in the recognition and funding of ECBAs compared to already registered non-profit associations in EU Member States (EU MS).
- SSE also welcomes 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 acceptance and use of the directive and the new legal form of an ECBA as well as its smooth implementation at the national level.
- The “only once principle” set out in Article 12 is essential as simple and non-burdensome administrative procedures are key to ensure the smooth implementation of the Directive at the national level.

³ This is also done in view of their double function “in the field of social services across Europe. They are both 1) providers of services of general (economic) interest in which they play an important role for the lives and well-being of millions of European residents, for the welfare states and social protection systems in the EU and at the same time 2) and promoters, facilitators, key actors and defenders of effective civil dialogue and participatory democracy. They also offer opportunities for volunteering.” (cf. [SSE Contribution to the EC call for evidence on an EC proposal for a legislative initiative on cross-border activities of associations](#) of 28 October 2022, p. 2)

⁴ The obligation for non-profit associations “to use their financial reserves and any possible profit only in accordance with their specific purpose (as laid down in the statutes) (...) in most cases and not least in the social services sector, is closely linked to the realisation of the general interest. Services of general economic interest (SGEI) also provided by associations, including those operating in the field of social services, are recognised in the Article 14 of the Treaty on the Functioning of the European Union (TFEU) and complemented by the Protocol (No. 26) on Services of General Interest.” (cf. [SSE Contribution to the EC call for evidence on an EC proposal for a legislative initiative on cross-border activities of associations](#) of 28 October 2022, p. 3)

- SSE agrees with the approach set out in Articles 6, 12 and 13 of the proposal for the Directive that there should be no restriction on the ECBA's right to receive and provide funding, except where a restriction is prescribed by law, justified by an overriding reason in the public interest and proportionate for ensuring the attainment of the objective pursued without going beyond what is necessary.
- SSE welcomes that this EU-level legislative initiative on an ECBA is formulated in a way to respect and maintain the diversity of existing legal frameworks for associations and public-benefit foundations at national level, as long as they are in compliance with the EU-level fundamental rights and civic freedoms, and open for a system of mutual recognition of a new legal form, as suggested as one of the major features of the proposed Directive.

2) Aspects that would need to be amended or clarified

- Explanatory Memorandum – Consistency with existing policy provisions in the policy area: Taxation is (rightfully) excluded⁵ from the Directive proposal, as one element of the pragmatic and anticipatory approach taken by the EC.
 - SSE, however, consider important to work towards a situation where the tax legislation of EU MS ensures that foreign-based ECBAs will be considered comparable to local/resident ECBAs. This would imply that donors giving to an ECBA registered abroad would receive the same tax advantages⁶ as if they were giving to a local/resident ECBA.
 - Article 9⁷, building on the general principles of EU law “equal treatment” and “non-discrimination, requests equal treatment of ECBA on all aspects of the operation compared to local/resident non-profit associations in an EU MS. This would, however, include – in our reading – legislation and regulations/rules related to tax advantages and/or the public benefit status of an association, etc. SSE would thus like to ensure that there are no inconsistencies as the EC proposal for a Directive on an ECBA excludes tax-related issues.
- Explanatory Memorandum – Terminology used (or term lacking): The distinction between economic activities and non-economic activities (in the logic of EU law) – in the “collective interest” or in the “general interest” essential in the field of services of general economic interest (SGEI) is not used in the proposal for the Directive. The term “economic activity”, however, appears in the Explanatory Memorandum⁸ and in some articles. For SSE, there might be a need to clarify the term “non-economic activity” in view of associations and compared to “non-profit” (as used in the legislative proposal in relation to “non-profit purpose” and “non-profit association”). SSE is delighted to see that Article 3 2. unambiguously highlights the non-profit purpose of an ECBA by stipulating that “Member States shall ensure that an ECBA shall

⁵ Quote from the Explanatory Memorandum (bold text by SSE): “This 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.” (p. 3)

⁶ See the two Staff Working Documents issued by the EC on 13 June 2023, “[EC Guidance on relevant taxation frameworks for social economy entities](#)” and “[Non-discriminatory taxation of charitable organisations and their donors: principles drawn from EU case-law](#)”.

⁷ It reads (bold text by SSE): “Each Member State shall ensure that **in any aspect of their operations**, ECBAs are not treated less favourably than the non-profit association in national law identified pursuant to Article 4(4).”

⁸ This is the case, e.g., on p. 5: “Article 114 TFEU is an additional legal basis for an intervention covering non-profit associations engaged in economic activities in the internal market, by harmonising divergent Member States’ restrictive provisions as regards their exercise of an economic activity and their freedom to receive capital, which have a direct effect on the functioning of the internal market.”

have a non-profit purpose and any profits of an ECBA shall be used exclusively for the pursuit of its objectives, as described in its statutes, without any distribution among its members.”

- Explanatory Memorandum and Recital 1: The proposed Directive uses the double legal basis of Articles 114 TFEU on internal market and of Article 50 TFEU on the freedom of establishment. Article 54 TFEU⁹, in the same section on the freedom of establishment, however, excludes the application of the freedom of establishment for non-profit making entities. For SSE, any doubts regarding the appropriateness of the double legal basis chosen as to the “subject matter” of the proposed Directive – basically non-profit making associations – and in view of the instrument proposed – i.e., the creation in the national legal order of the Member States of a new legal form of non-profit associations dedicated to cross-border activities – should be avoided. Where clarifications seem to be advisable, also based on the feedback from the consultation exercise, they should also be provided by the EC before the end of this legislative process.
- Recital 17 in combination with Article 3: SSE would like to ensure that “associations of these entities” in Recital 17 linked to Article 3 (a) is understood/interpreted in a way that it will not prevent national member organisations of SSE member organisations Caritas Europa and Eurodiaconia to become members of and/or to set up an ECBA. SSE agrees with the current wording of Recital 17¹⁰ proposed in the EP JURI Committee Report adopted on 13.02.2024.
- Article 4: Based on Article 4.2 and 4.4 of the proposed Directive, if an ECBA registered in Member State A operates in Member State B, it is not clear if it will operate based on the rules applicable to the closest legal form of the home country (MS A) or of the operating country (MS B). For SSE clarification on this point would also be instrumental in view of the conditions to be fulfilled for the attribution of a “public benefit status” (relevant for access to tax advantages) to non-profit associations in a range EU MS which might go beyond the aspects of the operation of ECBA referred to in Art. 9 of the proposal for the Directive on ECBA.
- Article 7: It has to be clear that the requirements for the founding members are rules which concern only the moment of establishment of an ECBA, without prejudice to further or future membership to an ECBA.
- Article 7: In order to be effective for EU-level networks/umbrella organisations, many of which have members outside of the EU MS (both in countries with candidate status for the EU and other European countries) it has to be clarified that non-EU based members can be part of an ECBA, and it has to be ensured that non-EU based people or non-profit organisations (and other non-profit legal entities) can hold leadership positions.
- Recitals 8 and 35: There are references to the establishment of “genuine internal market for the economic activities of non-profit associations “ (Recital 8) and of “a genuine internal market for non-profit associations” (Recital 35). This formulation should not make impossible the inclusion of exemptions, special rules, lighter regimes, etc. in EU State Aid or Public Procurement Legislation in the area of social services essential for the effective operation as part of SGEI and given their embeddedness in (solidarity-based) national social protection schemes/welfare states.

⁹ Article 54 2 TFEU reads (bold text by SSE): “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**”.

¹⁰ It reads (bold: amendments agreed): “Churches and other religious organisations and philosophical or non-confessional organisations, within the meaning of Article 17 TFEU, as well as associations of these entities, **have** a particular status in national law, **which should not be adversely affected by this Directive. Therefore, these entities** should also be allowed to establish **or become a member of** an ECBA, **if they choose to do so.**”

- Recitals 26¹¹ and 33 in combination with Articles 9 and 13 (see also above under the first bullet point “Explanatory Memorandum – Consistency with existing policy provisions in the policy area” under heading 2)): Article 13 aims at ensuring that non-profit associations have “free and non-discriminatory access to funding from a public source, in compliance with the general principles of EU law”. There could be a risk of undermining the action of already-established local non-profit social services or of services provided by non-profit providers in other sectors. Hence, SSE would like to ensure that the non-discrimination principle of Article 9 cannot be used as a basis for an ECBA set up in another EU MS to access national public funding (including to state aid) and/or to authorisations, accreditations, certifications, etc. needed to access these fundings and to undertake, e.g., social services activities if this ECBA does not also fulfil other conditions defined in national legislation and regulations for the provision of services of general (economic) interest.

3) Avenues of further work beyond the directive

- For SSE, taxation¹² is (rightfully) excluded from the proposal of the Directive for an ECBA, as one element of the pragmatic and anticipatory approach taken by the EC. SSE considers it very important to work towards a situation where the tax legislation of EU MS ensures that foreign-based ECBAs will be automatically considered comparable to local/resident ECBAs. This would imply that donors giving to an ECBA registered abroad would receive the same tax advantages as if they were giving to a local/resident ECBA.
- 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, SSE supports the call that in the future, a specific legislative initiative, similar to the ECBA, should also be proposed for foundations and mutual benefit societies.

¹¹ It reads (bold text by SSE): “ECBAs should be able to decide freely on their rules of operation. Any limitation on this freedom imposed by a Member State should be applied in a general and non-discriminatory way, **prescribed by law**, justified by an overriding reason in the public interest, and be appropriate for ensuring the attainment of the objective pursued and not going beyond what is necessary for it to be attained.”

¹² Quote from the Explanatory Memorandum: “This 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.” (p. 3)