



**Position Paper by the
Association of German Non-Statutory Social Welfare Organisations
(BAGFW)
regarding the Proposal of the European Commission for a Directive
of the European Parliament and of the Council on European cross-
border associations (COM (2023) 516) 05/09/2023**

06/12/2023

The BAGFW welcomes the proposal of the European Commission for a Directive on European cross-border association (ECBA), which was published on September 5th, 2023.

In the EU, the many different providers of social services can be distinguished between public and private providers. Private providers, in turn, can be distinguished between for-profit and non-profit organisations.

Germany has a long tradition of non-statutory, not-for-profit providers of social services. The six German non-statutory social welfare organisations are the largest providers of not-for-profit social services in Germany, counting around 1.9 million employees 3 million volunteers. The special role of non-statutory, not-for-profit welfare organisations is based on the welfare state principle in Article 20 (1) of the German Basic Law and the principle of subsidiarity.

A defining characteristic of German non-statutory, not-for-profit welfare organisations is their public benefit status (*Gemeinnützigkeit*), which is regulated in the German Fiscal Code (*Abgabenordnung*). Public benefit profit status entails the obligation that available funds are used efficiently and promptly in favour of people in need. It is therefore a quality criterion for the activities of non-statutory welfare organisations in Germany.

1. Strengthening civil society and social cohesion through ECBAs

The BAGFW welcomes the EU Commission's initiative for a new EU-wide form of an association, the ECBA, which is primarily intended to strengthen civil society activities in the 27 Member States. The draft directive is intended to help reduce bureaucracy for the cross-border activities of social enterprises within the framework of the internal market, by removing administrative obstacles. The establishment of an ECBA can promote democracy and social cohesion within the EU through a legally binding structure, which brings added value for the EU. The BAGFW supports the democracy-promoting effect of the ECBA, particularly in political systems in which

authoritarian governments restrict civil society's freedom of action and scope for partnership in relation to state authorities. Only in an EU, where democratic values and the rule of law are practised, will civil society actors - in their commitment to these values - be able to form the basis for social cohesion. Vulnerable people in need, people with disadvantages and people experiencing poverty need a stable social infrastructure. Providing this social infrastructure, has a strengthening effect on democracy. The BAGFW sees this interplay between the strengthening of civil society and cross-border association activities as an opportunity for democratic development and the cross-border expansion of social cohesion.

2. The ECBA as a new legal form

An ECBA shall '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' (Art. 3 (2) Draft Directive). When implementing the directive into national law, EU Member States need to establish the legal form of an ECBA into their domestic legal systems (Art. 3 (1) Draft Directive). To do so, they need to determine the 'most similar non-profit association in national law' (Art. 4 (2) and Art. 4 (4) Draft Directive). In Germany, there is no corresponding 'most similar' legal form which combines the components of having 'a non-profit purpose' and using any profits of an ECBA 'exclusively for the pursuit of its objectives, as described in its statutes, without any distribution among its members'.

A similar legal form exists under German law in the form of an 'ideal association' according to § 21 BGB (German Civil Code). An ideal association may also be economically active, provided that the economic activity is a prerequisite for the realisation of the idealistic objectives as described in the statutes. However, the prohibition of the distribution of profits is not linked to the legal form of the ideal association found in Section 21 of the German Civil Code. Instead, this prohibition is linked to the rules on the public benefit status that can be found in the *Abgabenordnung* (German Fiscal Code). In the case of an ideal association, economic objectives may at best play a subordinate role. An ideal association with predominantly economic objectives cannot be registered under German law. However, according to the so-called "Kita"-strand of case law of the Federal Court of Justice, the recognition of an association as a public benefit organisation within the meaning of the German Fiscal Code indicates that an association is not orientated towards a main economic purpose, can be registered and can thus receive legal personality. For this reason, the BAGFW is in favour that the ideal association of § 21 BGB should be defined as the "most similar" legal form of an ECBA.

3. The ECBA and possible recognition as a non-profit organisation

Regarding the additional acquisition of a public benefit status under national law, the legal form of an ECBA is neutral. As such, an ECBA could not acquire the public benefit status merely by registering in the home member state or by being automatically recognised as an ECBA in another member state. The legal rules surrounding the public benefit status are strongly characterised by national law and, particularly in Germany, by tax law. This means that any regulation of the public benefit status falls outside the EU's area of competence.

The BAGFW emphasises the importance of subsidiarity and welcomes the openness of the draft regarding the different forms of public benefit statuses among the EU Member States. This diversity does justice to the numerous possibilities for organising the general interest in the Member States. The public benefit status is a defining element for non-statutory welfare organisations in Germany. Numerous elements of the public benefit status are at the heart of the welfare state structure. The legislator classifies non-statutory social welfare organisations as guarantors for the provision of social infrastructure precisely because they all possess the public benefit status.

The BAGFW welcomes the prohibition of the distribution of profits as one key characteristic of the non-profit nature of an ECBA. The non-statutory social welfare organisations are equally in favour of the fact that the details of how to regulate the public benefit status are to be left to the Member States. ECBAs must comply with all "national rules applicable to the most similar non-profit association in national law" (Art. 4(2) Draft Directive). This refers not only to the provisions of association law, but in principle also to the rules of the public benefit status. However, since the EU does not have competence in the area of tax law, which is the legal basis for the many different forms of the public benefits status within the EU Member States, the public benefit status is excluded from the scope of application of the draft directive.¹ Hence, the BAGFW views the creation of an ECBA favourably, as ECBAs would in principle also be able to operate across borders and in a cooperative manner with the various national regimes of the public benefit status.

The general right to non-discrimination is considered in Art. 13 of the draft directive. Among others, ECBAs are granted 'free and non-discriminatory access to funding from a public source'. The BAGFW would like to emphasise that this is an inherent principle of EU law, which flows logically from Art. 18 TFEU. Non-discrimination also goes hand in hand with the principle of equal treatment (Art. 9 Draft Directive). ECBAs must be treated in the same way as the 'most similar legal form of non-profit

¹ 'Finally, 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.' (Explanatory Memorandum of the Draft Directive, p. 5).

association in its domestic legal order' (Art. 4 (4) Draft Directive). In Germany, an ECBA could therefore seek recognition of the public benefit status according to §§51ff. *Abgabenordnung* (German Fiscal Code). Once it acquires the public benefit status, it would then have to fulfil the same obligations as any national association that has successfully acquired the public benefit status (Art. 4(2) Draft Directive). The requirements for tax exemptions would have to be considered separately for each Member State. To reach the objectives of the Draft Directive in an equivalent way, one would have to create corresponding (but not identical) requirements in the respective Member States. From the BAGFW's perspective, it must be ensured that an ECBA cannot impose lower requirements on the public benefit status by referring to regulations in other countries.

4. The ECBA and religious organisations

According to Art. 3(1)(a) Draft Directive, "religious organisations and associations of such entities" are excluded from the scope of the proposed directive. Some providers of non-statutory welfare would fall under this exception and would therefore not be able to establish an ECBA. Besides the denominational organisations this exception would also apply to Muslim associations or associations of free churches, for example. Recital 17 refers to Art. 17 TFEU, which holds that the Union "respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States". In the ongoing legislative process, it must be ensured that their status under Art. 17 TFEU remains fully respected under national law. At the same time, their freedom of organisation under company law must not be restricted.

5. Involuntary dissolution

The BAGFW would also like to draw attention to the rules on involuntary dissolution of an association in Art. 25 (2) (b) Draft Directive. This provision is different from the German law on dissolution of associations that are set out in § 3 (1) sentence 1 *Vereinsgesetz* (Associations Act). The Draft Directive would restrict the German rules on involuntary dissolution and does not adhere to the principle of proportionality. Involuntary dissolution of associations, such as those that have recently taken place in the area of 'Samidoun Deutschland' must continue to be possible, if the association fulfils the criteria of the grounds for prohibition that can be found in the German Associations Act.

6. Conclusion

Overall, the BAGFW views the Draft Directive positively. Establishing an ECBA, would add a European dimension to national association laws. Being able to establish an ECBA would have a high symbolic value despite the expected low practical resonance among the German non-statutory welfare organisations. We would like to emphasise that according to that the Draft Directive, each ECBA would be free to choose whether to seek additional recognition of a public benefit status in the respective Member State, if such a status exists under national law. Another positive aspect of the proposed directive is that the establishment of an ECBA could lead to a reform of the German association laws. In particular, there is potential for a 'digitalisation boost'. The creation of a legal framework for the mutual recognition of non-profit associations across the EU should be the minimum objective of any future regulation.

Overall, the establishment of an ECBA would support civil society and democratic developments within the EU. In cases of authoritarian and anti-democratic conditions, where civil society is denied national support, an ECBA would strengthen civil society by adding a cross-border element. The BAGFW would like to stress that this is a very important aspect of the proposal, so that the values of the EU as a foundation for social stability can be realised.

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