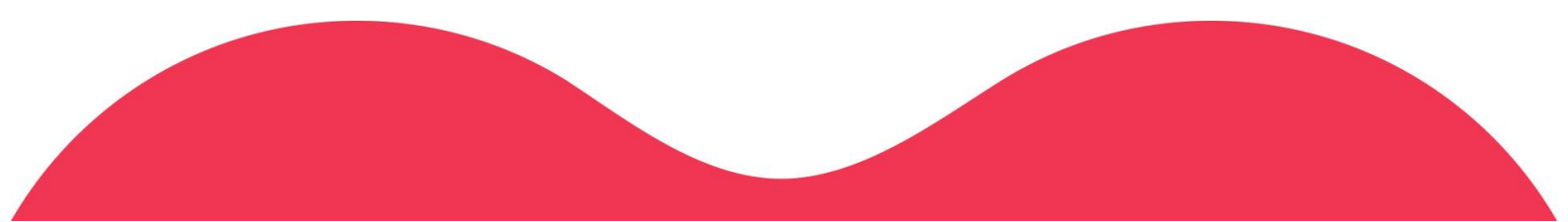


February 2024

Philea comments on the ECBA proposal COM 2023 516 final



Philea is pleased to submit the following comments on the EC Proposal for a Directive on European Cross-Border Associations (COM(2023) 516 final), 05.09.23 (ECBA)

- I. General comments about the scope and positive implications
1. Welcoming the ECBA and calling for a single market for philanthropy

We clearly welcome the proposed Directive for the establishment of a European Cross-Border Association (ECBA) as an important step in the direction of creating a level playing field for the public-benefit sector and for strengthening civil society space in Europe. We also believe that the ECBA will **pave the way for future similar legal initiatives for other legal entities such as foundations**. The Directive proposal does not, however, cover the wider non-profit sector and foundations nor comes in package with minimum standards for the wider non-profit organisations (NPO) sector as originally suggested by the European Parliament and the civil society and social economy sector. Foundations, as legal entities, can create an ECBA but they cannot convert into an ECBA and the ECBA proposal does not provide for the creation of a European Cross-border Foundation nor ensure minimum standards for NPO laws at the national level. The Directive also does not address the tax barriers that hamper philanthropic activities across borders.

Philanthropy and philanthropic organisations are a critical part of democratic and pluralistic societies. Institutional philanthropy in Europe includes more than 186,000 philanthropic organisations with an accumulated annual expenditure of nearly 60 billion euros, and there are millions of individual and corporate donors who donate small and larger amounts to good causes. Philanthropic organisations and donors work increasingly across borders and in collaboration with partners, yet they are challenged by various administrative, legal and fiscal barriers when doing so. A single market for philanthropy and public good does not yet exist and the ECBA will only address some of these barriers.

Passionate citizens and corporate donors struggle to claim non-discriminatory treatment when donating across-border. Public-benefit foundations also invest their endowments in cross-border markets but face complex rules and costs to gain equal treatment. Philanthropy faces structural and policy obstacles hampering free movement of philanthropic capital across the EU.¹

¹ Taxation of Cross- Border Philanthropy in Europe After Persche and Stauffer. From landlock to free movement? 2014, <http://efc.issuelab.org/resources/18545/18545.pdf>; see legal mapping [Comparative Highlights of Foundation Laws](#).



We hence call on EU policymakers to create a Single Market for Philanthropy by creating a legal form for foundations and by better implementing the non-discrimination principle announced in the Social Economy Council Recommendation:

- A legal form for cross-border foundations at EU level

The Directive proposal does not provide for the creation of a European Cross-border Foundation as an asset-based and public-benefit organisation. We call on EU policymakers to develop a specific legislative initiative, similar to the ECBA, to enable the creation of European cross-border foundations.

- Implement the Social Economy Council recommendation towards simplifying rules around the taxation of cross-border philanthropy.

The November 2023 Council Recommendation on developing the social economy framework conditions includes a clear call to Member States to overcome barriers to cross-border philanthropy, and we are now asking for follow up action. We argue that European philanthropy could be expanded much more if a single market for philanthropy existed. If there was greater clarity regarding administrative and taxation procedures, simpler rules around the comparability criteria, and support for foreign public-benefit organisations and donors seeking to navigate the issue of comparability, see also our 2023 updated [European Philanthropy Manifesto](#).

We now call on the EU and Member States to move towards developing tax incentives and simpler rules and more guidance as well as templates to overcome barriers for cross-border philanthropy.

2. A tool to unlock potential of non-profits in Europe and to overcome existing cross-border barriers

- The ECBA can help **unlocking the potential and can support the essential contributions of civil society organisations** be they associations or foundations – including not-for-profit providers of social services, as part of the social economy – to our democratic societies across Europe
- We believe that it can also be an important tool to **support and mobilise citizens' collective engagement for the public good**.
- We recognise that it can be a helpful instrument to support and ease transnational operations of NPOs including foundations
- The ECBA legal form will also **facilitate cross-border activities of European federations**, networks and other transnational activities of NPOs



3. Recognising and defining non-profit purpose and non-distribution constraint at EU level

We welcome the fact that the directive recognises European non-profit organisations and defines at EU level the feature of a **non-profit purpose and non-distribution constraint**, as set out in Article 1 of the proposal.

4. Setting features that can serve as a benchmark while not being overly prescriptive and directly impacting existing national legal forms

- We welcome the fact that the legislative proposal sets certain standards regarding key features of the ECBA such as governance, membership, funding, etc. We believe that the ECBA could potentially also serve as a benchmark for national laws.
- We are pleased that the proposed Directive is not overly prescriptive. It appears to be flexible enough to fit into the different national situations and the diversity of NPOs.
- We welcome the fact that this EU-level legislative initiative on an ECBA respects and maintains the diversity of existing legal frameworks for NPOs at national level (as long as they are in compliance with the EU-level fundamental rights and civic freedoms).

5. Mutual recognition and non-discriminatory treatment also across-border

We welcome the logic of **mutual recognition used and the equal/non-discriminatory treatment of the ECBA** to already registered non-profit associations in EU Member States also in cross-border contexts.

6. No restrictions on the right to access and provide funding also across-border

We welcome 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.

II. Suggestions to clarify some aspects around the ECBA

1. Equal treatment and taxation

- The Explanatory Memorandum of the proposal stresses that taxation is excluded from the Directive proposal. We consider it however important to work towards a situation where the tax legislation of EU Member States ensures that **foreign-**



based ECBA will automatically be considered comparable to local/resident ECBA. 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.

- **Article 9**, building on the general principles of EU law “equal treatment” and “non-discrimination”, requests equal treatment of the ECBA on all aspects of the operation compared to local/resident non-profit associations in an EU Member State. This would include – in our reading – legislation and regulations/rules related to tax treatment advantages and/or the public-benefit status of an association, etc. Member States would hence grant the ECBA equal treatment to NPOs at the national level also with regards to tax treatment

2. Founding members and members outside the EU

- 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 3**: Many EU-level networks/umbrella organisations such as Philea have members outside of the EU (both in countries with candidate status for the EU and other European countries, and also outside Europe). It should be clarified that non-EU based members can be part of an ECBA. It has to be ensured that non-EU based/resident individuals or associations and foundations (and other non-profit legal entities) can be members of an ECBA and hold leadership positions.
- **Recital 17 in combination with Article 3**: We 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 from becoming members of and/or set up an ECBA.

3. Which rules apply to ECBA acting across border

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).

4. Flexibility for governance rules

More flexibility could be introduced in terms of voting rights in the decision-making bodies, to accommodate the diversity of the organisations that could register as an ECBA.

5. Sharpen the criteria for national restrictions

National restrictions on the operation of ECBA should follow clear rules by adding a criterion of necessity and, for the dissolution of an ECBA, a judicial review pending finalisation.



6. Simplify the "only once principle"

Article 12: The "only once principle" set out in Article 12 should be reinforced as simple and non-burdensome administrative procedures are key to ensure the smooth implementation of the Directive at the national level.

About Philea

With individual philanthropies and national-level infrastructure organisations in over 30 countries as members, we unite over 7,500 public-benefit foundations that seek to improve life for people and communities in Europe and around the world.

Our vision is for philanthropy to use its full potential to co-shape and support a pluralistic, just and resilient society that centres people and planet.

Our mission is to enable, encourage and empower the philanthropic community to build a better today and tomorrow.

We galvanise collective action and amplify the voice of European philanthropy. Together we:

- Co-create knowledge and learn from effective practices
- Collaborate around current and emerging issues
- Promote enabling environments for doing good

European Transparency Register: 78855711571-1 www.philea.eu



ANNEX: List of barriers to cross-border philanthropy

Recognition of Foreign Foundations

Philanthropic organisations sometimes need to register or create a branch before they are able to operate in another country in Europe. The legal personality is not always recognised abroad.

Cross-Border Merger of Foundations

Philanthropic entities cannot merge across borders as companies can.

Cross-Border Transfer of the Seat

There is no legal provision in most countries for shifting a philanthropic organisation's headquarters across borders, so this process entails a high degree of legal uncertainty.

Restrictions on Foreign Funding ("foreign agent" laws)

Whereas philanthropic funding should flow freely according to the EU principle of free movement of capital within the internal market, there is a new worrying phenomenon of so-called foreign funding/foreign agent restrictions.

Difficulties due to banks not providing services

Banks are becoming more reluctant to provide services to philanthropic organisations especially when it gets to cross-border giving and grantmaking.

Discrimination of cross-border philanthropy and complex procedures

Some governments have not yet introduced the non-discrimination principle and the free flow of capital but continue to discriminate comparable foreign EU-based public-benefit organisations and their donors from local ones. Those that have formally removed discrimination often provide very complex rules and procedures under which circumstances Member States consider a foreign EU-based organisation comparable to a resident one. In some countries, carrying out activities abroad may put their tax-exempt status at risk. This relates to three scenarios:

Tax Treatment of Foundations/philanthropic organisations

There are still rules in place which provide that non-resident foundations are denied all or some tax benefits which domestic legislators have granted to resident foundations.

Tax Treatment of Donors

Donors giving to comparable organisations located in EU or EEA countries generally get equal tax treatment, however the conditions for the comparability vary and processes are often costly, lengthy and burdensome for users as well as the authorities.

Inheritance and gift tax treatment of legacies

When it comes to the tax treatment (inheritance and gift tax) of legacies to non-resident public-benefit foundations, some countries have not implemented the non-discrimination principle.