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## EUROPEAN CROSS-BORDER ASSOCIATIONS: ON THE SOCIAL FUNCTION OF LAW

*Associations are the glue which holds our society together<sup>1</sup>*

### INTRODUCTION

On 13 February 2024, the Legal Affairs Committee of the European Parliament voted by a large majority in favour of the European Commission's proposal for a directive introducing the additional legal form of the European cross-border association (ECBA) into the national legal systems of the Member States.<sup>2</sup> The goal of this initiative is to facilitate the cross-border activities of non-profit associations in the European Union, with the aim of improving the operations of the internal market by removing legal and administrative barriers and levelling the playing field for non-profit associations that operate or wish to operate in more

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<sup>1</sup> European Parliament Resolution of 17 February 2022 with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations (2020/2026(INL)), [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0044\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0044_EN.html)

<sup>2</sup> Proposal for a Directive of the European Parliament and of the Council on European cross-border associations, Brussels, 5.9.2023, COM(2023) 516 final, 2023/0315(COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A516%3AFIN&qid=1693910621013> (ECBA-Directive).

than one Member State, thereby promoting the role that non-profit associations play in generating economic and social values in the EU.

The aim of this article is to answer the question of the potential effectiveness<sup>3</sup> of introducing the regulation on European cross-border associations into the national legal systems. This question seems justified, taking into account not only the specific solutions that the European legislator considered optimal for facilitating the activities of non-profit associations in the European Union, but also the broader institutional context and purpose of the regulation. This is particularly relevant regarding the role and effectiveness of law on an international and supranational scale, including the need to reconcile the intention to harmonize laws and create a level playing field for all recipients of legal norms with the challenges posed by implementing unified legal norms in different social and economic conditions.

To achieve this, in the first part of the article, I will discuss the origin of the European Commission's proposal, refer to the legal grounds on which this legislative initiative is founded, and present the proposed structure and principles of operation of ECBAs, as adopted in the proposed regulation. In the second part of the article, I will describe the conclusions and doubts that arise from my analysis, with reference to the Polish legal regulations on associations and the legal solutions in other EU countries. I will also highlight the challenges and opportunities created by the introduction of European cross-border associations into the national legal systems.

I frame my analysis around the concept of the social function of the law, which consists in motivating behaviour through what Richard H. Thaler and Cass R. Sunstein call "the nudge,"<sup>4</sup> i.e. instilling enduring dispositions and beliefs in people while ensuring a certain level

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<sup>3</sup> I am referring to the Polish term *efektywność prawa*, not its *skuteczność*. In English, however, both these terms are usually treated as synonyms and translated as "effectiveness."

<sup>4</sup> R.H. THALER, C.R. SUNSTEIN, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, Poznań 2017.

of conformity in terms of uniform behaviour.<sup>5</sup> In my opinion, the social operation of the law – its legal effectiveness – should be understood not merely as the factors which make a norm a genuine regulator of social relations subject to the law,<sup>6</sup> nor simply as the alignment between the social outcomes of a legal norm and the legislator's intentions,<sup>7</sup> but instead it should mean the capacity of the given norm to enhance utility, both for the individual and on the social scale.<sup>8</sup>

To meet my objectives, the methodology of this article extends beyond the traditional analysis of normative material or a legislative review supplemented by other authors' statements. Instead, it refers to the issue of law as a fact, examining its "factuality" and social efficiency, treating the legal disciplines in connection with other social sciences.

The article does not embark on, nor would its format permit, a systematic or thorough discussion of EU association law, European cross-border associations, or a final assessment of the effectiveness of the proposed regulation. Its aim is to present the European Commission's proposal, discuss some of the debatable points in it, and, above all, contribute to the doctrinal discussion on this subject, particularly regarding how research on European cross-border associations should operate. I will use the proposed regulation on European cross-border associations as an example to illustrate the impact of law as a carrier of value to bring about required social change.

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<sup>5</sup> Cf. M. BORUCKA-ARCTOWA, *Legalizm i konformizm i oportunizm*, «Ruch Prawniczy, Ekonomiczny i Socjologiczny» 2/1964, pp. 241-242.

<sup>6</sup> M. BORUCKA-ARCTOWA, *O społecznym działaniu prawa*, Warszawa 1967. Although this author refers to Marxist theory and method, the essence of the approach she describes is the need to consider jurisprudence in the light of other social sciences.

<sup>7</sup> Cf. M. BORUCKA-ARCTOWA, *Legalizm...*, p. 239. See also M.E. STEFANIUK, *Skuteczność prawa i jej granice*, «Studia Iuridica Lublinensia» 16/2011, p. 55.

<sup>8</sup> J. STELMACH, *Efektywne prawo*, [in:] S. GRODZISKI et al. (eds.), *Vetera novis augere: studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi*, II, Kraków 2010, p. 960. These authors describe eight conditions for the operation of efficient law: efficacy, predictability of social and economic changes, maximisation of social and individual welfare, economic rationality of legal subjects, the proper allocation of goods, the law's capacity for self-restriction, fulfilment of the principle of inertia and the attention of legal theory to the analysis of efficient law.

The direct impulse for writing this article was my recent visit to the University of Osnabrück and a meeting with my colleague Tim Wöffen, a working associate of Prof. Dr. Lars Leuschner, who holds the University of Osnabrück's Chair for Civil, Commercial and Corporate Law" (Lehrstuhl für Bürgerliches Recht, Handels- und Gesellschaftsrecht). Tim has been studying associations for a long time and got me interested in this issue, for which I am sincerely indebted to him. This article would not have been possible without his inspiration and it would have been incomplete if it had omitted reference to his articles on the subject.

## PART I

### I. ORIGINS AND LEGAL GROUNDS OF THE PROPOSAL

It should be noted that the Commission's proposal is not the first recommendation for a legal framework for European associations. In 1987, Nicole Fontaine (16 January 1942 - 17 May 2018), President of the European Parliament, authored a report titled "Report on Non-Profit Making Associations in the European Community."<sup>9</sup> The Fontaine Report of 8 January 1987 recommended the abolition of all discrimination whatsoever on grounds of nationality regarding membership in associations across Europe for European citizens. Its aim was to achieve mutual recognition of national associations within the European Community and examine the grounds for a legal framework for a European status for European Associations.

On the grounds of the Fontaine Report, on 13 March 1987 the European Parliament adopted the Resolution on non-profit-making associations in the European Communities, requesting the European Commission "to draw up a proposal for a regulation incorporating a Community-wide statute for associations covering the requirements of associations

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<sup>9</sup> Resolution of the European Parliament on non-profit-making associations in the European Communities of 13.03.1987, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51986IP0196>.

operating in more than one Member State and national associations wishing to act in concert at European level.”<sup>10</sup>

The European Commission’s first proposition, “The Proposal for a Council Regulation on the Statute for a European Association” (EAS), was presented on 18 December 1991 but ultimately withdrawn on 27 September 2005.<sup>11</sup> The main reason for its failure was criticism from Member States challenging the EU’s jurisdiction and the concept of a statute for European Associations. Germany, Denmark, and the United Kingdom argued that the proposal undermined the principle of subsidiarity, asserting that EU legislation on associations should remain in the sole jurisdiction of the Member States.<sup>12</sup>

Although the European Economic and Social Committee (EESC) repeatedly called for the establishment of the EAS,<sup>13</sup> and despite the European Parliament adopting a “Declaration on establishing European statutes for mutual societies, associations and foundations” on 10 March 2011,<sup>14</sup> it was not until 2022 that serious consideration was given to the “Regulation on the Statute for a European Association.”

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<sup>10</sup> T. WÖFFEN, *European Associations: The Political Debate and Basic Legal Questions*, October 2018.

<sup>11</sup> It was accompanied by a “Proposal for a Council Directive Supplementing the Statute for a European association with regard to the involvement of employees.”

<sup>12</sup> The criticism also included detailed provisions of the proposed regulation, e.g. no distinction between non-economic and economic associations, too many administrative obligations on associations, the requirement to publish an annual financial audit – for more, see T. WÖFFEN, *ECBA (European Cross-Border Association) – Vorteile der Rechtsform und Fragen zum Richtlinienentwurf*, «npoR» 68/2024.

<sup>13</sup> See the Opinion of the European Economic and Social Committee on the representativeness of European civil society organisations in civil dialogue (2006/C 88/11) of 11 April 2006 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:520061E0240&from=IT>. TIM WÖFFEN presents the chronology of the initiatives leading to a European statute for associations in his publication *ECBA (European Cross-Border Association)*, *op. cit.* and in M. SCHWÄRZEL’s essay significantly titled *A study in perseverance... The timeline of initiatives towards a European statute for associations*.

<sup>14</sup> Declaration of the European Parliament of 10 March 2011 on establishing European statutes for mutual societies, associations and foundations - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011XP0101>.

This proposal builds on the Lagodinsky Report, which was drafted by Greens/EFA rapporteur Sergey Lagodinsky, Vice-Chair of the Legal Affairs Committee in the European Parliament. Lagodinsky commented on the “Statute for European cross-border associations and non-profit organisations,” which the European Parliament adopted by an overwhelming majority in February 2022.<sup>15</sup> The request for European cross-border associations, also referred to in the Action Plan for the Social Economy adopted by the Commission in December 2021, is part of a broader package of measures focused on social fairness and prosperity under the European Commission’s political priority for 2019–2024, “An Economy that Works for People.”<sup>16</sup>

In response to the European Parliament’s Resolution of 17 February 2022 on a statute for European cross-border associations and non-profit organisations,<sup>17</sup> the European Commission issued a Proposal for a Directive of the European Parliament and of the Council on European cross-border associations.

The first policy option which was considered involved the use of a regulatory route via Article 352 of the Treaty on the Functioning of the European Union (TFEU), and the European Commission’s legislative initiative to introduce a European legal form called “The European Association,” required unanimity in the Council

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<sup>15</sup> The proposal for a directive was drafted in response to the European Parliament Resolution under Article 225 of the Treaty on the Functioning of the European Union (TFEU), together with recommendations to the Commission on the Statute for European cross-border associations and non-profit organisations, adopted on 17 February 2022.

<sup>16</sup> As we have known for a long time, the EU action plan for the social economy clearly states that social economy entities, including non-profit associations, are not sufficiently understood and recognised, that they face difficulties developing and scaling up their activities and thus their task to deliver an increased economic and social impact is hampered. Therefore, “Building an economy that works for people” requires helping social enterprises to grow from local to European entities, including through the use of digital instruments.

<sup>17</sup> European Parliament resolution of 17 February 2022 with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations (2020/2026(INL)).

of the EU as well as the European Parliament's consent. This effectively prevented its implementation.

Therefore, a different option was adopted, i.e. the creation of an additional legal form at the national level for non-profit associations designed for cross-border purposes and recognised by Member States. The proposal is based on Article 50(1) and (2) TFEU, which empowers the European Parliament and the Council to adopt Directives that facilitate the exercise of the right to establish associations engaged in economic activity and help with their mobility, e.g. in the transfer of registered offices. Additionally, it relies on Article 114 TFEU, which grants the European Parliament and the Council the right to adopt measures for the approximation of laws, regulations, or administrative actions in Member States, which have as their object the establishment and operation of the internal market.

## 2. THE STRUCTURE AND ORGANISATION OF THE ECBA

The minimum standards for the ECBA are introduced primarily in Chapter 1 of the ECBA Directive proposal, which outlines general provisions such as the subject matter, scope (Article 1) and definitions, including terms like “non-profit purpose” and “non-profit association” (Article 2).<sup>18</sup> First, the ECBA must have a non-profit purpose, which means that regardless of whether the association's activities are of an economic nature, any profit generated is used solely in pursuit of its objectives as defined in its statutes, and not distributed among its members. Secondly, Chapter 1 sets out the characteristics of the European cross-border association (Article 3) and the rules that apply thereto (Article 4). Thirdly, the Directive gives European cross-border associations a legal personality and capacity, along with automatic recognition in all Member States (Article 5). Fourthly, it lays down common rules for all European cross-border associations with regard to their statutes (Article 6), governance (Article 7) and membership (Article 8).

Each Member State establishes the legal form of the European cross-border association (ECBA) in its legal system and ensures that the ECBA

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<sup>18</sup> The term “non-profit association” means a legal entity under national law that is membership-based and has a non-profit purpose and a legal personality.

is a membership-based legal entity, constituted through a voluntary agreement by natural persons who are EU citizens or legally resident in the EU, or by legal entities with a non-profit purpose legally established in the EU.<sup>19</sup> As regards the establishment or operation of ECBAs, the national law applicable to them is the same as the law that applies to the nearest or most analogous non-profit association under national law.<sup>20</sup> In consequence, ECBAs established in the European Union will vary, and we will have a Polish ECBA,<sup>21</sup> a German ECBA etc.

Chapter 2 outlines the rights and prohibited restrictions applicable to European cross-border associations. European cross-border associations benefit from the principles of equal treatment (Article 9) and non-discrimination (Article 10). All decisions concerning European cross-border associations made by the administrative authorities of Member States affecting the rights and obligations of ECBAs, or the rights and obligations of other persons in connection with the operations of ECBAs should be subject to judicial review in compliance with Article 47 of the EU's Charter of Fundamental Rights (Article 11).

To ensure ability to operate across borders, a European cross-border association should be registered only in one Member State to acquire legal personality and legal capacity<sup>22</sup> under Articles 18 and 19, and it is

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<sup>19</sup> With the exception of (a) trade unions, political parties, religious organisations and associations of such entities; (b) persons who have been convicted of money laundering, associated predicate offences, or terrorist financing; (c) persons who are subject to measures that prohibit their activity in a Member State in connection with money laundering, associated predicate offences, or terrorist financing.

<sup>20</sup> The rules applicable to ECBAs under this Directive do not affect measures adopted by Member States on grounds of public policy and public security to prevent the risk of misuse of non-profit associations and to ensure transparency of certain capital movements when required by EU law or national law in compliance with EU law.

<sup>21</sup> In addition, the matter is complicated by inconsistency in the Directive's different language versions; for instance, the Polish version refers to *stowarzyszenia niekomercyjne*, translated literally as "non-commercial associations," without the abbreviation "ECBA" in the Polish draft.

<sup>22</sup> Member States must ensure that ECBAs have the right to conclude contracts and perform legal acts, be a party to legal proceedings, own movable and immovable property, conduct economic activities, employ staff, receive, solicit and dispose



to be recognised in all Member States, without requiring any further registration. Both home and host Member States may request additional formalities, but only for overriding reasons of public interest (Article 12).

To guarantee the implementation of the Directive's goal, i.e. to make ECBAs capable of fully benefiting from the internal market, a European cross-border association should be able to apply for funding in the Member State(s) in which it operates without coming up against restrictions on its ability to provide or receive funding, unless such restrictions are provided for by law and justified by overriding reasons of public interest, appropriate to ensure the attainment of the objective pursued, and do not exceed what is necessary to achieve this (Article 13). A European cross-border association should also be able to provide and use services and trade in goods (Article 14). Moreover, in respecting freedom of establishment and association, no restrictions must be imposed on the freedom of establishment, the free movement of services, or the free movement of capital which still apply in the laws of certain Member States. An ECBA should not be subject to certain restrictions based on, for example, the nationality of its members or its executive body, except as provided for by this Directive.

Neither should Member States impose requirements regarding the physical presence of members of the ECBA, its executive body or its decision-making body for the validity of a meeting (Article 15).<sup>23</sup> However, the proposal explicitly requires that the ECBA must carry out, or have in its statute the objective to carry out activities in at least two Member States and have founding members associated with at least two Member States, either based on citizenship or legal residence in the case of natural persons, or based on the location of their registered office in the case of legal entities.

Member States may not impose any requirements on an ECBA to have its central administrative office or its principal place of operation in the same Member State as its registered office, to be subject to recognition

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of donations and other funds of any kind from all lawful sources, participate in public tenders, and apply for public funding.

<sup>23</sup> Article 15 introduces prohibited restrictions. Member States may not impose any of the listed restrictions on ECBAs.

once registered in another Member State, or to have been registered in its home Member State for a given period before it can operate in a host Member State.

Chapter 3 addresses the rules for the constitution and registration of ECBA's. Member States should ensure that an ECBA is created by means of registration and has a minimum of three founding members (Article 16). In terms of governance, the proposal regulates that Member States must ensure that a decision-making body and an executive body (composed of a minimum of three persons) consist only of natural persons, specifically EU citizens or legally resident in the EU,<sup>24</sup> and legal entities with a non-profit purpose established in the EU (Article 7).

An ECBA is constituted upon its registration (pursuant to Articles 18 and 19), but it is not created primarily (in an initial way); instead, it may be formed secondarily by means of the conversion of a non-profit association into an ECBA. Member States ensure that non-profit associations established in the EU may convert into an ECBA within the same Member State. The proposal specifies that Member States should establish a register for the registration of ECBA's (Article 20) and define the content of their ECBA Certificate (Article 21). The ECBA Certificate means a certificate issued by the competent authority in the home Member State, in both digital and in paper form, serving as proof of the ECBA's registration.

To enable ECBA's to reap the full benefits of the internal market, and given that mobility rights are directly related to and essential for the operation of the internal market, ECBA's should be able to transfer their registered office from one Member State to another without dissolution (Article 22). Chapter 4 lays down the rules on ECBA's mobility rights, including the procedure for the transfer of an ECBA's registered office (Article 23).

Chapter 5 contains provisions for the dissolution of an ECBA, including both voluntary (Article 24) and involuntary dissolution (Article 27). It

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<sup>24</sup> With the exception of natural persons who have been convicted of a particularly serious criminal offence, who may not be members of the executive body or representatives of a legal entity that is a member of the executive body.

also ensures that an ECBA's dissolution entails its liquidation, which must be concordant with the non-distribution constraint associated with its non-profit purpose (Article 25).

Chapter 7 sets out the final provisions, allowing the Commission to adopt implementing acts (Article 30), addressing the transposition of this proposal (Article 31), and specifying entry into force (Article 32) as well as the proposal's addressees (Article 33).<sup>25</sup>

## PART II

### 1. AN ASSESSMENT OF THE PROPOSAL

The Commission's proposal has met with a lot of criticism, especially from the French Parliament. In May 2024, before the formation of the parliament in its new post-election composition, the Commission on European Affairs of the French Parliament adopted a resolution to reject the draft Directive, calling the Commission's proposal a "real time bomb" for France.<sup>26</sup> The Rapporteur of the French Commission on European Affairs stressed that in its current form, the Directive would pose a serious threat to public order in France and the country's national security. He assessed the procedures to establish an ECBA adopted in the proposed Directive as too flexible, since they allow any person, including persons not holding EU citizenship, to form an association. This raises concerns about the potential use of cross-border associations for harmful hybrid foreign interference. Another objection to the proposed regulation is its lack of balance. The numerous powers

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<sup>25</sup> For a comprehensive description of the Directive's provisions, see T. WÖFFEN, *Geniestreich der Kommission: Die Rechtsform des europäischen grenzübergreifenden Vereins (European Cross-Border Association - ECBA)*, «ZIP: Zeitschrift für Wirtschaftsrecht» 2023, pp. 2185-2191.

<sup>26</sup> Compte rendu de réunion n° 74 - Commission des affaires européennes. Abandonner la proposition de directive concernant les associations transfrontalières européennes (n° 2656): examen de la proposition de résolution européenne (M. PIERRE-HENRI DUMONT, rapporteur), [https://www.assemblee-nationale.fr/dyn/docs/CRCANR5L16S2024PO415287N0074.raw#\\_Toc168408380](https://www.assemblee-nationale.fr/dyn/docs/CRCANR5L16S2024PO415287N0074.raw#_Toc168408380).

and freedoms granted to ECBAAs are not offset by transparency obligations, raising concerns that associations could be used for money laundering and terrorist financing. An association which did not comply with French law, once dissolved on those grounds, could easily recreate itself in another country and continue its activities on French territory by establishing itself in another Member State. It was also emphasised that in its current form, the Directive would allow ECBAAs to hold and acquire all types of assets, including ones not related to their activities, as well as to receive funds and inheritances also from abroad, which is not permitted under French law. The tax implications were far from neutral and could have a significant unexpected and crowding effect, attracting dubious associations to France while discriminating against French associations subject to applicable rules and regulations. It was argued that the liberal procedures for establishing, registering, and transferring the seat of an ECBA to another Member State would hinder Member States' ability to verify the status of its members or the activities carried out by the association itself. Given that the legal regulation takes the form of a Directive, it is reasonable to assume that this practice will differ from one country to another.

Earlier, the Czech Senate also adopted a resolution calling upon the Government not to support the Proposal for this Directive.<sup>27</sup> The Czech resolution indicated that the Directive de facto circumvented European law, since under the proposal, unanimity was required for the establishment of a European form of legal entity in the internal market. It was also considered unacceptable to weaken the protection of the rights of third parties (e.g., creditors) by the short periods for deletion from the register after the termination of the ECBA (6 months) or for the retention of personal data of natural persons (2 years), or by the very informal system for the transfer of an ECBA's seat.

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<sup>27</sup> 320<sup>th</sup> Resolution of the [Czech] Senate delivered at the nineteenth session held on 30 November 2023, on the Proposal for a Directive of the European Parliament and of the Council on European cross-border associations (Senate Print No. N 87/14, COM (2023) 516), <https://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=110437>

Regarding the French Commission's objections, it is worth pointing out that the restrictions on the financing of civil society organisations by persons residing or established outside a Member State which were in force in Hungary until recently are incompatible with EU law. The EU Court of Justice has determined that these restrictions are contrary to Article 63(1) TFEU, discriminating between domestic and cross-border capital movements, and contrary to the Charter of Fundamental Rights.<sup>28</sup> I find it hard not to infer that the Hungarian Government's position is strikingly reminiscent of the narrative of the French Commission on European Affairs.<sup>29</sup>

It is evident that civil society organisations may have a significant impact on public life and public debate due to the objectives they pursue and the resources available to them.<sup>30</sup> That is both true and necessary to increase the transparency of financing associations and to subject

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<sup>28</sup> The CJEU Judgement of 18 June 2020 in Case C-78/18 *Commission v Hungary*. The külföldről támogatott szervezetek átláthatóságáról szóló 2017. évi LXXVI. törvény Act (Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad: The Transparency Law) required organisations receiving donations from abroad to register as an "organisation receiving foreign support" if the amount of the donations they received from other Member States or third countries over the course of a year exceeded a certain threshold. Registration required the disclosure of the names of the donors, as long as the support amounted to at least HUF 500,000 (approximately €1,400) and the exact amount of support. Information about the status of the organisation receiving foreign support was disclosed on behalf of the organisation and published on a electronic platform accessible to the public.

<sup>29</sup> Quoted by the CJEU in its C-78/18 judgement, that "support provided to [civil society] organisations from unknown foreign sources may be used by foreign interest groups to push – by means of the social influence of these organisations – their own interests instead of the interests of the community in the social and political life of Hungary" and that this support "may pose a threat to the political and economic interests of the country, and also for the functioning of legal institutions without external interference."

<sup>30</sup> The European Court of Human Rights judgements of 14 April 2009 on the *Társaság a Szabadságjogokért v Hungary*, CE:ECHR:2009:0414JUD003737405 and of 8 November 2016 on the *Magyar Helsinki Bizottság v Hungary*, CE:ECHR:2016:1108JUD001803011. See also A. ZACHARKO, L. ZACHARKO, *Organizacje pozarządowe jako instytucjonalne formy nacisku na decydentów politycznych*, «Przegląd Prawa Publicznego» 7-8/ 2016, p. 44.

the sources of their financing to scrutiny, especially if they come from outside the EU.<sup>31</sup> Article 13 of the proposed Directive provides sufficient safeguards, since it prohibits the imposition of restrictions on an ECBA's ability to offer or receive funding, including donations, from any lawful source, except to the extent that such restrictions are: (a) prescribed by law; (b) justified by overriding reasons in the public interest; (c) appropriate to secure the attainment of the objective pursued by the ECBA, without going beyond what is necessary to achieve it. In relation to concerns about public order and security, it is worth pointing out, following the CJEU's guidance, that these considerations may only be invoked if EU law has not fully harmonised measures to protect them.<sup>32</sup> Since the EU legislature harmonises measures to combat money laundering and terrorist financing only partially, Member States retain the right to lay down national rules restricting the free movement of capital on the grounds of public policy.<sup>33</sup> However, such measures are intended to be proportionate, justified by a real, present and sufficiently serious threat to a fundamental social interest, and must be interpreted strictly.<sup>34</sup>

It is worth noting that the European Parliament decided in January 2024 that in the future, all EU-funded non-governmental organisations (NGOs) will be required to publicly disclose a detailed breakdown of their funds, including the identity of the final recipients and the sources of their funding.<sup>35</sup> However, the primary purpose of this resolution is to control how EU funds are spent, rather than to regulate NGOs. It

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<sup>31</sup> The CJEU considers it permissible to adopt national rules which restrict the free movement of capital from third countries to a greater extent than from Member States: see CJEU judgements of 18 December 2007, *Skatteverket v A.*, Case C-101/05, EU:C:2007:804 and of 26 February 2019, *X-GmbH v Finanzamt Stuttgart – Körperschaften*, Case C-135/17, EU:C:2019:136.

<sup>32</sup> C-78/18. C.f. also the CJEU judgments of 23 October 2007, *Commission v Germany*, Case C-112/05, EU:C:2007:623 and of 25 April 2013, *Jyske Bank Gibraltar*, Case C - 212/11, EU:C:2013:270.

<sup>33</sup> C.f. the CJEU judgment of 31 May 2018, *Zheng*, Case C-190/17, EU:C:2018:357).

<sup>34</sup> C.f. the CJEU judgment of 14 March 2000, *Church of Scientology*, Case C-54/99, EU:C:2000:124.

<sup>35</sup> European Parliament Resolution of 17 January 2024 on transparency and accountability of NGOs funded by the EU budget (2023/2122(INI)).

should be emphasised that the possibility of sourcing and using resources other than EU funds or public funds at the national or local level is essential for the existence and operations of NGOs. Provisions restricting this right would, in fact, undermine the very purpose of associations and other non-profit or not-for-profit entities. In my opinion, any future legal regulation on ECBA should ensure that they enjoy full, free and non-discriminatory access to funding, including public funding, in every Member State in which they operate.

Also the concerns raised by Les Républicains about the citizenship of ECBA members seem exaggerated. While Article 15(a) stipulates that Member States must ensure that ECBA are not subject to any requirements based directly or indirectly on the nationality or residence of the natural persons who are its members or members of its executive body, Article 3 clarifies that an ECBA is a membership-based legal entity, constituted by means of voluntary agreement among natural persons who are either EU citizens or legally resident in the EU, or by legal entities with a non-profit purpose which have been legally established in the EU.

The doubts raised by the French Commission on European Affairs about the need to accept the transfer to the territory of one Member State or the operation of an ECBA registered in another Member State demonstrate a certain “crisis of confidence” among EU countries, as well as general concerns regarding the EU’s principles of mutual recognition, which extends beyond goods, in the Member States of the European Union. However, it should be emphasised that in March 2023 the European Commission proposed a Directive amending the Directive to further expand and upgrade the use of digital tools and processes in company law. In February 2024, the Council issued a favourable decision regarding this amendment. The proposal introduces an EU Company Certificate and the “once-only principle,” meaning that companies will not be forced to resubmit information when setting up a branch or company in another Member State. The relevant information will be exchanged through the Business Registers Interconnection System

(BRIS). The solution proposed for ECBAs is analogous to that provided for companies.<sup>36</sup>

The ECBA Directive is to be accompanied by a Regulation that amends Regulation (EU) No 1024/2012,<sup>37</sup> which established the Internal Market Information System (IMI), to ensure that Member States' competent authorities cooperate and exchange information. It also amends Regulation (EU) 2018/1724,<sup>38</sup> which established the Single Digital Gateway, to ensure that Member States provide online access to information relevant to the European cross-border associations (ECBAs) and non-profit associations, and to facilitate the exchange of evidence between competent authorities during procedures concerning ECBAs.

However, an examination of the proposed ECBA Directive raises a number of further questions.

Firstly, there is the question of whether the directive should apply to non-profit associations, defined as legal entities under national law that are membership-based, have a legal personality and a non-profit purpose. This would mean that, regardless of whether the association's activities are of an economic nature, any profits generated must be used solely to pursue the objectives of the ECBA as defined in its statutes and must not be distributed among its members. Should the proposal be limited to associations, or perhaps include a wider group of non-profit organisations (NPOs)<sup>39</sup> to reflect the multitude of forms of membership

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<sup>36</sup> Proposal for a directive of the European Parliament and of the Council amending Directives 2009/102/EC and (EU) 2017/1132 as regards further expanding and upgrading the use of digital tools and processes in company law COM/2023/177 final.

<sup>37</sup> Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (OJ L 316, 14.11.2012, p. 1).

<sup>38</sup> Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 (OJ L 295, 21.11.2018, p. 1).

<sup>39</sup> The term NPO is often used interchangeably to describe non-governmental organisations (NGOs) which are entities (including foundations or associations) that are not units of the public finance sector and pursue their activities on a non-profit



and non-membership based organisations (such as foundations) not operating in the EU for profit, and not distributing surplus funds among their members, employees, etc. and whose assets are allocated to the pursuit of a specific aim? Poland's unique "Polish model of foundations," different from models in the Western Europe, is the best example of this diversity.<sup>40</sup> In 2021, 5,000 new NGOs were established in Poland, with associations accounting for only 800 entities more than foundations.<sup>41</sup> An upward trend is clearly discernible. In 2011, the number of associations in Poland was three times that of foundations, whereas in 2007 the ratio was sevenfold.<sup>42</sup> Contrary to the spirit of the law, the differences between the practical operations of associations and foundations have become blurred. One of the reasons for this is that the management of democratic member-based organisations (DMOs) is more complex due to their participatory structure. It requires more time, commitment, and specific competences to serve on their boards for effective governance.<sup>43</sup> In contrast, the simpler internal structure of foundations makes their management easier and less time-consuming.

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basis. The Act of 24 April 2003 on Public Benefit Activities and Volunteering uses the term NGO for entities not required to conduct a public benefit activity (socially useful activity in the sphere of public tasks specified in the Act), but entitled to apply for recognition as a public benefit organisation (PBO) conducting public benefit activities.

<sup>40</sup> B. CHARYCKA, M. GUMKOWSKA, M. ARCZEWSKA, *Forma ma znaczenie. Stowarzyszenia i fundacje*, Warszawa 2019, p. 4.

<sup>41</sup> In Poland in 2022, there were 103,400 active non-profit organisations, among which associations and similar social organisations were the most numerous group (68,900). They affiliated 8.3 million members, provided 153.4 thousand full-time jobs, which accounted for 1.4% of the average employment figures in the national economy. 9,500 units had the status of PBOs: Statistics Poland, *Activities Of Associations And Similar Organizations, Foundations, Faith-based charities, Business and Professional Associations in 2022 - preliminary results*, <https://stat.gov.pl/en/topics/social-economy/social-economy-third-sector/activities-of-associations-and-similar-organizations-foundations-faith-based-charities-business-and-professional-associations-in-2022-preliminary-results,4,10.html>.

<sup>42</sup> For the situation of foundations and associations, see, for example, H. IZDEBSKI, *Fundacje i stowarzyszenia. Komentarz, orzecznictwo, skorowidz*, Łomianki 2001.

<sup>43</sup> R. SPEAR, *Governance in Democratic Member-Based Organisations*. «Annals of Public and Cooperative Economics» 75/2004, p. 33 ff.; Report of The Working Group

The proposal does not associate ECBA status with that of “public benefit organisations” but instead focuses on “non-profit purpose,” in particular on the grounds of the traditional requirement that profits are not to be distributed, which serves as the distinctive element of the category of non-profit organisations. However, the non-distribution constraint on profit, which in the past was the essential element of identification of our organisations, seems to have lost its key role in this respect.<sup>44</sup> Indeed, a constructive definition of the organisational purposes of NPOs (or NGOs) together with other elements such as the nature of the activity performed, has made the element of profit non-distribution play only an ancillary role in the definition and qualification of non-profit organisations. This shift has also led to a relaxation of the same requirement, allowing the admission of organisations that do not impose a total prohibition on profit distribution, such as companies, which are more and more often being admitted into the realm of NGOs. The fact that national laws recognise statuses of public benefit/ public utility/ social utility fairly uniformly<sup>45</sup> and that they make such statuses available not only to associations, foundations, and non-profit organisations in the strict sense, but also to cooperatives, social enterprises and companies<sup>46</sup> creates a possibility to overcome the legal barriers that

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on Cooperatives, *‘Fostering cooperatives’ potential to generate smart growth & jobs*, 2015 <https://ec.europa.eu/docsroom/documents/10450/attachments/1/translations/en/renditions/pdf>

<sup>44</sup> A. FICI, *A statute for European cross-border associations and nonprofit organizations. Potential benefits in the current situation*, May 2021, p. 11 and H.B. HANSMANN, *The Role of Nonprofit Enterprise*, «Yale Law Journal» 89(5)/1980, p. 835 ff.

<sup>45</sup> The PBO status is provided quite commonly for in almost all Member States and PBOs are recognised as legitimate recipients of a preferential tax treatment, also regarding tax-exempt donations.

<sup>46</sup> In many jurisdictions, like Ireland and Poland, the so-called “functional neutrality of the company form” permits the setting up of a company for any lawful purpose. For more on the granting of the status of a public benefit organisation and the rules for conducting public benefit activities, see esp. J. Blicharz, *Ustawa o działalności pożytku publicznego i wolontariacie. Ustawa o spółdzielniach socjalnych. Komentarz*, Warszawa 2012 (Commentary on Art. 2 and 3) and P. Staszczuk, *Ustawa o działalności pożytku publicznego i o wolontariacie. Komentarz*, Warszawa 2022 (Commentary on Art. 2 and 3).

currently constrain the non-profit sector in Europe, without the need to establish new legal forms.

Secondly, the inconsistencies in the national legal frameworks of Member States regarding non-profit associations are recognised as the main barrier within the internal market preventing non-profit associations from extending their operations beyond their national borders. The Commission has stressed that currently, due to the lack of a legal framework at the EU level, non-profit associations are regulated differently by specific legislation in twenty-four Member States. This includes variations in rules on formation, acquisition of legal personality, membership, administrative costs for registration, activity and structure, governance, operating rules, bodies, public supervision, and taxation. As a result, their socio-economic potential is not being used to the full. The unsymmetrical approach to taxation for NPOs across Member States and the regulatory approach to cross-border charitable contributions pose the biggest problem. Obtaining tax-exempt status is demanding, and substantial differences exist across Member States.<sup>47</sup> Tax exemptions vary in extent and criteria, and there are no uniform rules for testing comparability, which consequently leads to case-by-case assessments<sup>48</sup> of whether in this context a foreign charity may be considered comparable to a domestic one.<sup>49</sup> This makes for high compliance and legal costs for NPOs conducting cross-border activities, not to mention the negative

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<sup>47</sup> K. MÜLLER, M. FERNANDES, *A statute for European cross-border associations and non-profit organisations. European added value assessment*, May 2021, p. 11.

<sup>48</sup> The ECJ case law confirms the problems concerning the tax treatment of cross-border donations and comparability procedures: see ECJ Case C-318/07, *Heinz Persche v. Finanzamt Lüdenscheid* and Case C-25/10, *Missionswerk Werner Heukelbach eV v. État Belge* discussed in the “*A statute for European cross-border associations and non-profit organisations. European added value assessment*”, *op. cit.*, p. 12.

<sup>49</sup> This includes the examination of the public benefit purpose, if relevant, compliance with the non-distribution rule, checking the form and contents of supporting documents that need to be translated and notarised, such as certificates of tax residence, withholding tax vouchers, audited accounts, constitution, statutes and articles.

impact on their potential, which limits competition, job creation, and investment.<sup>50</sup>

While the proposed Directive provides a certain degree of uniformity and recognisability through the requirements for national law and the European model of the ECBA Certificate, the ECBA Directive and its requirements does not offer a conclusive full statute of an association. Instead, national law applies. For matters not covered by the proposed Directive, such as taxation, Member States are required to treat ECBA in the same way as comparable national non-profit associations, thereby respecting Member States' traditions in this area.

Thirdly, for reasons already explained, the European legislator did not decide to introduce a pan-European legal form, a "European Association." Once the Directive is implemented, the EU will not have a single and uniform legal form for the ECBA, but twenty- seven different types of the ECBA.<sup>51</sup> The question is whether the formation of an additional twenty-seven new legal forms of such an association, each heavily regulated by national laws, will not mean "introducing a legal form that no one uses"<sup>52</sup> – just like the situation with the European company (Societas Europea, SE) – at least in Poland.<sup>53</sup> As transnational forms of economic activity conducted by EU entrepreneurs, SEs were

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<sup>50</sup> On the legal regulations in all Member States, see *Comparative legal analysis of associations laws and regimes in the EU final report*, RAS Institute September 2022, <https://op.europa.eu/en/publication-detail/-/publication/21adb612-42cb-11ed-92ed-01aa75ed71a1>

<sup>51</sup> T. WÖFFEN, *ECBA (European Cross-Border Association)*.

<sup>52</sup> A. FICI, *A statute for European cross-border associations and nonprofit organizations: potential benefits in the current situation*, p. 74.

<sup>53</sup> A supranational form of a capital company that permits operations throughout the European Union, regulated by Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European Company. Although the regulation's provisions are directly applicable in the legal system of a Member State, the regulation does not provide for the comprehensively regulation of business activities in this area (e.g. tax issues or intellectual and industrial property rules, as well as share issuance, trading, rights and obligations of shareholders) and therefore it has been implemented into Polish law.

supposed to facilitate the activities of companies prospering in various EU countries, nevertheless interest in them turned out to be unevenly distributed across EU Member States. Suffice it to say that in Poland there are only sixteen SEs. In Poland the regulation proved unnecessary in practice and did not catch on; however, it has been more successful in Germany and France.

## 2. CONCLUSIONS

The fact that numerous attempts to regulate the activities of associations in the European Union have been made over the years, yet have proved ineffective, coupled with the resistance of some Member States and their objections to the current proposal, the need to make use of Articles 50 and 114 TFEU (due to the lack of opportunities to obtain unanimity in the Council of the EU and the consent of the European Parliament) suggests that the view that the law is currently facing an “apparent crisis” on the international, supranational, and transnational scale may be correct.<sup>54</sup>

However, we should not jump to the conclusion that it is necessary to abandon the idea of regulating cross-border associations. Instead, it is essential to be aware of the particularities and challenges that the potential functions of the law encounter in the international and supranational context.<sup>55</sup> “For the law cannot exist in a socio-economic vacuum, solely in its own right, detached from the phenomena it regulates, from the entire social and economic context; otherwise it becomes dead and opens up the way to the pathologies, corruption, and interpretative abuse it is intended to combat.”<sup>56</sup>

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<sup>54</sup> D. BURCHARDT, *The Functions of Law and their Challenges: The Differentiated Functionality of International Law*, «German Law Journal» 20(4)/2019, p. 409 ff.

<sup>55</sup> D. BURCHARDT, *op. cit.*, p. 409 ff.

<sup>56</sup> J. STELMACH, *Efektywne prawo...*, p. 958. „Prawo bowiem nie może istnieć w społeczno-ekonomicznej próżni, samo dla siebie, oderwane od zjawisk, które reguluje, od całego społecznego i ekonomicznego kontekstu, staje się martwe – takie prawo otwiera drogę do patologii, korupcji, interpretacyjnych nadużyć, które właśnie ma zwalczać”.

The assessment of whether an ECBA Directive is needed in the European Union requires much deeper consideration and cannot be reduced simply to establishing that the regulations governing the operation of associations differ from each other and therefore should be harmonised. Such an assessment should be made from the vantage-point of legislation, tradition, economy, social relations, and thus the prevailing institutional conditions of each Member State. The law is designed to support society, open it up to innovations, respond to ongoing social change, and stabilise social relations while respecting a specific institutional context. Otherwise, if it is an artificial creation, it will not be accepted or it will fail to create a coherent system to inspire trust in the recipients of its norms.

I believe that the ECBA Directive can have a significant impact on the freedom to establish associations engaged in economic activity and facilitate the exercise of the right to establish such associations, as well as to promote their mobility. Social economy entities<sup>57</sup> in Europe contribute to the implementation of Sustainable Development Goals (SDGs) by supplying sustainable goods and services and bridging the digital divide, thereby supporting the green and digital transitions. Their participatory business models, which take into account the needs of citizens, employees and other stakeholders, help to ensure that

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<sup>57</sup> Social economy organisations may include social cooperatives operating on the grounds of the Act of 27 April 2006 on social cooperatives, labour cooperatives, including cooperatives for the disabled and cooperatives for the blind, operating on the grounds of the Act of 16 September 1982 – Cooperative Law, some non-governmental organisations referred to in Article 3 (2) of the Act of 24 April 2003 on public benefit activity and volunteerism, and entities referred to in Article 3(3)(1), (2) and (4) of the said Act, including capital companies. Social economy entities may obtain the status of a social enterprise which, while conducting business activity (or other paid activity), consider the activity as a means to provide services for members, employees or the community, not to make a profit, the achievement of which is only and no more than a means to achieve specific social effects, as the primary goal of their activity (over economic goals); see J. DĄBROWSKA, *Social Enterprises, Cooperatives or Benefit Corporations? On Reconciling Profit and the Common Good in Doing Business from a Polish Perspective*, «Review of European and Comparative Law» 50(3)/2022, pp.111-150.

the transitions are fair. Non-profit organisations such as associations are fundamental for the representation of the interests of citizens and the civil society, by providing services in areas of the social sector which are often unprofitable, by encouraging participation in social activities and by defending the rights of minorities.<sup>58</sup> Every day social economy entities create and maintain quality jobs, contribute to social and labour-market inclusion of disadvantaged groups and equal opportunities for all, drive sustainable economic and industrial development, promote citizens' active participation in our societies, play an important role in European welfare systems, and revitalise Europe's rural and depopulated areas.<sup>59</sup> What is more, social economy entities make a signal contribution to GDP. To be specific, 3.8 million non-profit associations, the biggest group of legal entities in Europe's social economy, operating in EU Member States create economic and societal value across the EU and conduct activities in key sectors such as health, welfare and social services, culture, employment services, sport, research and development, and education, contributing 2.9% of the EU's GDP.<sup>60</sup> The proposal meets the needs of EU citizens already active in associations and other entities seeking to operate not only locally, but across borders, including citizens

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<sup>58</sup> European Parliament Resolution of 17 February 2022 with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations (2020/2026(INL))

<sup>59</sup> G. KRLEV, G. PASI, D. WRUK, M. BERNHARD, *Reconceptualizing the Social Economy*, «Stanford Social Innovation Review» 2021, cited in *Building an economy that works for people: an action plan for the social economy*, Publications Office of the European Union, December 2021, <https://www.socialeconomy.eu.org/wp-content/uploads/2021/12/Building-an-economy-that-works-for-people-an-action-plan-for-the-social-economy.pdf>. See also the Explanatory Memorandum of the Proposal for a Directive of the European Parliament and of the Council on European cross-border associations (Text with EEA relevance) {SEC(2023) 306 final} - {SWD(2023) 292 final} - {SWD(2023) 293 final} - {SWD(2023) 294 final} <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A516%3AFIN&qid=1693910621013>.

<sup>60</sup> Proposal for a Directive of the European Parliament and of the Council on European cross-border associations, COM/2023/516 final.

in border regions, in areas such as science, sport, tourism, education, art, and environmental or climate protection.<sup>61</sup>

Of course, Member States differ enormously in terms of the popularity of associations. While some countries have a rich and uninterrupted tradition, others like Poland, where World War II and the subsequent Communist era under the People's Republic hindered the development of civil society institutions, are still in a bad situation. Although some associations and other social organisations were allowed to operate in Poland after the war, they were deprived of their autonomy and subjected to strict government control. It was not until the 1980s that new legislation regulating the establishment and operation of foundations was adopted.<sup>62</sup>

Regulations at the national level and Member States' legal traditions, administrative practices, policies and market conditions differ, and the differences have a negative effect on the freedom of association and dissuade non-profit organisations from extending their activities across borders, giving rise to an uneven playing field. However, there are no viable legal instruments to enable non-profit organisations to co-operate across borders.

An analysis of Member States' regulations shows that national regulations can indeed hinder the operations of associations throughout the European Union. For example, the current registration procedure for associations in Germany is still relatively bureaucratic compared to other countries, as it does not provide for electronic registration (in comparison, in France and Poland associations are registered electronically through the court portal, with e-forms readily available). Another example is the Polish regulation which says that a registered association must be founded by at least 7 persons who are Polish citizens with full capacity

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<sup>61</sup> T. WÖFFEN, *ECBA...*

<sup>62</sup> On the grounds of the Act of 6 April 1984 on Foundations and on the Law of 7 April 1989 on Associations. C.f. J. LUSTIG, *Zarys historii rozwoju stowarzyszeń i fundacji w Polsce* [in] P. GRZYWNA et al. (eds.), *Między ideą, pasją a działaniem: księga jubileuszowa dedykowana dr. hab. Marianowi Mitrędze*, Katowice 2017, p. 363 For more on the history of associations, see also P. SUSKI, *Stowarzyszenia i fundacje*, Warszawa 2005, esp. chapter 1 and 2.



to conduct legal transactions and enjoy full civil rights, or foreign citizens with the right of permanent residence in Poland. Foreign citizens not permanently resident in Poland may join associations only if the statutes of those associations provide for such a possibility. Legal persons may only be “supporting members” of an association (Article 20 of the Act on Associations), and the possibility for entities without legal personality but with legal capacity to join associations is unclear, as there is no legal regulation in this matter. This legislation is questionable with regard to compliance with the Treaty on the European Union (esp. Article 18 prohibiting any discrimination on grounds of nationality), the Charter of Fundamental Rights of the European Union of 7 December 2000 and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 11), to which the EU has acceded.<sup>63</sup> It is also contrary to Principle 3 (Freedom of establishment and membership) of the Joint Guidelines on Freedom of Association adopted by the Venice Commission on 12-13 December 2014, and may be considered contrary to the Polish Constitution (Articles 58 and 12).<sup>64</sup>

The legislative amendments related to the introduction of ECBA create an excellent opportunity to adjust the national laws of Member States, such as the Polish Law on Associations, to a greater extent than may arise on the grounds of the ECBA Directive alone.<sup>65</sup>

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<sup>63</sup> See Case C-172/98, *Commission on the European Communities v Belgium* [1999] ECR I-3999.

<sup>64</sup> See P. SARNECKI, *Prawo o stowarzyszeniach. Komentarz*, Warszawa 2007, p. 13. For more on the freedom of association and the right of association, see P. Suski, *op.cit.*, p. 95 and E. SMOKTUNOWICZ, *Prawo zrzeszania się w Polsce*, Warszawa 1990.

<sup>65</sup> Apart from amending the drawback of the Polish regulation highlighted above, it would also be worthwhile to put another provision in the Act, giving a member of the association the right to apply to the court to repeal (or to challenge) a resolution of the General Meeting of Members (Delegates) in breach of the law or the statute, as well as provisions enabling remote participation and voting (by means of electronic communication) in meetings of the association’s authorities. Such provisions were introduced during the COVID-19 pandemic in April 2020, but applied only in the event of the introduction of a state of epidemic threat or a state of epidemic, which means that after the cessation of epidemic states these provisions may no longer be applied.

Social economy entities, including non-profit associations, are still not sufficiently understood and recognised, which gives rise to difficulties in developing and scaling up their activities, thereby holding them back from delivering a greater economic and social impact. It is well known that public spending on social purposes is decreasing. Therefore, social organisations must be able to obtain funds from other sources. Meanwhile, as research shows, involvement in economic activities is still a niche activity, at least in Poland.<sup>66</sup> Legal regulations should ensure that associations enjoy the full benefits of the Internal Market, regardless of the Member State in which they are registered. They should be granted free and non-discriminatory access to public funding in every Member State. Such regulations can release the still undeveloped potential of non-profit associations, allowing them to reap the full benefit of freedom of establishment, as well as of freedom to provide services, goods, and capital in the EU, strengthening European integration, promoting social fairness and prosperity for EU citizens and facilitating the effective exercise of freedom of assembly and association throughout the EU.

An effort should be made to initiate a public debate to address all the doubts raised about the proposed regulation. Therefore, it is not only about the correctness of the law, but about its “real” effectiveness, which, to put it simply, consists in determining whether the existing or created law will work, whether it will make things easier, give us the necessary guarantees, establish clear rules of the game, or whether it will become a constant torment for all concerned.<sup>67</sup>

The law can play an important role in shaping a society’s future and responding to social change. An efficient institutional framework is needed to enable formal laws to be effective. Only once the law is well embedded in society can it be an originator of institutions. The role of individuals is crucial in the process of institution building.

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<sup>66</sup> See B. CHARYCKA, M. GUMKOWSKA, M. ARCZEWSKA, *Zysk nie tylko społeczny. Działalność ekonomiczna organizacji pozarządowych*, Warszawa 2019.

<sup>67</sup> The point at issue is about a different understanding of the concept of “effectiveness of law.” In my opinion, legislation designed to deliver the intended result need not always be effective (efficient). For more on the ambiguity of the concept of effectiveness of the law, see M.E. STEFANIUK, *op. cit.*, p. 55.

“Institutions are created and destroyed by individuals. The law should enable individuals to act together, build social bonds, support them by creating an institutional framework that encourages decentralised decision-making, enabling society to maximise opportunities for resolving social problems and promoting successful economic change.”<sup>68</sup> The harmonisation of laws aiming to build a single market cannot disregard the importance of institutions, also the informal ones at the national level. Only law that meets those institutional conditions may be described as effective, and therefore leading to the greatest possible increase in social welfare (social utility);<sup>69</sup> only such law can exercise its shaping or “expressive” function.<sup>70</sup> This is the function of law in “making statements” as opposed to controlling behaviour directly.<sup>71</sup> These legal “statements” may be designed to change social norms. An appropriately framed law may infuse values into society, influence social norms and “push them in the right direction.”<sup>72</sup>

#### EUROPEAN CROSS-BORDER ASSOCIATIONS: ON THE SOCIAL FUNCTION OF LAW

##### Summary

The aim of this article is to answer the question of the potential effectiveness of introducing the regulation on European cross-border associations (ECBAs) into the national legal systems of EU Member States. The goal of this initiative is to facilitate the cross-border activities of non-profit associations in the European Union, with the aim of improving the operation of the internal market by removing legal and administrative barriers and levelling the playing field for non-profit associations which operate or wish to operate in more than one Member State, thereby

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<sup>68</sup> D.C. NORTH, *Institutions, institutional change, and economic performance*. Cambridge 1990, p. 81.

<sup>69</sup> J. STELMACH, B. BROŻEK, W. ZAŁUSKI, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007, p. 26.

<sup>70</sup> C.f. C.R. SUNSTEIN, *Law's Expressive Function*, «*The Good Society*» 2/1999, p. 55-61.

<sup>71</sup> C.R. SUNSTEIN, *On the Expressive Function of Law*, «*University of Pennsylvania Law Review*» 144/1996, p. 2024.

<sup>72</sup> *IBIDEM.*, p. 2026.

promoting the role that non-profit associations play in generating economic and social value in the EU. In its first part, the article discusses the origins of the European Commission's proposal and presents the proposed structure and principles of operation of the ECB. In the second part, the article contains conclusions and doubts concerning the Commission's proposal, also referring to the Polish legal regulations relating to associations and legal solutions operating in other EU countries. Rather than systematically or thoroughly discussing association law in the EU, the article intends to address certain elements of the proposed Directive, but above all to contribute to a doctrinal discussion on this subject, including how research on European cross-border associations should be conducted. I use the example of the planned regulation to illustrate the question of the impact of the law as a carrier of value in bringing about the expected social changes. I focus my considerations on the concept of the law's social function to ensure legal effectiveness. However, effectiveness should not be understood as compliance of the social results of a set of legal norms with the legislator's intentions, but instead as the situation when the law is well embedded institutionally and leads to an increase in social and individual utility.<sup>73</sup>

## EUROPEJSKIE STOWARZYSZENIA TRANSGRANICZNE CZYLI O SPOŁECZNEJ ROLI PRAWA

### Streszczenie

Celem artykułu jest odpowiedź na pytanie o potencjalną skuteczność wprowadzenia do krajowych porządków prawnych państw członkowskich UE rozporządzenia w sprawie europejskich stowarzyszeń transgranicznych (ECBA). Celem tej inicjatywy jest ułatwienie działalności transgranicznej stowarzyszeń nienastawionych na zysk w Unii Europejskiej w celu poprawy funkcjonowania rynku wewnętrznego poprzez usunięcie barier prawnych i administracyjnych oraz wyrównanie szans dla stowarzyszeń nienastawionych na zysk, które działają lub chcą prowadzić działalność w więcej niż jednym państwie członkowskim, a tym samym promowanie roli, jaką stowarzyszenia niekomercyjne odgrywają w tworzeniu wartości gospodarczych i społecznych w UE. W pierwszej części artykułu omówiono genezę powstania propozycji Komisji Europejskiej oraz przedstawiono proponowaną strukturę i zasady działania EBC. W drugiej części artykułu zawarto wnioski i wątpliwości dotyczące wniosku Komisji, odnosząc się do polskiej regulacji prawnej dotyczącej stowarzyszeń oraz rozwiązań prawnych obowiązujących w innych krajach UE.

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<sup>73</sup> J. STELMACH, *Efektywne prawo...*, p. 960.

Założeniem artykułu, bardziej aniżeli systematycznie i wyczerpującego omówić prawo o stowarzyszeniach w Unii Europejskiej, jest omówienie niektórych elementów projektowanej dyrektywy, ale przede wszystkim przyczynienie się do dyskusji doktrynalnej na ten temat, także w aspekcie tego, w jaki sposób powinny być prowadzone badania nad europejskimi stowarzyszeniami transgranicznymi. Na przykładzie planowanej regulacji postaram się ukazać zagadnienie wpływu prawa jako nośnika wartości w celu doprowadzenia do oczekiwanych zmian społecznych. Swoje rozważania ukierunkowuję wokół koncepcji społecznej funkcji prawa, która zapewnia efektywność prawa. Efektywność prawa nie powinna być jednak rozumiana jako jego skuteczność, czyli jako zgodność społecznych skutków norm prawnych z intencjami ustawodawcy, ale zachodzi, gdy prawo jest dobrze dopasowane do innych instytucji i prowadzi do wzrostu użyteczności (społecznej i indywidualnej).

**Keywords:** European cross-border associations; ECBAs; non-profit; effectiveness of the law.

**Słowa kluczowe:** European cross-border associations; ECBA, non-profit; efektywność prawa.

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