

European Commission
GD GROW G.2

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Impact assessment: Proposal for a legislative initiative on cross-border activities of associations; Evidence
Transparency Register No.: 10405322962-08

Dear Sir or Madam,

The Austrian Federal Economic Chamber (WKÖ) - as part of the Economic Chamber Organisation - is the legal representative of the business community in Austria (= all Austrian businesses, membership is compulsory). As a self-governing body, it is established by law and acts autonomously and independently from the State in as far as it is financed by its member contributions. It sets its own agenda and has its own decision making processes carried out by representatives elected by democratic ballot. WKÖ represents collective interests across all members, being required by law to perform a balance of interests and to promote a joint position with a single voice with a view to ensuring their wellbeing. Based on the Economic Chamber Law, the WKÖ is the official organisation representing the mutual interests of its more than 575,000 members in the fields of crafts and trades, industry, commerce, banking and insurance, transport and logistics, tourism and leisure and information and consulting at national and European levels. In addition, the WKÖ provides its members with comprehensive information and services with a global network of about 100 foreign trade centres.

We welcome the opportunity to comment on the impact assessment of a proposal for a legislative initiative on cross-border activities of associations.

Initial point is a resolution of the European Parliament aimed at facilitating the cross-border activities of European Associations and non-profit organisations by adopting a regulation establishing a 'European Association' on the one hand and a directive harmonising common minimum standards for non-profit organisations on the other.

The activities of numerous associations in a wide variety of fields for civil society cannot be overestimated. They can have a significant impact on public life and public debate.

However, the Commission's initiative fails to recognise one of the main features of associations: their activities are of an ideal nature. In principle they are prohibited to be economically active. The new legal form envisaged by the Commission does not correspond in its core to the nature of an association, but represents a new form of enterprise. Therefore, the Austrian economy is very critical and negative to this initiative, which must be emphasized at the beginning.

The fact that there are 27 different national rules in many areas, such as the law of associations, does not itself justify the adoption of new EU-law. In the Commission's view, any difference that could cause restrictions and obstacles within the Union would entitle the Union to adopt EU-regulations and EU directives. With this line of argument, all areas of law would be affected, because all are able to represent such restrictions and obstacles. However, the Treaties do not confer on the Union such unlimited competence.

Legislative intervention at European level is also not justified because associations founded at member state level are already to be recognised and allowed to operate throughout Europe under current law.

Specific comments on the Proposal for a regulation of the European Parliament:

The invitation to comment lacks a definition of what is meant by a 'European Association' and a 'non-profit organisation'. According to the European Parliament's resolution, a 'European Association' is a legal entity established by voluntary agreement for a common non-profit purpose. However, 'non-profit purpose' means only that the main objective is not to make a profit, even if economic activities may be carried out.

Thus, in any event, an economic activity is also permissible as the main purpose of a European Association and would have to qualify it as an undertaking (probably not only) within the meaning of the Austrian legal system under Paragraph 1(2) of the Commercial Code (*'An undertaking is any organisation of independent economic activity which is designed in the long term, even if it is not aimed at profit.'*).

Thus, the envisaged new legal form of a European Association does not correspond in several respects to the Austrian understanding of an association. On the one hand, this is because the European Association completely lacks the ideal purpose of the association and, on the other hand, the European Association should be allowed to carry out economic activities to a very large extent. Membership should be based on a voluntary agreement, but should be subject to the principle of non-discrimination (which, in our view, is contrary to freedom of association).

The importance of economic activities of such European Associations is explicitly emphasised in the documents, which states, for example, that the legal form of a European Association is also necessary for the completion of the internal market¹ or that the EU action is needed to remove existing barriers to and restrictions on associations' cross-border activities of in the single market.²

¹ Resolution, item 5.

² Call for Evidence, 2.

From the Austrian reality, it is well known that associations are often economically active in such a way that is not in line with the law. The ideal purpose has often receded into the background for a long time (abuse of legal form).

A need for action of the Union (so the call for evidence) to introduce its own legal form 'European Association' cannot be recognized. Not every legal form needs to be adapted in such a way that it is best suited for completely different purposes. Rather, it is a primary task of the proponents to choose the best legal form for their intended (economic) action. Not every inequality between existing national legal forms justifies action by the Union. In addition, the European Parliament itself cites the fact that (already due to the current legal situation) many non-profit organisations participate fully (!) in the economy and in the development of the internal market.

It should be noted that, with regard to the economic importance of the activities of the associations, there is no objective justification for the creation of a separate European legal form 'European Association'. There is no doubt that the economic importance of the many small different European corporations is many times higher than that of the associations. Quite rightly, there is no need for action at European level in this area either.

Irrespective of this, it should be ensured that a European Association is not granted any privileges of any kind whatsoever compared to existing European and national forms of enterprise. If a European Association becomes economically active in any way, this must be done under the same legal framework conditions that also apply to all (other) companies. Anything else would lead to an unjustified distortion of competition.

Remarks by the European Parliament, according to which esp. the freedom of association, expression and information are unduly restricted throughout the European Union are rejected as a blanket judgment without a sound basis.

Not only political parties, trade unions as well as churches and other religious communities enjoy a special status in national law, but this also applies fully to associations. If Parliament's proposal for a regulation expressly states that, with regard to the former, the Union does not have the power to regulate their status,³ we believe that this also applies to associations because of their special constitutional status.

According to Parliament's proposal, a European Association should be able to carry out economic activities. Thus, such an association is basically a company. Its activity may also be aimed at making a profit. Which goal is the 'main goal' among the various goals of a European Association could be argued. Legal certainty looks different and the assessment in this regard can by no means be left to the association itself, insofar as legal consequences result from this. In addition, goals are changeable.

The fact that the profit may not be distributed among the members, founders or other private parties⁴ does not change the entrepreneurial status. In addition, various constructions are well known, due to which economic advantages are sometimes distributed to a considerable extent, even without an explicit distribution of profits, for example to members and

³ Recital 13.

⁴ Does this mean that a distribution of profits to "public" parties would be permissible?

organs of such bodies. Such abuses would have to be countered in any case, which could also be achieved by expressly prohibiting a European Association from any economic activity.

If this prohibition is not expressly enshrined, a European Association would not be comparable to an association ('Verein') under Austrian law.

The courts and their commercial register offer themselves as the national authority for registration and monitoring.

Any assignment of tasks to the Committee for European Associations that goes beyond mere advisory activity is rejected. An additional authority would only cause disproportionate additional administrative burdens and thus costs, which must be avoided.

According to the principle 'tres faciunt collegium', at least three persons should be involved in all founding constellations. To qualify separately from the founding agreement would be the emergence of the European Association as a legal entity through registration with the competent authority.

Is a European Association a contract between its founders respectively members, this association can choose its members itself in accordance with the general principles of contract and reject applications for admission as a member without any justification. The Association is free with regard to the admission criteria and may legitimately discriminate in this regard on the basis of the freedom of association. It may have different categories of members, each with different rights and obligations.

A European Association may be granted non-profit status in accordance with the draft regulation of the European Parliament on application for the statutes. If this status entails the obligation to treat a European Association in the same way as legal entities which have been granted a corresponding status in that Member State, it would, for example, unduly interfere with the tax law of the Member State concerned. Such a provision must therefore be emphatically rejected. The question of non-profit status and the connected consequences must be assessed exclusively in the light of national law.

The structural composition of the proposal for a regulation seems strange; for example, where the transfer of its registered office (Art. 13) is regulated before the regulation on the legal personality of a European Association (Art. 12).

Activities carried out by members of the Board on behalf of the European Association must, in accordance with the general principles, bind the Association without restriction vis-à-vis third parties (including authorities and courts) and not only to the extent of the internally granted powers. This is because external third parties have no or only little insight into internal structures and given room for manoeuvre. In addition, they have no chance of receiving objective information about any restrictions from members of the Board other than those who appear vis-à-vis them. If the members violate the restrictions imposed on them internally, they may be liable for damages to the European Association.

In order to come as close as possible to the truth of the register, any change in the formation of the Board of directors must be reported to the national authority in a timely manner. A period of six months for this is unacceptable. As long as the change has not been reported, the Board in its previous formation is fully authorized to represent it.

According to the European Parliament, the liability of a European Association should be governed by those provisions that apply to comparable legal entities at the registered office of the association. Such a liability regime is not objectively justified on the basis of the fact that the activities of a European Association are aimed to be cross-border activities. A limitation of liability of the association is rejected.

It is striking that no minimum capital is prescribed for a European Association. Where no personal liability of the members of the association for association debts is provided, this is considered reasonable and necessary.

Another point of criticism is that the EU project does not provide for an auditor or another comparable person to check the financial management of the association.

Article 15 (8) stipulates that once a year the Board prepares annual financial statements for the accounts, which contain information on income from economic activities, on funds such as loans and bank loans as well as on donations, etc. In accordance with national law, Member States may require the Board to disclose the annual accounts to the competent authority and the members of the Association. Although members may request further information from the Board, including on the sources of funding, they may only do so if this is necessary and proportionate for reasons of transparency and accountability after the audit of the annual accounts.

On the other hand at least two independent and unbiased auditors who are not members of the Board must be appointed for each association. The auditors are responsible for the ongoing business control as well as the financial management of the association with regard to the regularity of the accounting and the statutory use of the funds. To this end, the Austrian law also provides for comprehensive rights for auditors; for example, the management body must submit the necessary documents to the auditors and provide the necessary information, identified deficiencies in management must be remedied, auditors may attend the general meeting and convene it themselves (in the event of serious breaches of the management body's accounting obligation).

In our opinion, the task of the auditors is to assess the financial status of the association neutrally. In addition, they help to create trust in the associations - especially since associations have repeatedly come under suspicion of being economically active in contrary to the law.

Specific comments on the Proposal for a Directive of the European Parliament:

The purpose of the request to issue a directive on the same subject matter in addition to the envisaged regulation does not open to us based on the current state of information.

Moreover, due to the principle of subsidiarity, this approach is not compatible with the Treaties.

Specific provisions of EU law for non-profit organisations are rejected on the grounds of the concerns already expressed above on the proposal for a regulation.

In any case, the definition of a non-profit organization as a voluntary association is incorrect, because an organization can never be a volunteer itself. If such organisations are allowed to

operate economically, they must be classified as undertakings. The fact that these organisations are not allowed to distribute possible profits among members, founders or other private bodies does not change this qualification as an enterprise.

Since such organisations are to be granted rights, it must be rejected that such organisations should be accepted even if they do not have legal personality. If they do not have legal personality, they cannot necessarily be represented. It is essential that a non-profit organisation acquires legal personality with registration.

An obligation for Member States to make public funds available to non-profit organisations must be strongly rejected. The fact that the Member States are free to do so is likely to be out of the question.

To sum up, we believe that the European Union has no competence whatsoever to act in this area. In addition, the content of the project is also emphatically rejected by the Austrian economy.

Sincerely,



Dr. Rosemarie Schön
Head of Department