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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Working Party on Company Law
Subject:	Proposal for a Directive on European cross-border associations – Legal basis

I. INTRODUCTION

1. On 5 September 2023, the Commission submitted a proposal for a Directive of the European Parliament and of the Council on European cross-border associations ("ECBAs") (the "Proposal", the "Proposed Directive").[2] The Proposal is based on Articles 50 and 114 of the Treaty on the Functioning of the European Union ("TFEU").

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[2] ST 12800/23.

2. At the meetings of the Working Party on Company Law on 29 May 2024 and 19 July 2024, the Council Legal Service ("CLS") intervened on three specific questions regarding the appropriateness of Articles 50 and 114 TFEU as legal bases for the proposed Directive. The Working Party then requested the CLS to provide its opinion on these questions in writing. The present opinion responds to that request.

II. LEGAL ANALYSIS

3. This opinion addresses three specific questions regarding the appropriateness of the proposed legal bases: first, harmonisation and new legal forms (**A**); secondly, the inclusion of economically inactive associations (**B**); and thirdly, the effect of the carve-out of non-profit-making legal persons contained in Article 54, second paragraph TFEU (**C**).

4. The basic principles should first be recalled. Under settled case-law, the choice of legal basis of Union acts must be based on objective factors amenable to judicial review, including the aim and content of the measure.[3] Where an act pursues a twofold purpose, or comprises two components, and one of those purposes or components is identifiable as the main one while the other is merely incidental, then the act must be based solely on the legal basis required by the main purpose or component.[4] Exceptionally, where a measure simultaneously pursues several objectives, or has several components, which are inextricably linked and without one being incidental in relation to the other, that measure must be founded on the various corresponding legal bases.[5] Nevertheless, the use of two legal bases is not possible where the procedures laid down for each legal basis are incompatible with one other.[6]

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3 Judgment of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 31 and case-law cited.

4 Ibid, paragraph 31.

5 Judgment of 2 September 2021, *Commission v Council*, C-180/20, EU:C:2021:658, paragraph 34; judgment of 20 April 2023, *Autorità Garante della Concorrenza e del Mercato v Comune di Ginosa*, C-348/22, EU:C:2023:301, paragraph 52.

6 Judgment of 2 September 2021, *Commission v Council*, C-180/20, EU:C:2021:658, paragraph 34.

5. The stated aim of the Proposal is to "*facilitate the effective exercise by non-profit associations of their rights related to the freedom of establishment, free movement of capital, freedom to provide and receive services and free movement of goods in the internal market*".[7] The Proposal is based on Article 50 TFEU (as regards the freedom of establishment) and Article 114 TFEU (as regards the other freedoms).

6. The Proposed Directive would achieve this aim by requiring Member States to create a new legal form – the ECBA – in their legal systems. An ECBA would be a non-profit-making legal person constituted by certain natural or legal persons with links to, and activities in, at least two Member States.[8] The Proposed Directive harmonises the rules applicable to this new form, including its nature, existence and establishment rights; regulation of its activities; and the applicable law (see further paragraphs 40-42 below). The intensity of this harmonisation varies: some aspects are fully harmonised (e.g. Article 8 on membership), whereas other provisions simply place limits on national regulation (e.g. Article 12(2) on authorisation for activities).

[7] This stated aim is also apparent from recitals 2, 7, 8, 14, 27, 34 and 35. See further, on the aim and content of the Proposal, paragraphs 38-43 below.

[8] Article 2, points (c) and (d), and Article 3(1-3).

7. Article 50(1) TFEU empowers the Union legislature to adopt directives "*in order to attain freedom of establishment as regards a particular activity*".[9] Article 114(1) TFEU empowers the legislature to adopt "*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishment and the functioning of the internal market*". In accordance with the case-law of the Court of Justice ("the Court"), reliance on Article 114 TFEU requires that (i) disparities between national laws exist or are likely to emerge and are such as to obstruct the functioning of the internal market or to cause significant distortions of competition; (ii) the purpose of the measure is genuinely to improve the conditions for the establishment and functioning of the internal market; and (iii) no other more specific legal basis is appropriate.[10]

A. THE FIRST LEGAL ISSUE: HARMONISATION AND NEW LEGAL FORMS

8. In its judgment in Case C-436/03 *SCE*,[11] the Court held that the creation of a new form that exists in parallel to existing national forms, leaving national law intact, does not constitute harmonisation.[12] An act whose main aim is the creation of such a form cannot, therefore, be adopted under Article 114 TFEU. The CLS has advised that the same is true under Article 50 TFEU.[13] Such an act would instead require reliance on a non-harmonising legal basis.

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9 The CLS has previously advised that the phrase "*particular activity*" does not preclude the adoption of directives applicable to all domains of activity: CLS opinion in doc. ST 14423/1/14 REV1 (single-member companies), paragraph 7.

10 CLS opinion in doc. ST 9328/24 (interest representation transparency), paragraphs 15-18, and notably judgment of 3 December 2019, *Czech Republic v Parliament and Council*, C- 482/17, EU:C:2019:1035, paragraphs 35-37 on point (i), judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraphs 32-33 on point (ii), and judgment of 26 January 2006, *Commission v Council*, C-533/03, EU:C:2006:64, paragraph 45 on point (iii).

11 Judgment of 2 May 2006, *Parliament v Council,* C-436/03, EU:C:2006:277 (henceforth "C-436/03 *SCE*"). See paragraphs 39-46, especially paragraph 44.

12 See, to similar effect, the CLS opinions in docs ST 4261/90 (European company), ST 8448/96 (European association), ST 16464/08 (European private company) and ST 14423/1/14 REV1. See also CLS opinion in doc. ST 7139/12 (common sales law).

13 CLS opinion in doc. ST 14423/1/14 REV1, notably paragraph 6, relying on the judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 28, and the Opinion of Advocate General Stix-Hackl of 12 July 2005, *Parliament v Council,* EU:C:2005:447, paragraphs 40-41.

9. In the CLS's view, this rule is limited to the creation of new European legal forms, existing and regulated primarily at the EU level while leaving pre-existing national forms and law intact. The rule does not apply to the harmonisation of rules concerning a particular national form, even where those rules require Member States to create that national form. In the latter case, unlike the former, national measures concerning the new form are approximated. First, in Case C-436/03 *SCE*, the difficulty was the creation of a "*European legal form for cooperative societies which has specific Community character*"[14] which left "*unchanged the different national laws already in existence*".[15] Secondly, the rule is built on earlier case-law on new legal rights,[16] according to which creating "*new rights superimposed on national rights"*[17] or a "*new protective right at Community level"*[18] is not possible under harmonising legal bases. Conversely, the harmonisation of "*rules laid down in the laws of the Member States for granting and protecting that [new protective] right"*[19] is possible under such bases. Finally, the first CLS opinion to identify this rule advised that the question was whether the relevant proposal "*aims to create a company under Community law with the capacity to act throughout the Community or, on the contrary, to permit the creation of national companies with a uniform status"*.[20]

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14 C-436/03 *SCE*, paragraph 40. See also paragraphs 41 and 42.

15 Ibid, paragraph 44.

16 Ibid, paragraph 37 and case-law cited.

17 Judgment of 9 October 2001, *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523, paragraph 24.

18 C-436/03 *SCE*, paragraph 37.

19 C-436/03 *SCE*, paragraph 37. Compare, further, judgment of 9 October 2001, *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523, paragraph 25. The Court has recognised the legislator's discretion to choose the "most appropriate method of harmonisation" and has held that this extends to the creation of EU bodies where such bodies contribute to the implementation of a process of harmonisation: judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C- 270/12, EU:C:2014:18, paragraphs 102-104 and case-law cited.

20 Doc. ST 4261/90, paragraph 6 (our translation). See also paragraph 7.

10. For this reason, the most recent relevant CLS opinion concluded that requiring the creation of a new form of company in national law would constitute harmonisation, by contrast with the creation of a "*new supranational form of single-member company, which would be governed first and foremost by the directive and which would [be superimposed on] national forms of single-member company without affecting national law*".[21]

11. In the present case, the centre of gravity of the proposed ECBA form is at the national rather than the supranational level. It is a national form with a uniform status, not a new supranational form. First, the Proposal is in the form of a directive. Rather than creating a 28th supranational form superimposed on national forms, it would harmonise national laws by requiring Member States to create this new national form.[22] Secondly, the new form would be national and regulated by national law, albeit that the Proposed Directive would set limits on much of that law and determine aspects of it.[23] Thirdly, the new form lacks the characteristics of a supranational entity, generally operating under mutual recognition rules.[24] Finally, Member States will need to change national law in order to implement the Proposed Directive, including by creating this new form.[25]

12. Nevertheless, one element of the proposed ECBA form does point towards a supranational character. This is the ECBA's ability to transfer its seat without dissolution or the creation of a new legal person (Article 22(2)). This element has been singled out by the Court (and the CLS) as indicating a supranational dimension.[26] The CLS considers that even with this ability the ECBA could still be defended as a national, rather than supranational, new form given the balance of the Proposal as a whole. Nevertheless, it does introduce a certain legal risk that would be mitigated by removing or qualifying this ability.

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21 CLS opinion in doc. ST 14423/1/14 REV1, paragraph 28. The original French version of that opinion used the words "*se superposerait aux*", which is correctly translated as "*superimposed on*" (as in the case-law).

22 Article 3(1). Compare doc. ST 14423/1/14 REV1, paragraph 29.

23 See paragraphs 6 above and 40-42 below. Compare doc. ST 14423/1/14 REV1, paragraphs 30-32.

24 Notably Article 12; but see the next paragraph below. Compare doc. ST 14423/1/14 REV1, paragraph 32.

25 Notably Articles 3(1) and 32(1). Compare doc. ST 14423/1/14 REV1, paragraph 34.

26 C-436/03 *SCE*, paragraph 42; and doc. ST 14423/1/14 REV1, paragraph 32.

13. Subject to that caveat, the ECBA would be a new national legal form with a largely uniform status, rather than a new supranational form existing and regulated primarily at Union level. The creation of this new form is therefore not an obstacle to the legislator relying on harmonising legal bases, including Article 50 and 114 TFEU, subject to the considerations set out below in relation to issues B and C.

B. THE SECOND LEGAL ISSUE: ECONOMICALLY INACTIVE ASSOCIATIONS

14. Measures adopted under Article 50 TFEU must aim to attain freedom of establishment; those under Article 114 TFEU must aim to improve the conditions for the establishment and functioning of the internal market (see paragraph 7 above). Economic activity is necessary in order to fall within the scope of that freedom and that market.[27] This does not mean that internal market legal acts can never regulate non-economic activity. In order fully to achieve the main internal market aim, it may be necessary to regulate non-economic activity on an ancillary basis. This could be necessary, for instance, to ensure legal certainty[28] or to ensure that the legal act's rules are not circumvented.[29]

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27 E.g. judgment of 23 February 2016, *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraph 154.

28 Compare judgment of 20 May 2003, *Österreichischer Rundfunk and Others*, C- 465/00, C- 138/01 and C- 139/01, EU:C:2003:294, paragraph 42.

29 Judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 82. See also judgment of 12 December 2006, *Germany v Parliament and Council*, C- 380/03, EU:C:2006:772, paragraph 80.

15. The ECBA Proposal's Explanatory Memorandum recognises this limitation, stating that Articles 50 and 114 TFEU permit measures concerning "*associations engaging in economic activity*".[30] However, pursuant to Article 3(2) and Article 2, point (c) of the Proposed Directive, an ECBA may be created and exist "*regardless of whether the association's activities are of an economic nature or not"*. An ECBA could therefore be created and exist without engaging in any economic activity whatsoever. The Proposal does not explain why economically inactive associations are included within scope, nor why this would be necessary to achieve the Proposal's internal market objective. At first sight, the scope could be limited to economically active associations without undermining legal certainty or creating a risk of circumvention.

16. As matters stand, therefore, the inclusion of economically inactive non-profit associations would exceed the proposed legal bases. Unless a convincing internal market justification exists and is articulated for their inclusion, the legislator should exclude such associations from the Proposal's scope.

C. THE THIRD LEGAL ISSUE: THE CARVE-OUT IN ARTICLE 54, SECOND PARAGRAPH TFEU

1) Articles 50 and 114 TFEU and the internal market

17. As recalled above, Article 50 TFEU enables the legislator to adopt directives "*in order to attain freedom of establishment*". This legal basis exists "*[f]or the purpose of achieving*" the objective established in Article 49 TFEU.[31] Article 50 TFEU thus provides a legal basis for attaining freedom of establishment within the meaning of the Treaties.

30 ST 12800/23, p. 5. See also recital 8 and Article 1.
31 Judgment of 21 June 1974, *Reyners*, 2/74, EU:C:1974:68, paragraphs 18-19.

18. Article 114(1) TFEU enables the legislator to adopt measures which pursue the "*objectives set out in Article 26*", i.e. the aim of "*establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties"* (Article 26(1) TFEU, emphasis added). Article 26(2) TFEU defines the internal market as "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*" (emphasis added). Article 114 TFEU measures must aim to establish or ensure the functioning of the internal market as defined in the Treaties, including the relevant fundamental freedoms.[32]

19. Indeed, the first limb of the Article 114 TFEU test is whether divergent national rules, current or potential, "*are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market […] or to cause significant distortions of competition*".[33] In assessing such obstruction, the Court thus regularly examines whether a measure in fact improves one or more of the four freedoms.[34] It has also interpreted Article 114 TFEU measures in the light of the case-law on the four freedoms.[35]
This anchoring to Article 26 TFEU and the fundamental freedoms is one of the limitations preventing Article 114 TFEU from becoming an open-ended power to regulate the internal market.[36]

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32 On the last point, see judgment of 26 September 2024, *Nord Vest Pro*, C-387/22, EU:C:2024:786, paragraph 32; judgment of 22 September 2020, *Austria v Commission*, C- 594/18 P, EU:C:2020:742, paragraph 101; and judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association*, C- 591/15, EU:C:2017:449, paragraphs 44-46.

33 Judgment of 8 June 2010, *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraphs 32-33 (emphasis added). On the three limbs of the test, see paragraph 7 above.

34 E.g. judgment of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraphs 48-49; judgment of 4 May 2016, *Pillbox 38*, C- 477/14, EU:C:2016:324, paragraphs 58, 85 and 112.

35 E.g. judgment of 9 July 2020, *RL (Directive to combat late payment*), C- 199/19, EU:C:2020:548, paragraph 30; judgment of 18 November 2020, *Techbau*, C- 299/19, EU:C:2020:937, paragraph 50.

36 See judgment of 5 October 2000, *Germany v Parliament and Council*, C- 376/98, EU:C:2000:544, paragraphs 81-83 and 99-105. Compare the CLS opinion in doc. ST 7515/23 (Single Market Emergency Instrument), paragraphs 27-28, 46 and 69.

20. In the CLS's view it follows from the above that an act whose primary aim and effect is to facilitate the freedom of establishment or freedom to provide services of persons who lack, pursuant to an express Treaty carve-out, any rights under Articles 49 and 56 TFEU (see below), may not be adopted under the above legal bases.[37] Notwithstanding the general breadth of the internal market, of the fundamental freedoms and of Article 114 TFEU, such an act would not attain the freedom of establishment (Article 50 TFEU) or remove an obstruction to the freedom to provide services so as to have a direct effect on the functioning of the internal market (Article 114 TFEU). Those freedoms are not facilitated by providing rights to persons that are expressly excluded from their scope.

21. It does not follow that a legal act adopted under Articles 50 and 114 TFEU could never regulate persons excluded from the personal scope of these freedoms. Where the conditions for relying on those legal bases are fulfilled in light of the legal act's aim and content, it may be necessary to regulate other situations or persons on an ancillary basis as explained in paragraph 14 above.

2) The effect of the "*non-profit-making*" carve-out in Article 54 TFEU

22. Articles 49-55 TFEU regulate the freedom of establishment. Article 49 TFEU prohibits "*restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State*". This includes a prohibition on restrictions on the "*setting-up of agencies, branches or subsidiaries*" and a right to "*take up and pursue activities as self-employed persons and to set up and manage undertakings*".

[37] Unless, exceptionally, this could address significant distortions of competition within the internal market, in which case Article 114 TFEU could become available (see paragraph 19 above). Nothing suggests that competition distortion is relevant in the case of ECBA.

23. Pursuant to Article 54 TFEU, certain "*[c]ompanies or firms*" are, for the purposes of the Chapter on establishment, to be "*treated in the same way as natural persons who are nationals of Member States"*. Article 54, second paragraph TFEU provides (emphasis added):

> *"Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."*

24. The most natural literal and contextual reading of Article 54 TFEU is that it extends the Article 49 TFEU right to legal persons, and that non-profit-making persons are excluded from this extension. Teleologically, while it is true that the freedom of establishment is interpreted very broadly,[38] the purpose of Article 54 TFEU is to define which legal persons can benefit from that freedom, which entails exhaustivity. The origin of this provision, finally, shows that the drafters intended to exclude "*les associations à but non lucratif*" from the "*libre établissement des personnes physiques et morales*".[39]

[38] Judgment of 30 November 1995, *Gebhard*, C- 55/94, EU:C:1995:411, paragraph 25.

[39] Archives historiques du Conseil, *Conférence intergouvernmentale : Historique des articles 52 à 58 du traité instituant la CEE*, CM3, Nº 0230, p. 55; compare pp. 24 and 125. Article 54 TFEU was also intended to be exhaustive: p. 125; compare pp. 16 and 24.

25. That interpretation is confirmed by the case-law. In general, it is a matter of well-established, fundamental case-law that Article 54 TFEU determines the personal scope of Article 49 TFEU as regards legal persons.[40] Accordingly, only legal persons falling within Article 54 TFEU may rely on Article 49 TFEU rights. Under settled case-law, "*the question whether the company is faced with a restriction on the freedom of establishment within the meaning of Article 49 TFEU can only arise if it has been established, in the light of the condition laid down in Article 54 TFEU, that the company actually has a right to that freedom*".[41] Because legal persons are creatures of national law, it is necessary to define which such creatures are recognised as being legal persons of a given Member State. Article 54 TFEU provides that definition. For natural persons, only Member State nationals fall within Article 49 TFEU's personal scope; for legal persons, only those who fall within Article 54 TFEU do so.[42]

[40] Judgment of 30 November 1995, *Gebhard*, C- 55/94, EU:C:1995:411; judgment of 25 July 1991, *Factortame and Others*, C- 221/89, EU:C:1991:320, paragraph 28.

[41] Judgment of 29 November 2011, *National Grid Indus*, C- 371/10, EU:C:2011:785, paragraph 26. See also judgment of 16 December 2008, *Cartesio*, C- 210/06, EU:C:2008:723, paragraphs 106-109. This includes the right to set up agencies, branches and subsidiaries, notwithstanding Article 49 TFEU's wording: judgment of 23 February 2006, *Keller Holding GmbH*, C-471/04, EU:C:2006:143, paragraph 29.

[42] Judgment of 29 November 2011, *National Grid Indus*, C- 371/10, EU:C:2011:785, paragraph 26.

26. More specifically, the Court has explicitly held that only profit-making legal persons may rely on Article 49 TFEU. In Case C-646/15 *Panayi*, the Court held that certain trusts could rely on Article 49 TFEU because they were "*other legal persons*" within the meaning of Article 54 TFEU.[43] In order to fall within Article 54 TFEU, and therefore Article 49 TFEU, the trust had to be "*profit-making*" (paragraphs 28-29). The Court held that this was fulfilled in the case, such that the trusts "*may rely on freedom of establishment*".[44] Similarly, in Case C-70/95 *Sodemare*,[45] the Court held that "*non-profit-making companies are excluded from the benefit of"* the Treaty Chapter on the right of establishment.[46]

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43 Judgment of 14 September 2017, *Trustees of the P Panayi Accumulation & Maintenance Settlements*, C- 646/15, EU:C:2017:682 (henceforth "C-646/15 *Panayi*"), paragraph 28.

44 Paragraphs 33-34. Compare the Opinion of Advocate General Kokott of 21 December 2016 in the same case, EU:C:2016:1000, paragraphs 22-25. See also judgment of 14 April 2016, *Sparkasse Allgäu*, C-522/14, EU:C:2016:253, paragraph 19.

45 Judgment of 17 June 1997, *Sodemare and Others*, C- 70/95, EU:C:1997:301, paragraph 25. Compare Opinion of Advocate General Fennelly of 6 February 1997 in the same case, EU:C:1997:55, paragraphs 25-26.

46 Judgment of 17 June 1997, *Sodemare and Others*, C- 70/95, EU:C:1997:301, paragraph 25. See further Opinion of Stix-Hackl in *Stauffer*, C-386/04, EU:C:2005:785, paragraph 58.

27. It is true that the Court has held that the "*decisive factor which brings an activity within the ambit*" of Articles 49 and 56 TFEU "*is its economic character*", regardless of whether the service-provider is "*seeking to make a profit*".[47] This ruling, however, concerns material scope, not personal scope.[48] Economic activities cannot be shielded from Article 49 and 56 TFEU by being conducted on a not-for-profit basis. In particular, requiring an economic activity to be carried out by a person having a particular legal form or status, such as being a non-profit body, is a "*significant restriction*" on the freedom of establishment and the freedom to provide services.[49] Such a requirement restricts access to activities within the material scope of those provisions. It follows that the beneficiaries of Articles 49 and 56 TFEU may rely on their rights to challenge such rules. But this says nothing about who those beneficiaries are. In particular, it does not follow that non-profit-making persons are such beneficiaries or, in other words, that they fall within the personal scope of Article 49 TFEU.

28. For the reasons set out above, the CLS's opinion is that Article 54 TFEU defines the personal scope of Article 49 TFEU in respect of legal persons. Legal persons falling outside of Article 54 TFEU do not, therefore, benefit from the freedom of establishment laid down by Article 49 TFEU. Non-profit-making legal persons are carved out from Article 54 TFEU and, as a result, do not enjoy rights under Article 49 TFEU.

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47 Judgment of 23 February 2016, *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraph 154.

48 See, underlining the distinction between these, judgment of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C- 290/04, EU:C:2006:630, paragraphs 67-68.

49 Judgment of 23 February 2016, *Commission v Hungary*, C-179/14, EU:C:2016:108, paragraphs 154 and 63; judgment of 15 January 2002, *Commission v Italy*, C-439/99, EU:C:2002:14, paragraph 32. Compare, concerning procurement law, judgment of 14 July 2022, *ASADE*, C- 436/20, EU:C:2022:559, paragraphs 62-63 and 87 and case-law cited.

29. Furthermore, this conclusion also applies to the freedom to provide services. By virtue of Article 62 TFEU, Article 54 TFEU defines the personal scope of Article 56 TFEU as regards legal persons.[50] It follows that non-profit-making legal persons do not enjoy rights under the Article 56 TFEU freedom to provide services.[51]

30. Two limits to this conclusion must be emphasised. First, Article 54 TFEU only applies to the Treaty freedom of establishment and freedom to provide (or receive) services. This carve-out does not, therefore, affect other internal market law.[52] Economically active non-profit-making legal persons enjoy rights under the free movement of capital and, almost certainly, goods.[53] They may also fall within the scope of the Treaty rules governing competition law.[54] Similarly, natural persons are not affected by the carve-out.[55] This asymmetry in the fundamental freedoms flows, like others, directly from the Treaty drafters' choices.

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50 Article 62 TFEU provides that "*[t]he provisions of Articles 51 to 54 shall apply to the matters covered by"* the Chapter on services. The judgment of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C- 290/04, EU:C:2006:630, paragraph 66 supports this reading.

51 This conclusion is likely to extend to the 'passive' freedom to receive services, which also appears to be limited to persons falling within Article 56 TFEU's personal scope: judgment of 24 September 2023, *Demirkan*, EU:C:2013:583, C-221/11 paragraphs 35-36; judgment of 15 June 2010, *Commission v Spain*, C-211/08, EU:C:2010:340, paragraphs 50-52.

52 See, similarly, Opinion of Advocate General Stix-Hackl of 15 December 2005 in *Stauffer*, C-386/04, EU:C:2005:785, paragraphs 57-58.

53 Judgment of 18 June 2020, *Commission v Hungary (Transparency of associations)*, C- 78/18, EU:C:2020:476; and compare judgment of 1 July 1969, *Brachfeld and Chougol Diamond*, 2/69 and 3/69, EU:C:1969:30 paragraphs 24-26.

54 Judgment of 1 July 2008, *MOTOE*, C- 49/07, EU:C:2008:376; judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C- 74/16, EU:C:2017:496, paragraphs 41-46.

55 Judgment of 18 December 2007, *Jundt*, C- 281/06, EU:C:2007:816, paragraphs 31-34.

31. Secondly, the beneficiaries of Article 49 TFEU (i.e. natural persons who are EU nationals, and Article 54 TFEU legal persons) also enjoy the right to "*set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54*". On its face, this extends beyond Article 54 TFEU legal persons to encompass all undertakings, which arguably includes[56] non-profit-making ones. Moreover, the founders or managers may rely on this right even where the undertaking falls outside of Article 49 TFEU.[57] However, these rights are limited. They concern the founders and managers' own rights, covering for instance rules that discriminate against non-resident shareholders or directors.[58] They do not include the (by definition separate) rights of the legal persons themselves.

3) The meaning of "*non-profit-making*" in Article 54 TFEU

32. In Case C-646/15 *Panayi*, the Court held that certain trusts were "*profit-making*" within the meaning of Article 54 TFEU because they "*have no charitable or social purpose and… were created in order that the beneficiaries might enjoy the profits generated from the assets of those trusts.*"[59] This suggests a focus on the purpose of the legal person. If a legal person's purpose is to pursue profits for its members or beneficiaries, rather than to further charitable or social purposes, then it is profit-making.

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56 Compare judgment of 1 July 2008, *MOTOE*, C- 49/07, EU:C:2008:376, paragraphs 19-28.
57 Judgment of 6 November 1984, *Fearon*, 182/83, EU:C:1984:335, paragraphs 8-11.
58 For instance, judgment of 13 April 2000, *Baars*, C- 251/98, EU:C:2000:205, paragraph 22.
59 C-646/15 *Panayi*, paragraphs 28-29 and 33.

33. This is consistent with the ordinary meaning of "*non-profit-making*". Several language versions make the focus on the purpose of the legal person explicit. For instance, the French text – which lies at the origin of the provision (paragraph 24 above) – excludes "*des sociétés qui ne poursuivent pas de but lucratif*".[60] As to the context and objective, this concept is likely to be interpreted strictly (as a carve-out from two fundamental freedoms[61]) but must be interpreted in a way that maintains its *effet utile*.[62] The Court has already held, in the context of procurement law, that a strict interpretation of "*non-profit-making*" is achieved by limiting the concept to organisations that do not pursue a profit-making objective and which cannot provide any benefit, even indirectly, to their members.[63] Conversely, interpreting "*non-profit-making*" as simply meaning "*economically inactive*" would render the carve-out a dead letter, because economic activity is a basic condition of the freedom of establishment's material scope. Finally, the origin of the carve-out supports this interpretation (paragraph 24 above).

34. This interpretation is, furthermore, consistent with the interpretation of equivalent concepts in secondary legislation.[64]

35. For the reasons set out above, a "*non-profit-making*" legal person under Article 54 TFEU is one that does not aim to make a profit for, or otherwise benefit, its members. This includes such persons that pursue a charitable or social purpose.

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60 The same is true of, *inter alia*, the German ("*die keinen Erwerbszweck verfolgen*"), Italian *(*"*delle società che non si prefiggono scopi di lucro*"), Spanish ("*de las que no persigan un fin lucrativo*'), Dutch („*welke geen winst beogen*") and Romanian ("*cu excepția celor fără scop lucrativ*"). See, strikingly, judgment of 21 March 2002, *Kennemer Golf & Country Club*, C-174/00, EU:C:2002:200, paragraph 26.

61 Compare C-646/15 *Panayi*, paragraph 27, and case-law cited.

62 Compare e.g. judgment of 30 January 2018, *X and Visser*, C- 360/15 and C- 31/16, EU:C:2018:44, paragraphs 93 and 107.

63 Compare judgment of 7 July 2022, *Italy Emergenza Cooperativa Sociale*, C-213/21 and C-214/21, EU:C:2022:532, paragraphs 32-33.

64 Judgment of 10 December 2020, *Golfclub Schloss Igling*, C- 488/18, EU:C:2020:1013, paragraphs 48 and 52 and case-law cited; judgment of 7 July 2022, *Italy Emergenza Cooperativa Sociale*, C-213/21 and C-214/21, EU:C:2022:532, paragraphs 33-35 and 39. See, similarly, national law: Commission, *Study supporting an impact assessment on cross-border activities of associations: Final Report* (September 2023), pp. 19 and 24.

36. Such persons are excluded from the personal scope of Articles 49 and 56 TFEU (paragraph 28-29 above). Consequently, Articles 50 and 114 TFEU would not be appropriate legal bases for a legal act whose primary aim was to facilitate those persons' freedom of establishment and freedom to provide services. Conversely, if the conditions for relying on Articles 50 and 114 TFEU were fulfilled, then it may be possible to regulate the establishment of, or provision of services by, non-profit-making legal persons on an ancillary basis (paragraphs 20-21 above). For instance, in regulating a service sector, the main aim (facilitating the freedom of establishment and freedom to provide services of profit-making persons) may require or justify inclusion of non-profit-making legal persons on an ancillary basis, notably to avoid the risk of circumvention of the rules.[65]

4) Analysis of the Proposal

37. In light of the above conclusions, it is necessary to assess the aim and content of the Proposed Directive (see paragraphs 4 and 7 above on the basic principles).

38. The stated aim of the Proposal is to "*facilitate the effective exercise by non-profit associations of their rights related to the freedom of establishment, free movement of capital, freedom to provide and receive services and free movement of goods in the internal market*" (Article 1). The Explanatory Memorandum and recitals broadly articulate the same aim,[66] although recital 2 can be read as prioritising the freedom of establishment among these.[67]

39. The content of the Proposed Directive does include provisions concerning all of the listed freedoms. However, that content is decisively weighted towards the freedom of establishment and services aspects. Those aspects constitute the true centre of gravity of the Proposal.

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65 See e.g. judgment of 16 October 2003, *Commission v Italy*, C-32/02, EU:C:2003:555; judgment of 3 December 2015, *Pfotenhilfe-Ungarn*, C- 301/14, EU:C:2015:793, paragraphs 36-52, especially paragraphs 40 and 51.

66 Explanatory Memorandum (ST 12800/23), pp. 1, 2, 5-6 and 13; recitals 2, 7, 8, 14, 27, 34 and 35.

67 "*in order to obtain the freedom of establishment, as well as other fundamental freedoms*".

40. First, the majority of substantive provisions concern those two freedoms. This is the case for Article 3 (conditions for creation), the majority of Articles 4 and 5 (applicable law for establishment and operation, and legal personality and capacity), Articles 6-9 (rules of operation, governance, membership and equality of treatment with the relevant national association), Article 12(1) (registration), Article 14 in part (provision of services), the majority of Article 15 (prohibited restrictions) and Articles 16-26 (constitution, registration, mobility and dissolution). Free movement of capital is directly addressed by a minority of provisions, namely Article 4(3) in part (excluding certain capital movements from scope), Article 5(2) in part (funding rights), Article 13 (access to funding) and Article 15, point (f) (funding restrictions). Free movement of goods is marginal, addressed directly only by part of Article 14 (trade in goods). Two provisions cover activity in general in a way that is likely to cover all freedoms (Article 12(2) (declarations and authorisations) and Article 15, point (g) (economic activity restrictions)).

41. Secondly, while less marginal than the free movement of goods provision, the free movement of capital provisions do not constitute a separate component or aim of the Proposal. The focus of these provisions is not on achieving the free movement of capital *per se*: that is, the movement of capital between Member States or between Member States and third countries.[68] These provisions do not aim to ensure such cross-border access to funding in a way that incidentally includes purely internal situations. Rather, they aim to ensure that ECBAs have access to funding in general,[69] something that incidentally includes access to cross-border funding.[70] These provisions appear to serve the overall objective of improving ECBAs' freedom of establishment and freedom to provide services.[71]

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[68] Article 63 TFEU; judgment of 12 February 2009 in *Block*, C- 67/08, EU:C:2009:92, paragraphs 18 and 21.

[69] ECBAs must have capacity to solicit and dispose of donations from "*any lawful source*" and apply for "*public funding*" (Article 5(2)); have free and equal access to public funding, and not be subject to unjustified restrictions on providing or receiving "*funding, including donations, from any lawful source*" (Article 13); and be able to receive donations from a "*source within the Union*" without national authorisation or approval (Article 15, point (f)).

[70] See, further, Explanatory Memorandum (ST 12800/23), p. 14: an ECBA should be able to *"apply for funding in the Member State (s) in which it operates and should not be restricted on its ability to provide or receive funding"* (*sic*, emphasis added).

[71] Recital 10 states that access to capital is "*necessary in order to facilitate non-profit associations' activities in the internal market*" (rather than being an aim of its own).

42. Finally, these provisions affecting the free movement of capital and goods could not exist separately. They are integrated in, and intertwined with, the preponderant provisions on freedom of establishment and freedom to provide services. Moreover, without those preponderant provisions, there would be no ECBA form whose freedom of goods or capital could be affected. The same is true of the few provisions which concern the rights of ECBAs' founders and managers.[72]

43. It follows that the centre of gravity of the Proposed Directive is facilitating the freedom of establishment and freedom to provide services of non-profit-making legal persons. In the opinion of the CLS, neither facilitating the free movement of goods nor of capital is a separate objective or component.

44. It further follows, applying the conclusions set out in paragraphs 35-36 above, that Articles 50 and 114 TFEU are not appropriate legal bases. The non-profit associations benefitted by the Proposal fall within the heart of the Article 54 TFEU carve-out.[73] The freedom of establishment and the freedom to provide services are not facilitated by providing rights to persons lacking those freedoms. These "out-of-scope" elements are not merely ancillary. They are the Proposal's core object.

5) Possible ways forward

45. Should the legislator wish to proceed with some or all of the elements of the Proposed Directive, then the CLS can see three possible ways forward.

[72] E.g. the membership criteria in Article 3(1). See paragraph 31 above.

[73] Compare recital 19, Article 2(1), points (c) and (d), and Article 3(2) with paragraph 35 above.

46. The first approach would be to use Article 352 TFEU as the legal basis for the Proposed Directive. Article 352 TFEU "*is designed to fill the gap*" where no specific legal basis applies but powers appear necessary to achieve one of the Treaty objectives.[74] Accordingly, it applies only where (1) action proves necessary, within the framework of the policies defined in the Treaties, to attain one of the Treaty objectives, and (2) no other provision of the Treaties gives the Union institutions the necessary power to undertake that action.[75] As to condition (1), facilitating non-profit associations' cross-border establishment and provision of services (and their receipt thereof) could likely be shown to contribute to social progress, scientific and technological advance, social justice and protection including combatting social exclusion and discrimination, social cohesion and the protection of Europe's cultural heritage. This would be achieved within the framework (as opposed to the strict scope) of the Union's policies concerning free movement (Part Three, Title IV). As to condition (2), neither Articles 50 or 114 TFEU nor any other provision of the Treaties grants the power necessary to undertake this action. In principle, therefore, Article 352 TFEU may serve as a legal basis for the Proposed Directive as it stands,[76] with limited amendments.[77] This would remain true even if achieving the freedom of capital were made more prominent and became a separate aim or component, so long as this remained incidental to the main aim and content of the act.[78]

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74 Judgment of 3 September 2009, *Parliament v Council*, C- 166/07, EU:C:2009:499, paragraph 41.

75 Article 352(1) TFEU; judgment of 3 September 2009, *Parliament v Council*, C- 166/07, EU:C:2009:499, paragraph 41. Additionally, the action must respect paragraphs 3 and 4 of Article 352 TFEU and cannot widen the scope of Union powers beyond the general framework created by the Treaties (Opinion 2/94 *(Accession of the Community to the ECHR)* of 28 March 1996*,* EU:C:1996:140, paragraph 30). None of these conditions poses challenges here.

76 Under this approach, it could in principle be possible to retain the provisions concerning mobility (contrast paragraph 12 above) and to include economically inactive associations within scope (contrast paragraph 16 above).

77 Notably changing the legal basis; ensuring that the recitals reflect and justify the use of Article 352 TFEU; and ensuring that the recitals and Article 1 reflect the predominant purpose and content of the act.

78 This follows from the basic principles concerning choice of legal basis (see paragraph 4 above). See CLS opinion in doc. ST 6982/05 (macro-financial assistance), paragraphs 6-7.

47. This conclusion is premised on the existing balance of the Proposed Directive being preserved. This could change if, for instance, the elements concerning the freedom of establishment and freedom to provide services were sufficiently weakened or made less central, or, conversely, if the elements concerning the free movement of goods and capital were sufficiently strengthened or made more central. In either case, the latter elements may become a second centre of gravity. Article 352 TFEU would then no longer suffice as a legal basis for the entire act. The safest course of action in this scenario would be to split the Proposal into two legal acts, one adopted under Article 352 TFEU (containing the freedom of establishment and freedom to provide services aspects) and the other under Article 114 TFEU (containing the free movement of goods and/or capital aspects). This would be a second approach.

48. Under the third approach, the legislator could radically rebalance the Proposal so that the freedom of establishment and the freedom to provide services were no longer objectives or components, or were only incidental objectives or components. For instance, the legislator could limit the Proposed Directive to its free movement of goods and capital elements and flesh these elements out. Instead of creating a new legal form, the Directive could instead establish common minimum standards regarding those freedoms for all non-profit organisations in the Union.[79] In principle, and subject to detailed assessment of any such proposal, Article 114 TFEU could be an appropriate legal basis for such a legal act.

III. CONCLUSIONS

49. As proposed, the ECBA would, subject to one caveat (paragraph 12 above), be a new national legal form with a largely uniform status across the Union, not a new supranational form existing and regulated primarily at Union level. The creation of this new form therefore constitutes harmonisation, and does not preclude the use of Articles 50 and 114 TFEU (paragraphs 8-13 above), subject to the conclusions set out below.

[79] Compare European Parliament Resolution of 17 February 2022 with recommendations to the Commission on a statute for European cross-border associations and non-profit organisations, OJ C 342, 6.9.2022, p. 225, paragraph 35 and Annex; and ST 12800/23, ADD3, pp. 47-48, 66-69 and 73-82.

50. In the absence of a convincing justification for their inclusion, economically inactive ECBAs cannot be included in the scope of the Proposed Directive under its current legal bases (paragraphs 14-16 above).

51. Article 54 TFEU exhaustively defines the personal scope of Articles 49 and 56 TFEU as regards legal persons and expressly excludes non-profit-making legal persons. Consequently, non-profit-making legal persons do not enjoy rights under the freedom of establishment or the freedom to provide services. The core object of the Proposed Directive is to facilitate the freedom of establishment and freedom to provide services of non-profit-making associations. Articles 50 and 114 TFEU are therefore not appropriate legal bases (paragraphs 17-44 above).

52. Should the legislator wish to proceed with the Proposal as it stands, then work could be pursued on the basis of Article 352 TFEU (paragraph 46 above). Alternatively, should the legislator wish to proceed with the Proposal but rebalance its aim and content, then it may be necessary to split the Proposal into two legal acts – one adopted under Article 352 TFEU, the other under Article 114 TFEU (paragraph 47 above) – or to pursue work on a much narrower act based on Article 114 TFEU alone (paragraph 48 above).