CCBE COMMENTS ON THE PROPOSAL FOR A COUNCIL REGULATION ON THE STATUTE FOR A EUROPEAN FOUNDATION (FE)

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The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

1.

On 20 May 2009, the CCBE submitted comments to the European Commission on this topic.

The CCBE's comments focused on the difficulties which arise when creating a European foundation due to the disparity of legal and tax regimes applicable to foundations throughout the territory of the European Union.

Among the major pitfalls, the CCBE pointed out the following:

- The absence of a (single) definition for public interest or general interest (criterion for a European label for foundations);
- The lack of automatic recognition of the existence of a national foundation as a legal person by another Member State;
- The inability to transfer the registered office of a foundation from one Member State to another without liquidating the foundation to be transferred and creating another foundation in the state of destination;
- The disparity in fiscal regulations between Member States.

The last pitfall was particularly significant.

2.

The proposed Regulation now submitted by the European Commission meets all the concerns highlighted by the CCBE.

Generally speaking, the project seems satisfactory as it allows the European Commission to achieve its goal to allow the creation of foundations with a European label covered by a favourable tax regime in each Member State and which can easily obtain funds and donations throughout the EU to achieve a public purpose.

3.

Generally speaking, only charitable foundations are concerned; only foundations which have or will have a transnational aspect and assets of at least EUR 25,000 will receive the label of European Foundations *(fondatio europaea* or FE).

Such a foundation could be created either *from scratch* or transforming a national foundation or merging two national foundations, or merging foundations in different Member States.

The FE will acquire legal personality upon registration in a Member State, it will receive full legal personality and the same tax treatment as that granted by each Member State to foundations constituted under its national law. Moreover, donors (nationals of the Member State where the

registered office is situated or not) shall enjoy the same tax advantages as those granted to donors who are nationals of the state in which the national foundation has its registered office.

4.

A systematic review of the proposal leads to the following remarks.

5.

Article 3 provides that each Member State shall take measures to make the implementation of the Regulation effective and shall address matters which are not covered by the Regulation.

Granting each Member State the ability to complete the Regulation may create separate regimes (at least on some points) from one state to another.

6.

Article 5 defines public purpose by reference to a list *(presumably* limited) which is a juxtaposition of public purposes in Member States.

The CCBE believes it is appropriate to amend this article so as to expressly note that the list is not exhaustive and must be updated from time to time.

Note that religion is considered by some member states as a public purpose, but this criterion is not included in the list in article 5.2 and does not appear to be subsumed under (a) (arts, culture and historic preservation), (d) (elimination of all forms of discrimination based on, among other things, religion) and (m) (education and training).

7.

Article 6, which defines the transnational component, seems very sketchy in the CCBE's view. Indeed, it only takes the FE to have activities or have as a statutory purpose activities in at least two Member States. One may wonder whether it would be useful to allow activity in a Member State and other states provided that the statutory goal is of real interest to the citizens of several Member States.

8.

Article 7 provides that the FE shall have assets of at least €25,000.

Two issues arise from this article: the expression of assets in EUR *(what about* the conversion rate, for example GBP - EUR?) and it is unspecified whether the value of these assets should be a present value at the time of formation, a constant value or a value at a given time (for example, when preparing annual accounts).

9.

Article 10 provides full legal capacity for the FE and details in a superabundant manner that it will be able to set up in any Member State.

However, it is not clear whether this establishment may take the form of a branch. Nothing is said regarding such a concrete possibility for the FE.

The CCBE believes that it would be helpful if the European Commission added an article on the possibility of opening branches and on the obligations they would have towards the state in which they are established.

10.

Article 11 deals with the economic activities of the FE. This article is poorly written.

It is difficult to know for sure if paragraph 2 supplements paragraph 1 or if these two paragraphs are completely distinct (in such case, some economic activities would be directly related to the pursuit of public purpose, while others only indirectly - the latter being more plausible).

The definition of indirect public activity is not satisfactory.

Article 11 should therefore be amended.

11.

Article 12 deals with the various methods for forming an FE.

This article calls for several comments.

First, the possibility of formation by merging two entities established within the same Member State should be supplemented by an express and more accurate reference to the transnational nature of the FE.

Then, the conversion of a non-profit public interest entity does not seem possible for some forms of national entities (*what about* the British trust?) and also leaves a doubt as to the transnational nature of the FE.

12.

Article 14 specifies the procedures for the formation of the FE through merger by referring to the applicable national law.

This is unfortunate, for example in the case of Belgium, where there is no merger of non-profit entities (there is a solution prepared by practitioners, but it is not satisfactory as it is not expressly provided by law).

13.

Article 16 deals with the consequences of the merger.

It is specified that the rights and obligations of each merging entity are transferred to the FE. However, it is not specified that this transfer is effected by operation of law pursuant to the Regulation. This clarification should be added.

14.

Article 17 specifies the procedures for the formation of the FE through conversion. This provision seems hard to apply successfully in some Member States with regard to their laws.

15.

Article 19 refers to the minimum content of the statutes.

Point (d) on the description of the public purpose should be supplemented by a reference to the transnational nature of the FE.

16.

Article 25 relates to the name of the FE. This article indicates that the name of FE will include the letters "FE" and the right to use such abbreviation.

Unfortunately, Article 25 states that entities constituted under national legislation before the coming into force of the Regulation and the name of which includes either the term "European Foundation" or the abbreviation "FE" can continue to use it.

This is confusing. It would be wiser to provide that national entities should either become an FE if they meet the conditions or change their names.

17.

Articles 27 to 33 relate to the bodies and functioning of the FE.

The FE is normally administered by a *"governing board"* which can engage the services of *"managing directors*". It seems that legal persons can be members of the *governing board* as well as *managing directors.*

The CCBE believes it would be useful for legal persons appointed as members of the *governing board* or as *managing director* to nominate a natural person as permanent representative to serve, *in concrete terms,* their mandate.

Similarly, it would be appropriate to clarify whether only members of the *governing board* may be *managing directors* or if, as assumed, third parties may be designated as such.

18.

The statutes of the FE can create other bodies such as a *supervisory board*, the powers of which are not otherwise specified.

FE control is exercised in the absence of a *supervisory board* at two levels: first, by the Commissioners *(see* Article 34) and second, by the competent national authority (designated by each state). For FEs with a single-tier board, non-executive directors can also play a part in monitoring and challenging the FE's activities.

One may wonder whether it would be advisable for some FEs to be required to have an increased level of outside scrutiny, either in the form of a supervisory board or in the case of a single-tier structure by the appointment of non-executive directors.

If a *supervisory board* were to become mandatory in some cases, concrete issues would arise about its composition (should there be a representative of the national states concerned given the favourable tax treatment of the FE?) and its competence.

19.

Regardless of the comments listed above, the CCBE would like to submit four considerations:

- It is feared that regulating the FE in this way, while allowing such a weak link with the transnational nature or with the practical value of such a tool for citizens, might spread to company law as a whole;
- The proposed regulation includes a terminology which is different from that used for the Regulation on a European company and the Directives on mergers whereas some concepts are identical *(see* e.g. transfers of universality by operation of law); it may be felt desirable to standardise the terminology (by borrowing the terminology for the European company and mergers);
- The draft regulation is intended as a tool for transforming any national, public-purpose entity into a European foundation, but it seems to ignore the particularities of some specific national laws *(see* British law and, more specifically *trust*);
- Public interest status is defined by reference to the content of national law of Member States - however all that has to do with religion (as included in public purpose in some national legislations) is not included in the definition provided by Article 2.