



ANSWERS TO THE EUROPEAN COMMISSION CONSULTATION ON A EUROPEAN FOUNDATION STATUTE

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The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further ten European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

1.1 Legal obstacles to cross-border activity by foundations

The obstacles of a legal nature identified within the feasibility study (the "Study") are real. They mainly arise from the fact that there is no legal harmonisation of the notion of foundation, and that the term covers very different entities from one state to another. Therefore, there is no automatic recognition of the legal personality of a foundation from one state to another. This could be solved with a common definition of general or public interest ("public interest") allowing recognition within the European Union of the statute of foundation for all entities pursuing a public interest.

Many states have recognition procedures, though these can be slow and costly.

Likewise, transferring a foundation's registered office (whether statutory or real) to another state is impossible.

A suggestion could be to give a single European definition for public interest, which could justify the existence of a foundation and its recognition in another state.

Public interest could be defined as the satisfaction of interests or needs of a category of the population (e.g. deprived children, humanities and art lovers, researchers, ...) with due regard for the founding principles of the Treaty, fundamental rights within the European Union and the public policy of the Member States, and excluding any profit-making interest of founders or members of an organisation.

1.2 Other obstacles

The legal and tax statute of foundations differ from one state to another.

As a result, the cross-border activity of a foundation comes up against very high administrative and tax costs which may prove dissuasive.

A suggestion could be to transfer the registered office of a foundation into another state without its losing its legal personality and without any major tax incidence, and without having to undertake any procedure similar to setting up a local-law foundation; such principles should apply to opening an establishment for a foreign foundation within another state.

1.3 Hierarchy of obstacles

In descending order, the issues can be summed up as follows:

1. No common recognition of the notion of public interest, starting from the characteristics of a foundation;
2. Difficulty (or even impossibility) of recognition of the legal personality of a foundation in another state, and the costs associated with such recognition when the procedure exists;
3. Impossibility to transfer the registered office to another state;
4. Differences in tax treatment.

1.4 et 1.5 Questions for foundations only

1.6 The Study identifies 7 tax obstacles:

1. Taxation of foreign foundations: tax benefits are usually for local-law foundations only;
2. Taxation of foundations with activity abroad: every state makes provision for a specific tax-exemption treatment, but when foundations mainly work abroad, they run the risk of losing their preferential tax statute (e.g. France);
3. Taxation of national donors to foreign foundations: In principle, donors enjoy tax exemptions. In most states, however, such exemptions do not apply to donations abroad or to foreign foundations; the tax system for donations to foundations abroad should be aligned to that of donations to national foundations (See below the 27 January 2009 ECJ Judgment on deduction of gifts to foreign bodies);
4. Taxation of foreign donors to local foundations: foreign donors are, by definition, taxed abroad; they must enjoy tax concessions for donations made to a foundation established in another state, by virtue of the 27 January 2009 ECJ Judgment, which establishes that free movement of capital conflicts with a member state law granting the advantage of tax deduction only to donations made to organisations established on the national territory, once donations given to an organisation which is established in another member state meet the requirements set by such legislation for granting such advantage.
5. Taxation of foreign donors to foreign foundations: a state can only grant a tax concession to a donor who is taxable in the very same state;
6. Taxation of affiliated beneficiaries: taxation does not seem to be unfair for private interest foundations or certain trusts though it returns to the difficulty of defining the public interest (See above 1.1) ;
7. Taxation on the estates of the deceased: most estates do not grant tax exemption for bequests to foundations abroad; this should be amended for European foundations.

1.7 Other obstacles

No

1.8 Hierarchy of tax barriers

In descending order:

1. No tax incentive for donations or bequests to foundations established in other states;
2. Differences in tax treatment for donations to foundations or charities in different states;
3. Higher taxation for foreign-source income of foundations.

1.9 N/A

1.10 Legal or tax obstacles

It is difficult to set up a hierarchy between obstacles of a legal nature and those related to taxes. When creating a foundation, legal obstacles are the most important, while tax obstacles are more important during its operation. Both are obstacles to the development of foundations outside their country of registration.

1.11 Why establish foundations in other states

Most probably for the foundation to be recognised in such other state and to enable it to undertake its activity (legal personality) and receive donations from residents of such other state.

1.12 Tax barriers seem to be a reason for the establishment of a foundation in another state. In addition, collecting donations is easier when done by organisations that are nearby, i.e. national organisations.

2.1 Solutions

Other solutions than those mentioned in the Study do not seem to exist.

2.2 European foundation statute

A European foundation statute seems to be the best option with, if possible, tax components and the harmonisation of taxation for foundations pursuing the public interest within each state. Maintaining the status quo is not satisfactory and the harmonisation of the law on foundations within different states does not seem very realistic or efficient.

2.3 OK N/A

2.4 European foundation statute without tax component

The most important seems to be the legal statute, which should lead to tax changes, but implementing harmonised tax schemes might take time. Such delays could be shortened if the aforementioned ECJ case law from 27 January 2009 is complied with by all states.

2.5 Accreditation system

This system does not seem to settle the issues mentioned, unless accreditation leads to recognition for foreign foundations within every state of the European Union; in this case, accreditation is the simplest and most efficient means: any national foundation with European accreditation has its statute recognised as a foundation in all other states.

2.6 European label

The European foundation label seems to offer benefits to foundations:

- Giving more recognition and respectability at European level;
- Easing donations, bequests and cross-border activity.

2.7 European label for European foundations only

Yes, since the European foundation alone avoids returning to a national law choice, which would be the case within an accreditation system.

3.1 Specifications for the European foundation

Agreement on the 5 principles developed within the Study:

- Legal personality (essential) which arises on the day of registration (like companies) and with limited liability (except for management faults, of course)
- Exclusive purpose of developing activities of public interest (see above 1.1: definition of public interest)
- It seems that it could have some members (founding members or not) in order to bring together entities or people within a foundation, but the members could not be beneficiaries of the foundation nor control it. There could not be in any way a relationship between members and the capital or assets of the foundation. The members' rights would be non-transferable.
- Creation by registration, after ensuring that requirements are met, on a register for foundations held by the relevant state authority within the relevant state.

3.2 Detailed statutes

It seems wiser to use a very detailed statutes template in order to avoid returning to the different states' national law provisions.

3.3 Capital

It seems impossible to establish a minimum capital for foundations since it depends on its size and purpose.

In addition, a foundation can be based on the founders' commitment to pay amounts to the foundation for some time.

3.4 Regulation of business activity

Business activity should be allowed for European foundations provided that it contributes to the general interest purpose of the foundation and does not conflict with public policy within the country in which it takes place. Many large foundations develop economic activities (which allow them to develop) and these foundations should not be excluded from the European foundation statute.

3.5 Organisation and control of European foundations

It seems possible to imagine national control bodies (3-1), such as Foundation Departments of the supervising Ministry, gathered within a European committee which would undertake the control, supervision and harmonisation of foundations and their activities.

3.6 Conversion into European foundation

Every state should allow existing foundations to convert into European foundations by adopting the European foundation statute and by registering in the European foundations register of their respective countries.

Provisions should also provide for foundations from different states to merge and for the foundation resulting from the merger to register within a national register for European foundations.

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3.7 Other characteristics

Provisions should feature within the European foundation statute in relation to the governance of foundations, the obligation of an auditor at certain thresholds, transparency of activity and activity reports (frequency).

Provisions should also settle the issue of relocating a European foundation head office to another state without winding up in the home state or losing its legal personality.

4 N/A