

## **European Foundation**

### **STEP Submission to the European Parliament**

**for meeting to be held on Monday 26 November 2012**

**John Riches – Co-chair STEP Public Policy Committee**

As a cross-border organisation whose members work with families on a pan-European basis, our starting position is one of sympathy and support for the concept of the European Foundation as a mechanism that is intended to facilitate the cross-border activity of public benefit foundations working within the European Union. We generally welcome the proposal issued by the European Commission in February 2012 and therefore wish to limit our comments to a number of practical and legal issues that occurred to us from having studied the proposal. These comments are grouped under the following headings:

- Definition of what is a public benefit purpose;
- Cross-border activities;
- Common Law Jurisdictions – the position of charitable trusts; and
- Taxation.

#### **1. Definition of what is a public benefit purpose**

One area of concern is the scope of the definition of public benefit purpose contained in the proposal's draft Statute (in Article 5). There is not a consensus within the 27 member states as to what purposes or activities are permissible from a legal (civil law) and fiscal perspective. We do not believe the list of purposes in Article 5 to be the 'lowest common denominator' amongst the member states that would be necessary to ensure that the European Foundation represents a useful tool for those seeking to establish a cross-border foundation. In some member states, some of the listed purposes are either not recognised as 'public benefit' purposes under the civil law, or recognised as such for civil law purposes but not for fiscal purposes, or are not recognised as such for either.

We do not consider it to be appropriate to compel each member state to abandon its own history and culture in defining what is regarded as for the public benefit (or 'charitable' or for the 'public utility' – as the terminology shows, there is historical diversity within the EU). We therefore consider that introducing a pan-European definition would have to reflect the 'lowest common denominator' amongst the purposes recognised across the EU if the European Foundation is to be properly utilised.

In addition, we note that there is no consensus on the attitude member states take to economic activity undertaken by their own domestic foundations. Some jurisdictions prohibit it despite which the draft Statute envisages that the proposed European Foundation would be able to undertake these activities provided income is used for the public benefit purposes. This would potentially create a two-tier regime in the jurisdictions with such a prohibition, putting the proposed European Foundation in a favoured position vis a vis domestic organisations.

These are our initial observations in this area – we do however believe that without addressing this point appropriately the practical workability of the EU Foundations could be seriously compromised.

## **2. Cross-border activities**

Whilst we consider it appropriate for there to be a cross-border requirement for European Foundations, we would welcome clarity as to what would constitute ‘activities’ for these purposes. Many of our clients are families with philanthropically-minded family members in more than one European jurisdiction (or individuals with assets in more than one European jurisdiction); it is not currently clear whether such families or individuals would need to specify that their European Foundation’s grant-making or other activities would be undertaken on a cross-border basis, or whether the mere fact that the European Foundation was funded from more than one member state would suffice.

## **3. Common Law Jurisdictions – the position of charitable trusts**

We know that the feasibility study undertaken by the Max Planck Institute for the European Commission recognised the fact that, within common law jurisdictions such as the UK and Ireland, there are alternative forms of public benefit organisation, including charitable trusts. An important note here is that a charitable trust lacks legal personality and acts through a group of trustees who have obligations under the trust instrument to carry out the trust’s charitable objects. We note that the European Commission’s proposal would not allow charitable trusts to ‘convert’ to European Foundations, but that the Trustees could establish a new European Foundation to which the trust’s assets could be transferred.

Given the proposal to allow a European Foundation to be regulated and located in a specific EU jurisdiction, it may be possible to incorporate enabling legislation that would allow for the conversion of a charitable trust so that the European Foundation will gain its legal personality on registration and the assets previously held on the terms of the trust and the liabilities properly payable out of those assets in accordance with the terms of the trust would become the assets and liabilities of the European Foundation.

Given that there may well be a significant number of charities in common law jurisdictions currently constituted as trusts that are enthusiastic about operating on a cross-border basis, it

occurs to us that this would be a pragmatic way of encouraging such activity without obliging the charitable trusts concerned to transfer their assets to a newly formed European Foundation (or eschew the European Foundation option entirely and incorporate a related corporate charity in another member state).

#### 4. **Conflicts of interest**

We wish to note briefly that inclusion of provisions to require the management of conflicts of interest should be applauded. However, we are concerned that the requirements in relation to the constitution of the board (in Article 32(1) in particular) may limit the utility of the European Foundation amongst families wishing to establish a cross-border philanthropic foundation in the United Kingdom, where family members may constitute the majority (or indeed the whole) of the board without breaching domestic conflicts of interest requirements.

#### 5. **Taxation**

We support the proposition that if the European Foundation proceeds as a concept, it would be helpful for there to be some means of ensuring that European Foundations receive equivalent tax treatment to domestic public benefit organisations for both donations to the European Foundation and for the Foundation's own income. The Commission's proposal does not impose any particular tax treatment; it merely states that equivalent treatment shall be available for European Foundations as is available for domestic organisations.

We are concerned, however, that this automatic equivalency may not be the most appropriate approach to ensuring equality of tax treatment, if, as mentioned above, the Statute's public benefit purpose provision is not the 'lowest common denominator' of purposes that are relieved of tax (to whatever extent) in all member states. This is because European Foundations could find themselves enjoying tax relief but carrying out activities that would not attract relief if carried out by domestic organisations. We do not consider that including 'common denominator' tax provisions in the Statute itself – that is, tax reliefs which are common to all member states – would be an appropriate approach considering the great variety of approaches across borders.

Instead, we feel the better option (and one that seems to us more politically realistic) would be for the European Foundation Statute to be silent on tax matters and leave the European Foundations and their donors to obtain equal treatment under the non-discrimination principles introduced by the *Stauffer*<sup>1</sup> and *Hein Persche*<sup>2</sup> cases at the European Court of Justice.

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<sup>1</sup> *Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften* (C386/04)

<sup>2</sup> *Hein Persche v Finanzamt Lüdenscheid* (C318/07)

A significant part of the practice of STEP members is to deal with cross-border succession planning and in this context affording relief from gift or inheritance taxes to EU nationals in giving to an entity registered as a European Foundation as opposed to a conventional domestic charity would in our opinion enhance the ability of those EU nationals who hold assets outside of their home country to donate tax-efficiently to public benefit foundation. We therefore enthusiastically support maximising the ability of such foundations to be eligible for relief. We would observe that this measure is likely to strongly increase the appeal of such foundations for those who wish to support cross-border EU charitable activity or for those whose assets are located in more than one jurisdiction who wish to support a specific charity with a donation with assets located in a second EU jurisdiction. In considering the potential application of charitable relief in these circumstances, the defined scope of charitable activity mentioned under heading 1 above will be of critical importance.