

Summary note- Brussels, September 2006

Towards a European Framework for Foundations in Europe

At a seminar organised by the European Foundation Centre (EFC) and the Academy of European Law (ERA) on September 14th 2006 in Brussels, it was announced that European Commissioner McCreevy will decide on the launch of a feasibility study on a European Foundation Statute this autumn.

Some 40 participants from across Europe discussed with representatives from the European Commission the benefits of such a statute, and what form it should take. The Commission completed a public consultation during the first half of 2006 on the future priorities concerning modernisation of company law and enhancing corporate governance in the EU. Nathalie Berger of European Commission Directorate General Internal Market & Services pointed out that, through the consultation, the European Commission had learned just how strong the support of the sector is for the development of a European Foundation Statute. The Commission received 266 contributions to the public consultation, a third of which came from foundations. Participating foundations supported the launch of a feasibility study on a European Foundation Statute. Ms Berger informed participants that the European Commission is to issue a statement to the European Parliament on the matter in due course.

Participants in the seminar were informed about an important European Court of Justice (ECJ) ruling of the same day in the so-called "Stauffer" case by Francis Houben of Legal & Tax Management SPRL. Sections of German tax law were seen by the ECJ to be in conflict with the EC Treaty. According to current German tax law, tax exemption granted to public benefit organisations does not apply to public benefit organisations that have their registered office and/or governance structure outside Germany¹. Mr Houben also outlined current infringement procedures launched by the European Commission in the field, one against Belgium and the second, more recent one against the UK. The Commission is of the opinion that the Walloon inheritance and gift tax and the UK tax scheme discriminate against foreign public benefit organisations². Currently quite a number of national tax laws are under scrutiny by the European Commission and the ECJ, a process that will, it is hoped, encourage Member States to introduce a cross-border-friendly environment for foundations and their donors. It was recalled that a European Foundation Statute would need to be embedded into tax changes at the national level if it is to achieve the aim of facilitating foundations' cross-border work and cross-border giving.

¹ The ECJ decision on case C-386/04 as well as the opinion of the Advocate General can be downloaded at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-386%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

² See press release IP/06/964 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/964&format=HTML&aged=0&language=EN&guiLanguage=en>

The barriers resulting from the current legal and tax regimes to the international work of foundations and their donors was highlighted by Nilda Bullain of the European Center for Not-for-Profit Law (ECNL). Administrative burdens encountered in the procedure for setting up a branch in another country, problems with the recognition of legal personality, and difficulties with running operations abroad are operational barriers to foundations' transnational work. Often foundations have to set up local organisations in different countries to operate efficiently and this of course is costly and time-consuming.

The foundation sector is of the opinion that a European Foundation Statute would help to overcome some of the barriers mentioned above and would improve the climate overall for foundations and funders that work across borders. Jan Scherphuis of Oranje Fonds outlined how a European Foundation Statute could contribute to European objectives and policies in various areas and could strengthen European citizenship and the advancement of the European public good. The European Foundation Statute would be the appropriate tool to actively build and support private investment for the European public good. Mr Scherphuis also stated that there is no good reason why foundations, as one of the oldest existing legal structures, should not benefit from the ongoing process of the development of a truly European Company law, and he referred to the European Company Statute and the European Co-operative Statute.

Are public benefit foundations covered by the EC Treaty? What could be the legal basis for a European Foundation Statute? Thomas von Hippel of the Max Planck Institute for International Private Law in Hamburg shared his opinion that public benefit foundations would be covered by the freedom of establishment (when offering goods and services) or the free movement of capital (when only grantgiving).

What would such a European Foundation Statute look like? For many years the Statute has been discussed by representatives both from within and outside the foundation community, including foundation practitioners, legal and tax experts and researchers. Henrique Antunes, representing the Portuguese Luso-American Foundation, presented the EFC's recommendations for such a Statute, which were finalised in 2005. The Bertelsmann Foundation brought together an international group of legal academic researchers who published their research findings about a European Foundation Statute this year. The findings were highlighted by Thomas von Hippel. Both recommendations opt for an additional and optional European legal tool, which would be governed by a EU Regulation.

In the absence of a European legal tool for foundations, the sector has had to develop innovative structures to create international networks and funds. Wolf Schmidt, Member of the Executive Board of the German Körper Foundation, presented a case study of EUSTORY, the History Network for Young Europeans. EUSTORY could present a model for a virtual European Foundation, which connects civil society and the private sector in a framework of cooperation between a foundation and a bank. Ludwig Forrest of the King Baudouin Foundation outlined the Transnational Giving Europe Agreement, which enables donors to identify qualifying partners in participating countries to facilitate cross-border giving. The foundation has also launched a cross-border giving database, which collects information about the national legal and fiscal treatment of cross-border gifts, donations and legacies and serves as an information tool for donors, intermediaries and beneficiaries about the best options and solutions for cross-border giving.