

Executive summary

I. The EFC welcomes the key conclusion of feasibility study and it strongly supports the creation of the European Foundation Statute as an optional legal instrument.

The feasibility study provides clear evidence for the need for a European legal tool for foundations and we trust that the European Commission, based on the clear recommendation of the feasibility study, will complete its impact assessment in 2009 and issue a proposal for a regulation when the new Commission takes office.

II. Specific comments on the feasibility study:

1. The European Foundation Statute received **considerable support**.
2. The study provides evidence of the **strength of the European foundation sector**.
3. While common features and trends can be identified, we would like to recall that the **details of the various foundation laws differ** considerably.
4. We can only support that increased cross-border activities of foundations and their founders are hampered by **economically relevant barriers**. The costs of barriers will certainly be **much higher** than estimated in the study. We would also like to stress the administrative burden and cost to foundations of dealing with a diversity of national rules. In addition, foundations have reported that they have set up branches in other Member States also because of the lack of trust in foreign legal forms.

We are of the opinion that important existing civil law barriers may not be resolved by the European Court of Justice (ECJ) and that with regard to tax law a non-discrimination solution as developed by the ECJ may be implemented by Member States in different ways. We believe that an EU-level regulation would be the most effective approach to solving the legal and administrative problems faced by foundations.

5. The EFC fully agrees with the conclusion of the study that the European Foundation Statute is the **preferable policy option**. The added value of a European Foundation Statute can be summarised as follows:

- **For foundations to facilitate and increase cross-border work and cooperation.** It would offer **legal certainty** and **cost savings**. It would be a **trusted** and **flexible** legal tool that would ease cross-border operations and enable foundations to **group their organisation and/or to further develop** their organisation and activities.
- **For donors** to help mobilise and channel private assets for public benefit across Europe. **For citizens** a robust and flexible tool to support citizen action at EU level and beyond. **For companies** to serve as a dedicated tool to develop a coherent European community.
- **To support European public good and to underpin EU competitiveness: knowledge society, research and innovation. To help the pooling of private resources**
- To have a **benchmark of accountability, transparency and good governance** and to **clarify the concept of foundation**

Tax treatment of the European Foundation: The objective of the EFC in the field is to ensure that the European Foundation would receive the same tax treatment as a tax-exempt foundation in the same Member State.

6. Suggested content of a European Foundation Statute: We agree that there are a number of questions for which certain alternative solutions are possible. The 2005 EFC recommendations on how a European Statute could look like can be downloaded at <http://www.efc.be/ftp/public/Legal/EuropeanStatuteUpdated.pdf>.

On 16 February 2009, the European Commission Directorate-General Internal Market and Services published the long-awaited Feasibility Study on the European Foundation Statute, which can be downloaded at http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm.

The European Foundation Centre (EFC) would like to comment on the findings of the study as follows:

I. EFC welcomes key conclusion of feasibility study:

The EFC strongly supports the creation of the European Foundation Statute as an optional legal instrument, which will help foundations that wish to develop and expand their activities across several countries, while also encouraging the creation of new foundations at European level.

The feasibility study on a European Foundation Statute provides clear evidence for the need for a European legal tool for foundations. The study outlines the strength of the European foundation sector both in numbers, as a major economic force, and as an important and innovative player for the development of key EU policies and European society. The study also offers a comprehensive overview of the regulatory environment. It analyses the difficulties foundations face when operating cross-border and suggests the European Foundation Statute as the best option to overcome existing barriers and to unleash the full potential of foundations in Europe.

While the study focuses on the economic aspects of the foundations' work, we would also like to stress the important and unique role that foundations play as innovators and idea drivers in our society. Recent EFC research on foundations' activity shows that their main areas of interest include: education and training, science and research, arts and culture and social matters.

More information on EFC research on the foundation sector can be obtained at <http://www.efc.be/projects/eu/research/FactsFigs.htm>.

We trust that the European Commission, based on the clear recommendation of the feasibility study, will complete its impact assessment in 2009 and issue a proposal for a regulation when the new Commission takes office.

If the EU was to continue with the status quo (to continue without a European Foundation Statute), the full potential of philanthropic work could not be developed. Foundations and donors would have only limited and non-cost-effective cross-border activities. It would discriminate against foundations and their donors in comparison to other legal forms active in the single market, whose cross-border actions are facilitated by European tools geared specifically to them. This would imply a waste of resources and a missed opportunity to channel private wealth (billions of euros) from the baby-boomer generation into public benefit activities. Instead, European private wealth could be redirected to other regions. By not providing a new mechanism which would support European public good and citizen participation, and address European social concerns, the gap between citizens and the EU would only increase. The European Foundation Statute would be a key opportunity for the EU to connect with its citizens.

II. Specific comments on the feasibility study

1. Comments on part 1: Introduction

The study correctly recalls in its introduction that the idea of a European Foundation Statute received considerable support with the turn of the century and that the foundation sector has been pushing at many occasions ever since for the development of such a European legal form.

2. Comments on part 2: Empirical Analysis – the Economic Relevance and Function of Foundations in Europe compared to the US

The study provides evidence of the strength of the European foundation sector and it reinforces existing empirical data on the foundation sector as follows:

- Europe's foundation sector substantially exceeds the economic weight of the US foundation sector.
- The public benefit foundation is the most relevant type of foundation. Private interest foundations only exist in some Member States.

3. Comments on part 3: Legal Comparative Analysis – common trends in a diverse landscape - a valuable contribution to comparative analysis of foundation law

The legal comparative analysis in the feasibility study highlights the regulatory differences in the 27 Member States. It reaches the conclusion that similarities are more significant than the differences. While common features and trends can be identified, we would like to recall that the details of the various foundation laws differ considerably. Apart from the highlighted different approaches regarding purpose of foundations (public benefit only or also private interest foundations), founding assets, auditing and disclosure, and scope of economic activity, it has to be noted that already the process of setting up foundations differs: some countries require state approval and/or registration whereas, for example, in Sweden only some foundations have to register. Also when it comes to governance, differences in detail are found, such as the number of board members, additional mandatory organs, etc. Different approaches are also found for rules on foundations as shareholders in companies or regarding the transfer of seat. The EFC has examined the differences in foundation laws across the EU and concluded that the operating frameworks of foundations in the EU are diverse, in particular when looking at the details of the various foundation laws. This is however seen as a richness deeply rooted in the legal traditions as well as cultural and socioeconomic development of the countries concerned¹.

At the same time the diverse operating environment gives rise to operational barriers and hindrances to cross-border work and cooperation of foundations and their funders, who have to struggle with very different national and even regional foundation laws.

The legal analysis of the feasibility study offers a profound and in-depth analysis of selected aspects on foundation law. It addresses: definition and characteristics of a foundation, governance and state supervision, formation, liquidation and fundamental decisions, activities of foundations, and tax law in the form of an overview. The comparative analysis of those aspects of foundation law forms a valuable and updated contribution for analysis and debate of European foundation law and will certainly be used among legal scholars.

4. Comments on Part 4: Increased cross-border activities are hampered by economically relevant barriers

The evolution of the foundation sector in recent years has made clear the need for a European legal tool for foundations. Like other entities, foundations and their funders are increasingly working across borders, and have every right to operate on a European-level playing field. In 2007 two-thirds of EFC members were working across borders and active outside their country of origin.² Individual and corporate donors are more mobile, and increasingly have assets or investments in several countries. The internationalisation of foundations' work stems from the international nature of the complex problems that

¹ "Foundations' Legal and Fiscal Environments – Mapping the European Union of 27," 2007

² Based on the information in EFC member profiles for approximately 200 members.

foundations seek to address. Issues such as migration, global health, and the environment do not stop at national borders. The international interest of founders, their rising geographical mobility during their working lives and upon retiring, and the related increased geographical spread of their assets across Europe and beyond also mean that foundations are more likely to be working and investing across borders. The sector has experienced rapid growth and internationalisation of foundations' work and interests. However, the current legal and fiscal framework lags behind, and foundations face a complex web of national laws and a number of barriers that restrain or preclude cross-border activities. Foundations that could in terms of their asset base and international orientation make a difference to public good at the European level currently face the frustration of administrative, legal, and fiscal barriers to their work.

The feasibility study analyses existing civil and tax law barriers and provides evidence of their economic relevance. The report lists the following barriers:

- Lack of possibility of transfer of seat to another Member State
- Difficulty in recognising foreign foundations' legal personality – recognition procedures exist in several Member States
- Legal insecurity over national recognition of "general interest" nature or "public benefit" status of resident foundations' cross-border work
- Barriers in foundations' fiscal environments
- Administrative burden and cost to foundations of the setting up several branches in other countries, which requires continuous legal advice.

Apart from these legal and administrative burdens, we would like to stress the following administrative barriers:

- Lack of trust in foreign-based foundations. Foundations have reported that they have set up branches in other Member States also because of the lack of trust in foreign legal forms. In this respect, the ability to operate under a foundation form known and recognised in all Member States would be seen as easing EU-wide operations.
- Administrative burden and cost to foundations of dealing with a diversity of national rules

We can only support the analysis of existing barriers with our own legal research and practical experience. The EFC is aware of many foundations that face practical obstacles and added costs in their everyday cross-border activities. The Carpathian Foundation International is based in Hungary, with additional national organisations established in Hungary, Poland, Romania, Slovakia and Ukraine.³ Naturally there are considerable costs arising from the establishment of several national organisations. Running offices in five different countries is expensive, and there are also costs resulting from having to consult legal advisors in all the countries in question, during the setting-up phase of the organisation and on a regular basis thereafter, to keep up with the changing legal environment in each country. Each national entity is also required to have a different governance structure in line with national rules, which complicates things further.

The German Körber Foundation has considered setting up several national foundations for the EUSTORY network because of the lack of a European Statute.⁴ The network, which supports teaching history to young people across several EU Member States, is suffering from the lack of a European framework for its activities. Some foundations also struggle to find the appropriate legal structure when they have a pan-European public interest objective and are therefore forced to establish themselves as national entities despite their pan-European mission. An example of a

³ Based on an interview with Janos Lukacs, the Executive Director of the Carpathian Foundation, 8 May 2008. Additional information is available on the organisation's website at www.carpathianfoundation.org

⁴ More information on the network: EFFECT magazine, vol. 2, issue 1, Spring 2008, p. 25, <http://www.efc.be/ftp/public/Communications/EFFECT/Spring2008/effectspring08creativity.pdf>

foundation encountering this type of problem is the RISE Foundation for rural development.⁵ The mission of the RISE Foundation covers all aspects of conservation and development in the rural world, promoting private investments, the advancement of private property, and cooperation between land managers and rural communities. It currently operates across all 27 EU Member States and has reported to the EFC that it faced a number of challenges during its setting-up phase. Problems were faced in dealing with different legal systems, in drafting the articles of incorporation, in fundraising, and in supporting transnational projects.

Do existing barriers conflict the EC Treaty?

The feasibility study analyses if existing legal and tax law barriers are in conflict with the EC Treaty and whether national legislators could be forced to remove some of them.

As regards the civil law barriers, the European Court of Justice (ECJ) has so far not addressed this question. However, as the feasibility study rightly suggests, it is likely that even if the ECJ would review and question, for example, the existing registration requirements for foreign foundations, those requirements may not even be seen as being in conflict with the EC Treaty (if those requirements are not contrary to the four-factor test set forth in the *Gebhard* case⁶). The ECJ may therefore not be able to help removing important existing civil law barriers.

In the field of tax law, the ECJ has developed the following non-discrimination principle: A foundation resident in Member State X but with activities/income in Member State Z should be treated equally to resident public benefit foundations and should therefore receive tax exemption if it fulfils the respective national tax law requirements in Member State Z (see “Stauffer” case C-386/04). As regards the tax treatment of donors, the recent “Persche” ruling (C-318/07) just confirmed that national tax laws should provide for equal tax treatment of donations going to resident and foreign EU-based public benefit foundations as long as the foreign beneficiary organisation fulfils the respective national tax law requirements of the taxpayer’s country.

However, as the feasibility study rightly outlines, such a non-discrimination solution as developed by the ECJ is not easy to implement because of the different requirements for tax exemption for foundations and their donors in the different Member States. In addition, it is not at all clear when and how such ECJ decisions have an impact in all Member States as the ECJ only has the competence to interpret a potential conflict of a national rule with the EC Treaty in a very specific national case. Member States will find different interpretations of the ECJ jurisprudence and will find individual and diverse ways to react to ongoing infringement procedures. Therefore, the EFC is of the opinion that legislators must act on several fronts to respond to EU reality and to ensure that national laws do not conflict with the EC Treaty. National legislators must ensure that national foundation laws are in line with the EC Treaty and in addition, European legislators should develop a European legal form for foundations.

The EFC believes that a European Foundation Statute, drafted by European legislators in consultation with the foundation sector, will enable cross-border work free of red tape. This legislative approach must obviously work in parallel with the courts and the European Commission infringement procedures. However, a EU-level regulation would be a more effective approach to solving also the legal and administrative problems faced by foundations. Current judicial rulings and infringement procedures focus on tax problems while the European Foundation Statute would offer an appropriate tool for cross-border cooperation and would remove existing civil law barriers.

Economic relevance of existing barriers

To sum up: There are legal barriers to cross-border activities of foundations and their founders both in civil law and in tax law. The report correctly states that some of the barriers can be overcome, for example, by involving consultants in different Member States, however this leads to considerable compliance costs. The calculable cost of existing barriers as suggested by the study

⁵ <http://www.risefoundation.eu/>

⁶ In the *Gebhard* case, the ECJ proposed a four-criteria test that decides under which conditions a Member State may derogate from the freedom of establishment by imposing its own mandatory laws, if these are 1) applied in a non-discriminatory manner 2) justified by imperative requirements of the public interest 3) suitable to attain their objective and 4) compatible with the principle of proportionality. See ECJ case C-55/94, which can be downloaded at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61994J0055&lg=en

is: €90,000,000 to €101,700,000 per year. However, one has to bear in mind that these estimations do not even take into account the costs of transfer of seat, of reduplication, or of undergone activities/initiatives. We are of the opinion that the actual costs (when taking into account non-calculable costs) are certainly much higher.

5. Comments on Part 5.A: The European Foundation Statute as the preferred option

The study reviews five policy options as to how cross-border barriers could be addressed. In comparing the different models (1) maintaining the status quo; (2) harmonisation; (3) multilateral or bilateral treaties; and the European Foundation Statute (4) without tax-exempt status or (5) with tax-exempt status, the study suggests the European Foundation Statute as being the preferable policy option.

We fully agree with the conclusion of the study that the European Foundation Statute is the preferable policy option. The EFC does not even consider the other three described scenarios as a viable option for the following reasons:

-Maintaining the status quo would leave foundations and their funders with existing barriers. The existing legal framework is not suited to respond to the specific needs of foundations and their founders in today's European reality. We do not believe that information campaigns or soft law approaches such as codes of conduct or accreditation models could reduce costs. Such approaches would in the case of cross-border operations not provide the necessary legal certainty and could hardly convince national governments to provide for equal tax treatment of foreign-based and local public benefit foundations and their donors.

-Harmonisation of foundation laws is neither wanted nor feasible. Foundation law differs considerably even though common key elements can be identified. The differences are rooted in different cultures and histories and are seen as an asset. Harmonisation of laws in the field would be difficult due to the diverse realities, such as the existence of private interests or commercial foundations in some national jurisdictions. Politically unrealistic in a Union of 27 countries and over 50 foundation laws, it could only result, if at all, in a minimum common denominator that would not solve current problems. In addition, there is no need to push for removal of different legal traditions at the national level if there are other tools to ease cross-border operations of foundations and their funders.

-The Treaty option (bi-lateral or multilateral) is unrealistic as experience shows that not all countries choose to sign such treaties. Obviously this option was not retained in the discussion on the other statutes.

We therefore see the European Foundation Statute as the only real option to overcome existing barriers in the most effective way. A European Foundation Statute could help overcome existing legal and administrative barriers. It would be an optional, public benefit tool, governed mainly by European law and complementing national and regional laws. The European Foundation Statute would allow foundations and funders established or operating in more than one country to adopt the form of a European Foundation registered in one EU Member State but recognised in the other 26. It would then be able to operate EU-wide according to a single set of rules and a coherent management and reporting system.

We support the feasibility study conclusion that a more comprehensive European Statute would lead to the highest cost reduction. The European Foundation Statute should be modelled in the spirit of the rather comprehensive and European draft of the proposed Private Company Statute but tailored to the specific needs of foundations.

Added value of the European Foundation Statute

The European Foundation Statute would offer a solution to key problems faced by organisations and initiatives that want to act cross-border, not least to have a cost-effective and efficient legal form that allows operations in different countries. Several initiatives have been delayed by the lack of an adequate European legal tool. The European Foundation Statute would be beneficial for advancing foundations' and funders work as well as the future of Europe as follows:

- **For foundations to facilitate and increase cross-border work and cooperation.** Such a European tool would ease foundations' **cross-border activities**. Foundations

from different regions address global issues that do not stop at national borders, such as environment, migration and research. These issues could be dealt with more effectively in **cooperation** with foundations in neighbouring countries, or communities facing similar situations. A European statute would encourage them to add a **European dimension** to their entities and activities.

- It would offer **legal certainty** and significant **cost savings** due to its **uniformity** throughout the EU.
- It would be a **trusted** legal tool that would ease cross-border operations.
- It would provide foundations and funders with a **flexible** European legal instrument to design internal governance structures and to **group their organisation and/or to further develop** their organisation and activities.
- A European Statute is needed to ensure that foundations receive equal treatment in the internal market regulation.
- **For donors to help mobilise and channel private assets for public benefit across Europe.** The European Foundation Statute would be a tool to meet the international interest of founders, their rising geographical mobility during their working life and upon retirement, and the related increased geographical spread of their assets across Europe and beyond.
- **For citizens to serve as a robust and flexible management tool to support citizen action at EU level and beyond.**
- **For companies to serve as a dedicated tool to develop a coherent European community.** The internationalisation of companies, which in many cases have to create foundations in the different countries with the related complexity of maintaining a coherent policy and management among the different branches and effectiveness.

Overall:

- **To support European public good**
- **To underpin EU competitiveness: knowledge society, research and innovation**
- To have a **benchmark of accountability, transparency and good governance** in channelling domestic and foreign financial funds for public purpose across the EU and beyond.
- **To help the pooling of private resources** to address pressing needs and global policy issues in areas such as research, education and innovation, mobility and migration, the environment, cultural and linguistic diversity and dialogue, security and development.
- **To clarify the concept of foundation** and provide a common definition of "public benefit purpose foundations" across the EU as currently the term "foundation" is much too loosely used to refer to very diverse undertakings, ranging from personal benefit to commercial endeavours.

Tax treatment of the European Foundation

A European Foundation Statute is most likely to only address legal elements, as it is the case for other statutes and proposals, such as the European Economic Interest Grouping (EEIG)⁷, the European Company (Societas Europaea, SE)⁸, the European Cooperative Society (Societas Cooperativa Europaea, SCE)⁹, and the proposed European Private Company

⁷ Council Regulation (EC) no. [2137/85](#) of 25 July 1985 on the European Economic Interest Grouping (EEIG), Official Journal C 285.

⁸ Council Regulation (EC) no. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), Official Journal L 294.

⁹ Council Regulation (EC) no. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Official Journal L 207.

(Societas Privatae Europaea, SPE)¹⁰. The introduction of a European Foundation Statute, whereby a European Foundation would have a legal personality recognised in all Member States, will in itself primarily help overcome the civil law barriers of foundations.

Direct taxation is a competence of the Member States not the EC. The objective of the EFC in the field is to ensure that a European Foundation will be treated like a tax-exempt national foundation. This is also the approach suggested by the feasibility study: *“Instead of harmonisation it seems to us that only a non-discriminatory solution is both realistic and reasonable.”* Through such a non-discrimination solution, the European Foundation would receive the same tax treatment as a tax-exempt foundation in the same Member State. Such a solution provides for consistency between the tax regime of “national law foundations” and the tax regime for the European Foundation.

The Feasibility Study lists the following options of how such a non-discriminatory approach could be implemented:

a) In the European Foundation Statute

One has to bear in mind that first drafts of other European Statutes also included a tax part, but those rules were removed later because no agreement among Member States could be reached. While this approach would be the clearest in theory, it may not be politically feasible.

b) Implementation by a Multilateral Treaty

The tax exemption (equal treatment with local tax-exempt organisations) of a European Foundation could be implemented by a European Foundation Statute which is accompanied by a multilateral treaty of all Member States accepting the status of the European Foundation as a tax-exempt organisation. However, the possibility of such a multilateral treaty being approved by all Member States is very unlikely.

c) “Automatic” implementation in the form of the lowest common denominator of the national tax laws

According to the case law of the ECJ, foreign foundations must receive equal tax exemption compared to local exempt organisations if this foundation meets all the other requirements of a national tax-exempt foundation.

Thus theoretically the European Foundation would be automatically tax-exempt in all Member States, if the European Foundation Statute were to combine all requirements of the tax law of the Member States (de facto lowest common denominator), i.e., allowing only such public benefit purposes as are allowed in all Member States, prohibiting remuneration for the board of directors, allowing only such purposes which are regarded as “public benefit” in every Member State, etc. The requirements of tax law could be mandatory for all European Foundations or be part of a “model statute”, leaving it open to the founder whether she/he wants the additional advantage of the status of a tax benefit foundation in all Member States.

At first sight, such a tax-exempt European Foundation may seem unrealistic, because it would imply the “lowest” and therefore strictest denominator. In addition, it may seem impossible to even identify the common denominator, looking at the various differences in the respective national tax laws. However, national foundation tax laws within the EU have more similarities than differences, and certainly more similarities than the national foundation laws. Such an attempt may be worth reviewing, considering immediate tax exemption in all Member States.

d) Implementation of non-discriminatory approach by national tax laws

Even if the European Foundation Statute is adopted without any tax provisions, a European Foundation should be treated like a resident public benefit foundation and should therefore receive tax exemption if it fulfils the respective national tax law requirements. Following the Jurisprudence of the ECJ in the “Stauffer” case (C-386/04), a European Foundation (wherever it may be based) should be treated equal with resident public benefit foundations and should therefore receive tax exemption if it fulfils the respective national tax law requirements. As regards the tax treatment of donors, the recent “Persche” ruling (C-318/07) just confirmed that national tax laws should provide for equal tax treatment of donations going to resident and foreign EU-based public benefit foundations as long as the foreign beneficiary organisation fulfils the respective national tax law requirements of the taxpayer’s country.

¹⁰ Proposal for a Council Regulation on the Statute for a European private company COM(2008) 396/3 http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf

National tax laws would need to be implemented accordingly to provide for non-discriminatory tax treatment of the European Foundation and its donors. As the feasibility study outlines, the tax treatment of a European Foundation and its donors would be decided by each Member State on a case-by-case basis, and it would be possible for European Foundations to be eligible for tax incentives in some Member States and not in others.

6. Comments on Part 5.B: suggested content of a European Foundation Statute

According to our understanding, part 5.B should have focused on the content of a European Foundation Statute and not the potential content of a Code of Conduct.

The 2005 EFC recommendations on how a European Statute could look like can be downloaded at <http://www.efc.be/ftp/public/Legal/EuropeanStatuteUpdated.pdf>. The EFC recommendations are considered an evolving document. They are currently being reviewed in the light of new legal analysis and research.

When it comes to the question of how **autonomous** and detailed a Statute on the European Foundation should be, the EFC is of the opinion that the statute should be comprehensive as regards most aspects of foundation law and should only refer to national law in as few legal fields as possible (e.g., tax law, insolvency law). The European Foundation would be autonomous from national foundation law regimes and would only refer to national laws for certain matters. This will allow founders to save compliance costs by using one legal tool and arrange for a governing structure which would be comparable in all Member States rather than having to deal with 27 different European Foundation structures throughout the EU.

The EFC fully supports the **five basic elements** outlined by the feasibility study. A European Foundation should:

1. Have legal personality (with full capacity and limited liability) which is acquired upon registration.
2. Promote public benefit purposes only.
3. Have no “formal” membership
4. Be supervised by an authority
5. Be established by registration

Apart from these five fundamental criteria, we agree that there are a number of questions for which certain alternative solutions are possible. We would like to highlight that we prefer the following options with regard to:

Open list of public benefit purposes: The description of public benefit should provide for an open list of public benefit purposes in order to allow for flexibility. Defining what is meant by a public benefit purpose by means of an open list, would make the review of such decisions the task of the European Court of Justice.

Minimum capital: We are of the opinion that a certain minimum amount of capital could indeed be a sign of the seriousness of the purpose of the European Foundation, and could strengthen trust in a European Foundation. Such a minimum capital should however not prevent smaller initiatives to start operations.

“European” Dimension: There are good arguments in favour of a European dimension: a mere “national” foundation will not carry out cross-border activities and therefore does not need a European legal form which aims to overcome barriers to cross-border activities. In addition, it may be easier to find political agreement on a proposal that does not allow a foundation which has only local activities to be set up as a European Foundation. The need for a European dimension would also be fully in line with the subsidiarity principle. The European Foundation would not compete with national foundation forms.

Options for the Governance of the Foundation: With regard to governance, the EFC is of the opinion that clear basic governance requirements should be drafted for the European Foundation, which could serve as a benchmark for the whole foundation sector in Europe and beyond. It should then be up to the founder/the board to structure details of internal governance rules in the bylaws of the EF. Having very detailed binding rules for internal governance would seem to be over-regulating the European Foundation with a one-size-fits-

all approach and not offering enough flexibility. While foreseeing a high degree of **uniformity of the statute externally** in terms of creditor protection through a minimum capital or representation of the European Foundation towards third parties, it seems important to leave some **flexibility internally** for founders and the board to design internal affairs in the bylaws.

State supervision: We believe that a central European state supervisory authority would be able to acquire a good reputation and could develop a uniform standard in its supervisory practice. Alternatively, the oversight over European Foundations could be delegated to the national level.

Economic activities: We believe that a European Foundation should be able to undertake economic activities either directly or through another legal entity provided that any income or surpluses are clearly and directly used in pursuance of its public benefit purposes. A significant amount of existing foundations undertake economic activities also across borders. It is therefore vital that a European Foundation Statute would allow such activities.

Conversion and merger: The Feasibility Study does not address in much detail how a conversion of an existing foundation to a European Foundation could work or how existing foundations/other legal entities could merge with a European Foundation. As the feasibility study mentions, it is likely that the process would be similar to the merger of existing national foundations or the conversion/transformation of foundations to other types of public benefit entities or the amendment of statutes. However, some more details would have been worthwhile considering. See also Article 5 in the EFC recommendations in this regard <http://www.efc.be/ftp/public/Legal/EuropeanStatuteUpdated.pdf>.

Member States would have to take steps to allow conversion of existing public benefit foundations into European foundations and for mergers (between both national foundations and between national foundations and foundations established in other EU countries) at least where such mergers were to result in a European Foundation.

Seat and transfer of seat: The Feasibility Study does not address in much detail the issue of “seat” and transfer of seat: Would a transfer of seat be allowed and if yes, under what circumstances? Would the registered office and the principal place of activity have to be in the same Member State? Would a transfer have to result in the transfer of both, the registered seat and the principal place of activity? This option of mandatory joint transfer of registered seat and principal place of activity (which was applied in the European Company/SE following the so-called “real seat” principle) may not be in line with recent case law of the ECJ. Another option could be to separate the registered office and the principal place of activity in a way that they could be in two different Member States (following the so-called incorporation principle) and could be transferred separately.

We are of the opinion that the transfer of seat to another Member State shall not result in the winding up of the EF or the creation of a new legal entity.