



## The European Foundation Statute: Frequently Asked Questions (FAQs)

*Produced by*  
**The European Foundation Centre (EFC)**  
**Advocacy Task Force**  
*March 2009*

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### **Acknowledgements**

The EFC wishes to thank its members and partners for their invaluable collaboration and contributions to this report, including the foundation representatives who serve on the EFC Advocacy Task Force:

Luc Tayart de Borms, Managing Director, King Baudouin Foundation, Chair

Francis Charhon, Chief Executive Officer, Fondation de France

José Manuel Fresno, Director General, Fundación Luis Vives

Mall Hellam, Executive Director, Open Estonia Foundation

Isabel Mota, Trustee, Fundação Calouste Gulbenkian

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## **Foreword**

Why is a European Foundation Statute (EFS) needed? What advantages is there to opt for a European Statute? What should the Statute look like? These are some of the frequently-asked questions (FAQs) about the development of a EFS.

The EFC Advocacy Task Force has released this short paper to answer these questions and address both misconceptions and reservations about what an EFS can help achieve.

The FAQs paper covers three complementary “chapters” as follows:

Why should we care about a statute? What’s in it for foundations for others?

What are potential concerns / misconceptions about the EFS?

A short practical A-Z guide to key elements of the EFC’s Proposal for a EFS

For further information and question foundations and other interested parties are invited to contact the EFC Advocacy Task Force secretariat, 78, avenue de la Toison d’Or, 1060 Brussels, Belgium t. +32.2.512.8938, email: [eu@efc.be](mailto:eu@efc.be)

## 1. Why should we care about a European Foundation Statute (EFS)?

Since 2001, the European Foundation Centre (EFC)<sup>1</sup>, individual foundations and national associations of foundations have urged EU institutions to propose and adopt an EU regulation, known as the European Foundation Statute (EFS), enabling foundations and donors to advance their work and cooperation across borders. The European Commission has commissioned a feasibility study on the matter, which conclusions should be made public mid December 2008. The Max Planck Institute for International Private Law (MPI) and the Centre for Social Investment (CSI) at the University of Heidelberg began working on the study in autumn 2007.

### Why is a European Foundation Statute needed?

Like other entities, foundations are increasingly working across borders, and have every right to operate on a European level playing-field. The internationalisation of the foundations' work is a direct result of:

The globalisation of the complex problems foundations contribute to address (e.g. migrations, global health issues, environmental questions).

The international interest of their founders, their rising geographical mobility during their working life and upon retiring; and the related increased geographical spread of their assets across Europe and beyond.

The EFS could foster the removal of national barriers to foundations' European cross-border initiatives and would be specially designed to conduct European transnational work.

Did you know that the biggest obstacles for donors and foundations operating in more than one EU Member State at their own perceptions are:

- Legal insecurity over national recognition of 'general interest' nature or "public benefit" status of resident foundations' cross-border work
- Administrative burden and cost of foundations setting up several branches in other countries
- Struggling with different national and even regional laws. New European initiatives delayed by lack of appropriate legal tools
- Difficulty in recognising foreign foundations' legal personality
- Barriers in foundations' fiscal environments. Non-resident bodies suffer national tax discrimination

In 2005 there were some 110,000 foundations (or c 4 foundations per 10,000 people) in the EU. Foundations spend between €83 billion and €150 billion annually, over twice as much as the US foundation sector. Foundations are also big employers with between 750,000 to 1 million direct full-time employees in the EU.<sup>2</sup> And foundations give grants or capital support to employment, creating and sustaining initiatives in their fields.

The foundation sector in Europe has seen a major boom over the past 10 to 15 years, and figures suggest there has been strong growth since the 1980s. Around one-third of all foundations in EU countries, including Germany, Finland, France and Belgium, were created in just the last decade<sup>3</sup>.

The growing number of foundations is present in nearly every areas of people's life from pre-school to higher education and research, from recreational activities, culture and sport to

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<sup>1</sup> [www.efc.be](http://www.efc.be)

<sup>2</sup> Feasibility Study on a European Foundation Statute 2009  
[http://ec.europa.eu/internal\\_market/company/eufoundation/index\\_en.htm](http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm)

<sup>3</sup> [www.efc.be/ftp/public/EU/EURweb/Facts\\_Figs\\_publication.pdf](http://www.efc.be/ftp/public/EU/EURweb/Facts_Figs_publication.pdf) (264kb)

health and social well-being; from local to global sustainable development. The EFS could support the development of European cooperation and integration in these fields of direct concern to people.

It would also give foundations equal rights and opportunities in Europe which were granted to other legal entities for which a European Statute has been adopted or is under discussion.

Finally this will contribute to developing a common definition of 'public-benefit purpose' foundations across Europe which clarifies the terms and concept of foundations (own resources, independent governance, public interest) as currently the term 'foundation' is much too loosely used to refer to very diverse undertakings, ranging from personal benefit to commercial endeavours.

### **What are the advantages of opting for a European Foundation (EF)?**

Opting for an EF could reduce administrative and legal costs significantly. It would allow foundations and funders established or operating in more than one EU country to merge or form a new foundation or joint subsidiary, thus operating EU-wide according to a single set of rules and a unified management and reporting system. So legal and practical constraints stemming from multiple applicable legal systems could be avoided. Foundations and other interested parties would be able to expand and restructure their cross-border operations without having to set up a network of subsidiaries governed by different national laws.

The EFS advantages:

- (for foundations) facilitate cross-border work and cooperation
- (for donors) help mobilise and channel private assets for public benefit across Europe, become a tax-effective scheme for cross-border donations
- (for citizens) provide a robust and flexible management tool to support citizen action at EU level and beyond
- (for corporations) provide a dedicated tool to develop a coherent European community investment policy/programme
- (for all) offers a European label that is easily recognisable throughout the EU

### **Why should any government prioritise the EFS: what's in it for them?**

An EFS will:

Promote the use of private resources and investment for public purposes, retain European funds and attract foreign funds, donors and foundations

Help develop attractive legal system for foreign investors by removing legal obstacle and administrative barriers and cost for public-benefit initiatives and investment

Assist and encourage cross-border cooperation between European border regions which face similar social and economic concerns. European territorial cooperation is now possible for local authorities through the new European Grouping of territorial co-operation (EGTC)<sup>4</sup>, for companies with the Company Statute, but not yet for foundations.

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<sup>4</sup> The EGTC is a new legal instrument which aims to facilitate cross-border, transnational and/or inter-regional co-operation between regional and local authorities. The latter would be invested with legal personality for the implementation of territorial cooperation programmes based on a convention agreed between the participating national, regional, local or other public authorities. See [http://ec.europa.eu/regional\\_policy/sources/docoffic/official/regulation/pdf/2007/gect/ce\\_1082\(2006\)\\_en.pdf](http://ec.europa.eu/regional_policy/sources/docoffic/official/regulation/pdf/2007/gect/ce_1082(2006)_en.pdf) (115kb)

### **Why should the European Commission make the EFS a priority on the EU Agenda?**

What can Foundations do for Europe? Foundations can support and advance the Europe Project, but what can Europe do for foundations?

Have a benchmark of accountability, transparency and good governance in channelling domestic and foreign financial funds for public purpose across the EU and beyond

Help the pooling of private resources to address pressing needs and global policy issues in areas such as research, migration, the environment, security and development

Support citizens' participation and projects at European level

Support European public good

### **What would be the impact of not having a European Foundation Statute?**

Limited and non-cost-effective cross-border activities for foundations and donors

Waste of resources and a missed opportunity to channel private wealth (billions of euros) from the baby-boomer generation into public-benefit activities

Potential redirection of European private wealth to other regions

Lack of recognition of the role that public benefit foundations are playing and could play in Europe

Continued discrimination against foundations across Europe and in the EU 'single market'

Another illustration of Europe's failure to connect with its citizens (by not providing a new mechanism which would support European public good, citizen-participation, and address European social concerns)

An increased gap between citizens and EU

### **What would a European Foundation be like?**

As the European Union has not yet tabled any official proposal for a European Foundation Statute (EFS), we can only envisage what it would be like, based on the European Foundation Centre (EFC) proposal for a Regulation on a EFS<sup>5</sup>. This also take into consideration existing Statutes designed for European Companies, European Cooperatives, the European Economic Interest Grouping, and the text initially proposed for the Statute for a European Association<sup>6</sup> which was withdrawn from the EU legislative process in 2006.

#### **a) Pan-European**

European Foundations would be recognised throughout the EU, have the same statutory rights and be governed by the same provisions. Donors, beneficiaries, partners, and public authorities can therefore be confident their rights would be protected.

#### **b) Optional**

National and regional laws governing foundations will continue to exist and will not be changed as a result of this new European-level law. The EFS would be designed particularly to apply to cross-border operations and would be therefore particularly suited for foundations and donors which intend to or already carry out such activities.

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<sup>5</sup> <http://www.efc.be/efs/aboutEFS.htm>

<sup>6</sup> See: <http://ec.europa.eu/enterprise/entrepreneurship/coop/statutes/statutes-association.htm>

### c) Public benefit

A key difference between public-benefit foundations and other forms of non-governmental organisations is that they are run for the benefit of the public at large and not the founders/investors or members.

Public-benefit foundations are independent, separately-constituted non-profit bodies with their own established and reliable source of income, usually but not exclusively, from an endowment, and their own governing board. They distribute their financial resources for educational, cultural, religious, social or other public-benefit purposes, either by supporting associations, charities, educational institutions or individuals, or by operating their own programmes (this functional definition was developed by the EFC).<sup>7</sup>

Public-benefit foundations form the vast majority of foundations in Europe<sup>8</sup>. They exist and have a legislative base in most of EU Member States except countries with a common-law background, (e.g. Cyprus, Ireland, the UK) where the focus is on the foundation's public-benefit character and activities, which can take different legal forms (e.g. incorporated or unincorporated associations, trusts, companies limited by guarantee, or the newly created charitable incorporated organisations<sup>9</sup> etc)

### d) Flexible and respectful of donors' intentions

The structure and operational nature of EFs would largely be defined by its own statutes (bylaws) in line with the general provisions of the proposed Regulation. This leaves founders of the EFs to establish their own rules according to their own objectives and working methods.

### e) Governed by new EU law

EFs would be mainly governed by a proposed Regulation on the Statute for a European Foundation (directly applicable in national jurisdictions). For areas not addressed by the proposed regulation, the European Foundations would be subject to relevant laws in Member States in which it is registered and based. So it would have the same rights, privileges and obligations as a foundation formed under the law of that state, for example in respect of tax, labour, intellectual, commercial and industrial property laws. While it would be registered in one EU country an EF would be recognised in all 26 other Member States.

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<sup>7</sup> "Working with Foundations in Europe: Why and How", EFC, Brussels 2001

<sup>8</sup> In approximately half of the EU countries foundations can be set up for public benefit only, whereas in other Member States foundations may also be set up for private purposes.

<sup>9</sup> Charities Act 2006 [www.opsi.gov.uk/acts/acts2006/ukpga\\_20060050\\_en\\_17](http://www.opsi.gov.uk/acts/acts2006/ukpga_20060050_en_17) and [www.opsi.gov.uk/ACTS/acts2006/20060050.htm](http://www.opsi.gov.uk/ACTS/acts2006/20060050.htm)

## 2. What are your concerns about the European Foundation Statute (EFS)?

### Harmonisation?

Will the EFS change or harmonise national and regional foundation laws across Europe?

- No. the EFS would be a new legal form which complements existing national and regional laws governing foundations in the 27 Member States. The harmonisation of foundation laws is neither wanted across the sector, nor feasible as the existing 50 legislations cover very different types of foundations and trusts (public utility, church, corporate, private interest, commercial etc.) which cannot be found in all the jurisdictions.

### Red tape and cumbersome procedures?

- An EF could register in any EU Member State. This gives its founders considerable freedom to choose the best place to register. This may be close to its founder's residence or operations, in a third 'neutral' country, or in a country where the operating environment is suitable for the EF's operations and goals. The registered office can subsequently be moved to another EU Member States by a simple board decision.

### Authoritarian EU Legislation?

- As any other foundation, the functioning and operations of an EF would be governed by its own bylaws as defined by its founders within the framework of the law. Basically, the founder(s) decides upon the EF's public-benefit purpose, define the conditions for the admission, expulsion and resignation of board members; rights and obligation of the board and; the function and structure of any additional organ; procedures for amending the EF's statutes; grounds for dissolution; the distribution of net assets after winding up; the rules applying to calling and conducting board meetings.

### Pay-out?

Will the EFS include pay-out rules?

- No. The EFS regulation would not include any provision on minimal capital or income spending rules.

### Taxes & unfair competition?

Where would the EFs be taxed? Would it pay more/less tax than foundations set up according to national/ regional legal provisions?

The EFs would not pay more tax than other public benefit foundations. The EFs would be taxed according to national rules governing foundations. EFs would be treated like any other foundation under fiscal laws in countries where the EF operates. Thus the EFS would help to remove some national tax barriers which currently discriminate non-resident foundations operating on a European level.

### A Statute with –or without tax provisions?

None of the other existing proposed statutes (European Company, Cooperative, Private Company Statutes) addresses tax issues. Direct taxes are a competence of the Member States subject to their compliance with the EC Treaty four freedoms and non-discrimination rules. The introduction of any tax provision in an EU text requires the unanimity of the 27 Member States. This is both technically challenging due to the various tax regimes and procedures (deductibility/ tax credit/ no deduction at all) and politically unlikely. This is why legal experts and foundation practitioners favour a non discriminatory approach in the field of taxation. This implies that a European Foundation would benefit from the same tax-treatment as public-benefit resident foundations in the country in which it is established.

### **Impact on international activities?**

Would the EFS have any impact on foundations' activities outside the EU, and would it facilitate their activities in third countries?

- The EFS aims to assist collaboration and cooperation between European funders and foundations for European and international activities. By cutting off red tape to set up pan-European cooperative funds it could also facilitate cooperation between foundations in Europe and international partners to work on joint international and development work.

### **Local focus only?**

Most foundations have a local/national mission. What added-value would an EFS bring?

- The EFS would provide a tool recognised EU-wide to form medium or long-term cooperation projects with other local foundations in neighbouring countries, or communities facing similar geographical or economic situations (e.g. inner-cities, remote or rural areas, regions in decline, high-technology and innovation areas).

### **Cultural diversity?**

Will the EFS have any impact on the language in which a foundation operates and reports on its activities? Particularly regarding official community/regional languages which are not official EU languages (e.g. Catalan, Welsh)

- In their official dealings, EFs will operate and report in the language(s) of the country/community where it is registered and has its headquarters.

### **Disengagement of the state & decreasing of public funding?**

Would the development of EFS imply a disengagement of public authorities and state funding?

Foundations' role at local, national or even European and international level is not to substitute public spending – their combined financial assets and expenditure do not compare with state budgets and public expenditure. Foundations' roles -as varied as they can be- are aimed primarily at: social and policy change; the promotion of pluralism; supporting innovation; the preservation of traditions and cultural identities as well as complementing state action by partnering with public authorities in neglected areas or addressing the needs of certain sections of society<sup>10</sup>. Foundations should act in fields where other institutions, notably the public sector, are unable or less capable to intervene. Foundations can play an important and effective role as facilitators for change. This role is mainly based upon their capacity to act differently, as they are not confronted with short-term elections, share-holders pressure, or fundraising strain.

### **What about EEA/EFTA countries?**

Will European Economic Area (EEA)\*/EFTA countries which are not EU members recognise the EFS, and grant European foundations the same rights as they would expect in any other EU country?

- As an internal market regulation covering company law, the proposed regulation on the EFS would also apply in the EEA countries (Iceland, Liechtenstein, Norway).

\*Iceland and Liechtenstein, Norway – EFTA: EEA countries plus Switzerland

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<sup>10</sup> See *The Politics of Foundations, A Comparative Analysis*, H. Anheier and S. Daly, Routledge, 2007, 349p.

### **3. A to Z guide to the EFC's Proposal for a European Foundation Statute**

#### **Who can create a European Foundation (EF)?**

- Individual donors, existing foundations, associations, public authorities, and EU-domiciled companies will be able to set up an EF by will or deed, and merge existing foundations or convert a national foundation into an EF

Can private-purpose, commercial, political and corporate foundations create a EF?

-Yes. Individual and legal entities can create an EF, provided its purpose is solely public-benefit as defined in the proposal.

#### **For what duration?**

- An EF can be set up in perpetuity or for limited duration.

#### **Does an EF need to have a minimum capital stake?**

- An EF's capital can be any sum over the minimum €50,000. (This amount was set in the EFC original proposal before the 2004 EU enlargement and can be reviewed and adapted to foundations standards in a Union of 27 Member States)

#### **Where do you register?**

-In any EU Member State. An EF needs only to register once in one Member State and can operate branches in various EU countries without having to set up subsidiaries under that country's company or foundation law. An EF will register in the country where it has its headquarters.

#### **What is the decision-making structure?**

- An EF has a simple and basic governing structure. An EF is governed by a board comprising at least three members. The governing board is responsible for all decisions regarding the proper administration and conduct of the EF's affairs. The governing board manages the EF and represents it in dealings with third parties and in legal proceedings. Decision-making rules are set by the foundation's by-laws, which define the conditions for admitting, expelling governing board members and their resignation; the rights and obligations of the governing board and its members; the function and structure of any additional organ; the rules applying to calling and conducting meetings of the governing board.

#### **Who's liable?**

-The liability of an EF is limited to its assets. The EFS protects members of the governing board who are not personally liable (to the EF and to injured third parties) except in cases of fraud, abuse, grossly negligent performance, or neglect of their duties.

#### **What are the transparency and accountability requirements?**

Will the EFS mean foundations will also have to be accountable to the EU as well as to the Member State in which there are based?

An EF must keep full and accurate records of all its financial transactions. It draws up and returns to the designated registration authority annual statements of account and an annual activity report, within 12 months from the accounting year's end. The annual activity report should list the grants distributed, taking into account the beneficiary's right to privacy. Large EFs with substantial assets and/or annual revenues will have their accounts professionally audited.

### **Where is an EF taxed?**

-For tax purposes, an EF will be treated as any other foundation under the fiscal laws applying in the countries where it operates. EFs must pay taxes in the countries where they operate.

### **What are the provisions for employment contracts and pensions?**

-These are not covered by the EFS regulation but are subject to the national law of the countries in which the EF operates.

### **How to wind up an EF?**

-The EF's governing board may decide to dissolve it if its objectives have been achieved or cannot be achieved; its pre-agreed lifespan has expired; or a total loss of assets has occurred. The board's proposed dissolution requires the registration authority's agreement. On dissolution, and once creditors have been paid in full, any remaining assets will be used for public-benefit purposes as near as possible to those the EF was addressing.

### **Who will supervise an EF?**

Who will have authority to ensure EFs adhere to the terms of the EFS regulation?

-The EF's governing board is responsible for all decisions regarding the EF's proper administration and conduct. The registration authority will also maintain a register of EFs, receive and hold public records, documents and other information needed to register an EF and its subsequent operation and to make them available for public inspection on request, and otherwise ensure that this regulation's requirements are adhered to. Any conflicts, allegations of misconduct or fraud will be dealt with by the courts.

### **How will the EFS be implemented in different Member States?**

-EFC's proposal calls for a regulation to apply directly in the countries concerned

The full text of the EFC's proposal for a European Foundation Statute is available on the EFC website at: <http://www.efc.be/SiteCollectionDocuments/EuropeanStatuteUpdated.pdf> (489kb)