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## **EUROPEAN FOUNDATION CENTRE**

# **PROPOSAL FOR A REGULATION ON A EUROPEAN STATUTE FOR FOUNDATIONS**

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## **A. INTRODUCTION**

This draft *Proposal for a Regulation on a European Statute for Foundations* is promoted by the European Foundation Centre (EFC). The proposal was originally developed by the European Union Committee and its Legal and Tax Task Forces as part of their project: "Enhancing the Legal Environment for Independent Funders in Europe" in 2005.

This draft sets out basic elements of a potential new complementary legal form of a European foundation. This European legal form would be an **optional** and **additional** instrument that funders and foundations active in more than one EU Member State may want to use instead of setting up several foundations according to national law in different EU countries. A European legal form of a foundation would also be considered as an instrument that would improve the cross-border activity of funders and foundations in Europe.

### **1. Background**

This draft *Proposal for a Regulation on a European Statute for Foundations* suggests how a possible European Foundation Statute (EFS) could look like.

The European Commission is in the process of taking the decision as to whether it will draft an EFS Regulation for the European Parliament and Council for review. The EFC clearly calls on the European Commission to undertake its internal impact assessment on the European Foundation Statute in 2010, and to present a draft regulation for approval by the Council and the European Parliament in due course.

### **The feasibility study on the EFS**

The European Commission published a feasibility study for a possible European Foundation Statute in 2009, which was undertaken by the Max Planck Institute of International Private Law (MPI) and Centre for Social Investment (CSI) at the University of Heidelberg. The study examines regulatory differences in foundations' operating environments, internal market barriers, and their costs. It assesses the foundation sector's scale and economic weight plus the impact a Statute would have on the sector and European Union's economy.

### **[The Feasibility study on the European Foundation Statute](#)**

#### **[EFC comments on the study](#)**

#### **Key findings of the feasibility study:**

- (1) The European foundation sector is a major economic force and makes significant contributions to the public good of Europe.
- (2) The public benefit foundation is the only type of foundation which is accepted in every Member State and in practice public benefit foundations are the most important foundation type.
- (3) In the 27 Member States considerable regulatory differences can be found. However, as regards the public benefit foundations there are also important similarities which overall are more substantial than the remaining differences.

(4) There are legal barriers to cross-border activities of foundations of the Member States both in civil law and in tax law. As in company law, most of the barriers can be overcome, but this leads to compliance costs which will often be higher than they would be in company law, given that the legal and personal environments vary (foundation and tax laws of the Member States seem to have more legal uncertainties inter alia because of much less case law and fewer specialised lawyers, and because board members of foundations may be less experienced in legal issues).

(5) The calculable cost of barriers against cross-border activities of European foundations ranges from an estimated €90,000,000 to €101,700,000 per year. Additionally, there are incalculable costs (costs of foundation seat transfer, costs of reduplication, psychological costs, costs of failure, etc.) which are certainly higher.

(6) Five policy options emerge for addressing cross-border barriers and thereby stimulating foundation activities. These policy options differ substantially in terms of their costs as well as in their legislative and administrative implications. In comparing the various models, the European Foundation Statute seems to suggest itself as the preferable policy option.

(7) Apart from the reduction of the costs for cross-border activities, a possible European Foundation Statute would have further positive effects on the general governance of foundations and trusts; on the behaviour of donors and giving; on the corporate sector; and on the European economy, especially in the field of R&D.

### **Brief history of the EFS**

Things first started to look more promising after 30 years of deadlock in the field of European company law, when the European Company Statute was adopted in 2001 (2157/2001), as was the European Cooperative Statute in 2003 (1435/2003). The Commission later also prepared a proposal on the European Private Company Statute in June 2008.<sup>1</sup>

In 2001/2002, the European Commission set up a **High Level Group** of Company Law Experts to review current trends in the field of European company law as well as the need for new European legal forms. The Group undertook a consultation, in which the EFC participated and stressed the added value of a European legal form for foundations.

Based on the groups' report, which was published in November 2002, the European Commission presented its **Action Plan** for Company Law and Corporate Governance in May 2003<sup>2</sup>. In this Action Plan the Commission states that it intends to review the feasibility of a separate European Statute for foundations by no later than 2006.

From December 2005 to 31 March 2006<sup>3</sup>, the European Commission undertook a **second consultation** on future priorities in European Company Law and Corporate Governance, and in particular on the relevance of pending proposals and initiatives set out in its 2003 Action Plan, including the need to launch a feasibility study on a European Statute for foundations. Almost a third of all respondents to the consultation were foundations which unanimously urged the Commission to carry out the feasibility study. The EFC and its members participated actively in this consultation (see briefing "Foundations express their support for a European Statute" <http://www.efc.be/ftp/public/EU/Communiques/befc0642.pdf>).

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<sup>1</sup> Proposal for a Council Regulation on the Statute for a European private company COM(2008) 396/3

<sup>2</sup> COM (2003) 284 final

<sup>3</sup> [http://europa.eu.int/comm/internal\\_market/company/docs/consultation/consultation\\_en.pdf](http://europa.eu.int/comm/internal_market/company/docs/consultation/consultation_en.pdf)

The European Parliament had also called upon the Commission to continue work on a European Foundation Statute in a report adopted on 4 July 2006 (A6-0229/2006).

In spring 2007 a call for tenders for the feasibility study on a European Foundation Statute was launched and in **February 2009** EC Directorate-General for Internal Market and Services (DG MARKT) released the EFS Feasibility Study and launched a **third public consultation**. A European Parliament report on social economy notes that there is a need for the recognition of a European statute for foundations to ensure that they benefit from equal treatment in internal market law. In **July 2009** European Economic and Social Committee decided to draw up an ‘own-initiative opinion’ on the EFS. In **November 2009** DG MARKT released the outcome of the public consultation on an EFS: The Foundation sector unanimously supports the European Statute as the most cost-effective policy option for addressing cross-border barriers and thereby stimulating foundations’ activities across Europe. In **January 2010** the Commissioner-designate for Internal Market announced that he will consider giving foundations a European Statute. An impact assessment is awaited in 2010.

The European Commission’s **Single Market Act** (SMA) was published on **27 October 2010** stating that the European Commission “will present proposals regarding a European Foundation Statute by the end of 2011”. The proposal about the European Foundation Statute is one of the 50 initiatives of the SMA, which was drafted under the lead of Commissioner Barnier. The EU plans to re-launch and complete the EU single market and bring it closer to EU citizens. The English version of the SMA is available at [http://ec.europa.eu/internal\\_market/smact/docs/single-market-act\\_en.pdf](http://ec.europa.eu/internal_market/smact/docs/single-market-act_en.pdf)

As far as the foundation statute is concerned the SMA text reads as follows:

#### 2.4 New resources for the social market economy

*“ Proposal No 37: For several reasons relating mainly to the nature of its financing and the preference of shareholders and stakeholders who support projects with a strong technological innovation, the market economy is structured around a variety of different types of legal status (foundations, cooperatives, mutual associations, etc.). The Commission will propose measures enabling the quality of the legal structures concerned to be improved in order to optimise their functioning and facilitate their development within the single market. **The Commission will present a regulation on a European Foundation Statute by the end of 2011** “*

*“Foundation activities have undergone significant developments over recent years and they enable ambitious objectives to be achieved in areas where European creativity and innovation have become crucial to the competitiveness of the Single Market in the global world particularly in the area of research. Administrative costs, registration in another country, the burden of proof imposed on foundations from a Member State seeking to become established in another Member State, and the problems involved in pooling financial resources on a cross-border basis within the EU, are obstacles which today impede the development of foundations in Europe and which a Regulation on a European Foundation Statute would address.”*

The EC impact assessment’s roadmap on the European Foundation Statute which details the context, the objectives and the various policy options can be downloaded at [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2011 Markt xxx european foundation\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2011 Markt xxx european foundation_en.pdf)

### **EFC legal work**

The EFC's legal work began in 2001 with a review of foundations' operating frameworks across the EU, and with the publication of country profiles of the legal and fiscal environments in which foundations operate in the different Member States. These profiles have been extended to all EU Member States and widened in scope in 2007 and 2009. The information provided by this work helped to identify good legal and fiscal rules and practice for public benefit foundations and was the basis for the 2002 EFC's so-called *Fundamental Legal and Fiscal Principles*. These Fundamental Legal and Fiscal Principles were in 2002/2003 translated into a draft *Model Law for public benefit foundations*. The EFC Model Law aims to positively influence the development of new foundation laws as well as the revision of existing foundation laws at national level and contains the basic elements for a *Proposal for a Regulation on a European Statute for Foundations*.

## **2. Rationale**

The following outline arguments in favour of a European legal form for foundations:

### **• Improved cross-border operations for foundations**

The first, and most straightforward, argument in favour of a European legal form for foundations is that such a form would **facilitate the giving and receiving of gifts and grants across borders and would otherwise improve the cross-border operations and activities** of funders and foundations in Europe. In the current context of globalisation, foundations and their funders are increasingly working across borders. However, a number of civil and tax law barriers are hampering their cross-border work. The lack of a proper legislative instrument at European level prevents them from working on an equal footing with other organisations and as a result many initiatives are delayed or even abandoned. The most important barriers are as follows:

- Lack of possibility of a transfer of seat to another Member State
- Difficulty in recognising foreign foundations “legal personality”
- Legal insecurity over national recognition of “general interest” nature
- Administrative burden and cost of foundation

### **• Clarify terms and concepts for public-benefit foundations**

The European Foundation Statute would improve the understanding of what foundations are: organisations with independent governance structures and own, established and reliable source of income, often from an endowment. The Statute would also clarify what activities would be considered as public-benefit, and would thereby result in an improved reputation and better understanding of the sector.

### **• European benchmark of good practice**

The European Statute for foundations can be seen as a benchmark and quality label in terms of governance, transparency and accountability in cross-border work and financing, at a time when the prevention of terrorism financing is of key concerns to national government, European and multi-lateral institutions.

### **• A new instrument for cooperation among funders and foundations**

One cannot predict how many foundations may wish to take advantage of a European statute. However, this does not alter the principled case for such an instrument – the use of which, after all, would be entirely voluntary. In fact, **in practice the case for a European statute is growing**: the EFC is itself eloquent evidence of the coming together of foundations at the

European level, and the well-established practice of **co-funding and engaging in joint activities and projects** is beginning to translate into increased **trans-national collaborative projects** not only within the EU but also in third countries.

- **Equal rights for foundations in comparison with other organisations**

There is really no good reason why foundations should not be favoured as other organisations are by providing them with a European legal form.

**The Statute would also provide the following benefits to EU policies and citizens:**

- **Supporting the democratic life of the Union: European public space**

. The Statute could be a new legal instrument of support for citizens' action and participation at the European level in their various fields of interest, including public health & consumers' rights, rule of law, cultural and other fundamental rights outlined in the Charter of fundamental rights of the Constitutional Treaty of the Union.

- **Channel private wealth into activities for public good**

The Statute would provide the opportunity to channel newly-emerged private wealth (billions of euros) from the baby-boomer generation into public-benefit activities.

- **Underpinning EU competitiveness: knowledge society, research and innovation**

A European Foundation Statute would be a new instrument to pool expertise and resources for European –level work including in those areas, which require increased scaling-up of funds, such as Research & Development, ICT and the promotion of scientific and technological advance.

- **Promoting sustainable socio-economic development and territorial cohesion in an enlarged Europe**

By promoting equal access and quality of access, in today's economic context, foundations aim to work towards a better distribution of wealth, where members of society can find a useful role whatever their talents, possibilities or, indeed, disabilities. For people at risk foundations participate in the development of training and inclusion schemes, allowing them to find their place as fully-fledged socio-economic actors.

See also “The Case for a Long Overdue European Foundation Statute” available at [http://www.efc.be/EuropeanFoundationStatute/Documents/efs\\_case\\_web%20\(2\).pdf](http://www.efc.be/EuropeanFoundationStatute/Documents/efs_case_web%20(2).pdf)

### 3. Legal basis

Politically, there seems little doubt that there would be pressure for the legal basis to be the same as for the other European Statutes, such as the European Economic Interest Grouping<sup>4</sup> and the European Co-operative Society<sup>5</sup> as well as the more recent proposal for a European Private Company Statute (Societas Privata Europaea, SPE)<sup>6</sup>. The legal basis for all of these is the old Article 308 – the “catch-all” Article. According to this Article 308, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures to attain, in the course of the operation of the common market, one of the objectives of the Community (and in case the Treaty has not provided the powers to do this otherwise). The old Article 95, which would require a qualified majority at the Council and a co-decision in the European Parliament, seems to be out of

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<sup>4</sup> Regulation (EEC) No 2137/85 on the European Economic Interest Grouping

<sup>5</sup> Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)

<sup>6</sup> Proposal for a Council Regulation on the Statute for a European private company COM(2008) 396/3

question for the European Foundation Statute since 2006 when the ECJ ruled against Article 95 as the legal basis for the European Co-operative Society<sup>7</sup>.

With the entry into force of the Lisbon Treaty, the legal basis would most probably be **Article 352 of the Treaty on the Functioning of the EU** (TFEU). According to this provision, the Council shall still act unanimously. A novelty with Article 352 TFEU, however, is that the powers of the European Parliament will be increased – it must give its consent. This means that the European Parliament has to approve the Commission's proposal in order for the Council to be allowed to adopt it. The Parliament does not have any formal powers to amend the proposal, but must take it or leave it as it stands. To give its consent, the Parliament votes by simple majority (i.e. by a majority of the MEP's present at the vote in plenary). The power of consent is often said to give the Parliament the power of indefinite delay and veto. If the Parliament does not act or if it rejects the proposal, the act cannot be adopted.

***Where do foundations fit in the internal market – are they covered by the EC-Treaty?***

Foundations are entitled to all the rights conferred by the Freedom of Establishment in the European Treaty as long as they are regarded as "companies or firms" within the meaning of Article 54 TFEU (the old Article 48 EC-Treaty). This Article gives all "companies and firms" constituted according to the law of a Member State all the rights provided for in Articles 49-54 TFEU (old Articles 43-48 EC Treaty). However, Article 54 appears to exclude "companies and firms" which are "non-profit making", though most European lawyers believe that, given that the purpose of the Article is to enable the development of economic activity by enterprises in the context of the internal market, only bodies which are essentially not at all active in an economic sense should be excluded.

Foundations play their own role in the internal market by engaging on a regular basis in what is essentially economic activity in many different areas such as education, culture, social work and science. The fact that they spend their income on public benefit purposes does not affect this argument. Moreover, the completion of the internal market must surely involve full freedom of establishment for all activities that contribute to the objectives of the Community regardless of the legal form organisations carrying out these activities might take. In that sense there is no good reason funders should not benefit from the freedom offered by the internal market just because they may opt to create a foundation.

The ruling of the European Court of Justice (ECJ) on the Walter Stauffer case confirms the view that public-benefit foundations could be covered either by the Freedom of Establishment or by the Free Movement of Capital EC Treaty.<sup>8</sup>

Lastly, it should be remembered that, a Statute for a European Foundation would, if it is to achieve the aim of facilitating the cross-border giving and receiving of gifts to and from European foundations in different Member States, have to set in motion tax changes at the national level. Also, the tax treatment of the EFS itself would need to be implemented at the national level. In the case that an EFS is developed, national tax laws would need to be adapted accordingly.

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<sup>7</sup> ECJ case number C-436/03, ruling of 2 May 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:143:0004:0004:EN:PDF>

<sup>8</sup> ECJ ruling of 14<sup>th</sup> September on case C-386/04

#### 4. Past documents and legal acts from European Institutions

##### European Commission

- The European Commission's Single Market Act published on October 27<sup>th</sup> 2010 stating that the European Commission "will present proposals regarding a European Foundation Statute by the end of 2011". The English version of the SMA is available at [http://ec.europa.eu/internal\\_market/smact/docs/single-market-act\\_en.pdf](http://ec.europa.eu/internal_market/smact/docs/single-market-act_en.pdf)
- The EC impact assessment's roadmap on the European Foundation Statute which details the context, the objectives and the various policy options can be downloaded at [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2011 Markt xxx european foundation\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2011 Markt xxx european foundation_en.pdf)
- The feasibility study on a European foundation statute: [http://ec.europa.eu/internal\\_market/company/docs/eufoundation/feasibilitystudy\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf)
- The European Commission proposal for a Council Regulation on the Statute for a European Private Company, 25 June 2008<sup>9</sup>
- The feasibility study on a European statute for small and medium-sized enterprises, 13 December 2005<sup>10</sup>
- Consultation on future priorities for the Action Plan on Company Law and Corporate Governance, 20 December 2005<sup>11</sup>
- The European Commission Communication to the Council and the European Parliament "Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move forward", 21 May 2003<sup>12</sup>. The Action Plan Communication outlines why and how the European regulatory framework for company law and corporate governance needs to be modernised.
- Commission communication, COM (2005) 620, The prevention of and fight against terrorist financing through enhanced national level coordination and greater transparency of the non-profit sector<sup>13</sup>
- The European Commission Communication "Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission", 11 December 2002<sup>14</sup>.
- The European Commission Discussion Paper "The Commission and Non-Governmental Organisations: Building a Stronger Partnership", 18 January 2000<sup>15</sup>.

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<sup>9</sup> COM (2008) 396/3

<sup>10</sup> Available online at [http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-priorities/doc/en\\_resume\\_rapport\\_final.pdf](http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-priorities/doc/en_resume_rapport_final.pdf)

<sup>11</sup> The consultation and its results are available at

[http://ec.europa.eu/internal\\_market/company/consultation/index\\_en.htm](http://ec.europa.eu/internal_market/company/consultation/index_en.htm)

<sup>12</sup> COM (2003) 284 final

<sup>13</sup> [http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005\\_0620en01.pdf](http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0620en01.pdf)

<sup>14</sup> COM (2002) 704 final

- The European Commission Communication “Promoting the Role of Voluntary Organisations and Foundations in Europe”, 1997<sup>16</sup>. The European Economic and Social Committee issued an opinion on this Communication in 1998<sup>17</sup>.
- The European Commission Communication “Businesses in the Social and Economic Sector – Europe’s Frontier Free Market”, 18 December 1987. The European Economic and Social Committee issued an opinion on this Communication on 19 September 1990<sup>18</sup>.

### **European Council**

- The Council Regulation (EC) 1435/2003<sup>19</sup> establishing the legal form of the European Cooperative.
- The Council Regulation (EC) 2157/2001<sup>20</sup> establishing the legal form of the European Company (SE) according to the legal principles of the public limited liability company.
- The Council Regulation (EEC) 2137/85<sup>21</sup> establishing the European Economic Interest Grouping (EEIG). It allows undertakings to promote certain activities in common, while preserving their independence, but does not meet the specific requirements of a foundation.

### **European Parliament**

- The European Parliament resolution on social economy, 19 February 2009<sup>22</sup>
- Report of MEP Alain Lamassoure to French Presidency on “European Citizens and Community Law Implementation” June 2008<sup>23</sup>
- European Parliament report on recent developments and prospects in relation to company law July 2006<sup>24</sup>.
- The European Parliament resolution “Foundations in Europe”, 9 March 1994<sup>25</sup>.
- The European Parliament resolution “Non-Profit Making Associations in the European Community”, 13 March 1987<sup>26</sup>.

### **EESC**

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<sup>15</sup> COM (2000) 11 final

<sup>16</sup> COM (1997) 241 final

<sup>17</sup> CES 118/98.

<sup>18</sup> SEC (1989) 2187 final - Official Journal C 332, 31.12.1990, p. 81

<sup>19</sup> Official Journal L 207, 18.08.2003, p. 1.

<sup>20</sup> Official Journal L 294, 10.11.2001, p. 1.

<sup>21</sup> Official Journal L 199, 31.07.1985, p. 1

<sup>22</sup> 2008/2250(INI)

<sup>23</sup> <http://www.alainlamassoure.eu/liens/818.pdf>

<sup>24</sup> July 2006 (P6\_TA(2006)0295)

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2006-0229&language=EN>

<sup>25</sup> A3-0419/93

<sup>26</sup> Official Journal C 99, 13.04.1987, p. 205

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- The European Economic and Social Committee (EESC) own-initiative opinion on the European Foundation Statute, 28 April 2010<sup>27</sup>. The opinion sets out some reflections and proposals on the development of a European Statute adapted to foundations, and proposes guidelines which could govern such a Statute.
- The European Economic and Social Committee (EESC) own-initiative opinion on the diverse forms of enterprise, 1 October 2009<sup>28</sup>
- The European Economic and Social Committee adopted a series of opinions relating to not-for profit and social economy organisations including: “Private not for profit- social services in the context of services of general interest in Europe”, 12 September 2001<sup>29</sup>.

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<sup>27</sup> INT/498

<sup>28</sup> INT/447

<sup>29</sup> Official Journal C 311, 07.11.2001, p. 33

**B. PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON A STATUTE FOR A EUROPEAN FOUNDATION**

**Article 1**

**Form of the European Foundation**

1. A foundation may be set up within the territory of the Community in the form of a European Foundation (EF) on the conditions and in the manner laid down in this Regulation.
2. An EF shall be an independently constituted and managed body, having the disposal of assets, whether or not in the form of an endowment, which are irrevocably dedicated to public benefit purposes.
3. An EF shall have minimum assets of €50,000.
4. An EF must have activities in at least two Member States.
5. An EF shall have no formal membership, although some participatory structure would be allowed whose rights are regulated by the statutes.
6. An EF may be established in perpetuity or for a specified period of time, as expressed by the statutes.
7. All EF's assets and income shall be used in the pursuit of its public benefit purposes.
8. An EF shall have legal personality.

**Article 2**

**Public benefit**

1. Under this Regulation an EF shall be regarded as being of public benefit if, and only if:
  - (a) it serves the public interest at large at European/international level, and;
  - (b) its purposes include the promotion of the public interest in one or more of the following fields or any other field determined from time to time to be of public benefit:
    - Arts, culture and historical preservation
    - Assistance to, or protection of, people with disabilities
    - Assistance to refugees and immigrants
    - Civil or human rights
    - Consumer protection
    - Development, international and domestic
    - Ecology or the protection of the environment
    - Education, training and enlightenment

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- Elimination of discrimination based on race, ethnicity, religion, disability, or any other legally proscribed form of discrimination
- Prevention and relief of poverty
- Health or physical well-being and medical care
- Humanitarian or disaster relief
- European and international understanding
- Protection of, and support for, children and youth
- Protection of, and support for, disadvantaged individuals
- Protection or care of animals
- Science
- Social cohesion, including the promotion of respect for minorities
- Social and economic development
- Social welfare
- Sports, amateur athletics

### **Article 3**

#### **Legal personality**

An EF shall have legal personality in all the Member States of the European Union. It shall acquire it on the day of its registration with the European Registration Authority under Article 6 below.

### **Article 4**

#### **Legal capacity**

1. An EF shall be free to act in pursuit of its objects in any manner allowed for in its statutes which is consistent with its public benefit status and which is not against the laws of the Community or, in the case of activities carried out in a particular Member State, not against the applicable laws of that Member State.
2. An EF shall have the right to hold movable and immovable property, to receive and hold gifts or subsidies of any kind, including shares and other negotiable instruments, and gifts 'in kind' from any lawful source including from countries not belonging to the EU.
3. An EF shall have the capacity to carry out activities within any Member State of the EU and may carry out activities in any third country.
4. An EF shall have the capacity, and be free, to engage in trading or other economic activities provided that any income or surpluses are clearly and directly used in pursuance of its public benefit purposes and do not constitute the main aim of the EF.

### **Article 5**

#### **Formation**

1. An EF shall be created:

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- by will by any natural person(s) resident in one or more EU Member States.
  - by notarial deed by any natural and/or legal person(s) or public body(s) resident in one or more EU Member States.
  - under clause 4 of this article by merger between public benefit foundations legally established in one or several Member States.
  - under clause 5 of this article by conversion of a public benefit foundation legally established in one Member State.
2. In this Article, ‘public body’ includes any entity, whether or not legally part of the state, national, regional or local government, or other legally constituted public authority, which provides public services or carries out public functions on a statutory basis.
3. Where an EF has been created by a public body it shall be managed independently of it.
4. Formation by merger
- (a) It shall be for the board of each of the merging foundations to decide on the merger.
  - (b) The merger must be permissible under the statutes of each of the foundations.
  - (c) A detailed request for a merger (‘Draft Terms of Merger’) into an EF including:
    - i. the name and registered office of each of the merging public benefit foundations including the name and address proposed for the EF;
    - ii. the date from which the transactions of the merging foundations will be treated for accounting purposes as being those of the EF;
    - iii. the proposed statutes of the EF;
    - iv. forms of protection of the rights of creditors of the merging foundations;
    - v. information on arrangements for employee involvement according to the Directive (...); must be submitted to the competent authority in the Member State where each of the public benefit foundations is registered or has its main office.
  - (d) The merger must follow the requirements imposed by the Member State to which each foundation is subject including, where appropriate, the publication of the Draft Terms of Merger in the national gazette.
  - (e) In each Member State concerned, the competent authority shall issue a certificate of the completion of the pre-merger acts and formalities. This certificate, together with the Draft Terms of Merger, must be submitted to the European Registration Authority within the six months following its issue.
  - (f) The European Registration Authority shall register the merged foundation, once it has ensured that the merging foundations have approved and published Draft Terms of Merger in the same terms and that the need for employee involvement in the EF has been taken into account (see Article 6.7). Only then shall the merger take effect. The decision of the European Registration Authority shall be published in the European Official Journal

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according to Article 6.8 of this statute. Formalities for the transfer of certain assets will have to be taken into account either by the merging foundations or the EF.

- (g) In cases of merger by the formation of a new legal person (EF), all assets and liabilities of each public benefit foundation shall be transferred to the EF, and the merging foundations shall cease to exist.
- (h) In cases of merger by absorption, all assets and liabilities of the public benefit foundation being acquired shall be transferred to the absorbing public benefit foundation. The foundation being absorbed shall cease to exist and the absorbing legal person shall then become an EF.

### 5. Formation by conversion of a national foundation

- (a) The board of the public benefit purpose foundation shall decide on the conversion to an EF and the new EF's statutes. The conversion shall not result in the winding up of the organisation or in the creation of a new legal person.
- (b) The conversion must be permissible under the statutes of the foundation.
- (c) A detailed request for conversion (Draft Terms of Conversion) including:
  - i. name and registered office of the converting public benefit organisation;
  - ii. the statutes of the EF;
  - iii. forms of protection of the rights of the foundation's creditors;
  - iv. information on arrangements for employee involvement according to the Directive (...); must be submitted to the competent foundation authority in the Member State, where the foundation is registered or has its main office.
- (d) The request for conversion must follow the requirements imposed by the Member State. The competent authority shall issue a certificate of the completion of the conversion and all necessary formalities. This certificate, together with the Draft Terms of Conversion must be submitted to the European Registration Authority within the six months following its issue.
- (e) The European Registration Authority shall register the foundation as an EF, once it has ensured that the foundation to be converted meets the criteria for an EF and that the need for employee involvement has been taken into account under Article 6.7 below. Only then shall the conversion take effect. The European Registration Authority's decision shall be published in the Official Journal according to Article 6.8 of this statute.

## **Article 6**

### **Registration**

1. A European Registration Authority shall be created, composed of at least five persons of good standing, at least one of whom shall be legally qualified and expert in foundation law.
2. The five persons composing the authority shall be appointed by decision of the European Council and European Parliament upon a proposal of the European Commission.

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3. The registration authority shall be established under European law and in any individual case shall act independently of the European Union's institutions, of any governmental, quasi-governmental, or any other public body or institution, and be free of political influence.
4. It shall be the duty of the European Registration Authority to:
  - (a) maintain a register of EFs
  - (b) receive and hold public records, documents and other information required for the registration of an EF and its subsequent operation and to make them available for inspection by the public on request;
  - (c) determine the registration of EFs; and
  - (d) otherwise ensure that the requirements of this Regulation are adhered to.
5. Applications for registration as an EF made to the European Registration Authority shall be accompanied by the following documents:
  - (a) the founding documents;
  - (b) a statement of the assets to be set aside for the purposes of the EF;
  - (c) the statutes;
  - (d) the intended registered office address within the Community;
  - (e) the names and addresses of all members of the governing board;
  - (f) the names, objects and registered offices of founding organisations where these are legal entities, or similar relevant information as concerns public authorities.
6. The European Registration Authority may refuse to register an applicant otherwise in conformity with the requirements of this statute if, and only if, it deems the purpose of the applicant to be illegal, or it deems the refusal of registration necessary for the protection of public security or safety; for the prevention of crime; for the protection of health; or for the protection of the rights and freedoms of others and the maintenance of public order.
7. An EF may not be registered unless arrangements for employee involvement pursuant to Article (...) of the Directive (...) have been made.
8. The decision of the European Registration Authority shall be published in the Official Journal of the European Communities together with the information outlined in 5 (a) – (f) of this Article.
9. The European Registration Authority shall reach its decisions without unreasonable delay.
10. An EF shall inform the European Registration Authority of any changes to the information outlined in 5 (a) – (f) of this Article, and the new details shall be published in the Official Journal.

**Article 7**

**Registered office and transfer of registered office**

1. The registered office of an EF shall be located within the European Union.
2. The registered office of an EF may be transferred to another Member State. Such transfer shall not result in the winding up of the EF or the creation of a new legal entity.
  - (a) The governing board of the EF shall decide upon the transfer of office and shall submit to the European Registration Authority a transfer proposal, which shall cover:
    - i. the current name, registered office address, and registration number of the EF;
    - ii. the proposed registered office address of the EF, including where appropriate its new name and amended statutes;
    - iii. the proposed timetable for the transfer;
    - iv. a report explaining and justifying the legal and economic aspects as well as the employment effects of the transfer and explaining the implications of the transfer for creditors and contracting partners of the EF, where appropriate.
  - (b) The governing board shall transmit the transfer proposal to the European Registration Authority. The Authority shall issue a certificate attesting to the completion of the acts and formalities to be accomplished before the transfer and shall then register the new address and amended statutes.
  - (c) The registration of the new address shall be published in the Official Journal of the European Communities, see Article 6.10.
  - (d) On publication of an EF's new registered address, the new registered office may be relied on.
  - (e) An EF may not transfer its registered office if proceedings for winding up, or other proceedings have been brought against it.

**Article 8**

**Statutes**

1. The statutes of the EF shall include at least:
  - (a) the name of the foundation, followed by the abbreviation "EF";
  - (b) a statement of its public benefit purpose;
  - (c) the address of the EF's registered office;
  - (d) the conditions for the admission, expulsion and resignation of members of the governing board;
  - (e) the rights and obligations of the governing board and its members;
  - (f) the function and structure of any additional organ;
  - (g) the procedures for amending the EF's statutes;

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- (h) the grounds for dissolution;
  - (i) the distribution of net assets after winding up; and
  - (j) the rules applicable to the calling and conduct of meetings of the governing board.
2. The EF's statutes shall also provide for the avoidance of actual or potential conflicts of interest between the personal or business interests of officers, board members, and employees of the EF, and the interests of the EF.

### **Article 9**

#### **Law applicable**

1. An EF shall be governed:
- (a) by this Regulation;
  - (b) where expressly entitled by this Regulation, by the provisions of its statutes; and
  - (c) in the case of matters not regulated by this Regulation by:
    - i. the laws adopted by Member States in the implementation of Community measures relating specifically to EFs
    - ii. the laws of Member States, which apply to foundations and public benefit organisations formed in accordance with the law of the Member State in which the EF has its registered office.
    - iii. The provisions of its statutes, in the same way as for a public benefit foundation formed in accordance with the law of the Member State in which the EF has its registered office.
2. Where a Member State comprises several territorial units, each of which has its own rules of law applicable to the matters referred to in paragraph 1, each territorial unit shall be considered a Member State for the purposes of identifying the law applicable under this paragraph.
3. Subject to this Regulation, an EF shall be treated in every Member State as if it were a foundation and public benefit organisation formed in accordance with the law of the Member State in which it has its registered office.

### **Article 10**

#### **Particulars to be stated in the EF's documents**

Letters and documents sent to third parties by the EF shall state legibly:

- (a) the name of the EF, followed by the abbreviation "EF";
- (b) the number of the EF's entry in the register kept by the European Registration Authority;
- (c) the address of the EF's registered office; and
- (d) where appropriate, the fact that the EF is the subject of insolvency or dissolution proceedings.

**Article 11**

**Governing board**

1. An EF shall be governed by a board composed of at least three members.
2. The governing board shall take responsibility for all decisions with regard to the proper administration and conduct of the EF's affairs. The governing board shall manage the EF and shall represent it in dealings with third parties and in legal proceedings. Members of the board shall observe a duty of loyalty in the exercise of their responsibilities, shall act with diligence and care, and shall ensure compliance with the laws and statutes of the EF.
3. The governing board shall ensure the return to the European Registration Authority of all documentation required under Articles 6.4 and 13.2 of this Regulation.
4. It shall be the duty of the governing board to make available to the European Registration Authority all evidence material to any inquiry undertaken under Article 14.
5. The governing board shall decide upon the amendments of the statutes, subject to Article 15.1 in case they affect the purpose of the foundation.
6. The governing board of the EF may decide upon the transfer of the registered office, see Article 7.
7. Reasonable remuneration and reimbursement of expenses to the governing board may be provided.

**Article 12**

**Liability of the EF and the governing board**

1. The liability of an EF shall be limited to its assets.
2. Members of the governing board shall be personally liable to the EF and to injured third parties for the wilful or grossly negligent performance or neglect of their duties, but shall not otherwise be liable.

**Article 13**

**Transparency and Accountability**

1. An EF shall be obliged to keep full and accurate records of all financial transactions.
2. An EF shall be obliged to draw up and return to the European Registration Authority full and accurate annual statements of accounts and an annual activity report, within 12 months from the end of the accounting year. The annual activity report should list the grants distributed, taking into account the right of privacy of the beneficiary.
3. An EF with annual revenues in excess of €(x) and/or assets in excess of €(x) shall have its accounts professionally audited.

4. For the purpose of drawing up its accounts, including the annual report accompanying them and their auditing and publication, an EF shall be subject to the relevant legal provisions in line with European legislation.

**Article 14**

**Supervision**

1. The European Registration Authority is the supervisory body for EFs. It shall have the duty to safeguard that the governing board acts in accordance with the EF's statutes and this Regulation.
2. Where the European Registration Authority has reasonable grounds to believe that the governing board of a foundation is not acting in accordance with the foundation's statutes or this Regulation, it shall have the power, in carrying out its duty under section 1 above, to inquire into the affairs of that foundation.
3. In the case that there is evidence that:
  - (a) the governing board has acted improperly with respect to the EF's statutes, and;
  - (b) the governing board refuses to act on a warning from the European Registration Authority;

the European Registration Authority shall have the power to order the governing board to comply with the foundation's statutes and this Regulation. If evidence of financial impropriety, serious mismanagement and/or abuse is brought to the notice of the European Registration Authority, the authority may designate an independent expert to inquire into the affairs of an EF.

4. In the case of inquiries carried out under sections 2 and 3 above, the European Registration Authority shall have the power to require the governing board and officers of the foundation to make available all and any evidence material to its effective conduct.
5. The European Registration Authority shall have the power to require the dismissal of any member of the governing board or officer of the foundation found guilty by a court of financial impropriety.
6. Exceptionally, if the European Registration Authority deems that the assets of the foundation are at serious and immediate risk, the European Registration Authority shall have the power temporarily to freeze the foundation's bank accounts and take such other emergency measures as it sees fit to protect the foundation's assets until such time as the matter can be brought before a court.
7. Where the European Registration Authority is satisfied that the foundation is unable properly to conduct its own affairs, it may appoint an independent receiver and manager to act in place of the governing board. The appointment of a receiver and manager must be reviewed by a court within three months.

8. If the purpose of the foundation has become impossible to fulfil and cannot be amended under Article 15, or if any of the circumstances described in Article 6.6 apply, the European Registration Authority may, after having heard the governing board of the foundation, propose to the court the dissolution of the foundation.
9. Nothing in this Article shall empower the European Registration Authority to act in the administration of a foundation.

### **Article 15**

#### **Change of purpose**

1. Any change to the purpose proposed by the governing board shall require the agreement of the European Registration Authority.
2. Any amendment of the bylaws, insofar as they affect the purpose of the EF, should be consistent with the will of the founder.
3. The purpose of the EF may only be changed if the current purpose has been achieved or cannot be achieved or where the current purposes have ceased to provide a suitable and effective method of using the foundation's assets.

### **Article 16**

#### **Dissolution**

1. The governing board of the foundation may decide upon dissolution of the EF only if the aim of the EF has been achieved or cannot be achieved; the time for which it was set up has expired; or the total loss of assets has taken place. The dissolution proposed by the governing board shall require the agreement of the European Registration Authority.
2. Upon dissolution under section 1 above or, with the court's agreement, under Article 14.8, and once the creditors have been paid in full, any remaining assets of the EF shall be used for public benefit purposes as near as possible to those for which the EF was created.

### **Article 17**

#### **Conversion into a public benefit purpose foundation under Member State law**

1. An EF may be converted into a foundation governed by the law of the Member State in which it has its registered office. No decision on conversion may be taken before two years have elapsed since its registration or before the first two sets of annual accounts have been approved.
2. The board of the EF must decide on the conversion to a foundation and the new statutes. The conversion shall not result in the winding up of the organisation or in the creation of a new legal person.
3. The conversion must be permissible under the statutes of the EF.
4. A detailed request for conversion (Draft Terms of Conversion) including:
  - i. name and registered office of the converting EF

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- ii. the statutes of the new public benefit foundation must be handed over to the competent foundation authority in the Member State, where the public benefit organisation should be registered or should have its main office. The request for conversion must follow the requirements imposed by the Member State. The competent foundation authority will then forward the approved request for conversion to the European Registration Authority.
5. The European Registration Authority shall remove from the EF register the converted foundation as an EF, once it has ensured that the conversion has been approved according to national law and employee involvement are taken into account. Only then the conversion will take effect. This decision must be published in the European Official Journal.

### **Article 18**

#### **Appeal to the courts**

All decisions of the European Registration Authority shall be appealable to the courts.

### **FINAL PROVISIONS**

#### **Effective application**

Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

#### **Review of Regulation**

Five years after the entry into force of this Regulation, the Commission shall forward to the Council and the European Parliament a report on the application of the Regulation and proposals for amendments, where appropriate.

#### **Entry into force**

This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Union.

It shall apply from date (...)

This regulation shall be binding and directly applicable in all Member States.

**Additional Articles on the tax treatment of the EF, its donors and beneficiaries**

1. Tax treatment of EFs

a. With respect to corporate income tax; gift and inheritance tax; and property and land tax, any EF shall be subject to the tax regime applicable to public benefit purpose organisations in the Member State where it has its registered office.

b. Any branch of an EF established in a Member State other than that in which it has its registered office shall be subject to the tax regime applicable to public benefit purpose organisations in that Member State.

2. Tax treatment of EFs' donors

Any individual or corporate donor giving to an EF within or across borders shall receive the same tax deduction or tax credit as if the donation were given to a public benefit purpose organisation in the donor's own Member State.

3. Tax treatment of EFs' beneficiaries

Grants or other benefits received by individuals or public benefit organisations from an EF established in any Member State shall be treated as if they were given by a body established in the Member State in which they are received.

## C. COMMENTARY

Three basic principles underlie the draft of a European statute for foundations. First, while legislation needs to be comprehensive, it should also be as *clear and as simple* as possible. The grounds for this are obvious: clarity will help European Foundations (EFs) to comply with the law, and those charged with supervision to enforce it.

Second, while the law clearly needs to establish the *framework* in which EFs are established, operate, and are accountable, it should not constrict their freedom to conduct their business more than is strictly necessary, particularly as regards internal governance. Accordingly, while the draft requires certain topics concerning internal governance – for example the rules applicable to meetings of the governing board – to be covered in the EF’s founding documents, it leaves the framing of those rules to the EF’s governing board.

Third, and most important, the draft is designed to be resolutely “European”. Present draft legislation for the non-profit sector is vitiated by constant references to the laws of Member States. In these circumstances the chances of creating a truly European legal model are slim. The present text is based on the view that it will be vital to persuade those responsible for legislation to regard the European area as conducive to the purpose of foundations wishing to operate across Europe. Thus the regulatory body is established at the European level, as is supervision, as are appeals to the courts.

Employee involvement, such as participation and information/consultation arrangements in an EF, shall be governed by the provision of a separate European Directive.

The part dealing with taxation makes two minor intrusions into the present "forbidden" territory of taxation policy, where the EU has only limited competence: it requires Member States to recognise the list of public benefit topics mentioned in the statute, and in the case of EFs, to allow their citizens who wish to give across borders the same tax relief as if they were giving to indigenous organisations. The demands on Member States are therefore small and hardly involve concessions of principle that might lead to the “Europeanisation” of tax relief or its capture by the European Commission.

The draft European statute for foundations is based on the Legal and Fiscal Fundamental Principles agreed by the EFC. Translating the Principles into a coherent legal text has inevitably meant that choices have had to be made. For this reason there will be points at which the draft will be incompatible with existing legislation in some Member States. It should, of course, be emphasised that it would be entirely optional for foundations or founders to take advantage of the new legislation, or not, as they wish.

### **Article 1 – Form of the European Foundation (EF)**

According to the definition of Article 1, the European legal instrument pursues public benefit purposes only. The EFC is aware that some national foundation laws also address foundations that pursue any lawful purpose including private purpose foundations. The EFC focuses however its recommendations on a European legal instrument that pursues public benefit purposes. The concept of public benefit is in most continental jurisdictions defined by tax law, but in some countries the concept of foundations as a civil law form for general purposes is

not known. The vast majority of foundations in Europe pursue public benefit purposes and the history of the foundation sector is based on the public benefit concept.

The definition suggests that an EF should have minimum assets of €50,000. However in specific cases fewer assets may be accepted. The introduction of a minimum capital will require that an EF has some degree of financial strength. First, it can be argued that a foundation can only seriously pursue the public interest at large at European/international level if there is some reasonable degree of financial force behind it. Second, the setting aside of significant assets, together with proper supervision is aimed at creating the sort of trust which will reassure the public and the relevant authorities and so aid the acceptance of the foundation throughout the EU and beyond.

It is important to note that the assets of an EF may not revert to private ownership.

The EF must have activities in at least two Member States. It is suggested that the “European” character of the EF can be clearly confirmed only if it is required to have activities in at least two Member States and its subsequent operations demonstrate that this is indeed the case. This requirement will help distinguish the EF from the majority of national foundations, which are in general not required to operate in more than one EU country. The present text will have the consequence that foundations which pursue, for example, the purpose of European integration but are active in only one country (that is to say, do not operate across borders), may not be set up as an EF.

The definition of an EF is based on the fact that foundations, in contrast to associations, in most continental European jurisdictions, have no members. The main governing organ of an EF is the board. However, the EF may have additional organs and may also develop some type of “participatory” structure. Generally, a European Foundation shall have no members. However, some foundations do have members, whose rights are regulated by their statutes. Said members are gathered in an assembly and may be elected to sit on the Board of Directors and on controlling bodies. Such foundations are known in Italy.

Any kind of “participatory” structure in the form of a council or an assembly may in no case be linked to monetary interests. In addition, the EF is a legal entity, which is independent from the founder(s)/donor(s), once the EF is established. The governing board of an EF and the European Registration Authority, which has to approve important decisions of the EF such as amendment of the purpose of the EF or dissolution, will safeguard the initial will of the founder.

The EF may be set up for a specified period of time.

## **Article 2 – Public benefit**

Article 2 contains an open list of public benefit purposes with the aim of leaving the notion of public benefit flexible. An EF has on the one hand to serve the public at large at European/international level, and on the other hand to serve a purpose in the fields listed in Article 2 or fields determined from time to time to be of public benefit. It is important to understand that the “public at large” does not imply that only a large number of beneficiaries may benefit from the EF, but rather that the class of potential beneficiaries must be open, and seen to be open, to any member of the public coming clearly within the class. Foundations

having a “closed” class of beneficiaries – such as foundations intended to benefit only the members of one family, would not, therefore, be eligible to be EFs.

The draft Regulation proposes a list of public benefit purposes widely accepted in the EU. However the list is “open” in the sense that it allows for other purposes deemed from time to time to be of public benefit to be added to it. The purpose here is to allow the list to be amended in the light of social and other changes.

### **Article 3 – Legal personality**

An EF shall have legal personality for reasons of legal clarity and security. Article 3 ties the acquisition of legal personality to registration. If an EF is set up by will, the EF only comes into existence in the moment of its registration (and is not retroactive to the time of the founder’s death). It should be noted that the European Registration Authority has very limited powers under Article 6.5 and 6.6 to refuse to register a foundation.

### **Article 4 – Legal capacity**

This Article defines legal capacity as widely and completely as possible. The legal capacity of an EF deliberately goes wider than some EU jurisdictions by allowing foundations to receive the widest possible range of gifts and income without permission of any public or judicial authority. Note that the trend in Europe is for the relaxation of existing restrictions.

An EF shall in particular be allowed to engage in trading or other economic activities provided that the income is used for the pursuance of its public benefit purpose. The economic activity can either be performed directly by the foundation or indirectly through another legal entity. The income of both types of economic activity must be used for the public benefit purpose of the foundation.

### **Article 5 – Formation**

Article 5 sets out the different ways in which an EF may be established. For reasons of legal security, a simple written declaration will not suffice. The notarial deed or will must include an expression of the founder’s/ founders’ wish to set up an EF and mention which assets the founder/founders will donate. In addition the deed or testament needs to define the public benefit purpose(s), which the EF shall pursue. The Article also notes that public bodies can create an EF but that the EF should subsequently be managed independently of them.

Any individual/individuals and/or legal person(s) resident in one or more Member States has the right to set up an EF as long as the legal requirements set out in this law are met.

In addition an EF may be established through a merger of national foundations. If the foundations to be merged are legally established in only one Member State, the EF would need to pursue activities in more than one Member State.

- **Merger**

Initially it would only be possible for national foundations to merge if foundation mergers were allowed for under national law. However, if mergers were allowed for under European law – as suggested in the draft – then Member States would have to take steps to allow

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 an EF. In order to protect the wills of the founders, a merger should only be possible if it is permissible under the statutes of each of the foundations.

As far as the conditions and consequences of merger are concerned, the board of each of the merging foundations must decide on the merger. A detailed request for merger (Draft Terms of Merger) must be submitted to the competent domestic foundation authority in the Member State(s) where each of the public benefit foundations is registered or has its main office.

The request for merger must follow the requirements imposed by the Member State(s) including publication of the draft terms of merger in the national gazette, where appropriate.

In each Member State concerned, the competent domestic authority shall issue a certificate of the completion of the pre-merger acts and formalities, which then must be handed over to the European Registration Authority.

The European Registration Authority shall register the merged foundation, once it has ensured that the merging foundations have approved draft terms of merger in the same terms and that the need for employee involvement in the EF has been taken into account. Only then will the merger take effect. This decision of the European Registration Authority shall be published in the European Official Journal according to Art. 6.8.

- **Conversion**

It will be for the governing board of the public benefit foundation to decide on the conversion to an EF and to approve the new EF statutes. The conversion shall not result in the winding up of the organisation or in the creation of a new legal person. The conversion must be permissible under the statutes of the foundation. A detailed request for conversion (Draft Terms of Conversion) must be submitted to the competent domestic foundation authority in the Member State where the public benefit organisation is registered or has its main office. The request for conversion must follow the requirements imposed by the Member State. Once all the formalities have been completed and the requirements are met, the European Registration Authority shall register the converged foundation as an EF.

### **Article 6 – Registration**

Note that Article 3 ties the foundation's legal personality to registration by a European Registration Authority. The European authority will have to review the notarial deed or will and the statutes of the applicant EF and must respond within a certain deadline.

For this and other reasons, the registration authority is an important and potentially powerful body, particularly if, as this text suggests, it also has responsibility for supervision under Article 14. We believe that a European Registration Authority, which should also function as a supervisory authority, would be the most appropriate solution for a transparent and well-functioning European foundation sector. The European Registration Authority should be established under European law and should be fully independent (the concept of a European agency or authority is not entirely new, see for example the European Food Safety Authority-EFSA). The EF registration authority should be composed of at least five persons of good

standing, at least one of whom shall be legally qualified and an expert in foundation law. The five persons composing the authority shall be appointed by decision of the European Council and European Parliament upon proposal of the European Commission.

However, the powers of the European Registration Authority are significantly constrained – it must act independently of political influence, act promptly and cannot normally refuse to register an applicant foundation which fulfils the legal requirements. Clause 6 of this Article does give the authority scope to review whether to refuse to register the EF for fundamental reasons.

Not all EU Member States have a national foundation register. In addition, not all foundation laws link the establishment of a foundation to registration. The registration and the maintenance of such a register for EFs may therefore not be equally transparent and clear at the national level. Where the establishment of a European Registration Authority would not be seen as feasible, the registration and establishment of an EF could also be exercised at the national level. One has to bear in mind however that this would lead to 27 different ways of setting up an EF.

The draft opts for a transparent and accountable legal framework for EFs. The founding documents as well as a statement of the assets and the statutes must accompany the application for registration. In addition, the names and addresses of all members of the governing board as well as founding organisations must be handed over to the European Registration Authority. The decision of the European Registration Authority will be published in the Official Journal, as will any later changes to the information required to be registered. In addition, the information held by the European Registration Authority may be open for the public upon request.

A specific Directive will have to deal with employee involvement.

#### **Article 7 – Registered office and transfer of registered office**

The registered office of an EF may be transferred to another Member State. The governing board of the EF may decide upon the transfer of the registered office. The governing board must submit to the European Registration Authority a transfer proposal, which shall include the current registered address and the proposed new registered address of the EF, the timetable for the transfer as well as a report explaining and justifying the legal and economic aspects and employment effects of the transfer.

#### **Article 8 – Statutes**

Article 8 lists 10 key elements that the bylaws of an EF must address. As long as all these matters are addressed, the text assumes that each foundation should be free to decide what other matters should be covered and how. The statutes would of course have to comply with the relevant laws.

Clause 2 is intended to deal with the question of actual or potential conflicts of interest.

The statutes of an EF must set out provisions regarding the procedure for amending the EF's statutes. The governing board decides upon the amendment of statutes, see Article 11.5. Any amendment to the statutes has to be communicated to the European Registration Authority

and published in the Official Journal according to Article 6.10. However, the approval of the authority is not required. The founder can ensure that the statutes themselves include detailed provisions on the procedure of amendment of the statutes, see Article 8.1 (g) and in that way ensure that the EF will comply with the original will of the founder.

Amending the purpose of the EF is more challenging. Amendments are only allowed in legally defined cases and the European Registration Authority must approve any change to the purpose, see Article 15.

### **Article 9 – Law applicable**

Article 9 lists the rules that govern the EF in a hierarchical order, first of all by this Regulation. This hierarchy implies that those elements of the statutes of an EF, which are based on an explicit authorisation of the EF Regulation, would overrule certain areas of national foundation laws. Only in those cases that are not regulated by the European Regulation would the national laws overrule the statutes of an EF.

The alternative would be that national foundation laws would always overrule the statutes of an EF. This would imply that the EF would be governed mainly by the national level and not by common European characteristics as foreseen by this draft proposal.

### **Article 10 – Particulars to be stated in the foundation's documents**

As noted above, this Article requires certain topics to be covered in the foundation's governing documents, but leaves to the governing board decisions as to how precisely the internal governance of the EF is to be managed. Note that the names of board members can be obtained from the European Registration Authority under Article 6.5(e).

### **Article 11 – Responsibilities of the governing board**

The introduction of this principle is intended to underline the importance of foundations' boards and good governance. It also touches upon the issue of the disclosure of governance structures and practices. Note that this Article contains a provision in 11.4 that places a duty on the governing board to cooperate with any inquiry ordered by the European Registration Authority under Article 14.2 and 14.3. An EF shall be governed by a board composed of at least three members. Individuals as well as legal entities represented by individuals may be appointed as board members.

The governing board is responsible for all decisions with regard to the proper administration and conduct of the EF's affairs and will represent the EF towards third parties. Delegation of representative functions and powers of signature as regards administrative matters will have to be communicated to the European Registration Authority. Major or fundamental decisions concerning an EF such as the amendment of statutes; approval of budget and accounts; decision on merger; conversion or dissolution cannot be delegated by the governing board.

The governing board is responsible for deciding upon the amendment of the statutes. Any changes to the EF's purpose must be approved by the European Registration Authority under Article 15. Any other changes to the statutes will have to be reported to the European Registration Authority. Under Article 8.1(g), the statutes will have to provide procedures for amending the statutes.

Founders, board members, directors or employees of the foundation shall not receive any benefits from the foundation. However, reasonable remuneration and reimbursement of expenses to board members are allowed and, of course, employees of the EF can be paid.

As regards such matters as the appointment of board members and their expulsion, terms of office, the decision procedures to be adopted (e.g. simple or qualified majority), as well as the number of meetings, the Regulation leaves room for the statutes to frame the relevant rules, see Article 8.1. Recommendations would be as follows: the first board shall be appointed by the founder(s); members of the governing board shall elect new members of the governing board or a special election committee may be established; the term of office shall be four years; re-election shall be possible; the governing board may dismiss a board member with qualified majority at any time; board decisions are taken with simple majority except for decisions concerning the amendment of the statutes; a simple majority of board members can call a meeting of the governing board; the board shall convene at least once a year.

### **Article 12 – Liability of the foundation and board members**

The liability of the EF is limited to its assets. The board members would be personally liable to the foundation and to the injured third parties only in the case of wilful or grossly negligent performance or neglect of their duties.

### **Article 13 – Transparency and accountability**

A foundation must provide its documents to the registration office, which will make them accessible to the public. Both annual statements of accounts and an annual report of activity should be made publicly available. Accounts provide financial information whereas annual reports describe the foundation's activities in pursuit of its public benefit purpose. Larger EFs will be required to have their accounts professionally audited. The method of appointing the auditor could be addressed in the statutes. Otherwise it would be up to the governing board to decide.

For the purpose of drawing up its accounts, including the annual report accompanying them and their auditing and publication, an EF shall be subject to the relevant legal provisions in line with European legislation (Directives such as 78/660/EEC and 83/349/EEC), where appropriate.

### **Article 14 – Supervision**

In order to guarantee the will of the founder as well as the independence of the EF, some competent and quick functioning supervision authority must be installed. The crucial question is whether the supervisory system should be left to the Member States or whether, as proposed in this draft, a European registration agency should be established, which is also responsible for supervising EFs. We opt for a European supervisory structure. The real advantage of choosing a European supervisory structure is that it levels the field and provides better assurance that supervision will take place in a comprehensive and comparable way across the EU. Where the establishment of a European Registration Authority would not be seen as feasible, the registration and establishment of an EF could also be exercised at the national level. One has to bear in mind however that this would lead to 27 different ways of setting up an EF.

It is important to note that the powers of the European Registration Authority to supervise foundations are of two kinds:

- those which are aimed at ensuring that the governing board respects the statutes of the foundation (and of course the foundation law);
- and those that are aimed at dealing with mismanagement and abuse.

Note also that as drafted, the European Registration Authority is also the supervisory authority. These two functions – of registration and supervision – could be separated if it were thought wise to do so. There could, for example be a new body specifically designed to deal with supervision, or the courts could be required to take over investigation and to take remedial action once the regulation authority had evidence of mismanagement or abuse. The difficulty with the latter suggestion is that the problems that are likely to beset foundations are often a complex mix of legal and administrative factors which the courts are not necessarily well equipped to deal with. Furthermore, emergency action might need to be taken, for example to protect the assets of a foundation from an ongoing fraud that could not wait for the relatively slow procedures sometimes involved in obtaining a court order. Any decision of the European Registration Authority in this regard would, of course, be subject to judicial review, or the equivalent; to a court injunction if the foundation were able to obtain one; and to appeal.

The question of what powers a supervisory body should possess is, of course, a large one. At present the Article is drafted so as to give the supervisor the minimum power consistent with the capacity to carry out an effective investigation into an errant foundation and to provide an effective remedy. In case the European Registration Authority has reasonable grounds to believe that the governing board of a foundation is not acting in accordance with the foundation's statutes or this law, it has the power to inquire into the affairs of that foundation. The European Registration Authority reviews the annual report as well as the annual accounts of an EF. Where there is evidence that the governing board has acted improperly with respect to the foundation's statutes and this law, the European Registration Authority may warn the foundation and, if it fails to act, may order it to comply. The orders of the European Registration Authority will be enforced according to the national law. In cases of financial impropriety, serious mismanagement and/or abuse, the authority may designate an independent expert to inquire into the affairs of a foundation.

It is important to note in this regard that the current Article 14.6 assumes that the European Registration Authority's powers should cover only the period before the matter can be brought before a court. This means that should a foundation, whose assets have been frozen, decline itself to challenge the authority's decision, the authority would, in effect, have to seek the court's approval for its actions.

Note that the *independent* receiver and manager would be intended to supplant the governing board during his or her period of operation and otherwise to take over the running of the foundation *for a limited period*. Note also that the court must review the appointment of the receiver and manager within three months. It will also be for the court to decide upon any proposal from the European Registration Authority to dissolve a foundation according to Article 14.8. Note also that the regulatory authority is expressly forbidden to take over the administration of a foundation at any time, including such time as the foundation might be in difficulty.

According to Article 8.1 (f), the statutes of an EF may provide for additional organs, such as a supervisory council. However the supervisory power of the European Registration Authority may not be reduced through the establishment of additional internal control organs.

### **Article 15 – Change of purpose**

In order to protect the will of the founder and the foundation itself, any change to the public benefit purpose needs to be approved by the European Registration Authority. In addition, the purpose may only be changed in clearly defined cases.

### **Article 16 – Dissolution**

The law should recognise two kinds of dissolution:

*Voluntary dissolution* (dealt with in this article): The board of the foundation should be able to decide upon dissolution in clearly defined cases (if the aim of the foundation is achieved or the total loss of assets has taken place). In any case the board decision must be approved by the European Registration Authority. The rationale behind this is to protect the will of the founder as well as the foundation itself. The statutes may provide for additional procedures for dissolution, see Article 8.1(h).

*Involuntary dissolution* is dealt with in Article 14.8. The European Registration Authority may propose to the competent court to dissolve a foundation. The involuntary dissolution of a foundation is therefore the business of the competent court.

### **Article 17 – Conversion into a public benefit foundation under Member State law**

An EF may be converted into a foundation governed by the law of the Member State in which it has its registered office. However the decision on a conversion may only be taken two years after its registration as an EF or after the first two sets of annual accounts have been approved.

### **Article 18 – Appeal to the courts**

All decisions of the European Registration Authority need to be subject to appeal to the courts. This is particularly important as regards a refusal to register an applicant foundation and in respect of any exercise of the European Registration Authority of its powers of supervision. Given the length of time that may elapse before full legal proceedings can take place, the court will need to decide in the light of the circumstances in each case whether or not to suspend the action taken or proposed by the European Registration Authority pending the hearing of the appeal.

### **Additional Articles on the tax treatment of the EF and its donors**

The rules applying to tax exemptions of an EF as well as to tax incentives for donors should be clear and user-friendly.

## EUROPEAN FOUNDATION CENTRE

In general the EF shall be subject to the tax regime applicable to public benefit organisations in the Member State where it has its registered office. Any branch of an EF established in a Member State other than that in which it has its registered office shall be subject to the tax regime applicable to public benefit organisations in that Member State.

For the purposes of taxation, any gift or donation **to** an EF made within or across borders within the European Union shall be treated as if made to a public benefit organisation under the law of the Member State where the donor pays (corporate) income tax.

For the purposes of taxation, any gift or donation **from** an EF made within or across borders within the European Union shall be treated as if they were given by a body established and registered in the Member State in which they were received.

**VAT rules** and their application should take into account the public benefit nature of foundations and their activities, and should in no case disadvantage foundations.

The tax treatment of “foreign” and “national” foundations should, in principle, be the same in each EU country. In particular, cross-border giving and the reception of gifts across borders should attract identical tax relief, as should gifts or giving to or from foundations within or without the EU. The Member States should review their national tax regime and introduce equal treatment of all public benefit foundations set up in the EU (see EFC *Model Law for public benefit foundations*, available at [http://www.efc.be/projects/eu/legal/model\\_statute.asp](http://www.efc.be/projects/eu/legal/model_statute.asp))



*Promoting the work of foundations and corporate funders in Europe and the world*

## **About the EFC**

**The European Foundation Centre (EFC)** is the leading membership association representing public-benefit foundations at European level. It was founded in 1989, and is based in Brussels.

The EFC currently has **229 members** including community and independent foundations as well as corporate funders spread across 40 countries. A large majority (86%) are based in Europe.

The EFC develops and pursues activities in line with its objectives:

**Benchmarking and capacity-building** - The EFC aims to set standards and build professional capacity in the sector through a wide range of benchmarking and training activities. All members undertake to respect the **EFC Principles of Good Practice**.

**Creating an enabling legal and fiscal environment** - The EFC is leading the campaign for the creation of a **European Foundation Statute**, which would make it easier for foundations that wish to develop cross-border activities in the EU.

**Documenting the foundation landscape** - To facilitate the sharing of knowledge and information, and raise awareness about the valuable work foundations are doing, the EFC produces numerous publications including **Effect** magazine (twice per year).

**Networking and partnership building** - The EFC promotes collaboration, both among foundations and between foundations and other actors, to advance the public good in Europe and beyond.

**The EFC's annual conference** is the most important opportunity for professionals in the European foundation sector to meet each other and share ideas.

EFC members have established a range of **Interest Groups and Forums** which facilitate cooperation and exchanges of good practice in various fields of activity including: diversity, migration and integration; human rights and disability; protecting the environment; HIV/AIDS; global health challenges; social investment; central and eastern Europe.

The EFC hosts the secretariat of **Donors and Foundations' Networks in Europe (DAFNE)**, which supports cooperation among national networks which have been established in 22 European countries.

The EFC coordinates the **European Forum on Philanthropy and Research Funding**, which was launched in 2007 with the support of the European Commission and other partners.

**For more information about the EFC please see: [www.efc.be](http://www.efc.be)**

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