

# The New Proposal for a Regulation on the Statute for a European Foundation: Towards Harmonizing the Regime for Foundations Operating Across the EU

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## I. INTRODUCTION

On February 8, 2012 the European Commission (hereinafter "EC") published a proposal<sup>1</sup> for a European Foundation Statute in order to facilitate the cross-border activities of public benefit purpose foundations and make it easier for them to support public benefit causes across the EU.

The adoption of the proposal followed the Single Market Act Communication<sup>2</sup> adopted in April 2011 which highlighted the need to put an end to market fragmentation and to eliminate barriers to the free movement of services, innovation and creativity in order to deliver growth and employment, and promote competitiveness. The Act recognized that although foundations make a large contribution to the financing of innovative initiatives of general interest, they still face difficulties in establishing themselves in other Member States or pooling their assets on a cross-border basis<sup>3</sup>. In the same regard, the EU Citizenship report 2010<sup>4</sup> had stressed the importance of enhancing the European dimension of the activities of public benefit purpose foundations with a view to promoting citizen action at EU level while the "Social Business Initiative" (SBI) Communication<sup>5</sup> underlined the importance of developing European legal forms for entities in the social economy sector.

The proposal, which tackles specific issues such as the uncertainty of recognition as a public benefit purpose foundation in other Member States, the costs of pooling and distributing funds on a cross-border basis and the limited cross-border donations, will now be shared between the European Parliament (for its consent) and the Council of Ministers representing the governments of the 27 Member States, which have to take a unanimous decision to adopt the text, in order for the Statute to come into force, which is expected in 2014.

## II. ASSESSMENT OF THE NEW PROVISIONS

### General Requirements

The EU Foundation shall be established as a separate constituted entity for a public benefit purpose<sup>6</sup>, registered in one Member State<sup>7</sup>, bearing legal personality in all Member States and having legal capacity to conduct the entirety of its activities<sup>8</sup>. The draft Regulation contains a restrictive number of purposes<sup>9</sup>

which shall be considered “public benefit purposes”, therefore the list cannot be extended to activities related to fields other than: a) arts, culture or historical preservation; b) environmental protection; c) civil or human rights; d) elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination; e) social welfare, including prevention or relief of poverty; f) humanitarian or disaster relief; g) development aid and development cooperation; h) assistance to refugees or immigrants; i) protection of, and support for, children, youth or the elderly; j) assistance to, or protection of, people with disabilities; k) protection of animals; l) science, research and innovation; m) education and training; n) European and international understanding; o) health, well-being and medical care; p) consumer protection; q) assistance to, or protection of vulnerable and disadvantaged persons; r) amateur sports; and s) infrastructure support for public benefit purpose organizations.

The exhaustive list of activities, although enhancing legal certainty, might create problems with Foundations whose purpose will not *prima facie* be considered as falling within the scope of one of the above activities. Such matters of interpretation will probably have to be solved through the provisions which will be adopted by the Member States to ensure effective application of the draft regulation<sup>10</sup>. Nevertheless, it shall be mentioned that an EU Foundation can carry out trading or other economic activities provided that any profit is exclusively used in pursuance of its public benefit purpose<sup>11</sup>.

One very important aspect of the draft Regulation is that the Foundation, which must have assets equivalent to at least 25.000 EURO, needs to operate in a cross border manner since its activities must take place in at least two Member States<sup>12</sup>. The cross border element should be perceived as essential to the harmonization of the regime for foundations throughout the EU, while the minimum limit in asset value guarantees the effective operation of the Foundation.

### **Formation Requirements**

The Foundation can be formed: a) *ex nihilo*<sup>13</sup> (by a testamentary disposition, by notarial deed or by means of a written declaration by any natural and/or legal person or public body in accordance with the applicable national law); b) by the *merger*<sup>14</sup> of public benefit purpose entities legally established in one or more Member States or c) by the *conversion*<sup>15</sup> of a national public benefit purpose entity legally established in a Member State into the Foundation.

The rather detailed provisions regarding the creation of an EU Foundation following the merger of public benefit entities in different Member States is an important step towards the harmonization of the regime permitting entities with common objectives but different establishments in the EU to join forces under one

legal personality. Formation through conversion guarantees the effective transition from the previous national frameworks of operation to the new system. The equalization of a conversion request with a simple statute amendment request under the old regime<sup>16</sup> introduces a simplified procedure whereby discretionary powers of the supervisory national authority seem to be limited.

### **Organization and Dissolution**

The Foundation shall be governed by a governing board composed of an uneven number of at least three members<sup>17</sup>. Members of the governing board shall have full legal capacity and not be disqualified under the laws of any Member State or a judicial or administrative decision in any Member State from serving as a board member<sup>18</sup>. The main duties of the governing board are the following<sup>19</sup>: a) take responsibility for the proper administration, management and conduct of the Foundation's activities; b) ensure compliance with the statutes of the Foundation, the draft Regulation and the applicable national law. The board can decide on the creation of other boards, such as a supervisory board, should conflicts of interest arise either between members of these two boards<sup>20</sup> or between members of the governing board who may have a business, family or other relationship with the founder or with each other, which could create an actual or potential conflict of interest such as to impair his/her judgment<sup>21</sup>.

Careful consideration to the above provisions should be paid by potential founders who shall ensure their incorporation into the Foundation's statutes. The draft Regulation establishes efficient mechanisms of management of the Foundation, although the extensive conflicts of interest especially among members of the same family in the governing board may create problems for "Family Foundations", which may need to designate third persons for inclusion in the governing board.

The draft Regulation allows *vice versa* the conversion of the Foundation back into a public benefit purpose entity governed by the law of the Member State where it is registered, upon the condition that such a conversion is permissible under the statutes of the Foundation<sup>22</sup>. It also contains rules on winding up in the following cases: a) the purpose of the Foundation has been achieved or cannot be achieved; b) the time for which it was set up has expired or c) it has lost all of its assets<sup>23</sup>.

It is important to mention that the draft Regulation establishes a winding up procedure according to which once the creditors of the Foundation have been paid in full, any remaining assets of the Foundation shall be transferred to another public benefit purpose entity with a similar public benefit purpose, or otherwise used for public benefit purposes as close as possible to those for which the Foundation was created<sup>24</sup>. Therefore, contribution to the assets of the Foundation results in their permanent separation from the donor's property, who cannot claim back remaining funds or assets after the winding up procedure. Further guidance on this issue shall be provided by the national legislation of the Member State where the

dissolved foundation has its establishment. Often national laws provide a requirement that prior to the establishment of a Foundation one must define what will happen with the proceeds in the event of a liquidation.

### **Member State Supervision**

The competent national supervisory authorities have extensive powers in order to enable them to effectively oversee the activities of the public benefit purpose entities for which they are responsible. Apart from their general obligation to oversee the application of the relevant laws by the governing board of the Foundations, the national supervisory authorities can ask the board for all information or evidence relating to suspected actions which are infringing the applicable law, appoint an independent expert in cases of financial impropriety, serious mismanagement or abuse, issue warnings to the governing board, dismiss a member of the governing board, and decide to wind up the Foundation<sup>25</sup>. Cooperation between national authorities of Member States is also provided to tackle possible infringements<sup>26</sup>.

The competences of the national supervisory authorities are very broad and this can be problematic for the operation of a Foundation. Possible misuse of the wide discretionary powers provided in the draft Regulation by the national authorities may result in serious obstacles to the operation of Foundations in the EU. Although supervision is indispensable for the proper administration of a Foundation and for the effective application of all legitimate means to achieve its statutory goals, it should not, however, lead to wide scale state interference. In any event, founders and members of the governing board should establish close cooperation with the authorities to facilitate the Foundation's activities.

### **Tax Treatment**

The draft Regulation provides for the automatic application to the Foundation and its donors for the same tax benefits granted to domestic public benefit purpose entities.

This is because Member States would be required to regard the Foundation as equivalent to public benefit purpose entities established under the legislation of the Member States concerned. Donors to and beneficiaries of the Foundation should be treated in accordance with the same principle<sup>27</sup>.

Equal tax treatment with "national" foundations is definitely beneficial to EU Foundations, given that the principle of decreased taxation of public benefit purpose foundations is embedded in the legal culture of Member States. It must be pointed out that founders and donors should be in close cooperation with the competent tax authorities both in the Member State where they have their registered office and in those where they conduct their activities, to ensure compliance with the relevant national tax legislations.

### III. CONCLUSION

The new proposal for a draft Regulation on the Statute for a European Foundation creates a new European legal form intended to facilitate foundations' establishment and operation in the single market. It will allow foundations to more efficiently channel private funds to public benefit purposes on a cross-border basis in the EU, substantially decreasing their costs and thus allowing the allocation of more funds for public benefit purpose activities. The increased competence of the national supervisory authorities as a balancing factor calls, however, for close cooperation between them and the governing boards to ensure Foundations' effective operation within the applicable legislation.

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<sup>1</sup> On the applicable law, see Proposal for a Regulation on the Statute for a European Foundation, *supra* note 1, Article 3.

<sup>2</sup> *Ibid.*, Article 11. Note though that economic activities unrelated to the public benefit purpose of the FE are allowed up to 10% of the annual net turnover of the FE provided that the results from unrelated activities are presented separately in the accounts.

<sup>3</sup> *Ibid.*, Article 6. It suffices though that the Foundation has as a statutory objective to carry out activities in two or more Member States.

<sup>4</sup> European Commission Proposal for a Regulation on the Statute for a European Foundation (FE), (COM (2012) 35/2, 08.02.12, available [here](#).

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Single Market Act. Twelve levers to boost growth and strengthen confidence "Working together to create new growth" (COM (2011) 206 final), available at [here](#).

<sup>6</sup> *Ibid.*, paragraph 2.8, p.15.

<sup>7</sup> EU Citizenship Report 2010 Dismantling the obstacles to EU citizens' rights, paragraph 2.6, page 21.

<sup>8</sup> Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative: Creating a favorable climate for social enterprises, key stakeholders in the social economy and innovation for social enterprises, paragraph 3.3, page 9 and paragraph 4, page 12.

<sup>9</sup> Proposal for a Regulation on the Statute for a European Foundation, *supra* note 1, Article 5.

<sup>10</sup> *Ibid.*, Article 21, paragraph 1.

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*Ibid.*, Article 9.

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Supra note 6.

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*Ibid.*, Article 13.

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*Ibid.*, Article 14-16.

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*Ibid.*, Article 17.

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*Ibid.*, Article 18, paragraph 3.

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*Ibid.*, Article 27, paragraph 1.

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*Ibid.*, Article 28, paragraph 1.

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*Ibid.*, Article 29, paragraph 1.

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*Ibid.*, Article 32, paragraph 2.

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*Ibid.*, Article 32, paragraph 1.

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*Ibid.*, Article 41, paragraph 1.

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*Ibid.*, Article 43, paragraph 1.

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*Ibid.*, Article 43, paragraph 1.

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*Ibid.*, Article 46, paragraph 2.

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*Ibid.*, Article 47.

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*Ibid.*, Articles 50-51.