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CONSULTATION ON A POSSIBLE STATUTE  
FOR A EUROPEAN FOUNDATION

Consultation by the Services of the Internal Market Directorate General

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Consultation document of  
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Preliminary Remark

The following document has been drafted by the Services of the Internal Market Directorate General in order to assess the need for a European Foundation. It does not reflect the views of the European Commission and will not prejudice its future decisions, if any, on further measures concerning the European Foundation.

## 1. INTRODUCTION

In its Action Plan of 2003 on Modernising Company Law and Enhancing Corporate Governance in the EU<sup>1</sup>, the Commission foresaw, as a medium term priority, the assessment of the need for the creation of a statute for a European Foundation. A public consultation and hearing on future priorities for the Action Plan was carried out in spring 2006<sup>2</sup> demonstrating a need for further work in this area. In addition the European Parliament invited the Commission to continue its preparation of Community legislation providing for legal forms of entrepreneurial organisation, such as the European Foundation<sup>3</sup>. The Commission consequently undertook to launch a study aimed at an in-depth assessment of the feasibility of such a statute. Following an open tender, a feasibility study was commissioned by the Commission in November 2007, to be carried out jointly by the Max Planck Institute for Comparative and International Private Law in Hamburg and the University of Heidelberg.

The Commission has taken no decision as to the need for a European Foundation Statute or the content or structure of a possible statute. If a European Foundation Statute were to be proposed, the objective would be similar to that sought with other European legal forms, i.e. to make possible the use of a single legal form instead of up to 27 national ones. The European Foundation would be parallel to the national legal forms and its use would be optional.

In order to assess these issues better, the Services of DG Internal Market have decided to make the feasibility study public on its website and simultaneously to launch a specific related public consultation. The purpose of the consultation is twofold: to get feedback on the feasibility study itself and on the need for a European Foundation Statute, and to get more in-depth information on the operational problems that foundations face when operating cross-border. The responses will be taken into account in assessing the need for and impact of a new legal form.

There are two parts to the questionnaire. Part I contains general questions about the need for and desirability of a new legal form, together with questions about the content of a possible European Foundation Statute. It also contains questions targeted specifically at foundations, aimed at getting concrete information about difficulties and hindrances foundations face in the Internal Market, as well as about their interest in a possible statute. Part II is targeted at donors to, and founders of, foundations and aims at obtaining information on how a potential European Foundation Statute might affect founders' and donors' attitudes. Where appropriate the questions refer to the relevant pages of the [feasibility study](#). The Commission Services are aware that many foundations have already answered the survey which was included in the feasibility study. Careful

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<sup>1</sup>[European Commission » Internal Market » Company Law » Modernisation of Company Law and Enhancement of Corporate Governance](#)

<sup>2</sup>[European Commission » Internal Market » Company Law » Consultation on future priorities for the Action Plan](#)

<sup>3</sup><http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-20060229+0+DOC+PDF+V0//EN&language=EN>

consideration has therefore been given to ensuring that responses supplement rather than duplicate the information already provided by foundations through the feasibility study.

Responses to this consultation should be concise, focused specifically on the questions raised and sent **no later than 15 May 2009**. The answers to Part I of the questionnaire (to be found below) should be sent to DG Internal Market and Services, Unit F2, European Commission, B-1049 Brussels. Responses may also be sent by e-mail to: [markt-consultation-ef@ec.europa.eu](mailto:markt-consultation-ef@ec.europa.eu)

Part II of the questionnaire, which is targeted at donors and founders takes the form of an online questionnaire. Respondents to this part are kindly asked to note that the responses cannot be saved before submitting them and that the time allowed for answering is 90 minutes. [Link to the questionnaire, Part II](#)

## 2. THE QUESTIONNAIRE, PART I

### Information about the respondent

A. Name of the foundation/company/organisation/person and your function

B. Address and register ID number of registered organisations<sup>4</sup>

C. The legal form, field of activity and country of origin of your organisation

D. If you are answering for a foundation

1. Does your foundation conduct cross-border activities in the EU/EEA area?

If yes, in which form does your foundation conduct these activities (*e.g. foreign foundations, branches, subsidiaries, provision of services, export/direct sales of goods, fund raising, grant making*)?

2. Does your foundation plan to expand its activities to other Member State(s) in the foreseeable future?

If yes, in which form (*e.g. foreign foundations, branches, subsidiaries, provision of services, export/direct sales of goods, fund raising, grant making*)?

Please indicate to which Member State(s).

3. Please indicate the approximate yearly expenditure of your foundation.

4. Please indicate whether the purpose of your foundation is (1) public benefit only, (2) mixed public benefit and private or (3) private only.

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<sup>4</sup> The Commission asks organizations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent. If an organization decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see [COM \(2002\) 704](#), and Communication on ETI Follow-up, see [COM \(2007\) 127 of 21/03/2007](#))

### **Question 1: Barriers to the cross-border activities/establishment of foundations**

Q 1.1 The study identifies four categories of civil law barriers/difficulties for the cross-border activities of foundations in Europe (pp. 105-111):

- 1) Recognition of foreign foundations (pp. 105-107),
- 2) Recognition of trusts (p. 107),
- 3) Cross-border transfer of the Real Seat (pp. 107-110),
- 4) Cross-border transfer of the Registered Seat (pp. 110-111).

Do you agree with these findings?

Q 1.2 Do you see any further civil law barriers/difficulties? Please specify.

Q 1.3 Please rank the civil law barriers in order, starting with the one you find the most important.

Q 1.4 If you are answering for a foundation, please give concrete examples of the civil law barriers and/or difficulties you have encountered. How do you deal with these barriers/difficulties? Have they influenced your plans to conduct cross-border activities?

Q 1.5 If you are answering for a foundation and have tried to transfer your real or registered seat cross-border, have you experienced any problems? Please specify your reasons for wanting to transfer the seat and the problems experienced, if any.

Q 1.6 The study identifies eight categories of tax law barriers/difficulties for the cross-border activities of foundations in Europe (pp. 111-122):

- 1) Income taxation of foreign foundations (pp. 112-114),
- 2) Income taxation of domestic foundations operating abroad (pp. 114-115),
- 3) Income taxation of domestic donors of foreign foundations (p. 116),
- 4) Income taxation of foreign donors of domestic foundations (p. 117),
- 5) Income taxation of foreign donors of foreign foundations (pp. 117-118),
- 6) Income taxation of affiliated beneficiaries (p. 118),
- 7) Inheritance taxation (pp. 118-120),
- 8) Further taxes (pp. 120-121).

Do you agree with these findings? If not, please explain why.

Q 1.7 Do you see any further tax law barriers/difficulties? Please specify.

Q 1.8 Please rank the tax law barriers in order, starting with the one you find the most important.

Q 1.9 If you are answering for a foundation, please give concrete examples of the tax law barriers and/or difficulties you have encountered. How do you deal with these barriers/difficulties? Have they influenced your plans to conduct cross-border activities?

Q 1.10 Do you consider the civil law barriers or the tax law barriers more important?

Q 1.11 Why do foundations set up additional organisations/structures in other Member States in your view?

Q 1.12 The study seems to identify tax barriers as the main reason for foundations setting up additional organisations/structures in other Member States (p. 122).

Do you agree with this finding? If not, what do you think is the main reason for foundations setting up additional structures/organisations in other Member States?

## **Question 2 – What solutions would be most appropriate**

Q 2.1 The study assesses five different options to deal with the barriers/difficulties identified. The options assessed are (p. 178-194):

- 1) Status quo combined with soft law instruments
- 2) Harmonization
- 3) Bilateral or multilateral treaties
- 4) A European Foundation Statute without tax elements, and
- 5) A European Foundation Statute with tax elements

What other options for solving the problems do you see if any?

Q 2.2 The study suggests that of the above options, the European Foundation Statute seems to be the preferable policy option (p. 1). Do you agree? Why/why not?

Q 2.3 If you do not agree, what do you consider as the preferable policy option? Why?

Q 2.4 Would you consider a European Foundation Statute which does not include tax elements (for instance a tax-exempt status in all EU Member States, p.191) as a useful/attractive instrument? Why/why not?

Q 2.5 Do you believe that an accreditation system (pp. 179-180) could be a proportionate solution to the problems for cross-border activities that foundations face today? Why/why not?

Q 2.6 What added value do you think a "European label" (obtained for instance through a European legal form like the European Foundation) would bring for the foundations?

Q 2.7 In your view, the benefits attached to a "European label" for foundations:

- can only be achieved through a specific European legal form (European Foundation Statute)
- can be achieved through an accreditation system
- can already be achieved through national foundations (e.g. through their names, statutes, marketing)
- can be achieved through other means, which ones?

### **Question 3: Content and form of a possible statute for a European Foundation**

Q 3.1 According to the study the European Foundation should have the following five main characteristics (p.194):

- 1) Legal personality
- 2) Promotion of a public benefit purpose
- 3) No membership
- 4) State supervision, and
- 5) Establishment by registration

Do you agree that a European Foundation should have these five characteristics? If not, please explain why.

Q 3.2 How detailed should the European Foundation Statute be? Should it be as comprehensive as possible (as is the case for the Commission proposal for a European Private Company Statute) or should it only contain basic rules and refer to national laws on other issues (as is the case for the European Company Statute) (pp. 195-196)?

Q 3.3 Should an initial endowment be required (p. 199)? If yes, how large an endowment should be required?

Q 3.4 What should be the rule on economic activities by the European Foundation itself (p. 204)?

Q 3.5 How should the supervision of a European Foundation be arranged (pp. 200-203)?

Q 3.6 On what conditions should an existing foundation be able to transform itself into a European Foundation (p 184)?

Q 3.7 If you think that the European Foundation should have other characteristics, please specify which ones.

**Question 4: Potential transformation of existing foundations into a European Foundation**

If a European Foundation Statute were introduced, the possibility of transforming existing foundations into a European Foundation would seem to depend on several factors e.g. the statutes of the foundation ("will of the founder"), the agreement of the board of the foundation, the approval of the supervisory authority, the scope of cross-border activities and existing barriers, as well as on the content of a possible European Foundation Statute (p.184).

Q 4.1 If you are answering for a foundation, would you consider transforming your foundation into a European Foundation if possible?

Q 4.2 On what criteria would the decision of the board depend?

Q 4.3 What do you think the benefits and drawbacks of a transformation in the case of your foundation would be?

Q 4.4 Would the possibility to transform itself into a European Foundation be decisive in order for your foundation to expand its activities to other Member States? Why/why not?

Q 4.5 In case your foundation already operates cross-border, would this possibility lead to a substantial increase of cross-border activities?

**Question 5: Any other comments**