



EUROPEAN COMMISSION

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Herrn Horst SEEHOFER  
Präsident des Bundesrates  
Leipziger Straße 3 - 4  
D-10117 BERLIN

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Statute for a European Foundation {COM(2012) 35 final} and apologises for the delay in replying.

As regards the Bundesrat's concerns about the legal basis, the Commission believes that, due to the cross-border character of the obstacles that foundations currently face in their EU-wide activities, it is necessary to undertake action at EU rather than at national level. The proposed action falls within the competences defined in the Treaties and aims to attain the objectives set out therein. The objective of the proposal is to facilitate the cross-border activities of foundations. These activities fall under the fundamental freedoms enshrined in the Treaty (i.e. freedom of establishment, freedom to provide services and free movement of capital) as illustrated in section 2.3.2 of the impact assessment<sup>1</sup>, where an overview of the current legislative framework at EU level is provided. Moreover, the Commission would like to clarify that, according to the proposal, the European Foundations (FEs) would be allowed to engage in economic activities as long as they use the profits exclusively in pursuance of their public benefit purpose (which is important to ensure that they follow the will of their founder). The limitation of 10% of the annual net turnover mentioned by the Bundesrat is specifically imposed on economic activities that are unrelated to the public benefit purpose of the FE and not on economic activities overall.

As regards proof of difficulties faced by foundations, the Commission takes note that German authorities (e.g. Bavaria and Hamburg supervisory authorities) are not aware of legal obstacles for foreign and domestic foundations, and that the 2009 survey carried out in the Länder among the foundation authorities found no indication of problems. However, the comprehensive research carried out by the Commission provided evidence that many foundations currently encounter obstacles in their activities across the EU. This research included a feasibility study carried out by an external contractor in 2008, two public consultations (in 2009 and 2010) and information-gathering in cooperation with the foundation sector. The results of the research and some examples of specific problems encountered by foundations are described in the impact assessment.

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<sup>1</sup> [http://ec.europa.eu/internal\\_market/company/docs/eufoundation/impact\\_assesment\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/eufoundation/impact_assesment_en.pdf).

*Regarding the funding for public benefit purposes and its geographical distribution, it is very difficult to estimate the future impact of the Statute on the amount of funding available. As illustrated in the impact assessment, the costs for legal advice should decrease because FEs would benefit from similar rules and conditions across the EU. As with any new piece of legislation there would be some initial costs that should diminish the more the proposed legal form is known and the more advice is available about it. Any additional costs resulting from obligations proposed by the draft Statute, such as auditing of accounts, would depend on the national rules in place (in a number of Member States audited accounts are already required in general or for larger foundations). One also needs to remember that these obligations are very important to make the FE transparent and accountable. As regards the overall amount of funding available, it could be expected that, thanks to reduced legal advice/administrative costs, the European Foundations would be able to channel more of their resources into public benefit purpose activities.*

*As regards the Bundesrat's suggestion to explore other means for addressing the obstacles faced by foundations, the Commission would like to recall that it has analysed and compared potential policy options (see sections 4 and 5 of the impact assessment) and in this context, the Statute appeared to be the most appropriate solution.*

*The Commission takes note of the Bundesrat's concerns regarding potential implementation costs, specifically for registration and supervision. The Commission considers that setting out certain rules regarding implementation, including registration and supervision of FEs, in the Statute is essential to enable foundations to use this new legal form. National systems might need to be adapted; and the corresponding costs could not be avoided. At the same time, the proposal refers to the systems in place in Member States, which should limit these costs. As regards registration in particular, the proposal refers to the national registration systems and does not interfere with the form they should take (e.g. whether there should be one or more bodies responsible and at which administrative level). But it requires that in each Member State there is a system in place whereby European Foundations are registered – at central or regional level - and whereby information about all registered FEs is easily available.*

*On supervision, the Commission agrees with the Bundesrat that the supervisory authorities have a duty to ensure that foundations are not misused for improper purposes. The Commission believes that it is very important to set minimum, but robust, powers (as foreseen in the proposal) to guarantee that supervisory authorities have adequate powers to oversee the activities of FEs. Appropriate supervisory powers and good cross-border cooperation between supervisory authorities are essential given that the Statute focuses on foundations with cross-border activities and aims to facilitate those, and given the variety of supervisory requirements across the Member States. The costs of adaptation of national systems to the Statute would depend on what powers are currently in place in Member States and what additional supervisory powers they would decide to give to national authorities.*

*The Commission is aware that the taxation of public benefit purpose entities is a sensitive topic for Member States and therefore, the proposed tax articles take into account both the need to respect Member States' fiscal sovereignty and the case-law of the Court of Justice of the European Union. The proposal does not lay down new specific rules on the tax treatment of the FEs or their donors and therefore, does not interfere with national laws. Instead, it refers to the national tax rules for domestic public benefit purpose entities and aims at ensuring that this treatment is also applied to FEs. Member States*

would be required to regard FEs as equivalent to domestic public benefit purpose entities established under their laws.

As regards the Bundesrat's observations on the individual provisions and in particular on the term "foundation", the proposal aims to ensure that the pursuit of the foundation's purpose is guaranteed by, *inter alia*, assuring that assets are irrevocably dedicated to the purpose (Article 5), that any profits from economic activities are exclusively used in its pursuance (Article 11), that governing board members act according to the purpose (Article 29) and by restricting the circumstances when an amendment of the purpose is possible (Article 20). All the key requirements for an FE would also need to be verified by the registration authority (see Article 23(2)). As regards the minimum founding assets, the chosen amount needs, on the one hand, to demonstrate that FEs have sufficient resources to pursue their purpose and, on the other hand, to keep the legal form accessible to foundations across the EU. This is not an easy balance to strike given the very diverse requirements in place in different Member States.

As far as Article 35 on the seat of the FE is concerned, the Commission takes note of the Bundesrat's view that registered and administrative offices of the FE should be in one place. Given the politically sensitive discussions on this issue in the context of other proposals (including on the European Private Company (SPE) Statute), the draft Statute leaves this issue to the national legislation. At the same time, certain safeguards are foreseen, for instance Article 21 includes a strict provision specifying where a registered office can be located in the case of a merger or a conversion.

Finally, the Commission takes due note of the issue raised by the Bundesrat of a potential threat to the public interest and impermissibility of specific public benefit purposes under some national laws. It is now up to the Member States to agree on public benefit purposes listed in Article 5 of the draft Statute that would be acceptable to all national delegations.

I hope that these clarifications address the concerns expressed by the Bundesrat and I look forward to continuing our political dialogue in the future.

Yours faithfully,

Maroš Šefčovič  
Vice-President