

Chapter 1: DRAFT

Part 1: Civil Law

Based on EC Treaty Art. 95 and 308 the following proposition is made

Preamble

This draft for the European Foundation is intended to promote foundations in Europe (especially within the European Union). European Foundations shall exemplify generally accepted best practice in their activities and administration, especially in following high standards in matters of accountability and serving the public interest, and could therefore benefit from a favourable tax status, especially for cross border relationships.

Art. 1 Definitions

1.1 General Definition

European Foundations are separately constituted and independently managed bodies with their own governing board, having been irrevocably provided with valuable goods, rights or other resources and/or having at their disposal an income, having no members, and serving a public benefit purpose (see Art. 1.2).

1.2 Public Benefit Purpose

European Foundations serve public benefit purposes at domestic and/or international level either by supporting individuals, associations, institutions or other entities or by operating their own programmes.

European Foundations serve public benefit purposes if the purpose for which they are established is within one or more of the following categories:

- (a) Amateur sports;
- (b) Arts & culture;
- (c) Children and youth;
- (d) Civil or human rights;
- (e) Consumer protection;
- (f) Democracy;
- (g) Disaster relief;
- (h) Ecology & protection of the natural environment;
- (i) Education;
- (j) Elimination of discrimination;
- (k) European and international understanding;
- (l) Handicapped people;
- (m) Health & medical care;
- (n) Historical preservation (conservation of the built environment);
- (o) Prevention and relief of poverty;

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- (p) Protection or care of animals;
- (q) Refugees and immigrants;
- (r) Religion;
- (s) Science;
- (t) Social or economic development;
- (u) Social welfare;
- (v) Other public benefit purposes.

1.3 Non-Distribution Constraint, Split-Interest Endowments

Benefits shall not be distributed either directly or indirectly to any Founder, Director, officer or employee of the foundation other than by way of reasonable and proper remuneration under a contract of service or a contract for services entered into for the benefit of the foundation and/or its beneficiaries, nor extended to any related person thereof unless the latter belongs to a class of beneficiaries in the sense of Art. 1.2. (but cf. Art. 4.1.1, para. 2).

The Founder can restrict his donation in such a way that he, his spouse and his children are entitled to receive up to 30 percent of the foundation's available revenue for distribution from that source for their lifetime. In any year this private distribution shall not exceed the foundation's aggregate distribution for public benefit purposes. The European Foundation shall distribute a reasonable proportion of its available revenue in due time to its beneficiaries.

Art. 2 Legal Status

The European Foundation has legal personality (with full capacity and limited liability) which is acquired upon registration (see Art. 3.5).

Art. 3 Formation

3.1 Right to Establish

Anybody has the right to establish a European Foundation as long as that person complies with the prescribed rules as to form and content.

3.2 Form of Establishment

The formation of a European Foundation ensues

- (a) in the form of a public deed or a written declaration; or
- (b) by testamentary disposition or (provided it is in accordance with national law) by inheritance agreement.

3.3 Formation Deed

The formation deed of a European Foundation must

- (a) express the intention to establish a foundation;
- (b) express the intention to donate to the foundation;
- (c) determine the foundation's (initial) assets; and
- (d) determine the public benefit purpose of the foundation.

3.4 No State Approval

The coming into existence of a European Foundation does not depend on any acknowledgement or approval by a court or other State supervisory body (see Art. 7).

3.5 Registration

Every European Foundation shall be registered in an independent national Public Register in the member State where the registered office is located, certifying the existence of the foundation for the purpose of its recognition in all other member States of the European Union.

The initial registration entry and any notified changes of particulars are to be published in the Official Journal by the Public Registrar.

Any person shall be entitled to inspect the statutes and other documents of the European Foundation which are deposited with the Public Register without having to prove any specific interest.

All decisions of the Public Registrar shall be appealable to the courts.

3.6 Statutes

The statutes of the European Foundation shall determine

- (a) the name of the foundation, followed by the abbreviation 'EF';
- (b) the public benefit purpose;
- (c) the address of the one and only registered foundation office; and
- (d) the process for appointing members of the Board of Directors (and, where applicable, the Supervisory Board).

If the formation deed or statutes of a European Foundation do not make adequate provision for the necessary governance, the State supervisory authority (see Art. 7, para. 1) must ensure that the statutes are amended (see Art. 8.1.1).

Art. 4. Governance

4.1 Board of Directors

4.1.1 Responsibilities, Rights and Duties

The Board of Directors is responsible for the proper management of the foundation and for all duties not having been delegated to any other organ of the foundation by the statutes or the law.

The members of the Board of Directors shall observe a duty of loyalty in the exercise of their responsibilities, they shall act with due diligence and care, and shall act in compliance with the law and, subject thereto, with the statutes of the foundation.

The European Foundation may provide reasonable financial compensation to the members of the Board of Directors, and may reimburse all reasonable expenses.

The members of the Board of Directors and of the Supervisory Board are personally liable to the European Foundation for losses deemed attributable to any negligence, reckless acts or willful defaults on their part.

4.1.2 Board Members

The Board of Directors is composed of at least three competent, independent and unrelated natural persons.

4.1.3 Admission, Expulsion and Resignation

Members of the Board of Directors are elected by the Supervisory Board (if existing) or by the Board of Directors or any other person/institution specified in the statutes. The first Board of Directors is determined by the founder.

The members of the Board of Directors serve for a period of not more than four years at a time. Re-election is possible.

Members of the Board of Directors can resign at any time but they must provide for the proper continuation of the foundation's administration.

The electing organ (see Art. 4.1.3, para. 1) can dismiss a member of the Board of Directors by a $\frac{2}{3}$ majority vote at any time or for exceptional reasons by a simple majority vote.

4.2 Supervisory Board

European Foundations may have a Supervisory Board, which shall be composed of at least three members.

European Foundations with annual gross revenues in excess of Euro *** and/or gross assets in excess of Euro *** in any of the last three fiscal years shall have a Supervisory Board.

Members of the Supervisory Board shall have right of access to all books, records, and information concerning the foundation's functioning, the investment of its funds and its activities and affairs generally.

If the Supervisory Board discovers serious irregularities which, after reasonable written notice, the Board of Directors fails to correct or prevent, it shall report these facts to the auditors (see Art. 5.3) and/or to the State supervisory authority (see Art. 7, para. 1) as may be appropriate.

In all other respects, the external regulation of the Board of Directors shall be applied by analogy to the foregoing except where specific provision is made in this Statute/Regulation or, failing that, in national legislation.

4.3 Rights of the Founder

The Founder of a European Foundation and also any subsequent donor of a significant contribution have the right to intervene with the State supervisory authority if the Board of Directors and/or the Supervisory Board fail to comply with their responsibilities; the State supervisory authority must produce a substantive statement on this intervention within 60 days.

4.4 Rights of the Beneficiaries

Any person with a legitimate interest in, whether or not a beneficiary of, a European Foundation may submit a report to the State supervisory authority if the Board of Directors and/or the Supervisory Board do not comply with their responsibilities; the State supervisory authority must produce a substantive statement on this report within 60 days.

4.5 Rights of Third Parties

Donors, creditors, employees, tenants and other third parties whose own interests are affected by the activities of a European Foundation may notify the State supervisory authority if in their view the Board of Directors and/or the Supervisory Board are failing to comply with their responsibilities; the State supervisory authority has full discretion as to how best to respond.

Art. 5 Reporting, Transparency and Disclosure

5.1 Public Accountability

The Board of Directors must deliver to the State supervisory authority (see Art. 7, para. 1) every year, within 6 months after the end of the foundation's financial year, an annual report and annual accounts (and where applicable an audit report) for that financial year.

The annual accounts for all European Foundations are required to show a true and fair view. The accounts shall be prepared in accordance with International Financial Reporting Standards (IFRS), where applicable, or else with national or international standards commonly recognized for public benefit purpose institutions.

European Foundations must keep complete and accurate records of all financial transactions and retain the records of the last three financial years in addition to the current year.

5.2 Disclosure

Everyone can inspect the last three annual reports and accounts (and where applicable audit reports) of a European Foundation filed with the State supervisory authority (see Art. 7, para. 1) without having to prove any specific interest.

5.3 Auditor

European Foundations may have an auditor.

A European Foundation with annual gross revenues in excess of Euro *** and/or gross assets in excess of Euro *** in any of the last three fiscal years, shall have its accounts for the year audited by an independent company auditor or other regulated auditor subject to internationally recognised professional auditing standards and eligible under the rules of the relevant regulatory body to act as a charity auditor.

The auditor is appointed by the Board of Directors or (where applicable) by the Supervisory Board.

The auditor must report to the appointing Board, and in terms that accord with generally recognised professional auditing standards, on the annual accounts within 6 months after the end of the accounting year.

The auditor must inform the State supervisory authority promptly in writing about any serious irregularities coming to notice in the course of acting in that capacity.

Art. 6 Activities

6.1 Asset Management

The Foundation's statutes can prescribe that the European Foundation shall preserve the real value of their permanent capital against devaluation of money (inflation) and distribute only their available revenue.

6.2 Economic Activities (Trading)

A European Foundation must not engage in permanent trading as a direct activity.

A European Foundation may hold a controlling interest in another undertaking which engages in permanent trading only if such trading is within the foundation's public benefit purpose or ancillary with a view to furthering it (related economic activities) or in the circumstances described in the next paragraph.

A European Foundation may hold a controlling interest in another undertaking which engages in any other kind of permanent trading with a view to profit (unrelated economic activities) only if (i) the profits derived therefrom are used solely for the furtherance of the foundation's public benefit purpose and (ii) the interests of that other undertaking do not conflict with the furtherance of the foundation's purpose.

6.3 Political Activities

European Foundations may engage freely in research, education, publicity and other activities with respect to any issue affecting public affairs, including criticism of policies or politicians.

Subject to the preceding rule in para. 1 European Foundations may not engage in fundraising or campaigning to support or oppose any political party or candidate for public office.

Art. 7 State Supervision

European Foundations are subject to the supervision of a public authority (State supervisory authority) in the member State where the European Foundation has its registered office – with the support of the State supervisory authority of the member State where the foundation has other offices.

If a European Foundation has no Supervisory Board (see Art. 4.2, para. 2), the State supervisory authority must review the annual report.

If a European Foundation has no certified auditor (see Art. 6.3, para. 2), the State supervisory authority must review the annual accounts.

The State supervisory authority has the right to intervene in the event of any significant breach of the law or the statutes, but has no right to review the Board of Directors' (and where applicable the Supervisory Board's) discretionary decisions for any other reason. Once a written notice of non-compliance has been given and adequate opportunity to correct any defect has been provided, the State supervisory authority may take any supervisory measures deemed necessary.

All decisions of the State supervisory authority shall be appealable to the courts.

Art. 8 Fundamental Decisions

8.1 Amendment of Statutes

8.1.1 Changes of Administrative Provisions

If the administrative provisions of a European Foundation for any reason become unreasonable or outdated the Board of Directors may amend the statutes (see Art. 3.6) and/or formation deed (see Art. 3.3) accordingly.

Changes to the statutes are to be in the same form as for the establishment of the European Foundation (see Art. 3.2(a)) and must be notified to the appropriate Public Registrar (see Art. 3.5).

The State supervisory authority (see Art. 7, para. 1) shall be entitled to reject the change of statutes if this is deemed necessary in order to prevent the original intentions of the Founder, or the reasonable expectations of the foundation's beneficiaries, or the legal rights of other persons affected, from being compromised.

The Supervisory Board (see Art. 4.2), the Founder (see Art. 4.3), the beneficiaries (see Art. 4.4) and any other persons whose rights or interests are affected by the change of the statutes may lodge an appeal against the State's acceptance or rejection of any such amendment with the competent court.

In the absence or inactivity of the Board of Directors, the State supervisory authority may itself amend the statutes to eliminate impediments to the effective furtherance of the foundation's purpose. The Board of Directors may lodge an appeal with the competent court against any such amendment.

8.1.2 Modification of Purpose

If the original purpose of a European Foundation has acquired a completely different meaning or effect, or for any other reason is no longer viable as a public benefit purpose in its present form, and as a result of this the foundation is obviously estranged from the intentions of the Founder (especially if the purpose is incapable of achievement, inadmissible, irrelevant or unreasonable) the Board of Directors (or in its absence or inactivity the State supervisory authority) may amend the statutes (see Art. 8.1.1) subject to the written consent of the State supervisory authority by changing the purpose of the foundation or cancelling or amending requirements or conditions which impair the foundation's purpose. The new purpose must be similar to the old purpose.

In the absence or inactivity of the Board of Directors, the State supervisory authority may intervene to modify the foundation's purpose to the extent deemed necessary to avoid the impending or potential frustration of that purpose. The Board of Directors may lodge an appeal with the competent court against any such modification.

8.2 Liquidation

The Board of Directors, or if it is non-existent or inactive the State supervisory authority, must liquidate a foundation as soon as the purpose cannot be achieved even by changing that purpose (see Art. 8.1.2), or when, owing to inadequate assets, the duties of the foundation can no longer be fulfilled, or if the duration specified in the statutes or foundation deed has expired.

Any residual proceeds of liquidation must be transferred to a foundation with a similar purpose. If there is no foundation with a similar purpose, the proceeds go to the government to distribute it in line with the purpose of the foundation.

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Art. 9 Applicable Law

A European Foundation shall be governed

(a) by this regulation, or

(b) in matters of foundation law not covered by this regulation, by the law of the member State where the European Foundation is registered.

PART 2: TAX LAW

Preamble

There is no basis within the laws of the European Union for a regulation on the tax treatment of European Foundations. Nevertheless it seems worthwhile to explore a common tax treatment on the basis of tax law in Europe. Therefore this paper offers two solutions, a complete harmonization of the tax law within the countries of the EU as a Model Tax Law for the treatment of a European Foundation (Part A) and the introduction of non-discrimination rules and double tax treaty amendments within the context of national tax laws (Part B).

As it is unclear whether a general non-discrimination rule (as suggested in Part B) already follows from actual European Union law, this part proposes codified non-discrimination rules in order to provide a clear solution and avoid legal uncertainty.

Tax Law Part A: Harmonized Tax Law

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1.3 Non-Distribution Constraint, Split-Interest Endowments

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Art. 2 Competence and Procedural Rules

The competence of tax authorities to determine whether the European Foundation serves public benefit purposes rests with the tax authority of the member State where the foundation is domiciled.

Art. 3 Tax Benefits

3.1 Foundation

European Foundations shall be tax exempt from income tax on income and capital gains derived from their assets and entitled to a refund of tax withheld from such income and gains, unless Art. 5.2 applies.

European Foundations shall be exempt from gift tax and inheritance tax on both their initial endowment and subsequent gifts.

European Foundations shall be exempt from capital taxes on the value of their assets.

European Foundations shall be exempt from taxes on the transfer of their assets.

European Foundations shall be eligible for a rebate of irrecoverable VAT incurred on expenditure attributable to their non-business public benefit activities.

European Foundations shall be able to opt to tax at a super-reduced VAT rate their supplies of goods and services that are currently exempt.