

The European Foundation

Progressing European integration calls for an instrument to serve the European public good. The EC is already preparing the future framework of not-for-profit organisations which will be available to Europeans. The aim of the European Foundation Project is to develop the legislative draft for the legal form of a European Foundation, designed to provide an alternative to the national legal forms available in EU members states. A team of top-level experts in comparative law from across Europe, commissioned by the Bertelsmann Foundation, the Compagnia di San Paolo, and the ZEIT-Stiftung Ebelin snf Gerd Bucerius, has undertaken feasibility research, and developed a proposal. The resulting draft legislation is clearly presented here in a way which makes it easy for the reader to locate information on specific legal issues. The draft is supported by comprehensive explanatory chapters on each issue which cover European countries, the USA and China. This book lays the groundwork for policy and advocacy initiatives in the European foundation and the not-for-profit sector.

KLAUS J. HOPT is the Director of the Max Planck Institute for Foreign and International Private Law, Hamburg.

W. RAINER WALZ is the Director of the Institute for Foundation and Charity Law at the Bucerius Law School, Hamburg.

THOMAS VON HIPPEL is a Senior Fellow of the Bucerius Law School and at the Max Planck Institute.

VOLKER THEN is Programme Director, Philanthropy and Foundations, at the Bertelsmann Foundation. Gütersloh.



The European Foundation

A project of the Bertelsmann Stiftung, Gütersloh, in cooperation with the Compagnia di San Paolo, Torino, and the ZEIT-Stiftung Ebelin and Gerd Bucerius, Hamburg



The European Foundation A NEW LEGAL APPROACH

Edited by

KLAUS J. HOPT,
W. RAINER WALZ,
THOMAS VON HIPPEL,
VOLKER THEN







Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India

103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9780521863339

© Bertelsmann Foundation 2006

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2006

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-86333-9 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



vii

Contents

Ackno	wledgements	page 3
Memb	ers of the Core Team of the European Foundation Project	5
CHAI	PTER 1 DRAFT	
Part 1	Civil Law	6
Pream	ble	6
Art. 1	Definitions 1.1 General Definition 1.2 Public Benefit Purpose 1.3 Non-Distribution Constraint, Split-Interest Endowments	6 6 6 7
Art. 2	Legal Status	7
Art. 3	Formation 3.1 Right to Establish 3.2 Form of Establishment 3.3 Formation Deed 3.4 No State Approval 3.5 Registration 3.6 Statutes	7 7 7 7 8 8 8
Art. 4	Governance 4.1 Board of Directors 4.1.1 Responsibilities, Rights and Duties 4.1.2 Board Members 4.1.3 Admission, Expulsion and Resignation 4.2 Supervisory Board 4.3 Rights of the Founder 4.4 Rights of the Beneficiaries 4.5 Rights of Third Parties	8 8 8 9 9 9 9
Art. 5	Reporting, Transparency and Disclosure 5.1 Public Accountability 5.2 Disclosure 5.3 Auditor	10 10 10 10
Art. 6	Activities 6.1 Asset Management 6.2 Economic Activities (Trading) 6.3 Political Activities	11 11 11 11
Art. 7	State Supervision	11
Art. 8	Fundamental Decisions 8.1 Amendment of Statutes 8.1.1 Changes of Administrative Provisions 8.1.2 Modification of Purpose 8.2 Liquidation	12 12 12 12 12
Art. 9	Applicable Law	13



viii

Part 2	Tax Law	14
Pream	ble	14
Part 2	A Harmonized Tax Law	14
Art. 1	Definitions 1.1 General Definition 1.2 Public Benefit Purpose 1.3 Non-Distribution Constraint, Split-Interest Endowments	14 14 14 15
Art. 2	Competence and Procedural Rules	15
Art. 3	Tax Benefits 3.1 Foundation 3.2 Donors 3.3 Beneficiaries 3.4 Volunteers	15 15 16 16
Art. 4	Use of Funds and Timely Disbursement 4.1 De Minimis Rule 4.2 Timing Rule	16 16 16
Art. 5	Economic Activities 5.1 Related Business Income 5.2 Unrelated Business Income 5.3 Turnover Ceiling for Tax-Exempt Unrelated Business Activities 5.4 Passive Income	16 16 16 16 17
Art. 6	Restructuring	17
Part 2	BNon-Discrimination in a Non-Harmonized Context	17
Art. 1	General Rule	17
Art. 2	Tax Treatment 2.1 Tax Treatment of the European Foundation 2.2 Tax Treatment of Donors 2.3 Tax Treatment of Beneficiaries	17 17 17 18
СНАІ	PTER 2 COMMENTARY AND COMPARATIVE VIEW	19
Part 1	Private Law	19
Pream	ble	19
Introd	uction Civil Law (Hopt/von Hippel/Then)	19
1.	Preliminaries 1.1 The European Foundation – a New European Legal Instrument 1.2 Initiatives to Introduce a European Foundation Statute	19 19 20
2.	Arguments for a European Foundation 2.1 Facilitation of Cross-Border Foundation Activities 2.1.1 Recognition and Transferring the Foundation's Office Abroad 2.1.2 Tax Relief for Donations 2.2 Positive Effects of a European Foundation	21 21 22 23 24
3.	Governance and Foundations	24
4.	Main Ideas of this Draft	25



ix

5.	Comparison with the EFC Proposal			
6.	Subsidiarity and National Regulatory Competences	26		
7.	Questions of Implementation 7.1 Legal Basis 7.1.1 Potential Legal Basis: Art. 95 or Art. 308, EC Treaty? 7.1.2 Applicability to the Establishment of European Non-Profit Legal Entities?	27 27 27 27		
	 7.2 Possibilities of Implementation 7.3 Special Rules 7.3.1 Co-determination 7.3.2 Conversion of a National Foundation to a European Foundation 	28 28 28		
	and vice versa	28		
Art. 1.	1	29		
1.	Commentary on Art. 1.1 (Hopt/von Hippel) 1.1 General Introduction to Art. 1 1.2 The Four Criteria of Art. 1.1 1.2.1 Organisational Independence 1.2.2 Assets 1.2.3 No Membership 1.2.4 Public Benefit Purpose 1.3 No Further Mandatory Criteria	29 29 29 29 29 30 30 30		
	1.3.1 No European Dimension Necessary	31		
2.	1.3.2 No Perpetuity Necessary Comparative View to Art. 1.1 (von Hippel) 2.1 The Different Legal Approaches of Civil Law and Common Law 2.2 Conceptual Criteria 2.2.1 Organisational Independence 2.2.2 Assets 2.2.2.1 Minimum Value of Founding Assets 2.2.2.2 Adequate Founding Assets to Fulfil the Purpose of the Foundation 2.2.2.3 No Founding Assets Necessary 2.2.4 Pursuance of a Specific Purpose 2.2.4.1 Public Benefit Purpose 2.2.4.2 'Useful' Purpose 2.2.4.3 'Any Lawful' Purpose 2.2.4.4 Relating Family Foundations to 'Private' Distributions 2.2.4.5. Particularity of Purpose	31 31 31 33 34 34 34 36 36 38 39 40 40 40		
Art. 1.	2	42		
1.	Commentary on Art. 1.2 (Fries) 1.1 Introduction 1.2 Proposed Rule 1.3 Explanation 1.3.1 The List of Art. 1.2, para. 2 1.3.2 Meaning of 'Public' 1.3.3 Public Policy 1.3.4 Pursuance of More Than One Public Benefit Purpose 1.4 Determination of Public Benefit Status	42 42 43 43 43 44 45 45		



х

2.	Comparative View to Art. 1.2 (von Hippel) 2.1 Introduction: The Concept of Public Benefit in Organisational Law 2.2 Statutory Definition of Public Benefit Purposes 2.2.1 Closed List of Public Benefit Purposes 2.2.2 Open List of Public Benefit Purposes 2.2.3 No Definition 2.3 Accounted Presented	46 46 46 46 46 48
Art	2.3 Accepted Purposes	48 50
1.	1.3, para. 1 Commentary on Art. 1.3, para. 1 (Melz)	50
	1.1 Introduction 1.2 Clarifications 1.2.1 Self-Dealing and Remuneration 1.2.2 Relatives as Beneficiaries	50 50 51 51
2.	Comparative View to Art. 1.3, para. 1 (von Hippel)	52
Art.	1.3, para. 2	54
1.	Commentary on Art. 1.3, para. 2 (Moosmann) 1.1 The Need for Split-Interest Endowments 1.2 Proposed Rule	54 54 54
2.	Comparative View to Art. 1.3, para. 2 (von Hippel) 2.1 Family Foundations 2.1.1 Prohibition 2.1.2 Restrictions 2.1.2.1 Limited Circle of Family Members 2.1.2.2 Necessitous Family Members 2.1.2.3 Limited Duration 2.1.3 No Restriction 2.2 Split-Interest Endowments	55 55 56 56 56 57 57 57
Art.	1.3, para. 3	59
1.	Commentary on Art. 1.3, para. 3 (Melz)	59
2.	Comparative View to Art. 1.3, para. 3 (von Hippel) 2.1 Distribution Rules 2.2 Restrictions on the Accumulation of Income 2.3 Tax Law Rules	59 59 60 60
Art. 2	2	62
1.	Commentary on Art. 2 (Richter/Moosmann)	62
2.	Comparative View to Art. 2 (von Hippel) 2.1 Civil law countries 2.1.1 Legal Personality Without Restrictions 2.1.2 Limited Capacity 2.1.3 Acquisition of Legal Personality 2.2 Common Law Countries 2.3 Dependent Foundations and Trusts	62 62 62 63 63 64
Art. 3	3.1	65
1.	Commentary on Art. 3.1 (Künzle/von Hippel) 1.1 General Introduction to Art. 3 1.2 Right to Establish (Art. 3.1)	65 65 65
2.	Comparative View to Art. 3.1 (von Hippel)	65



xi

	 2.1 Approval by an Administrative Body With Discretion 2.2 Approval by an Administrative Body Without Discretion 2.3 Control by the Registration Authority 2.4 Control by a Notary Public 2.5 No Femal Public Act November 1987 	66 66 67
Art.	2.5 No Formal Public Act Necessary	67
		68
1.	Commentary on Art. 3.2 (Künzle/von Hippel) 1.1 Foundations Established Inter Vivos (Art. 3.2(a)) 1.2 Foundations Established Mortis Causa (Art. 3.2(b))	68 68 68
2.	Comparative View to Art. 3.2 (von Hippel) 2.1 Establishment Inter Vivos 2.2 Establishment Mortis Causa	68 68 69
Art.	3.3	71
1.	Commentary on Art. 3.3 (Künzle/von Hippel)	71
2.	Comparative View to Art. 3.3 (von Hippel)	72
Art.	3.4	73
1.	Commentary on Art. 3.4 (Künzle/von Hippel)	73
2.	Comparative View to Art. 3.4 (von Hippel)	73
Art. 3		74
1. 2. Art. 3 1. 2.	Commentary on Art. 3.5 (Künzle/von Hippel) 1.1 Registration in a National Public Register (Art. 3.5, para. 1) 1.2 Recommendations for National Legislators 1.2.1 Registration Procedure 1.2.2 Contents of the Register 1.3 Publication (Art. 3.5, para. 2) 1.4 Inspection Rights (Art. 3.5, para. 3) 1.5 Appeals (Art. 3.5, para. 4) Comparative View to Art. 3.5 (von Hippel) 2.1 Registration of Foundations 2.2 Access to the Register	74 74 74 74 75 75 75 75 75 77 78 78 79 79
Art.	4.1.1, para. 1	81
1.	Commentary on Art. 4.1.1, para. 1 (Doralt/Hemström/Kalss) 1.1 General Introduction to Art. 4 1.2 Responsibility and Delegation (Art. 4.1.1, para. 1) 1.3 Procedural Remarks 1.3.1 Meetings 1.3.2 Chairing the Board 1.3.3 Board Decisions 1.3.4 Auditor	81 81 82 82 82 83 83
2.	Comparative View to Art. 4.1.1, para. 1 (von Hippel) 2.1 Responsibility of the Board of Directors	84 84



xii

	2.2 Delegation2.3 Procedural Rules	84 85
Art. 4.	.1.1, paras. 2–4	86
1.	Commentary on Art. 4.1.1, paras. 2–4 (Doralt/Hemströ 1.1 Duties of Loyalty, Diligence and Care (Art. 4.1.1, 1.1.1 Introduction 1.1.2 Duty of Loyalty 1.1.3 Duty of Care 1.1.4 Provisions by Individual Member States	
	1.2 Rights of the Board of Directors; Reasonable Con Reimbursement of Expenses (Art. 4.1.1, part. 1.3 Liability (Art. 4.1.1, para. 4)	npensation and
2.	Comparative View to Art. 4.1.1, paras. 2–4 (von Hippel 2.1 Duty of Loyalty 2.1.1 Conflicts of Interests, and Self-Dealing 2.1.2 Remuneration 2.1.2.1 Permissibility of fair and reasonable 2.1.2.2 Restrictions 2.1.2.3 Prohibition of Remuneration 2.1.2.4 Enforcement 2.2 Duty of Care 2.3 Liability and Standard of Diligence	91 92 93
Art. 4.		99
		99
2.	Commentary on Art. 4.1.2 (Doralt/Hemström/Kalss) 1.1 At Least Three Members 1.2 Personal Requirements for Board Members 1.2.1 Eligibility and Other Restrictions 1.2.2 Natural Persons 1.2.3 Independence 1.2.4 Unrelated Comparative View to Art. 4.1.2 (von Hippel) 2.1 Number of Board Members 2.2 Personal requirements 2.2.1 Eligibility 2.2.2 Legal persons as Board Members 2.2.3 Board Members to be Independent of Each 2.2.4 Founders as Board Members 2.2.5 Beneficiaries as Board Members 2.2.6 Employees as Board Members 2.2.7 Persons with a Financial Interest as Board Members 2.2.8 Persons Who Supervise the Foundation as B 2.2.9 State Officials as Mandatory Board Members	99 100 100 100 100 101 101 101 103 103 104 Other 104 105 105 Members 106 oard Members 106
Art. 4.		107
1.	Commentary on Art. 4.1.3 (Doralt/Hemström/Kalss) 1.1 Introduction 1.2 Election (Art. 4.1.3, para. 1) 1.2.1 Electoral Procedures 1.2.2 Initial Board Members 1.2.3 Subsequent Board Members	107 107 107 107 108 108



xiii

	1.4	Limited Tenure of Office (Art. 4.1.3, para. 2) Resignation (Art. 4.1.3, para. 3)	109 109
•		Dismissal (Art. 4.1.3, paras. 4 and 5)	110
2.		mparative View to Art. 4.1.3 (von Hippel)	111
	2.1	Appointment 2.1.1 Discretion of the Founder	111
		2.1.1 Discretion of the Founder 2.1.2 Restrictions	111 111
		2.1.2 Restrictions 2.1.3 Subsidiary Appointment by the State Supervisory Authority in Ca	
		of Need	112
	2.2	Limited Tenure of Office	112
	2.3	Resignation	113
	2.4	Removal	113
		2.4.1 Discretion of the Founder	113
		2.4.2 Removal by the State Supervisory Authority	114
Art. 4	.2		115
1.		mmentary on Art. 4.2 (Doralt/Hemström/Kalss/von Hippel)	115
		Introduction	115
	1.2	Composition of the Supervisory Board (Art. 4.2, paras. 1 and 5)	116
		1.2.1 At Least Three Members (Art. 4.2, para. 1) 1.2.2 Personal Requirements for Board Members (Art. 4.2, para. 5)	116 116
		1.2.2.1 Eligibility, Natural and Legal Persons	116
		1.2.2.2 Independent and Unrelated	117
		1.2.3 Election of the Members of the Supervisory Board	117
		1.2.4 Limited Tenure of Office	117
		1.2.5 Resignation and Dismissal	118
	1.3	Rights and Duties (Art. 4.2, paras. 2 and 3)	118
		Procedural Remarks	118
2.		mparative View to Art. 4.2 (von Hippel)	119
		Discretion of the Founder	119
		Mandatory Two-Tier System	119
	2.3	Incompatibilities	120
Art. 4			121
1.		mmentary on Art. 4.3 (Doralt/Hemström/Kalss)	121
		Introduction	121
		Intervention Right Further Rights of the Founder	121 121
	1.3	Further Rights of the Founder	121
2.		mparative View to Art. 4.3 (von Hippel)	122
Art. 4			124
	1.	Commentary on Art. 4.4 (Doralt/Hemström/Kalss)	124
At 1	2.	Comparative View to Art. 4.4 (von Hippel)	125
Art. 4	.s 1.	Commentary on Art. 4.5 (Doralt/Hemström/Kalss)	126 126
	2.	Comparative View to Art. 4.5 (Dorald Tellistrolli/Raiss)	126
Art. 5		Comparative view to 71tt. 1.5 (von 111ppei)	128
1.		mmentary on Art. 5.1 (Dawes)	128
		Annual Report (Art. 5.1, para 1)	128
		Annual Accounts	129
		1.2.1 Coverage	129
		1.2.2 Accounting Standards	129



xiv

		Accounting Records Credibility	130 130
2.	2.1 2.2	nparative View to Art. 5.1 (von Hippel) Annual Reports and Accounts Standards Accounting Records	131 131 132 133
Art. 5.	2		134
1.	Cor	nmentary on Art. 5.2 (Crook)	134
	1.1	Proposed Rule	134
2.	Cor	nparative View to Art. 5.2 (von Hippel)	134
Art. 5.	3		136
1.	Cor	nmentary on Art. 5.3 (Dawes)	136
2.		nparative View to Art. 5.3 (von Hippel)	137
Art. 6.			139
1.	Cor 1.1 1.2 1.3	nmentary on Art. 6.1 (Ferrer Riba/Moosmann/Then) Capital Maintenance Asset-classes and Investment Strategies Infringement of the Rule and Imposition of Sanctions Competence of the State Supervisory Authority	139 139 140 141 141
2.	2.1 2.2	nparative View to Art. 6.1 (von Hippel) Rule of Capital Maintenance Investment Rules Approval of Certain Transactions by the State Supervisory Authority	142 142 143 144
2.4	Adı	ministration Costs	144
2.5	Res	trictions on the Ownership of Corporations	145
2.6	Dis	tributions	145
Art. 6.	2		146
1.	1.1	Introduction Proposed Rule 1.2.1 Trading Foundations (Art. 6.2, para. 1)	146 146 147 147
		1.2.2 Foundations in Control of a Subsidiary Business Enterprise carrying on a Related Economic Activity (Art. 6.2, para. 2)1.2.3 Foundations in Control of a Subsidiary Business Enterprise carrying	148
	1.2	on an Unrelated Economic Activity (Art. 6.2, para. 3)	148
	1.3	European Foundation and Group Law 1.3.1. Group Direction	149 149
		1.3.1.1 General Intra-Group Conflicts	149
		 1.3.1.2 Foundation-Specific Intra-Group Conflicts 1.3.1.3 No EU-Wide Harmonisation of the Foundation-Specific Intra-Group Conflict 	149 149
		1.3.1.4 Risk of Statutory Liability and Amount of Endowment	150
		1.3.2 Corporate Group-forming	150
		1.3.3 Group Accounting	150
		1.3.4 Dependent Foundations1.3.5 Conclusion	151 151



xv

		Should Co-determination Apply? 1.4.1 Introduction 1.4.2 Proposal Foundations as an Anti-Takeover Device?	151 151 152 152
2.	2.1	nparative View to Art. 6.2 (von Hippel) Scope of the Permitted Economic Activities 2.1.1 No Special Restrictions 2.1.2 Trading Subordinated to Public Benefit Activities 2.1.3 Restriction on Foundations Having Trading Subsidiaries 2.1.4 Necessity of Using a Subsidiary Company	152 153 153 154 155 156
	2.2	Comparable Standards to Business Organisations 2.2.1 Special Provisions for Foundations carrying on Economic Activities	156
	2.3	2.2.1.1 The Danish Act on Enterprise Foundations 2.2.1.2 Other Countries 2.2.2 Application of the Rules of Commercial Law Special Questions 2.3.1 Danger of Inefficient Trading because of the Non-Profit Objective?	156 156 157 158 158
		2.3.2 Trade Protection Foundations	158 159
Art. 6.3	3		160
1.	Con	nmentary on Art. 6.3 (Fries)	160
2.		nparative View to Art. 6.3 (von Hippel)	160
Art. 7			162
1.	1.1 1.2 1.3 1.4	Introduction 1.1.1 Meaning of State Supervision 1.1.2 Proposed Rule State Supervision and Private Supervisory Mechanisms 1.2.1 The Need for State Supervision 1.2.2 State Supervision and Alternative Solutions to the Monitoring Problem Supervisory Authority (Art. 7, para. 1) Tasks of the Supervisory Authority 1.4.1 Overview 1.4.2 Review of the Annual Report and Annual Accounts (Art. 7, paras. 2 and 3) 1.4.3 Enforcement (Art. 7, para. 4) 1.4.1.2 Significant Breach of Law/Statutes (Art. 7, para. 4, clause 1) 1.4.1.2 Proportionality of Supervisory Procedures (Art. 7, para. 4, clause 2) 1.4.1.3 Necessary Supervisory Measures (Art. 7, para. 4, clause 2)	162 162 162 163 163 164 165 165 166 166
2.	Con 2.1	Appeal to a Court (Art. 7, para. 5) inparative View to Art. 7 (von Hippel) Introduction State Supervisory Authority 2.2.1 Public Administrative Body 2.2.2 Public Independent Body 2.3.3 Combination of a Company and a Court	166 167 167 167 168
	2.3	2.2.3 Combination of a Governmental Body and a Court Extent of Supervision	168 169



xvi

			Approval 1 2.3.2.1 A 2.3.2.2 A 2.3.2.3 C	ervisory Officials as Board Members for Certain Decisions of the Board of Directors Acquisitions Asset Management Conflicts of Interest Amendments, Liquidation	169 170 170 171 172 172
		2.3.3	Information 2.3.3.1 F	on and Inquiries Provision of Annual Reports and Annual Accounts Special Inquiries	172 172 172 173
		2.3.4		ent Measures	173
Art. 8.1	1				176
1.				8.1 (von Hippel)	176
			duction		176
		-	roposed Ru		177
	1.3			ninistrative Provisions (Art. 8.1.1)	177
				eason (Art. 8.1.1, para. 1) 1 Requirements	177 178
		1.3.2		Normal Procedure (Art. 8.1.1, paras. 2 and 3)	178
				Exceptional Procedure (Art. 8.1.1, paras. 5)	178
	1.4	Modi		Purpose (Art. 8.1.2)	178
				Special Reason	179
			-	1 Requirements	179
	1.5			ergers, and De-Mergers	179
2.	Con	nparat	ive View to	Art. 8.1 (von Hippel)	179
	2.1	Amer	dment by a Intervention	a Foundation's Organ or by the Founder Without Public on	179
	2.2	From 2.2.1	the State S Procedure	a Foundation's Organ, or by the Founder, with Approval Supervisory Authority	180 180
			Cause		181
	2.3	Amer	dment by t	the State Supervisory Authority	182
Art. 8.2	2				184
1.	Con	nment	ary on Art.	8.2 (von Hippel)	184
			fied Specia		184
	1.2	Proce	dural Requ	irements	184
2.	Con	nparat	ive View to	Art. 8.2 (von Hippel)	184
	2.1	Term	nation by a rention	a Foundation's Organ or by the Founder Without Public	184
	2.2	the A		a Decision of the Foundation's Governing Body and with the State Supervisory Authority	185 185
			Cause		185
	2.3			the State Supervisory Authority	186
				Remaining Endowment	186
			Cy-Près R		186
			Other Pub		187
		2.4.3	Determina	ation by the Founder	187
Art. 9					189



xvii

1.		Introduction 1.1.1 Possible Solutions 1.1.2 The 'Real Seat' Principle as a Rule for the Existing European Legal Forms 1.1.3 New Developments in International Company Law 1.1.3.1 The Decisions of the ECJ in the Cases Centros, Überseerin	189 189 189 189 190 g 190
		and Inspire Art 1.1.3.2 The Dominance of the Incorporation Doctrine in the New European Legislation 1.1.4 Relevance of the New Developments for Foundation Law Proposed Rule Alternative Solutions 1.3.1 State Supervision in the State of the Head Office of the European Foundation 1.3.1.1 Advantage of an Easier Enforcement 1.3.1.2 Complications 1.3.2 Application of the 'Real Seat' Principle	191 192 193 193 193 194 195
Introdu	ictio	n Tax Law (Walz/von Hippel/Schäfers)	196
1.	Arg	uments For Facilitating Cross-Border Donations	196
2.	Init	iatives to Facilitate Cross-Border Donations	197
3.	3.1	estions of Implementation Legal Basis The Dual Approach of Implementation	198 198 198
4.	4.1	es a General Non-Discrimination rule for Donations Already Exist? Principle of Non-Discrimination Application to Cross-Border Activities of, and Donations to, European Foundations and Other National Public Benefit Organisations?	198 199 199
Art. 1	Гах 1	Law	202
1.	1.1 1.2	nmentary on Art. 1 Tax Law (Walz/von Hippel/Fries) Similarities and Differences Between Civil Law and Tax Law Closed List Questions of Determination 1.3.1 Divergences Between Civil Law and Tax Law 1.3.2 Divergences Between the Different National Tax Law Authorities	203 203 204 204 205 205
2.	2.1 2.2 2.3 2.4 2.5	nparative View to Art. 1 Tax Law (Bater/von Hippel) Organisational Requirements Public Benefit Purpose Non-Distribution Constraint Family Foundations Split-interest Endowments Timing Rule	205 206 206 206 206 207 207
Art. 2	Гах 1	Law	208
1. 2.	Cor 2.1	nmentary on Art. 2 Tax Law (Bater/Melz) nparative View to Art. 2 Tax Law (Bater) Income Tax Net Wealth Taxes	208 209 209 210
Art. 3	Гах 1	Benefits	211



xviii

1. 2. 3.	Commentary on Art. 3.1, para. 1 Tax Law (Bater) Comparative View to Art. 3.1 Tax Law (Bater) Policy Recommendation for the Legislator	211 211 212
Art. 3. 1. 2. 3.	1, para. 2 Tax Law Commentary on Art. 3.1, para. 2 Tax Law (Bater) Comparative View to Art. 3.1, para. 2 Tax Law (Bater) Policy Recommendation for the Legislator	213 213 213 214
Art. 3. 1. 2.	1, para. 3 Tax Law Commentary on Art. 3.1, para. 3 Tax Law (Bater) Comparative View to Art. 3.1, para. 3 Tax Law (Bater)	215 215 215
Art. 3. 1. 2.	1, para 4 Tax Law Commentary on Art. 3.1, para. 4 Tax Law (Bater) Comparative View to Art. 3.1, para. 4 Tax Law (Bater)	216 216 216
Art. 3. 1. 2. 3.	1, paras. 5 and 6 Tax Law Commentary on Art. 3.1, paras. 5 and 6 Tax Law (Bater) Comparative View to Art. 3.1, paras. 5 and 6, Tax Law (Bater) Policy Recommendation for the Legislator	217 217 219 219
Art. 3. 1. 2. 3.	2 Tax Law Commentary on Art. 3.2 Tax Law (Bater) Comparative View to Art. 3.2 Tax Law (Bater) Policy Recommendation for the Legislator	222 222 224 225
Art. 3. 1. 2. 3.	3 Tax Law Commentary on Art. 3.3 Tax Law (von Hippel) Comparative View to Art. 3.3 Tax Law (Bater) Policy Recommendation for the Legislator	226 226 226 226
Art. 3. 1. 2. 3.	4 Tax Law Commentary on Art. 3.4 Tax Law (Bater) Comparative View to Art. 3.4 Tax Law (Bater) Policy Recommendation for the Legislator	227 227 227 227
Art. 4. 1. 2. 3.	1 Tax Law Commentary on Art. 4.1 Tax Law (Melz) Comparative View to Art. 4.1 Tax Law (Bater) Policy Recommendation for the Legislator	228 228 228 229
Art. 4. 1. 2. 3.	2 Tax Law Commentary on Art. 4.2 Tax Law (Melz) Comparative View to Art. 4.2 Tax Law (Bater) Policy Recommendation for the Legislator	230 230 231 231
Art. 5. 1. 2.	1 and Art 5.2 Tax Law Commentary on Art. 5.1 and Art. 5.2 (Beltrame) Comparative View to Art. 5.1 and Art. 5.2 Tax Law (Bater) 2.1 Distinction Between Related and Unrelated Business Income 2.2 Demarcation 2.3 No Preponderance of Unrelated Business Activity Policy Recommendation for the Legislator	232 232 233 233 233 234 235
Art. 5. 1. 2. 3.	3 Tax Law Commentary on Art. 5.3 Tax Law (Beltrame) Comparative View to Art. 5.3 Tax Law (Bater) Policy Recommendation for the Legislator (Beltrame)	236 236 236 237



xix

Art. 5.4 1. 2. 3.	4 Tax Law Commentary on Art. 5.4 Tax Law (Beltrame) Comparative View to Art. 5.4 Tax Law (Bater) Policy Recommendation for the Legislator (Beltrame)			238 238 238 239
	Tax Law Commentary on Ar 1.1 Conceptual Co 1.2 The Path Towa		rt. 6 Tax Law (Habighorst) onsiderations onds European Foundation Status Through the Restructuri on-Profit Corporations Tax Treatment of Change of Form, (Cross-Border) Change of, De-Merger, and Asset Transfer, by Change of Form Change of Form Change of Location of a National Tax-Privileged Corpo From One Member State to Another Merger of a Non-Profit Corporation With a Foreign Tax Paying/Tax-Advantaged Corporation to Establis	241 Non- 241 241 ration 241 sh a
	1.2.2	1.2.1.4 1.2.1.5 Treatmen	Foundation as a European Foundation at Home or Abro- De-Merger of (National) Non-Profit Corporations for the Purpose of Establishing European Foundations Transfer of Assets nt of Corporations Not Serving Non-Profit Purposes	242
2.	Comparative View to Art. 6 Tax Law (Habighorst)			243
3.				243
Art. 1	Tax Law Pa			245
1.	Commentary on Art. 1 Tax Law Part B (Schäfers) 1.1 Introduction 1.2 Status Quo - International Tax Law 1.3 Treaty Law 1.4 Limited Possibilities for Private Initiatives 1.5 Conclusion			245 245 246 247 248 248
1.	Commentary on Art. 2.1 Tax Law Part B (Schäfers) 1.1 Introduction 1.2 Existing Provisions 1.3 The Non-Discrimination Provision in Detail			249 249 249 250
Art. 2.2	2 Tax Law	Part B		253
1.	Commentary on Art. 2.2 Tax Law Part B (Schäfers) 1.1 Introduction 1.2 The Term 'Donation' 1.3 Tax Treatment of Donations			253 253 253 253
1.	Commentary on Art. 2.3 Tax Law Part B (Schäfers) 1.1 Introduction 1.2 The Regulation in Detail			
Bibliography				258
Abbreviations of Law Journals				266
Country Index				267



- 3 -

Acknowledgements

This book is being published as the result of a project which the Bertelsmann Stiftung initiated in 2001. Following two substantial comparative publications, which had each come out in the same year, and the initiation of a debate in the European foundation sector, the Bertelsmann Stiftung joined forces with the Compagnia di San Paolo, Torino, and the ZEIT-Stiftung Ebelin and Gerd Bucerius, Hamburg, to fund a project to develop and design in detail a proposal for the legal form of a European Foundation. The project has been directed by Dr. Volker Then at the Bertelsmann Foundation.

Professor Klaus J. Hopt, Director of the Max-Planck-Institute of Foreign Private and Private International Law in Hamburg and Vicepresident of the German Research Foundation, and Professor W. Rainer Walz, Director of the Institute for Foundation Law and the Law of Charitable Organizations were invited to direct a team of some 25 distinguished comparative law experts from across Europe to accomplish the task. Dr. Thomas von Hippel joined the project as senior researcher to co-ordinate and edit the individual contributions of the many team members. The Bertelsmann Stiftung and its foundation partners wish to express their gratitude to all these contributors for their enthusiastic and co-operative efforts far beyond their duties that they have put into the project to bring it to a successful conclusion.

The core members of the project team are listed in alphabetical order at the end of this preface. The result of this project truly is a collaborative result and many parts of the book can therefore only be acknowledged as the result of such a team effort. Wherever individual authors have contributed paragraphs or sub-chapters, they are acknowledged appropriately. The conceptual efforts of the team were greatly enhanced by Prof. Dr. Hans Rainer Künzle who provided the first version of the legal draft for further discussion.

In comparative efforts of such a dimension, numerous questions arose that reached beyond the competences even of a team as substantial as this. Additional advice was therefore sought from corresponding country experts. They have been added to the list of contributors of this project. Greyham Dawes merits particular mention for his editing of the manuscript which combined the skills of the expert on charity regulation compliance with those of the native speaker, an advantage that most of the team members who wrote in English as a foreign language do not possess.

The project results are being published at a timely moment. Following the advice of the High Level Group on European Corporate Governance, the European Commission has set out to explore the feasibility of a European Foundation in a mid term perspective in the action plan which it adopted in May 2003. The project has always profited from the advice and guidance of its chairman and member of the High Level Group, Professor Klaus J. Hopt, on these matters.

Andrea Leuck-Baumanns at the ZEIT-Stiftung, Dr. Markus Baumanns at the Bucerius Law School and Prof. Michael Göring at the ZEIT-Stiftung, as well as Dr. Piero Gastaldo at the Compagnia di San Paolo have provided their most valuable guidance as members of the steering committee of the project working in close cooperation with Dr. Volker Then at the Bertelsmann Stiftung. For the first three years, the project enjoyed the management support of Dr. Christian Meyn at the Bertelsmann Stiftung, now an attorney with Latham & Watkins LLP, Hamburg. Our thanks go also to Kim Hughes, Jane O'Regan and Caroline Murray at Cambridge University Press for taking care of the technical preparation of the manuscript.



- 4 -

All the contributors and supporters of the endeavour hope to provide both a thorough piece of academic scholarship and a valuable contribution to the political development of philanthropy in Europe. Europe needs the involvement and investment of its citizens in the common good. The European Foundation will be a good means to that end.

Klaus J. Hopt W. Rainer Walz Thomas von Hippel Volker Then



- 5 -

Members of the Core Team of the European Foundation Project

Prof. Dr. Dr. h.c. Klaus J. Hopt · Max Planck Institute · Hamburg (Chair) Prof. Dr. W. Rainer Walz · Bucerius Law School · Hamburg (Chair Tax Law)

Prof. Helmut K. Anheier · University of California · Los Angeles

Paul Bater · International Bureau of Fiscal Documentation (IBFD) · London

Prof. Pierre Beltrame · University of Marseille

Andrew Crook · Bouloc

Greyham Dawes · Horwath Clark Whitehill · London

Prof. Dr. Peter Doralt · University of Wien

Prof. Dr. Josep Ferrer Riba · University of Barcelona

Richard Fries · International Center for Not-for-Profit Law (ICNL) · London

Prof. lic. jur. Søren Friis Hansen · Syddansk University · Odense

Bradley Gallop · BDG & Associates · Bruxelles

Prof. Dr. Mathias Habersack · University of Mainz

Oliver Habighorst · White & Case Feddersen · Frankfurt/Main

Prof. Dr. Carl Hemström · University of Uppsala

Dr. Thomas von Hippel · Bucerius Law School · Max Planck Institute · Hamburg

Prof. Dr. Susanne Kalss · University of Wien

Prof. Dr. Hans Rainer Künzle · University of Zürich · Kendris private AG · Zürich

Prof. Dr. Michael Lang · University of Wien

Prof. Dr. Peter Melz · Stockholm University

Dr. Christian Meyn · Latham & Watkins · Hamburg (formerly Bertelsmann Stiftung)

Dr. Kurt Moosmann · SIF Zürich

Dr. Andreas Richter · LL.M. P+P Pöllath + Partner · Berlin

Dr. Bernadette Schäfers · LL.M. oec. · Hamburg

Hanna Surmatz · European Foundation Centre · Bruxelles

Dr. Volker Then · Bertelsmann Stiftung · Gütersloh

Prof. Dr. Verica Trstenjak · Court of Justice of the European Communities Luxembourg

Dr. Wino J. M. van Veen · Baker & McKenzie · Amsterdam

Additional contributions were provided by corresponding country experts:

Dr. Victoria Athanassopoulou Athens (Greece)

Ulrich Brömmling Hertie School of Governance Berlin (Norway)

Zoltan Csehi LL.M. (Heidelberg), PhD.; University of Budapest (Hungary)

Julia Runte Bucerius Law School · Hamburg (France, Italy)

Sebastian Sturm P+P Pöllath + Partner · Berlin (England & Wales, USA)