

THE PROPOSAL FOR A EUROPEAN FOUNDATION STATUTE

IN FEBRUARY, THE EUROPEAN COMMISSION RELEASED A PROPOSAL FOR A COUNCIL REGULATION ON THE STATUTE FOR A EUROPEAN FOUNDATION. THIS HAS BEEN THE RESULT OF A LONG PROCESS OF PREPARATION WHICH STARTED IN FEBRUARY 2009. THE PROPOSAL WILL NOW BE CONSIDERED BY THE COUNCIL OF MINISTERS REPRESENTING THE GOVERNMENTS OF THE 27 MEMBER STATES, AND BY THE EUROPEAN PARLIAMENT, BEFORE ITS FINAL ADOPTION. **TEXT GHISLAIN JOSEPH, MEMBER OF THE BOARD OF UIA, PROFESSOR OF TAXATION AT HOGESCHOOL-UNIVERSITEIT BRUSSEL (HUB), AND MEMBER OF THE BRUSSELS BAR**

The proposed Statute envisages to create the European Foundation as a new European legal instrument that is optional and complementary to the existing national legislations of the EU Member States. It will mainly be governed by European law and will only apply to foundations pursuing a public benefit purpose. It is stated that qualifying foundations should serve the public interest at large. Therefore, the proposed Statute provides an exhaustive list of such permissible public benefit purposes which include, inter alia, arts, culture, environmental protection, civil or human rights, elimination of illicit discrimination, education and consumer protection. Yet, the proposed Statute permits foundations to perform trading or economic activities which are unrelated

to their public benefit purpose, if not disallowed by their statutes and provided that any profit is exclusively used in pursuance of their public benefit purpose. However, these unrelated activities may not exceed a threshold of 10% of the annual net turnover, while the results from these unrelated activities will have to be presented separately in the accounts.

The legal form of the European Foundation will under the Statute be designated by its Latin name of '*Fundatio Europaea*', or 'FE'. The FE will have legal personality and full legal capacity in all EU Member States. It will be able to transfer its registered office from one EU Member State to another, without having to wind up or to create a new legal entity and without

affecting any right or obligation which existed before the transfer.

The FE can be set up by one or more persons (individuals or legal entities) or public bodies. In terms of available methods, the FE can be set up by will, by authentic deed or written declaration, by merger of existing public benefit purpose entities from one or more EU Member States, or by conversion of a national public benefit purpose entity into an FE.

The proposed Statute refers to 'public benefit purpose entities'. This term refers to public benefit purpose foundations as well as to other entities which also follow public benefit purposes and have similar characteristics to foundations.

This formulation was chosen to encompass entities in EU Member States where the specific legal form of a foundation does not exist. In addition to the public benefit purpose, there are still a number of other requirements to be met by the FE in order to benefit from the Statute. In particular, the FE should carry out activities in at least two Member States or have the intention, stated in its statutes, of doing so. Moreover, the FE should have assets equivalent to at least EUR 25.000,00. On the other hand, the liability of the FE will be limited to its assets.

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The EU Commission has proposed the creation of the FE based on evidence gathered during the above-mentioned consultation process. It appears that many foundations encounter numerous obstacles when they want to operate outside national borders. The differences and obstacles of national laws seem to make the conduct of cross-border activities unduly costly and cumbersome. The findings of the EU Commission indicate that foundations have to bear extra costs to meet the different legal and administrative requirements when they operate in multiple EU Member States. As a matter of fact, foundations often have to spend a part of their resources on legal advice and on fulfilling legal and admin-

istrative requirements which may apply in different EU Member States. Furthermore, the EU Commission claims that there is insufficient legal certainty as to whether a foundation recognized by one EU Member State will be allowed to act as a public benefit purpose foundation in another EU Member State. Foundations are also uncertain about the tax treatment they will be subject to abroad. All these difficulties can limit the scope of the foundations' work and diminish the amount of funds available for their public benefit purpose activities.

It is clear that the proposed Statute for a European Foundation will offer more uniform conditions regarding recognition as a public benefit purpose foundation in the respective EU Member States and will boost legal certainty. As a result, this may cut the legal and compliance costs resulting from the above-mentioned difficulties and obstacles created by the lack of convergence between the national civil laws of the EU Member States. The European label of the new vehicle might have a positive impact on cross-border donations and might encourage more foundations to develop activities on EU-wide issues. Indeed, as mentioned earlier, cross-border activities are a requirement under the proposed Statute.

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