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IMPACT ASSESSMENT

Accompanying the document

Proposal for a Council Regulation on the Statute for a European Foundation (FE)

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This document is a European Commission staff working document for information purposes. It does not represent an official position of the Commission on this issue, nor does it anticipate such a position.

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Introduction

Foundations play an important role in the EU, particularly in civil society. Through their various activities in numerous areas, they make a major contribution to the fundamental values and objectives of the Union, such as respect for human rights, the protection of minorities, employment and social progress, protection and improvement of the environment or the promotion of scientific and technological advances. Their contribution to society's public benefit is significant. In this context, they make a substantial contribution to achieving the ambitious goals of smart, sustainable and inclusive growth set by the Europe 2020 strategy[1]. They also enhance and facilitate a more active involvement of citizens and civil society in the European project.

Foundations have traditionally been active at national, regional or local level, and the rules and procedures to which they are subjected are deeply rooted in the national environment. Studies and consultations carried out by the Commission[2] show that in recent years, foundations have become more active on a cross-border basis in the EU. Yet the variety of national rules makes these cross-border operations costly and cumbersome, and the cross-border channelling of funds to public benefit purposes through foundations is largely under-exploited.

The Single Market Act Communication[3] adopted in April 2011 highlighted the need to put an end to market fragmentation and to eliminate barriers and obstacles to the movement of services, innovation and creativity in order to deliver growth and employment, and promote competitiveness. It stressed the importance of strengthening citizens' confidence in the single market and of ensuring that its benefits are passed on to citizens. In the context of foundations' contribution to the social economy and to financing innovative initiatives of public benefit, the Single Market Act called for action to remove obstacles that foundations face in operating on a cross-border basis. The same call was made in the EU Citizenship report 2010 "Dismantling the obstacles to EU citizens' rights"[4], which stressed the importance of enhancing the European dimension of the activities of public benefit purpose foundations with a view to promoting citizen action at EU level.

The Commission also underlined the importance of developing European legal forms for entities in the social economy sector (e.g. foundations, cooperatives or mutuals) in its "Social Business Initiative" Communication of 25 October 2011[5]. The Social Business Initiative aims to support the development of businesses that primarily focus on creating social impact through their activities and its actions also address and benefit those social economy entities (including foundations) that meet the general criteria for a "social business" in the Communication.

This impact assessment report analyses different options for overcoming problems foundations face when operating in the single market, including the option of the Statute for a European Foundation.

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1 COM (2010)2020.

2 An external feasibility study published in 2008 and a public consultation carried out in 2009. See section 1.2.

3 COM(2011)206.

4 COM 603 (2010).

5 *Add reference when available*

1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

1.1. Procedural issues

The formal work on the Impact Assessment (IA) started in autumn 2010, led by the Directorate General for Internal Market and Services.[6] Data gathering and preparatory work had already started in 2008. An Impact Assessment Steering Group (IASG) was set up with the participation of the following DGs and Services: Secretariat General, Legal Service, DG ECFIN, DG ENTR, DG COMP, DG EMPL, DG ENV, DG RTD, DG TAXUD, DG EAC, DG SANCO, DG JUST, DG HOME, DG TRADE and DG DEVCO. The IASG met four times (9 December 2010, 3 March, 15 April and 5 May 2011). Comments provided by DGs have been taken into account to a very large extent. Minutes of the last meeting have been submitted to the Impact Assessment Board[7] (IAB) of the Commission.

The draft IA report was discussed with the IAB on 6 July 2011. This updated report reflects the IAB's recommendations in the following way:

- more explanation about the gap between current and required practices was added in section 2.4, e.g. by clarifying the nature of the "comparability test" and types of costs involved;

- a description of legal issues and their pracatical implication was further clarified in section 2.3.1;

- references to potential indirect impacts of the preferred policy option, and a more detailed explanation of risk mitigation features (e.g. of the supervisory powers which the Statute would give to national supervisory authorities), were included in section 4.3;

- an effort was made to explain the estimated costs and benefits more clearly and carefully throughout the report (including the introduction of a new section 2.2 on data);

- the conclusion to section 5 was updated to summarise more clearly the rationale for the preferred policy option;

- more references to stakeholders' views were added in section 1.2 and in the analysis of the preferred policy option in section 4.3;

- other comments by the IAB were reflected throughout the report.

1.2. External expertise and consultation of interested parties

In preparing the Impact Assessment, the Commission relied widely on external expertise and engaged comprehensively with different stakeholders. It also based itself on the reflection carried out in the context of the 2003 Commission Action Plan on Modernising Company Law and Enhancing Corporate Governance[8].

First, a feasibility study — by a Consortium consisting of the Max Planck Institute for Comparative and International Private Law in Hamburg and the University of Heidelberg

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6 Agenda Planning reference: 2011/MARKT/027.

7 The IAB is an independent internal body of the Commission set up to ensure more consistent and higher quality of impact assessments prepared by various Commission departments. The IAB works under the direct authority of the Commission President. Its members are appointed in their personal capacity and on the basis of their expert knowledge.

8 COM(2003) 284, 21.5.2003. The 2003 Action Plan listed a feasibility study as a medium term measure; foundations supported it during the 2005 public consultation (32.7% replies from foundations).

(Centre for Social Investment)[9] — was carried out and published in 2008. Out of the five policy options which it considered (status quo, harmonisation of national laws, bilateral or multilateral treaties, a Statute for a European Foundation with or without tax exemptions), the study suggested that a Statute for a European Foundation (with or without tax exemptions) would be the preferable policy option to address the problems identified.

Subsequently, the Commission put the recommendations of the feasibility study to a public consultation between February and May 2009. Among the 226 replies, the biggest number (around 87%) came from the non-profit sector, i.e. foundations, charities, trusts, associations involved in social economy or philanthropy, and their networks and umbrella organisations. Other replies came from business associations, public authorities and law firms. In their contributions, foundations expressed strong support for the idea of a European Statute. They argued that it would facilitate their cross-border activities and make it easier for donors to channel private funds for public benefit purposes within the EU. Most of them perceived the civil and tax law barriers identified in the feasibility study as real problems; although there were also some respondents who reportedly did not experience significant problems in their cross-border activities.

National authorities from six Member States[10] and, to some extent, business organisations were more sceptical as to the need for - and feasibility of - such a legal form. They questioned the magnitude and relevance of the cross-border problems identified in the feasibility study[11] and the potential problem-solving capacity of a Statute for a European Foundation[12].

Improvements to cross-border activities of foundations were also subject to another consultation, on the Communication "Towards the Single Market Act" between October 2010 and February 2011[13]. According to the overall online results, the action calling for improvement of the legal status of entities in the social economy (including foundations) was seen by respondents as the second most important of the proposed Single Market Act actions, showing strong support for an initiative in this area[14].

In addition, the Commission gathered further information about concrete problems encountered through bilateral discussions with foundations, in particular during the "European Foundation Week" in June 2010 and via contacts with the European Foundation Centre (EFC)[15]. All interlocutors consulted saw a need for a Statute in the light of the concrete problems they faced when trying to carry out activities and/or receive tax benefits in other Member States.

The Commission also collected information on the relevant national legislation from national authorities through a questionnaire and subsequent discussions within the Company Law

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9 See http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf, hereafter the "feasibility study".

10 Replies were submitted by authorities from: Finland, the United Kingdom, Sweden, Estonia, Germany and Denmark.

11 E.g. referring to the fact that foundations were already internationally active, and asking whether the problem of recognition was not limited to some Member States only.

12 For more details, see the summary report of the 2009 consultation on the following link: http://ec.europa.eu/internal_market/consultations/docs/2009/foundation/summary_report_en.pdf.

13 25.5% of responses were submitted by non-governmental organisations (including foundations).

14 See SEC(2011) 467, 13.4.2011.

15 Established in 1989, EFC is an international association of foundations and corporate funders. See: http://www.efc.be.

Expert Group (CLEG)[16] in 2009, 2010 and 2011. Many Member States expressed reservations towards the Statute, stating they did not see a need for a new legal form including for foundations, and calling for a careful analysis and consultation before any new initiative was proposed. Some stressed that they were not aware of difficulties related to cross-border activities experienced by their national foundations; thought that national systems were already flexible enough; or were concerned about potential circumvention of national rules.

The idea of a Statute for a European Foundation has received strong support from the other EU institutions. The European Parliament called for an appropriate legal framework for foundations (as well as for mutual societies and associations) - to give them a European status and prevent legal uncertainty - in its resolution responding to the Commission's Single Market Act; argued in favour of introducing Statutes for these legal entities in its written declaration 84/2010 of March 2011; and urged the Commission to work towards this objective in its previous resolutions of 2006 and 2009[17]. The European Economic and Social Committee advocated a Statute in its 2010 own initiative opinion[18], which set out its reflections on how such a Statute should be developed, and the Committee of the Regions supported the Commission's announcement of the initiative on foundations in the Single Market Act[19].

2. POLICY CONTEXT, PROBLEM DEFINITION AND SUBSIDIARITY

2.1. Scope

There is no universal definition of a "foundation" or "public benefit purpose foundation" across the EU. Definitions in national laws vary considerably.

The overall definition of a foundation used for the purpose of this report follows the one put forward in the feasibility study. The authors developed a definition based on the lowest common denominator of the legal definitions in the Member States. Accordingly, a foundation:

- is an independent entity (generally with its own legal personality);
- has no formal membership[20];
- is supervised by a State supervisory authority;
- serves a specific purpose;
- has a founder who provided an endowment and determined the foundation's purpose and statutes[21].

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16 CLEG brings together company law experts from national administrations and meets three times per year, under chairmanship of DG Internal Market and Services.

17 EP resolution of 6 April 2011 on a Single Market for Europeans (2010/2278(INI)); Written declaration 84/2010, P7_DCL(2010)0084; EP resolution on recent developments and prospects in relation to company law (2006/2051(INI)); and EP resolution of 19 February 2009 on Social Economy (2008/2250(INI)).

18 INT/498 - CESE 634/2010 - April 2010.

19 Opinion on the Single Market Act, 31 March–1 April 2011, CdR 330/2010 fin.

20 A membership based organisation would be either an association or a corporation. However, according to the information provided by the EFC, in Italy there are foundations that have a particular type of "participatory structure" (i.e. they have members whose rights are regulated by their statutes and they are gathered in an assembly and may be elected to sit on the Board of Directors).

Moreover, there are a number of different typologies of foundations, including classification on the basis of the purpose that they pursue or the type of activities that they perform[22].

For the following reasons, this report focuses on public benefit purpose foundations. First, such foundations benefit a broadly defined group of recipients - the public at large (compared to the private benefit purpose foundations that focus only on the members of a family or on a closed circle of beneficiaries) – and therefore, focusing EU action on their activities would benefit European citizens and the EU's economy to a larger extent. Secondly, such scope seems to respond well to the needs of the foundation sector; a great majority of foundations in the EU have public benefit purpose and most of those follow a purely public benefit purpose. Finally, public benefit purpose foundations constitute the most common type of foundations and they are present and recognised in all Member States (with only half of the jurisdictions in the EU recognising private benefit foundations), making such scope of the iniatitive more acceptable.

2.2. Data on foundations

The data in this report stems from the feasibility study, which, in turn, was based on the available figures on foundations in the EU (including the research carried out by the EFC[23]) and a survey conducted by the contractors for the purpose of the feasibility study. The data from the study is supplemented in this report by, among others, further information from the EFC and anecdotal evidence from individual foundations and national authorities.

All the figures quoted below are intended to provide an impression – rather than a complete picture - of the foundation sector in the EU. This is due to the difficulty with obtaining data about European foundations, caused by inconsistent definitions and substantial differences in how foundations are defined in national laws across the EU, and inconsistent data[24]. In addition, many surveys - including the EFC research and the survey carried out for the feasibility study - suffer from low response rate[25] and lack representativeness. For those reasons, the data quoted below should be seen as an indicator and an estimate rather than representative and exact figures. The additional individual examples and cases are also used for illustrative purposes only.

The estimates for the overall number, growth and economic weight (assets, expenditures) should be seen as referring to public benefit purpose foundations but should be taken as

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21 In this context, it is necessary to keep in mind the specific case of the common law countries (Cyprus, Ireland, Malta and the United Kingdom) where there is no special legal form for a "foundation" and where the focus is mainly on the "charitable" character of the organisation. Charitable organisations must have exclusively charitable purposes and must be administered for public benefit. For more details see the feasibility study, p. 51. The term "foundation" is traditionally used in these Member States when referring to grant-making charities.

22 See Annex 2 for more detailed information regarding classification of foundations on the basis of their purposes and section 2.3 regarding classification on the basis of activities.

23 Report of the European Foundation Centre Research Task Force "Foundations in the European Union: Facts and Figures" of May 2008; http://www.efc.be/NewsKnowledge/Documents/EFC-RTF_EU%20Foundations-Facts%20and%20Figures_2008.pdf.

24 For instance, some data sources focus on non-profit sector as such with limited information about foundation sector. In others, information is not easily comparable, e.g. foundations' expenditures can refer to grant-making and the related costs or to operational expenditures of running a project.

25 The latter consisted of 134 cases of foundations in 24 EU Member States (a response rate of 21%).

indicative because, among others, the dataset used might have also included small numbers of other types of foundations[26].

2.3. Background and context

2.3.1. *Nature and size of the market concerned*[27]

Foundations are important actors in the EU economy. Although it is difficult to provide exact figures, the calculations carried out in the feasibility study estimate the assets of the public benefit purpose foundations in the EU to amount to about €350 billion and their annual expenditures to €83 billion (lower end estimates)[28]. On the basis of further research and extrapolations, the study suggests that upper end estimates could be approximately €1,000 billion for assets and €153 billion for expenditures. It is worth mentioning that while the size of foundations can vary considerably, assets and expenditures tend to be heavily concentrated in a number of large foundations[29].

Overall, the foundation sector in Europe consists of approximately 110,000 public benefit purpose foundations[30]. Their distribution varies significantly: there are fairly high numbers of foundations (over 10,000) in Hungary, Germany, Romania, Spain or Sweden, while fewer foundations (below 200) are active in Estonia, Ireland, Latvia or Slovenia[31]. The number of public benefit purpose foundations has seen substantial growth in the recent years, e.g. between 28% and 40% of all foundations in Member States such as Germany, Finland, France and Belgium were founded in the last decade. Similarly, according to the EFC research[32], in nine countries (Belgium, Estonia, France, Germany, Italy, Luxembourg, Slovakia, Spain and Sweden) around 43% of foundations (over 18,000 in absolute numbers) were set up during the last two decades[33].

The foundation sector plays a significant role in the EU labour market, both directly – by involving employees and volunteers in their projects – but also by indirectly supporting employment and volunteer work in the organisations and activities they fund. According to EFC research[34], in ten and seven EU countries respectively, some 34,400 foundations directly employ about 311,600 employees, and some 31,800 foundations engage 231,600 volunteers –

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26 First, the estimates in the feasibility study are based on a dataset with a majority of public benefit foundations, which means that it could also include some other types of foundations. This should not have a significant impact as the whole foundation sector mainly consists of public benefit foundations and data for groups of foundations which are known to be non-public benefit (e.g. Dutch commercial foundations) was excluded from calculations. Secondly, foundations in the dataset are public benefit as defined in national legal terms, which means the dataset is not consistent and does not only include strictly public benefit foundations (as understood in this report).

27 Data, unless otherwise referenced stems from the feasibility study.

28 These figures for assets, expenditures and employment are estimates based on the survey carried out for the purpose of the study, a secondary analysis of the data and an additional plausibility review. The data from the EFC research (see footnote 21) mentioned assets of €237 billion for foundations surveyed in 15 EU countries and total spending of €46 billion by foundations surveyed in 14 EU countries.

29 Report by an expert group: "Giving More for Research in Europe: the role of foundations and the non-profit sector in boosting R&D investment", September 2005.

30 According to the EFC research and other published sources available to the contractors.

31 See Annex 1 for more detailed information.

32 See footnote 23.

33 Data in EFC report looks at different periods varying from 7 to 11 years for different countries, between 1990 and 2007.

34 See footnote 23.

amounting to an average of about nine employees and seven volunteers per foundation. On the basis of this research and additional data and extrapolations, the feasibility study suggests that there are between 750,000 and 1 million full time employed staff working for the foundation sector across the EU[35] and a further 1 million persons involved in their projects as volunteers. The numbers could be higher in practice given that the study does not carry out analysis on part-time staff, freelancers or consultants also working for foundations[36]. Direct employment varies per country (according to the feasibility study, the United Kingdom, Germany, Spain, Poland and Hungary account for about 80% of foundation employment in Europe).

Foundations are active in a number of key areas benefiting European citizens and the EU economy, but their contribution, as well as their potential to generate social and economic added value, is not always easy to quantify and it often risks being underestimated. According to the feasibility study, education and research dominate the profile of public benefit purpose foundation activity in the EU, with an average of 30% of activity focused in this area[37]. Foundations are an important source of funding for some research activities and could be an important element to achieve the European Research Area[38]. On the basis of results of the FOREMAP project[39], there are likely to be over 10,000 foundations in Europe supporting research activities, with the amount of their support varying between Member States (with Denmark, France, Germany, Italy, Sweden and the UK accounting for 88% of research expenditure funded by private non-profit sector). Moreover, foundations have close links with universities, the latter seeing foundations as one of the principal sources of their funding and many universities (31% of surveyed universities according to a recent study[40]) creating foundations to handle fundraising activities.

Social and health services appear to be the next biggest areas, with an average of 25% of public benefit purpose foundations activity in the area of social services, and 17% in the area of health. In addition, according to the EFC research in seven EU countries, surveyed foundations appear to spend most on social and health services, e.g. 49% of overall support provided by surveyed French foundations goes to health services, and 36% to social services; and 31% of all support of surveyed Dutch foundations focuses on social services[41]. Arts and culture is the next significant area of activity after health; it is the most important area in Spain with 44% of Spanish foundations involved in this field; and is relatively prominent in a number of other countries (such as Finland, Germany, Italy, Portugal, the Czech Republic and Poland).

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35 This figure only refers to employment in the public benefit section of foundations' activities (and does not include employment in related corporations in which foundations might hold shares).

36 In its initial estimation, the feasibility study mentions that there could be approximately 1.5 million full-time staff, 2.5 million volunteers, half a million part-time staff and almost a million of freelancers and consultants but these numbers are scaled down or not analysed further in the analysis, pp. 25-27.

37 The interest in this area appears smaller according to the EFC research, where over 10% of surveyed foundations were interested in science; see footnote 27.

38 See footnote 29.

39 The project was co-funded by the Commission and coordinated by the EFC; a pilot study gathered comparable data on foundations' support for research in Germany, Portugal, Slovakia and Sweden: http://www.efc.be/Networking/InterestGroupsAndFora/Research%20Forum/Documents/Understanding%20European%20Research%20Foundations_2009_09_FOREMAP.pdf.

40 "Giving in evidence: Fundraising from philanthropy in European universities", 2011, http://ec.europa.eu/euraxess/pdf/research_policies/Fundraising_from_Philanthropy_in_European_Universities.pdf.

41 See footnote 23.

Other areas include environmental protection and climate change - from the EFC research in six Member States it appears that over 5% of foundations surveyed support environmental issues[42] - but also development and migration issues. Foundations also play an essential role in promoting active civil society in Europe as many of the areas in which they engage are closely linked to citizens' concerns[43]. Furthermore, by acting across borders and engaging directly with citizens they promote dialogue among different actors and cultures at local level.

In all these areas foundations are active through making their resources available to citizens or organisations for a specified purpose (i.e. grant-making foundations) and/or running their own operations and programmes, e.g. some private universities, hospitals, museums or research projects or institutes (i.e. operating foundations). Both grant-making and operating foundations are present – to a varying degree - across Europe. In some countries – e.g. France or Italy – the foundation sector mostly includes "operating" rather than "grant-making" foundations, and in others, such as the UK, there is a predominant grant-making culture with hardly any operating foundations. Overall, it appears that many foundations in Europe combine both operating and grant-making to pursue their objectives and the number of these "mixed" foundations is increasing. Examples of such foundations include the Gulbenkian Foundation in Portugal, the BBV Foundation in Spain or the Bosch Foundation in Germany[44]. For example, out of 232 EFC members, 73% (169 members) both give grants and operate their own programmes; 14.6% (34 members) do only grant-making; and 12.5% (29) only operate their own programmes[45].

Foundations also mobilise - through partnerships and by pooling funding - other philanthropic actors, business or public sectors to address specific issues (e.g. develop and support health children programmes), which multiplies the impact of their work[46]. Partnering and co-funding with foundations can be attractive for public bodies as foundations can complement the actions of governments.

Foundations have traditionally been more active at national, regional or local level. However, the numbers of foundations and donors operating on a cross-border basis, or expressing willingness to be engaged in such operations, have increased significantly during the recent decade.

Anecdotal evidence from bilateral discussions with foundations in 2010[47] suggests there are a number of foundations that see activities abroad as an important part of their activities. For instance, the European Climate Foundation explained that it had donors all across the EU; cross-border activities of the King Baudouin Foundation amounted to about 25% of their activities, and those of the Calouste Gulbenkian to 20%; and the Open Estonia Foundation estimated that more than half of its activities were cross-border.

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42 See footnote 23.

43 "EU citizenship report 2010: dismantling the obstacles to EU citizens' rights", COM (2010)603, 27.10.2010.

44 Data from the feasibility study; "Foundations in Europe: a comparative perspective", Civil Society Working Paper 18, H. Anheier, 2001; and information from the EFC.

45 Internal research carried out by the EFC, June 2011.

46 See for example the cooperative scheme between European foundations and the Roma Education Fund with the objective of helping to close the educational gap between Roma and other children (see "Foundations in the European Union, Facts and figures", 2008, p. 19).

47 Bilateral discussions with representatives of some foundations during the European Foundation Week in June 2010.

Furthermore, the number of EU-wide projects currently in place provides evidence of growing interest among foundations for European level cooperation. These include, among others, the creation of Donors and Foundations' Networks in Europe (DAFNE) in 2006, which now includes 16 networks across several EU countries, a number of projects introduced by the EFC in specific areas of interest (such as HIV/AIDS, disability, etc.), or other initiatives such as the Network of European Foundations (NEF) for innovative cooperation or the European Venture Philanthropy Association (EVPA), which aim to develop cooperation and networking between philanthropist entities in Europe[48]. In the survey carried out for the feasibility study, 46% of the surveyed foundations stated that they conducted international activities "regularly"[49]; and about half of the surveyed foundations which conduct international activities "at least occasionally" indicated that they planned to expand those activities further. These survey results provide an example of the growing interest of foundations in cross-border activity in Europe, even if the figures should be considered as indicative[50].

As regards donations, figures for gifts channelled through the "Transnational Giving Europe" (TGE) mechanism, which during 2010 grew by 25% and exceeded €4.2 million, indicate that there is growing potential for cross-border giving[51].

2.3.2. Overview of the legislative framework

At EU level

There is no EU legislation in the area of foundations. However, their activities may fall under the provisions of the Treaty on the Functioning of the European Union (TFEU) relating to freedom of establishment (Article 49 TFEU), freedom to provide services (Article 56 TFEU) or free movement of capital (Article 63 TFEU). According to Article 49 TFEU, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. According to Article 56 TFEU, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

It should be noted, however, that Article 54 excludes legal persons that are non-profit-making from the right of establishment. Nonetheless, in the light of the Court of Justice of EU case-law[52], a non-profit making foundation can invoke freedom of establishment when it engages in economic activities.

Being unremunerated, the awarding of grants (which is the main or exclusive type of activity of certain foundations) would not be considered an "economic activity" under the Treaty provisions relating to establishment and services or under Directive 2006/123/EC on services

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48 See footnote 23.

49 The survey gave a very high result of 65-67% (of the weighted data) foundations active on international level "at least occasionally".

50 See feasibility study, p. 149 and p. 153. The survey consisted of 134 cases of foundations in 24 different countries (response rate to the survey was 21%). The figures might be overestimated, e.g. due to overrepresentation of larger foundations in the sample.

51 http://www.transnationalgiving.eu/tge/default.aspx?id=219948&LangType=1033.

52 See for example cases C-172/98, 13/76, C-222/04,

in the internal market[53] (hereafter the Services Directive) - and would not therefore be covered. As far as funding in general is concerned, if this is defined as a payment of contributions for a non-profit purpose, it would not be considered an economic activity either; in contrast fund "raising" may well be an economic activity (i.e. renting out property, selling handicrafts or organising sports activities for which participants or spectators are charged entry fees).

According to Article 63 TFEU all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited. Gifts, endowments, inheritances and legacies are listed under "Personal Capital Movements" in Annex I of Directive 88/361/EEC which constitutes an indicative, non-exhaustive list of what is covered by free movement of capital. Funding, fund raising and grant-making in these forms can benefit only from the free movement of capital provided that they are cross-border[54].

Secondary legislation - "the Services Directive" - ensures that both service providers and recipients benefit more easily from the fundamental freedoms guaranteed in Articles 49 and 56 TFEU. The implementation of the Services Directive should make the establishment of foundations performing economic activities easier by eliminating requirements governing access to or exercise of service activities that were discriminatory, unjustified or disproportionate. This means, for example, that their establishment should not be made subject to: discriminatory requirements based directly or indirectly on nationality (i.e. relating to the registered office of the foundation or nationality or residence requirements for the staff); restrictions on the freedom to choose between a principal or secondary establishment; or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary.

In addition, foundations undertaking economic activities should be able to provide cross-border services in other Member States without any national requirements governing access to or exercise of that activity being imposed upon them, unless they are non-discriminatory, justified by reasons of public policy, public security, public health or protection of environment, and proportionate. Requirements such as the obligation to have an establishment in the Member State where cross-border services are provided will not be justified in most cases.

In conclusion, foundations developing economic activities may benefit from the freedom of establishment and the freedom to provide services, as guaranteed by Articles 49 and 56 TFEU (as well as the Services Directive), while foundations carrying out non-economic activites (e.g. grant-making) may benefit the free movement of capital, as guaranteed by Article 63 TFEU.

At national level

At national level, civil laws set out requirements which foundations need to fulfil in order to be able to operate. More detailed information about national legislation can be found in Annex 2.

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53 OJ L 376, 27.12.2006, p. 36.

54 It is to be noted that grant-making/funding might also be understood as necessary operations for the purpose of the capital movements, in particular as part of the related transfers, in the sense of Annex I to Council Directive 88/361/EEC, entitled 'Nomenclature of the capital movements referred to in Article 1 of the Directive'.

Foundations and their donors are also subject to the relevant tax rules of the various Member States. Tax law may function both as an incentive and a disincentive for donors (depending on whether or not tax benefits are provided for donations made to foundations) and is also relevant for the investments of foundations (as tax benefits may be provided for income earned by foundations). This is true mainly for income taxation, but it may also be relevant for inheritance taxation (i.e. gift, inheritance and/or estate taxes, which may be applied at both the level of the foundation and of the donor). In most Member States, in order to qualify for tax benefits, foundations have to meet certain requirements that are additional to those provided under civil law.

2.4. Problem definition[55]

Inefficient use of funds for public benefit purposes through foundations in the EU

As illustrated in the previous sections, foundations make, through their activities in key areas, a major contribution to the achievement of a number of the EU's objectives. Their role in performing public benefit activities has always been important, but it has gained even greater significance in the aftermath of the recent economic and financial crisis due to the growing expectations of citizens. Yet, support from the private sector to public benefit causes is not fully exploited across the EU.

One of the main reasons for this appears to be that foundations – which are important sponsors of public benefit causes - cannot pool and distribute funds efficiently on a cross-border basis in the EU. When they decide to operate across borders, foundations have to spend part of the resources they collect on legal advice or on fulfilling different legal and administrative requirements laid down by national laws (see section on costs below). This means that less funding is available for public benefit activities. This was confirmed by the public consultation carried out by the Commission in 2009[56], in which respondents underlined that part of the funds of foundations active abroad is used to cover operation costs instead of being channelled for public benefit purposes.

In addition, these legal and administrative requirements have a strong deterrent effect on foundations initiating or developing operations across borders, with the result that the scope of their activity is narrower than could be expected from their full potential and their expansion ambitions.

For instance, the Fondation d'Entreprise du Groupe SEB affirmed that it limited its activities abroad as a consequence of the existing barriers, and the Calouste Gulbenkian Foundation stated that the civil law obstacles it encountered influenced the dimension and budget of its EU-wide activities, which could otherwise be larger[57].

The problems described above can be further divided into the following sub-problems: a) *uncertainty about recognition as a public benefit purpose foundation in other Member States*,

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55 Information about national practices is based on the Commission's understanding of the replies submitted by national authorities to the Company Law Expert Group (CLEG) questionnaire during 2010 and 2011, on information provided by the European Foundation Centre, on the feasibility study, and on the 2009 consultation replies.

56 See http://ec.europa.eu/internal_market/consultations/docs/2009/foundation/summary_report_en.pdf.

57 "European foundations' case studies", April 2010 drawn up by the EFC.

b) *costs for pooling and distributing funds on a cross-border basis* and c) *limited cross-border donations*.

a) Uncertainty about recognition of foreign foundations as public benefit purpose entities in other Member States

The national definitions of public benefit vary across the EU. Certain Member States have a closed list of public benefit purposes, although most of them have either an open one or no definition at all.

In a number of cases, Member States seem to require foreign foundations which have activities in their territory to fulfill the public benefit purposes as foreseen by their legislation.

In certain cases, in order to be granted the status of public benefit, foundations need to follow a specific procedure of recognition or to obtain permission. For instance, a special recognition authorisation (via a decree issued by the Minister of the Interior, after having received the approval of the State Council) is foreseen for foreign foundations which envisage operating as "public benefit purpose foundations" in France whereas, in Spain, the state supervisory authority determines whether the purposes of a "formal delegation" of a foreign foundation are in accordance with "general interest". In some other countries e.g. Poland and Slovakia, the purposes of a representative office of a foreign foundation need to be in line with national law requirements. For example, in Poland, checks are carried out to verify whether purposes are in line with the national definition of "public benefit" before permission is granted by the competent Minister to set up a representative office.

Such cases can lead to some legal uncertainty as to whether a foundation will be recognised across borders as a public benefit purpose one. Similarly, tax barriers and restrictions[58] can also cause uncertainty regarding recognition and, consequently, whether a foundation will be eligible for the same tax benefits as those available to domestic foundations. Such uncertainty might dissuade foundations from operating in other countries.

b) Costs for channelling funds on a cross-border basis

The national legal and administrative requirements affect both the setting up and the running of foundations' activities, as foundations are obliged to dedicate additional human and financial resources to tackling these requirements. It is difficult to provide an overall estimate of the costs faced by foundations, as some of these costs (e.g. administrative or staff costs) will depend on specific cases and are, therefore, difficult to quantify.

According to the calculations carried out in the feasibility study, the overall costs of the barriers foundations face in their international activity could amount to a minimum of between €90 and €102 million a year. This figure is based on calculations of costs of legal and fiscal counselling for setting up a new entity abroad (in case this is necessary to operate abroad) and for keeping abreast of changes in national legislations when already running operations abroad. The calculations are based on assumptions of one-off legal counselling costs of €10,000 - 16,000 for setting up a new entity and ongoing legal yearly costs of €3,000 for monitoring changes in national legislations per foundation. In addition, assumptions as regards numbers of foundations which might need to establish new entities to operate abroad (750 - 1,200 per year) and those that might need counselling when running operations abroad

[58] Tax related barriers will be assessed more in detail in a separate subsection, please see below.

(27,500) are estimates on the basis of a survey of 134 foundations. Due to the data uncertainty involved, the figures for costs are to be seen as assumptions only and are used for illustrative purposes [59].

Although this report will use the above figure when talking about overall costs, it is important to point out that the overall set-up and running costs abroad might be higher when other costs are also taken into account. Looking at the EUSTORY and Carpathian Foundation case studies mentioned in sections 2.4.1 and 4.3, setting up an additional entity abroad amounted to €40,000 (or even up to $100,000) and running it – to €30,000 (or $25,000) when other costs, such as registration fees, administrative expenses, travel and accommodation costs, costs of internet presence and of public relations abroad, were also taken into account. Furthermore, should the establishment of a new entity in other Member States be required, the feasibility study suggests that costs could amount to between €138 and €179 million when an average amount of minimum founding assets currently required in the EU is included in the calculations.

c) Limited cross-border donations

Donors' lack of trust in, and knowledge of, foreign foundations, and tax law barriers or restrictions are also reported as being a barrier to cross-border donations.

2.4.1. Causes and drivers of the problems

Civil law barriers or restrictions for foreign foundations

There are significant divergences in Member States' approaches towards the setting up and operating of foundations. This means that foundations are subject to different requirements across the EU in terms of, *inter alia*, minimum founding assets, internal governance, supervision, activities allowed, etc. For instance, certain Member States foresee strict requirements regarding minimum founding assets (e.g. €1 million in France or €250,000 in Portugal) whereas in others, these requirements might be lower (e.g. over €30,000 in Denmark or €25,000 in Finland) or no founding assets may be required at all (e.g. in Estonia or Latvia). This requirement exposes founders to a potential cost because it can oblige them to put up more money than is actually necessary to establish. In particular, in certain cases it may prove to be difficult, if not impossible, for the founders to establish a small foundation if it has to respect, for example, a very high minimum founding assets requirement such asthose mentioned above.

Furthermore, it appears that some Member States only allow specific forms of establishment for foundations[60] (i.e. Slovakia, Latvia) or that they allow their establishment under conditions

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[59] The feasibility study calculations of set-up costs are based on the assumption that about 750 - 1,200 foundations per year might want to start operating abroad via creating a new entity, given that (i) 25,000 – 30,000 foundations indicated in the survey carried out for the purpose of the feasibility study that they would like to expand their international activities and that (ii) at least 3-4% of those already active internationally had to establish new entities abroad (as so many reported difficulties with establishing those). The calculations of running costs are made for 27,500 foundations (assumingly because 25,000 – 30,000 foundations indicated their interest in expanding abroad). For further detail, please see the feasibility study, pp. 170-174.

[60] The foundations should be able to choose between primary and secondary establishment or between establishments in the form of branches, agencies, subsidiaries, in another Member State. Imposing a specific form would limit the freedom of establishment of foundations.

of reciprocity (i.e. Italy). Moreover, there are also cases where the host Member State requires the residence on its territory of a person authorized to act on behalf of the foreign foundation (e.g. in Malta), while some others require evidence that the value of assets corresponds to their national legal requirements when a foreign foundation establishes a branch (e.g. in the Czech Republic and Slovakia).

In addition, difficulties and costs when a foundation wants to transfer its seat to another Member State were mentioned in the feasibility study and the responses to the 2009 public consultation.

Certain Member States (e.g. Czech Republic) appear to prohibit the cross-border provision of services by foundations, thereby making it difficult for foundations to operate on a temporary basis across the EU.

Moreover, there are national requirements on foundations when receiving donations (e.g. in Lithuania a "status of a recipient of sponsorship" from the Register of Legal Entities for providing and receiving donations is requested whilst in Belgium and Luxembourg authorisations are requested for donations exceeding certain amounts). Provisions also exist which require foreign foundations to reside on the territory of a particular Member State in order to perform fund raising and grant making.

The example below provides a specific illustration of the difficulties and costs encountered due to divergences in national (civil and tax) laws for foundations across the EU:

Example: History Network for Young Europeans EUSTORY[61]

EUSTORY was founded in September 2001 on the initiative of the Körber Foundation. It is a common platform of non-governmental organisations from civil organisations in 22 European countries, which supports teaching history to young people across the EU.

Since its founding, it has struggled to find the appropriate legal structure for its pan-European public interest objective. In order to avoid linking symbolic EU-wide activities with a single national law, until 2008 it operated as a non-registered association. However, this became an obstacle to its development in an increasing number of EU countries due to the fact that it was not contractually capable (e.g. it could not submit an application for EU funding, nor attract sponsors).

The only available option to create an independent entity with legal personality at EU level was to establish itself as an international association under Belgian law, which EUSTORY did in June 2008. However, the costs of establishing and maintaining the association during 2008-2010 proved disproportionate for the Körber Foundation, to the extent that a discussion at a general assembly is foreseen in 2011 to consider the dissolution of the association. The examples of such costs include:

- costs of setting up and providing for a legal seat in Belgium of €40,000[62] in 2008, part of which would not have been sustained if a foundation under European law could have been set up in Germany (where the secretariat of the Körber Foundation is based);

[61] This example is based on information from "European foundations' case studies", April 2010 drawn up by the EFC, and on further contribution on costs provided by EUSTORY to the EFC in the context of this report.

- costs of around €30,000 a year in 2009 and 2010 for administrative expenses of the EUSTORY association[63], part of which were due to the fact that the Körber Foundation had to operate with the association in the context of foreign (civil and tax) law. These would have been avoided, had it been possible to set up a European Foundation in Germany.

Tax law barriers or restrictions for foreign foundations and their donors

Member States enjoy broad freedom to design their tax systems and allocate taxation powers between themselves. Thus, it is for each Member State to determine whether it will provide for tax incentives for public benefit purpose foundations and their donors and, if so, what kind of general interests it wishes to promote by such tax incentives. According to the case law of the Court of Justice of the EU, once a Member State decides to provide such tax incentives, it should provide for non-discriminatory tax treatment of comparable foreign foundations and their donors, as required under the fundamental freedoms enshrined in the TFEU.

In the past, in many Member States, foreign foundations were not able to benefit from the same advantages with respect to income taxes which were granted to domestic foundations (even if they fulfilled the relevant requirements provided by the national tax law). Similarly, in many cases, domestic donors could not benefit from tax deductions which were available for donations made to domestic foundations when they made a donation to a comparable foreign foundation. Discriminatory tax treatment of foreign foundations and donors also occurred with respect to inheritance, estate and gift taxes. This situation resulted in tax law barriers to foundations operating across borders. This is confirmed by the results of the 2009 public consultation. On the question of tax law barriers encountered by foundations in carrying out cross-border activities, a majority of respondents indicated "income taxation of foreign foundations and of domestic foundations operating abroad" followed by "inheritance taxation" and "tax treatment of donors" as the most important tax law barriers. Asked for concrete examples, most respondents referred to the fact that foreign foundations were taxed at a higher level than local entities in most Member States, to the fact that foundations found it difficult to attract foreign donors due to lack of tax advantages for cross-border donations, and to the less favourable gift and inheritance tax treatment.

The Court has ruled on cases which correspond to the situations identified as representing the most significant tax law barriers to cross-border activities of foundations. In the *Stauffer* case[64], the Court affirmed that where a Member State gives tax exemptions to domestic foundations, it should extend these advantages to comparable foundations in other Member States which meet the same conditions as domestic ones. In the *Persche* case[65], the Court stated that where a Member State grants tax incentives for donations to certain domestic foundations, the conditions for these tax incentives must apply in a comparable way to cross-border donations to foreign foundations. In the very recent *Missionswerk Werner* case[66], which concerned the applicability of reduced rates for succession duties, the Court decided that a Member State granting certain tax advantages to domestic foundations had to apply the

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62 Start up costs (legal advice, notary, registration fees; travel and accommodation costs for journeys related to the establishment process; administrative expenses related to setting up a legal seat in Belgium).

63 Including, costs of accounting, legal advice, internet presence, PR materials with details of presence in Belgium, travel costs, etc.

64 C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften

65 C-318/07 Hein Persche v Finanzamt Lüdenscheid

66 C-25/10 Missionswerk Werner Heukelbach eV v État belge

same tax treatment to foreign foundations that satisfied the conditions laid down by that Member State concerning the types of domestic foundations entitled to the tax advantages.

Following the above-mentioned judgments in the *Stauffer* and the *Persche* cases and a systematic examination of national laws in this field by the European Commission, infringement proceedings have been opened against a number of Member States whose tax legislation discriminated against foreign foundations by not granting them or their donors certain tax advantages which were available to comparable domestic foundations and their donors. As a consequence, many Member States amended their tax rules in this area with a view to bringing them into line with the TFEU. Some Member States are still in the process of doing so, and it still remains to be seen how these rules will be applied in practice. The example below illustrates the problems regarding tax issues encountered in practice by a specific foundation.

Example: the Fondation INSEAD (Institut européen d'administration des affaires)[67]

The Fondation INSEAD was established in France as a "fondation reconnue d'utilité publique" in order to collect donations from the network of alumni, recruiters and friends of INSEAD Business School and use them to fund scholarships and research. INSEAD Business School has a European (and now a global) focus, and therefore, the alumni network is very international with a strong European basis[68].

The Fondation INSEAD believes that, over the years, it has lost potential donors due to the fact that prospective foreign donors are often discouraged from making donations to foreign foundations because of unfavourable tax treatment. It also states that it often has to seek legal advice on the tax treatment of donations from donors who are resident in other EU Member States (e.g. recently in the case of Italy and the Netherlands), and such consultations can amount to between €10,000 - €15,000.

As a consequence, the Fondation INSEAD has had to create domestic foundations or trusts in other countries as "collecting agents" with local alumni, and this has incurred costs (variable per country and context). Because of these costs, the Fondation INSEAD is likely to create domestic foundations only in countries with high fund raising potential, thus excluding potential donors from other countries.

Even in cases where the same tax advantages are provided for in the relevant tax law and are therefore available to foreign foundations and their donors, benefiting from them might still prove costly and difficult. Foreign foundations and their donors need to prove that they pursue a public benefit purpose and meet the other requirements imposed in the domestic legislation of the host Member State. The example below illustrates how such a "comparability test" works in practice and what obligations foreign foundations and their donors may have to meet.

How the "comparability test" works in practice

A donor who is tax resident in the UK and makes a donation to a foundation established in Spain (which does not have a secondary establishment in the UK) needs to prove to his tax

[67] This example is based on the information received directly by the Commission from INSEAD.

[68] With 55% of members of the alumni network coming from the EU countries.

administration that the foundation is "comparable" to a foundation established in the UK in order to obtain tax relief for this donation. This could involve the following steps and related costs:

- the donor might first need to find out about the conditions under which a UK foundation is considered as a charity (and therefore donations made to it are subject to beneficial tax treatment), which might involve costs for legal advice;

- the donor will need to provide documentary evidence that the foreign foundation satisfies the above-mentioned conditions, which could lead to translation costs and notary costs for certifying documents. In most cases, he will have to ask the foreign foundation for the relevant documents, with evident logistic and linguistic difficulties. For example[69], the King Baudouin Foundation made a request to the French authorities to be exonerated from inheritance taxes on a legacy received from a testator having property in France (which is possible according to the legislation in force if a foundation is deemed comparable to a French one). In this particular case it took more than a year to pass the "comparability test" and be recognized as comparable to a French foundation. In addition to the lengthy procedure, the estimated cost for the services of a lawyer and notary amounted to €3000-4000.

- the donor's national tax administration will need to check the submitted documents and, should it not consider them sufficient, may need to ask the tax authority of the Member State where the foundation is established for more information (via the administrative cooperation channels), which could lead to administrative costs for national authorities.

The procedure for passing the "comparability test" may prove to be particularly difficult for foundations wishing to operate in several Member States and having to undergo the "comparability test" in all of them. In addition, should the national authority decide that the beneficiary foreign foundation is not comparable to domestic ones, the foundation may encounter further administrative and legal costs for adapting to the requirements (e.g. by changing statutes).

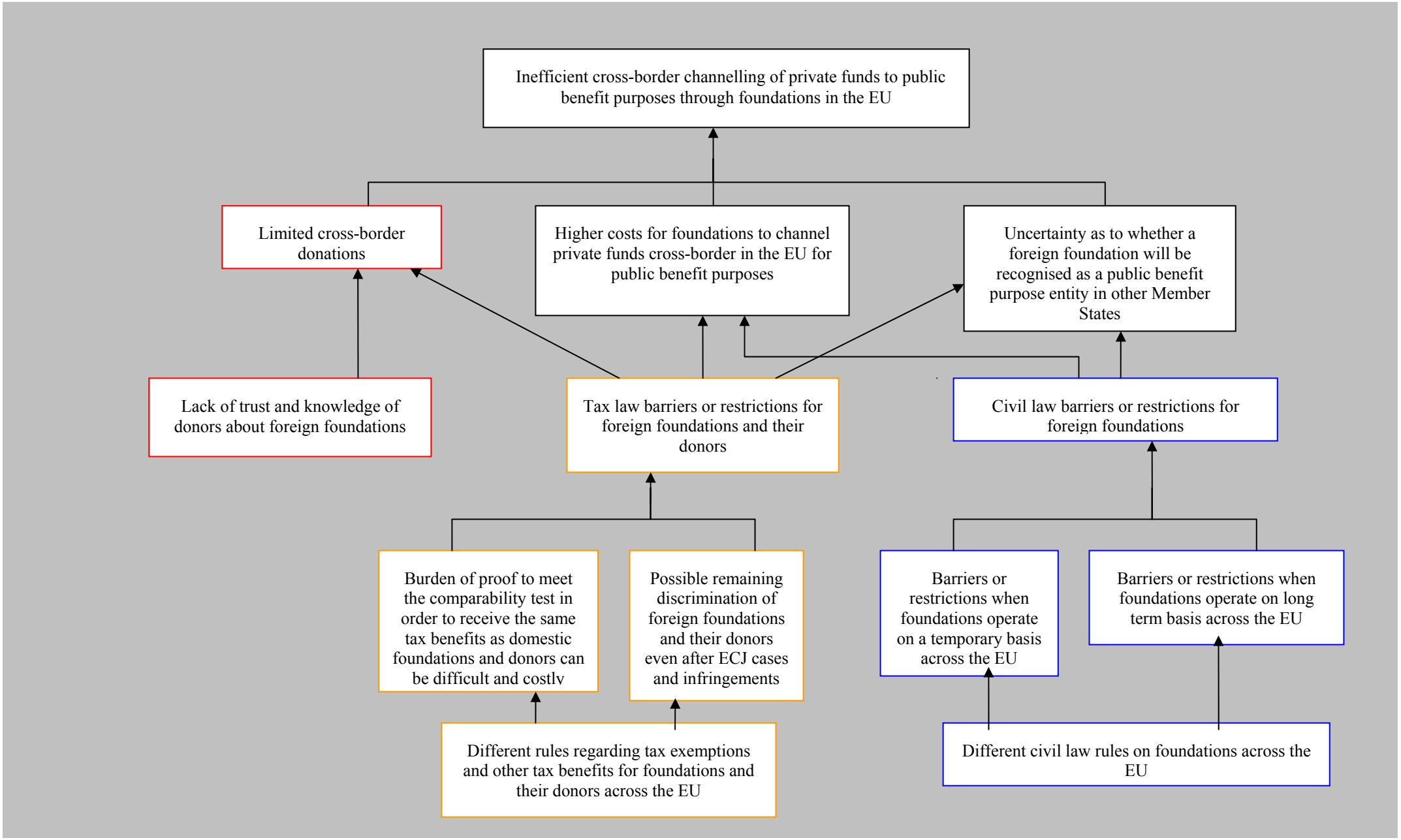
According to one foundation, the "comparability test" is seen as a lengthy and costly procedure amounting to a barrier – in particular for smaller foundations; this is also the case for bigger foundations with only a few foreign donors in a particular Member State[70]. For instance, some foundations will only undergo the "comparability test" procedures if they are sure they will receive sufficient donations from donors in a certain Member State; otherwise, many continue to use other solutions such as the Transnational Giving Europe network when receiving foreign donations.

Lack of trust by donors in foreign foundations

One of the problems foundations are confronted with when raising funds for public benefit purpose activities is the insufficient knowledge and lack of trust by foreign donors. Some donors find it easier to donate money to domestic foundations, whose purposes they can find out about more easily and whose legal form is well known to them. Others, for instance those interested in donating to EU-wide purposes, might lack assurance that their donations to

69 Information provided by the EFC.
70 Information received from an EFC member.

foreign foundations will effectively benefit such purposes. In both cases, they might donate less or not at all to foreign foundations.


Inefficient cross-border channelling of private funds to public benefit purposes through foundations in the EU
Limited cross-border donations
Higher costs for foundations to channel private funds cross-border in the EU for public benefit purposes
Uncertainty as to whether a foreign foundation will be recognised as a public benefit purpose entity in other Member States
Lack of trust and knowledge of donors about foreign foundations
Tax law barriers or restrictions for foreign foundations and their donors
Civil law barriers or restrictions for foreign foundations
Burden of proof to meet the comparability test in order to receive the same tax benefits as domestic foundations and donors can be difficult and costly
Possible remaining discrimination of foreign foundations and their donors even after ECJ cases and infringements
Barriers or restrictions when foundations operate on a temporary basis across the EU
Barriers or restrictions when foundations operate on long term basis across the EU
Different rules regarding tax exemptions and other tax benefits for foundations and their donors across the EU
Different civil law rules on foundations across the EU

2.5. Baseline scenario: expected development if no action is taken

Whether an action is proposed at EU level or not, a number of initiatives will continue, with different impacts on the legal framework relevant for foundations.

- *Ongoing infringement cases and work in the tax area, and related changes to national tax legislation*

In the area of taxation, the Commission will continue its infringement actions against Member States discriminating against foreign foundations and their donors; Member States should, therefore, amend their legislation in compliance with EU law[71]. In this regard, it can already be assumed that this process will have considerable impact on the tax treatment of foreign foundations and will allow them and their donors to benefit from tax benefits given to national public benefit purpose foundations.

However, the pace and scope of change is difficult to predict. It remains to be seen how easy it will be in practice for foreign foundations and their donors to prove and pass the "comparability test" (as described in section 2.4) with a view to obtaining tax benefits.

The implementation of the new Directive 2011/16/EU on administrative cooperation in the field of taxation[72] is likely to strengthen the cooperation between national authorities in the area of direct taxation and therefore provide Member States with an efficient tool to check whether foreign foundations can be considered as "comparable" to domestic ones. However, it is likely that improved cooperation would not be sufficient to simplify the "comparability test" for foreign foundations.

- *Implementation of the Services Directive*

The implementation of the Services Directive constitutes an important step forward in terms of the lifting of barriers to establishment and services within the single market. Numerous discriminatory, unjustified or disproportionate requirements for established and cross-border service providers have been abolished throughout the EU. In addition, several Member States have set up specific mechanisms to prevent the creation of new barriers in the future (i.e. internal notification obligations, guidelines for future legislation or "Single Market tests" in the impact assessment of new requirements[73]). The Services Directive also strengthens the rights of recipients of services, both consumers and businesses.

However, it is important to recall that benefits related to the implementation of the Services Directive will normally only affect foundations when they carry out economic activities. Rules that do not govern access to or exercise of a service activity (such as grant-making and part of fund-raising) will not fall under the Directive's scope.

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71 22 infringement cases have already been closed following the changes brought to the national laws.

72 OJ L 64/1, 11.3.2011.

73 See for more details the Commission Communication "Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive" (COM (2011)0020 final).

- *Ongoing foundation sector and Commission initiatives in the area of research and development*

Efforts will continue to facilitate transnational cooperation and information exchange regarding philanthropic support for research, e.g. through the work of the European Forum on Philanthropy and Research Funding[74], following comprehensive discussions and analysis which have been taking place since 2005 in order to encourage support from the philanthropy sector to research within the EU[75]. Mapping of the activities of research foundations across the EU – so far via the 2009 FOREMAP project - is in the process of being extended to the rest of the EU Member States, bringing a better overview to those concerned. Such efforts might alleviate certain obstacles to operating cross-border by facilitating networking and making more data available, but they will not tackle the main obstacles.

- *Ongoing foundation sector initiatives to support cross-border giving*

The ongoing private sector initiatives aiming to encourage cross-border giving are likely to become better known and to cover more countries. The "Transnational Giving Europe" network, which currently brings together a number of prominent grant-making entities in 13 Member States and Switzerland,[76] allows donors from the participating countries to provide cross-border donations to public interest entities while benefiting from the tax advantages available in their country of residence for a fee of 5% of the donation's value. The current members want to extend the network further in the near future, which would potentially lead to an increased amount of cross-border donations. So far, the gifts channelled through the network exceeded €4.2 million in 2010 (an increase of 25%). However, it is difficult to predict whether and how quickly new foundations will join and to what extent new donors will make use of the network.

The "Giving in Europe" website run by the King Baudouin Foundation[77], which provides free practical information for donors, intermediaries and beneficiaries regarding legal and fiscal aspects of cross-border philanthropic transactions, and covers 23 countries, might also make it easier for donors or foundations to engage in cross-border giving.

Nonetheless, both sector initiatives are geographically limited to only some Member States and the services are not a substitute for legal advice; they might not therefore lead to a substantial decrease in costs for donors and foundations.

2.6. The EU's right to act

An action at EU level is needed in order to ensure the functioning of the single market.

The legal base for a Regulation on the Statute for a European Foundation would be Article 352 TFEU, which provides the appropriate legal base when no other provision in the Treaty gives the necessary powers for EU institutions to adopt a measure.

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[74] http://www.efc.be/Networking/InterestGroupsAndFora/Research%20Forum/Pages/EuropeanForumPhilanthropyandResearchFunding(Default).aspx.

[75] Including workshops organised by the Commission and foundation sector in 2006 and 2010.

[76] See http://www.transnationalgiving.eu/tge/. Partner organisations include, among others, the Charities Aid Foundation, the King Baudouin Foundation, the Fondation de France, the Oranje Fonds. The countries covered are: Belgium, Bulgaria, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Switzerland and the United Kingdom.

[77] http://www.givingineurope.org.

Article 352 is the legal base of the existing European legal forms, i.e. the European Company, the European Economic Interest Grouping and European Cooperative Society. The Court of Justice of the EU confirmed in a case[78] relating to the European Cooperative Society that Article 352 was the correct legal base.

Should the chosen option be to harmonise Member States' laws in the field, Article 114 TFEU would be the appropriate legal basis.

The proposed action fully complies with the principle of **subsidiarity**. An EU action is needed in order to remove the current national barriers and restrictions encountered by foundations when operating across the EU. The current situation demonstrates that the problem is not properly addressed at national level and its cross-border character requires a common solution to enhance foundations' mobility.

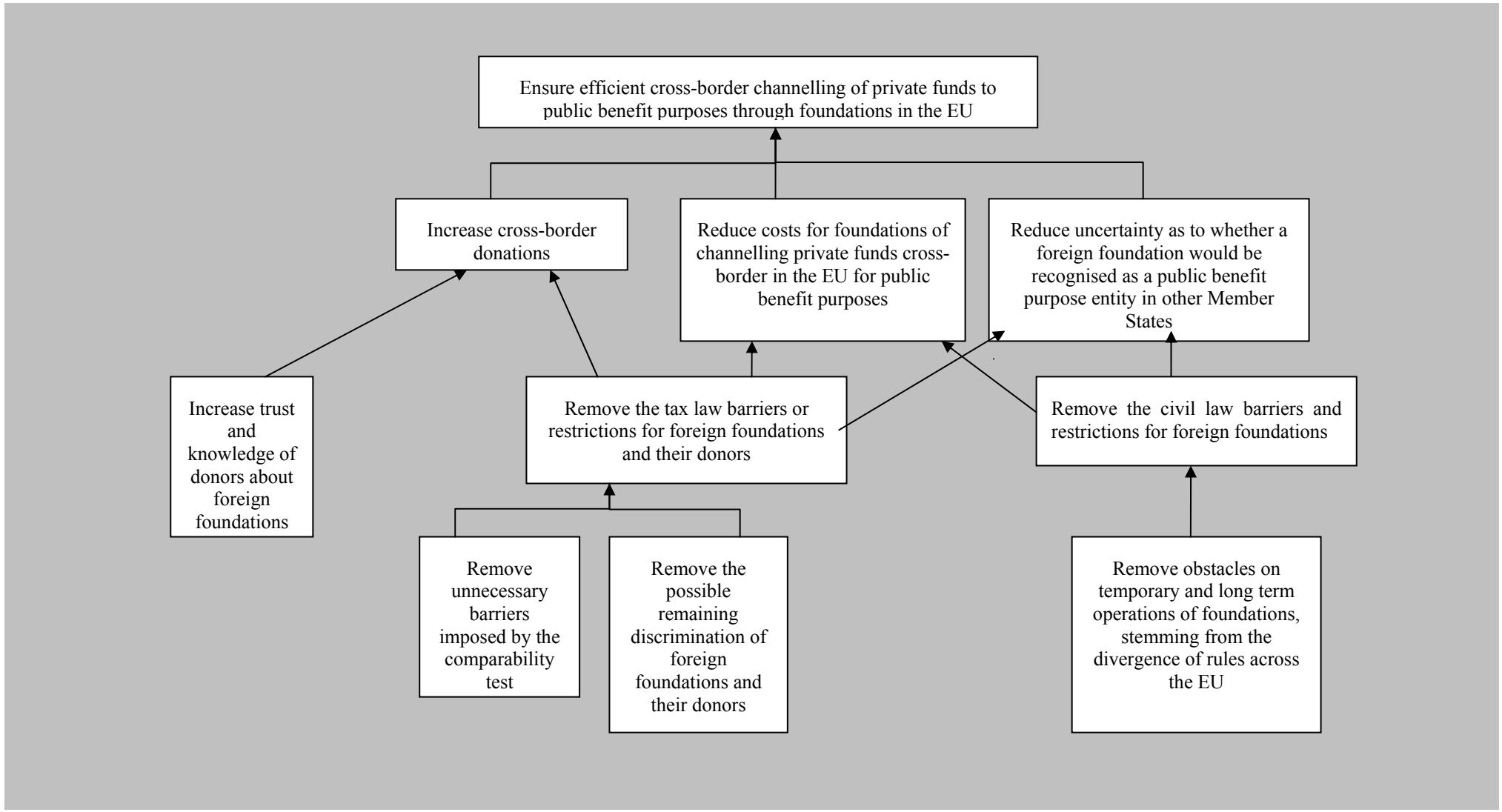
The objectives of the proposed action are better achieved by action from the Union, which will ensure clear and coherent rules for foundations across the EU.

The respect of the **proportionality** principle will be addressed in the context of the comparison of options.

3. OBJECTIVES

The policy objectives for the initiative in the area of foundations are presented in the figure below. The main objective of the future initiative would be to allow foundations to more efficiently channel private funds to public benefit purposes on a cross-border basis across the EU, which should increase the amount of funding available for public benefit activities, and in turn benefit European citizens and the EU economy. This objective translates into several specific objectives, responding to the specific problems and drivers described in the problem definition section (2.4) and presented in the problem tree.

[78] C-436/03 European Parliament v Council of the European Union.


Ensure efficient cross-border channelling of private funds to public benefit purposes through foundations in the EU
Increase cross-border donations
Reduce costs for foundations of channelling private funds cross-border in the EU for public benefit purposes
Reduce uncertainty as to whether a foreign foundation would be recognised as a public benefit purpose entity in other Member States
Increase trust and knowledge of donors about foreign foundations
Remove the tax law barriers or restrictions for foreign foundations and their donors
Remove the civil law barriers and restrictions for foreign foundations
Remove unnecessary barriers imposed by the comparability test
Remove the possible remaining discrimination of foreign foundations and their donors
Remove obstacles on temporary and long term operations of foundations, stemming from the divergence of rules across the EU

4. POLICY OPTIONS AND ANALYSIS OF IMPACTS

4.1. Baseline scenario

Description

In this option no new initiative would be proposed at EU level and impacts would only be those of already ongoing initiatives as described in section 2.5.

Assessment

The ongoing initiatives would, to a certain extent, respond to the problems foundations are confronted with but will not be sufficient to meet the policy objectives as described in section 3.

The implementation of the Services Directive has removed numerous barriers and restrictions to establishment and cross-border provision of services and therefore substantially decreased civil law related costs. Nonetheless, it will not address non-economic activities carried out by foundations[79].

Infringements in the tax area should substantially remove discriminatory tax treatment of foreign foundations and their donors, but the cross-border activity could still continue to be costly, in particular due to the need to satisfy the "comparability test". Foundations may therefore continue to have difficulty being recognised as public benefit purpose foundations in other countries and might still be required to set up a secondary establishment abroad, which is usually costly.

In addition, infringement proceedings take place on a case-by-case basis and they only result in the removal of the discriminatory tax provisions of the Member States concerned. They are therefore not able to provide an EU-wide solution that is applicable in all Member States. It may also take time to deliver solutions, depending on the length of the infringement proceedings and/or the time needed for the ruling by the Court.

Non-legislative initiatives focused on improving the available information on the relevant national regimes will indeed alleviate some of the problems foundations and donors are confronted with. Nonetheless, such initiatives will not impact on the national requirements themselves and will not eliminate the need and costs of legal advice. They will not be a substitute for a trustworthy label which could increase donors' trust and give a European image to foundations with EU-wide activities. In addition, it is important to underline that those initiatives are geographically limited to some Member States, therefore not covering the whole EU.

[79] See section 2.3.1.

4.2. Launching an information campaign and a voluntary quality charter

Description

This option would first seek to improve foundations' and founders' knowledge of their rights and obligations under relevant national laws when operating across borders and, secondly, to encourage foundations to ensure the quality and trustworthiness of their activities on a voluntary basis.

An information campaign on the civil and tax requirements and on opportunities for foundations to operate across the EU could, therefore, be launched. It could be conducted through a Europe-wide website or through specific publications. It could be run and financed either by the Commission, by the foundation sector, or by the latter with the Commission's support.

In addition, foundations could be encouraged to sign up to a quality charter, on a voluntary basis. Such a charter, to be drawn up by the foundation sector with the support of the Commission, would establish a set of common rules and criteria to be complied with by foundations (for instance, on reporting, transparency and disclosure). Compliance with the charter could be subject to independent, objective scrutiny by a third party. Moreover, the sector could be encouraged to broaden the scope of the charter by agreeing on a common definition of what a public benefit purpose foundation is. In order to improve public awareness of the quality charter and the visibility of the foundations complying with its standards, these foundations could be awarded a "European quality label".

Assessment

The measures described above would only remove some of the difficulties in foundations' cross-border activities. In particular the information campaign would help to address the problems relating to the lack of knowledge of Member States' rules and administrative procedures on foundations. The more topics of interest it covered and the more backing from the EU institutions ithad, the more added value it would be able to bring as compared with the initiatives in place (e.g. the existing "Giving in Europe" website[80]). At the same time, an information campaign would call for a comprehensive information gathering effort and would, therefore, involve costs (i.e. to present a complete overview and to keep the information up-to-date). For example, establishing the "Giving in Europe" website cost about €90,000 and keeping it up-to-date amounts to about €15.000 per year[81]. The costs would be higher for the proposed information campaign given its wider scope (involving civil law issues and foundations' activities), although the exact amount would depend on the extent to which it would be linked with the existing initiatives. Although it could help to cut down some of the costs of legal advice for the foundations, it would not lead to a substantial decrease because – as it can be seen on the basis of the experience of "Giving in Europe" - this information would not fully replace specific legal advice.

A voluntary quality charter would facilitate, through voluntary common rules across the EU, an integrated perception of how foundations operate, thereby enhancing to a certain extent the

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80 See section 2.5.

81 Costs of establishing the website included developing its structure and content in cooperation with experts, and about 1 day per country to introduce the content on the website. Information received from King Baudouin Foundation.

confidence of public authorities and donors (be it donors from the EU or from third countries). It could thus increase donors' willingness to donate to foundations signed up to the charter as well as national authorities' trust in those foreign foundations. This may have an indirect effect on tax authorities who might be less strict in performing the "comparability test" with a view to granting tax benefit to foreign foundations which have signed up to the charter. The better known foundations become through the information campaign and the voluntary charter, the easier their operating should be in – and outside of - the EU.

However, as a soft law instrument it would not bring uniform effects across the Member States, as national authorities would be free to decide whether or not to recognise the label. Despite potential marginal changes, national laws would overall remain as currently in place. The uncertainty as to which treatment chartered foundations would find in which Member State would still leave substantial uncertainty as to whether foundations would be recognised as public benefit purpose entities abroad. For the same reason, potential cost reductions for foundations are difficult to estimate. In the replies to the 2009 public consultation most respondents did not think this solution would reduce the costs foundations face, nor that it would bring sufficient legal certainty. All in all the measures would not be sufficient to solve the problems currently faced by foundations and donors.

4.3. Statute for a "European Foundation"

Description

A. Statute without tax elements

Under this option, a new European legal form, the "European Foundation" (FE), would be created. It would be an alternative and additional legal form for foundations; it would not call for changes to the existing national foundation forms and its use would be voluntary for foundations. The choice as to whether to include tax elements in the Statute or not is developed below. The other sub-options relating to the cross-border dimension, minimum founding assets, employees' involvement, supervision and economic activities are described and assessed in Annex 3 and only the preferred sub-options are presented below.

In order for the European Foundation to be trustworthy in the eyes of the donors and the public authorities and to prevent circumvention of national laws on foundations, the Statute needs to introduce high standards not only for accountability and transparency but also as regards other main characteristics of the FE, including what is recognised as public benefit purpose. The Statute would lay down the main requirements for the FE, which would have a legal personality across the EU. For the sake of trustworthiness and accountability, the FE would have to have founding assets equivalent to at least €25 000. Its assets would be dedicated to a public benefit purpose, as defined in the Statute through an exhaustive list of commonly accepted purposes in most Member States. Each foundation wanting to use this legal form would need to prove its cross-border dimension in terms of activities or intentions thereof in at least two Member States. The FE would be free to act in pursuit of its purposes in any lawful manner allowed in its statutes, consistent with its public benefit purpose and in line with the Regulation on the Statute for a European Foundation. It would have the capacity to carry out activities within any Member State and outside the EU. It would be free to engage in economic activities provided that any profit was exclusively used in pursuance of its public

benefit purposes. However, economic activities unrelated[82] to the FE's public benefit purpose would only be permitted up to a threshold, which would be determined in the Statute. In order to distinguish the income arising from related and unrelated activities, the latter would need to be presented separately in the accounts.

An FE could be created from scratch, by conversion or by merger between two public benefit purpose entities, meaning public benefit purpose foundations and/or similar public benefit corporate bodies without membership formed in accordance with the law of one of the Member States. The Statute would stipulate which documents or particulars could be required for the applications for registration by the national registration authority. Furthermore the Statute would include rules regarding disclosure, internal organisation, dissolution as well as rules regarding information and consultation of employees. FEs would be able to transfer their registered office to another Member State. To ensure high standards regarding transparency and accountability, the FE would need to keep records of its financial transactions, and its annual accounts would need to be audited and disclosed to the public.

Supervision would be carried out by designated national supervisory authorities in the Member State in which an FE has its registered office. The Statute would define the powers of supervisory authorities. These powers would have to be proportionate, yet robust enough to enable the supervisory authorities to also effectively oversee the cross-border activities of the FEs they are responsible for. Supervisory authorities would have the duty to ensure that the governing board acts in accordance with the FE's statutes, the Regulation of the Statute for a European Foundation and applicable national laws. They would have the necessary powers to ensure this, including the power to inquire into the affairs of the FE, appoint an independent expert to do so, and if evidence of misconduct was found – to issue warnings. In the case of continued violation of the FE's statutes, the Regulation on the Statute or the applicable national laws, the supervisory authority could dismiss governing board members or decide to wind up the FE. The Statute would also include an obligation for supervisory authorities to cooperate and exchange information with one another.

An important choice to be made is whether or not to include tax elements in the Statute for a European Foundation. If left out, the Statute would only focus on civil law issues (such as recognition, registration, disclosure and internal organisation), with the main characteristics and legal capacity described above.

B. Statute with tax elements

If tax elements were included, this could be done in the following ways:

1) *a separate tax regime for the European Foundations provided in the Statute itself*. According to this option, the European Foundation would be subject to the same tax treatment in all 27 Member States. Its impact would, of course, depend on how the regime was designed in terms of conferring tax benefits as compared to the existing tax regimes;

2) *a non-discriminatory treatment granted automatically to European Foundations*. According to this option, European Foundations would be automatically granted the same tax benefits and to the same extent as those provided for domestic foundations, without any need

[82] Independent delivery of goods or services which do not *directly* serve the public benefit purpose of the foundation, i.e. a museum running a petrol station next door, foundations organising concerts to raise funds (see Annex 3 for more details on related and unrelated economic activities).

to check whether they can be regarded as "comparable" to domestic foundations. The justification would be that the European Foundation can be assumed to carry out activities of public benefit purpose and respect certain requirements that have been agreed upon by all Member States and should therefore automatically qualify for tax relief in all Member States (provided that they grant tax benefits to domestic foundations and their donors). All the above-mentioned solutions would also apply with respect to beneficiaries of and donors to European Foundations.

Assessment

A. Statute without tax elements

The Statute for a European Foundation would allow individual foundations to establish and to perform activities in the EU Member States by using a single legal form, substantially similar in all Member States. It would remove the obstacles and administrative burden experienced today with regard to recognition of foreign foundations and different civil registration requirements. It would unify the concept of "public benefit purpose".

The uniformity of this legal form would translate into cost savings on legal advice currently needed when a foundation wants to operate abroad (e.g including setting up new entities or secondary establishments in other Member States than the country of registration, and monitoring changes in national legislation of the host countries when it already runs operations abroad). The costs for legal counselling on both civil and tax law issues for setting up a new entity abroad and for its ongoing operations can currently be assumed to amount overall to at least €90 - €102 million a year for EU foundations, according to the feasibility study. The Statute without tax elements could be expected to result in a significant reduction of part of those costs – i.e. costs spent on civil law advice. It could also help foundations to save on some other administrative costs of being active cross-border as mentioned in section 2.4 and as illustrated in the specific example of the Carpathian Foundation below:

Example: the Carpathian Foundation[83]

The Carpathian Foundation focuses primarily on inter-regional and cross-border activities, and economic and community development in the bordering regions of Hungary, Poland, Romania, Slovakia and Ukraine. It was set up in 1995 as a network of national entities established in the above-mentioned countries.

Establishing separate offices in different countries involved considerable costs, due among others to the need to find out about the legal environment of foundations in each country, and the fact that it was not possible to set up identical entities in each country, as national requirements differed (regarding, for example,governance or supervisory arrangements). A lot of time was also reportedly spent on keeping up-to-date with the relevant changes for foundations in national laws, which made operations more costly. Examples of the costs involved were as follows:

- set-up costs for the five affiliate entities between 1995 and 1999 amounted to approximately $500,000 ($100,000 annually with on average one affiliate entity established each year);

[83] This example is based on information received from the Carpathian Foundation (through the EFC).

- operational maintenance costs for the cross-border activities of the five affiliate entities between 2000 and 2010 amounted to approximately $1,375,000 (an average of around $25,000 per entity per year);

both adding up to $1,875,000 between 1995 and 2010.

However, as pointed out in the 2009 public consultation, the Statute would not address all issues, which may pose problems to foundations in their cross-border activities, and FEs would need to adjust to different national laws in some areas. For instance, legal advice with regard to social, administrative and labour matters in the host country, which fall outside the scope of the Statute, would still be required when the European Foundation is active in a foreign legal environment. Since European Foundations would have to be registered in the Member State in which they will have their registered office, the Statute would not result in the removal of all registration and publication fees.

A uniform Statute, setting out the same requirements throughout the EU, would render cross-border operations for foundations easier, and would make them more trustworthy for both the public authorities and the potential donors. In particular, a reliable and recognised label – and a European image - offered by the Statute would have an important impact on the knowledge and trust of donors and could lead to an increased amount of cross-border donations (see below for the expected impact of the Statute on the number of FEs and donations). The Statute would also help foundations to develop more efficiently their European-wide activities on cross-cutting issues such as the environment or research. The expected impact of the Statute on those issues was also underlined by some respondents to the consultation on the Single Market Act Communication; in their view the Statute would offer an innovative tool for new European initiatives, a new means for citizens' action and participation in various fields of interest, and would serve as a benchmark for political recognition of the sector[84].

As regards tax aspects, Member States should grant the European Foundation (and its donors) the same tax benefits that are provided under its tax law for domestic foundations (and their donors), to the extent that the European Foundation can be considered as "comparable" to domestic foundations. This obligation for Member States comes directly from the TFEU as interpreted by the Court in the above-mentioned case-law. However, the burden created by the procedures for checking whether the "comparability test" is satisfied would not be removed. On the other hand, it can be assumed that the existence of a uniform legal form recognised in all 27 Member States, which would make the European Foundation a trustworthy entity for public authorities, could result in a situation where tax administrations might become more used to dealing with FEs and therefore less strict in performing the "comparability test". The Statute without tax elements could, therefore, still provide an indirect tax benefit for foundations and their donors.

B. Statute with tax elements

A Statute with tax elements would have the same impacts on the civil treatment of FEs as described above. In addition, following the comparison of the sub-options presented in detail in Annex 3, the automatic application of a non-discriminatory treatment to European Foundations (2nd option in the description of the Statute with tax elements above) would bring most added-value to foundations and their donors and would meet the objectives set in an

84 See http://ec.europa.eu/internal_market/smact/consultations/2011/debate/index_en.htm.

optimal way. As Member States would need to grant European Foundations and their donors the same tax benefits as provided for domestic foundations and their donors, this solution would ensure equal treatment of European Foundations and domestic ones. Moreover, it would apply automatically i.e. without any need for the European Foundation and its donors to go through the procedures aimed at assessing whether the European Foundation can be considered as "comparable" to domestic foundations, removing the related administrative burdens and costs as described in section 2.4.1. Moreover, the solution would remove uncertainty as to whether FEs would be recognised as public benefit purpose foundations for tax purposes.

The above would lead to a significant decrease in costs for tax legal advice, even if some legal advice might still be necessary. The costs for EU foundations could be expected to decrease by overall between €90 and €102 million a year (as estimated in the feasibility study). This is an indicative estimate and is based on an assumption of costs of ongoing legal advice of €3,000 a year per foundation. The reductions in individual costs per foundation could vary on a case-by-case basis and bigger reductions could potentially be expected where costs of ongoing legal advice were higher than €3,000 (e.g. €10,000 – 15,000 for advice on tax treatment of donations from foreign donors in the case of INSEAD, or €3000-4000 for the costs of going through a "comparability test" in the case of the King Baudouin Foundation; both described in section 2.4.1). With the above-mentioned cost reductions, the Statute with tax elements would be likely to encourage foundations to operate across borders to a greater degree than the Statute without tax elements. Foundations' fewer needs for legal advice could translate into some reduced revenues for other actors such as legal firms, although the latter should see increased demand for their services from entities looking to create or convert into FEs.

The Statute with tax elements could also lead to a greater increase in the amount of cross-border donations (as compared to the Statute without tax elements). The exact impact is difficult to ascertain. However, figures for gifts recently channelled through the "Transnational Giving Europe" (TGE) mechanism[85] seem to show that when easier means of making donations are available, donations increase in number. There is not enough evidence to predict whether the overall amount of donations would increase or remain the same. There could, for example, be some cases – thanks to the Statute - of donors being able to give money to a specific purpose abroad to which they could not previously donate due to existing barriers. This might result in additional donations. The likelihood of overall donations remaining the same is, however, more realistic. An increase in cross-border donations could have an impact on amounts being available for donations domestically in that, should overall donations remain the same, more money spent abroad would result in a reduction in donations to national foundations. This could be avoided if overall donations increase but cannot be excluded.

The impact of this policy option will, however, depend on a number of issues. One of those would be the tax treatment available to foundations at national level. As there have been some cases where a Member State, following the Court of Justice ruling on the non-discriminatory treatment of foreign foundations and their donors, restricted its domestic rules (e.g. regarding conditions according to which a foundation is recognised as having a public benefit purpose), the risk that some Member States might make their tax rules less beneficial for both domestic and foreign foundations cannot be excluded.

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[85] See section 2.3.1.

The Statute's impact would also depend on the number of foundations that decided to use it, with interest expected to be higher for the Statute including tax elements. Although the exact number is difficult to estimate, one could assume that - provided that the rules governing the FE are precise and uniform and the FE is easy to set up - many of those foundations which are keen to expand their existing EU-wide activities could be interested in the FE. As an example, according to the feasibility study, between 25,000 and 30,000 foundations already carrying out international acitivites plan to expand them further[86] - and a number of those foundations could choose to do so via the Statute. Those not planning to expand further might still benefit from the Statute in terms of their cross-border donations. In addition, given the recent positive growth trends in the foundation sector and their increasing interest in cross-border work[87], both new foundations and those only active at national level but interested in activities abroad, might be interested in the Statute. In the 2009 public consultation, most foundations were positive about converting into the European Foundation provided that the new legal form would bring them added value.

Another important issue in relation to the take-up – as pointed out during the public consultation - is also whether and to what extent national legislations could make it more difficult to convert into or create the FE. Some respondents to the 2009 public consultation also questioned to what extent the Statute would be used by foundations, quoting a relatively low take-up of previous European legal forms. In this context, in order to ensure its optimal use, efforts would be needed by the European institutions, national authorities and the foundation sector to make this new legal form and its benefits known to foundations.

Although the Statute would make cross-border operations easier, it would also impose some costs on the European Foundations, which - depending on the Member State - might be higher or lower compared to the current costs of operating under a national foundation legal form. For instance, under the Statute all FEs would need to draw up an annual statement of accounts and an annual activity report and send them to the competent national registry and supervisory aurthority; both the accounts and the report would need to be disclosed and the accounts would also need to be audited regardless the size of the FE concerned. Providing accounts and reports to the authorities should not lead to additional costs for most FEs as this is already a domestic requirement in almost all Member States; in addition, 18 Member States already require some disclosure of documents to the public[88].

However, the requirement to have the accounts audited would results in higher costs for FEs in those Member States in which only larger foundations need to be audited and in particular in 8 Member States where no auditing requirements are in place[89]. The information regarding

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86 These figures were calculated in the feasibility study on the basis of the survey data carried out for the purpose of the feasibility study. See footnote 55.

87 See section 2.3.1.

88 Member States which do not require that annual reports and/or accounts are made publically available: Austria, Cyprus, Germany, Ireland, Italy, Latvia and Slovenia. In addition, Denmark and the Netherlands impose this requirement only on commercial foundations. Among Member States requiring disclosure, in a few cases this requirement focuses on specific foundations (e.g. tax-exempt ones) or on specific documents (e.g. annual accounts only).

89 In some Member States an external auditor is generally necessary (Greece, Czech Republic, Cyprus, Finland, France, Lithuania, Sweden and Slovakia); in others an audit is necessary only for larger foundations (Belgium, Bulgaria, Spain, Hungary, the Netherlands, Poland (medium or large entities), United Kingdom) or for certain kinds of foundations (Austria for private foundations, Denmark for commercial foundations, Estonia for larger private foundations, Ireland for incorporated foundations). In 8 Member States an auditor is not required.

the cost of an external audit below illustrates the type of costs which could be involved. It is based on the experiences of a limited number of foundations or accounting companies in some Member States which have been contacted on this issue[90]. The costs vary from €500 to over €53,000 depending on the Member State (with, in general, lower costs in the EU-12 countries) and increase with size of the foundation. The costs focus on audit costs for foundations with national activities only, and costs for those with activities in other Member States would usually be higher[91].

Costs of external audit for public benefit purpose foundations in the EU	
- Czech Republic	- €1,000 - €4,000
- Hungary	- €2,500 - €6,500
- The Netherlands	- € 14.800 (cost for a medium-size foundation with expenses of €2,450,000; this amount consists of basic fixed costs of €5,000 for a medium-sized foundation and a multiplier related to the amount of expenses, and excludes VAT)
- Poland	- €1,700 - €14,000
- Slovakia	- €500 - €1,000
- Sweden	- €53,417 (2010 audit costs of an EFC Swedish member, which amounted to 487,000 Swedish krone)
- United Kingdom	- €10,300 (the average audit fee for a medium-sized foundation with income audited between £1 – 3 million, which amounted to £9,000 according to the League table of top charity auditors 2009/10 from Caritasdata[92]).

At the same time, the Statute could lead to savings for those foundations which are currently required to submit separate audit reports for the accounts of their offices abroad to authorities in those Member States – as they would be only obliged to file one set of audited accounts under the Statute.

C. Administrative impacts of the Statute on national authorities

The relevant national (registration, supervisory, tax) authorities would need to adapt their systems to be able to deal with the new legal form of FE at national level. For instance, as European Foundations would have to be registered in a national registry, this would require adjustments (including in IT systems) in the relevant registries in order to include the European Foundation as a category of foundation and training of staff regarding the registration requirements related to the FEs. The example of cost estimates below for one national registration authority related to the implementation of the European Company (SE) Statute illustrates the type of registration costs which could be involved.

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90 This information has been gathered for the purpose of this report by the EFC through its network of national associations of foundations and donors, and its network of national foundation law experts.

91 At the same time, a couple of contributions with information quoted in the box mentioned that costs would not change if a foundation carried out activities in more than one Member State.

92 http://www.charitiesdirect.com/images/cms/file/Top%20charity%20audtiors%202010.pdf.

Example: Estimated costs of implementing the SE Statute in Denmark[93]

The adaptations and related costs were estimated as follows:

- changing the IT system in the Danish registration authority with one-off costs of 3.7 million Danish krone (2003 value; amounting to about €500,000);

- recurrent annual costs as a registration authority of approx. 0.4 million DKK (2003 value; amounting to about €53,500).

Other costs involved costs of training of staff and of preparation of guidance documents for companies (including an additional guidance on the employee involvement regime in SEs).

In addition, in Member States which currently do not have a registry for foundations[94], a system of registration would need to be created or the existing system updated, and this may entail further costs. However, existing registries could most likely be adapted and used instead of creating new ones, thus limiting the costs involved. The Statute would not lay down rules on the registration fees. The Statute would also require Member States to notify the Commission about newly registered FEs; this requirement should not, however, add much additional burden on national authorities as this information is also required for internal purposes.

European Foundations would also need to be supervised by a State supervisory authority. According to the feasibility study, there is already a State supervisory authority for foundations in all Member States. Consequently, there would be a need to adjust these systems to cater for European Foundations and to train the responsible officials but there would be no costs associated with the creation of new authorities.

In the case of the Statute with tax elements, training and adaptation of the current procedures would be also required within the national taxation authorities, and cooperation would be needed between registries, supervisory and tax authorities, leading to some additional costs as compared to the Statute without tax elements.

The extent of costs for retraining and carrying out additional duties (and therefore, employing extra staff) in all authorities concerned would depend on how many foundations took on the FE status, and how quickly, and on the registration and supervisory duties introduced by the Statute as compared to the national rules in place. The exact number of FEs is difficult to determine (see above) and would be likely to vary per country, depending on the role played by foundations, their current number in that country and the national requirements in place. The Statute's take-up would likely be gradual, with some time needed for the foundation sector to become familiar with the new rules (as was, for instance, the case with the European Company (SE) Statute). As regards new registration and supervisory duties, costs would be likely to vary across Member States, e.g. with changes being smaller for countries with authorities which already have extensive supervisory powers (e.g. Austria or France) and bigger for those where there are currently fewer supervisory requirements (e.g. Cyprus)[95].

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93 Information from the Danish Commerce and Companies Agency. The estimation was carried out in 2003 in preparation of the law implementing the Member State options in the SE Statute and does not prejudge this authority's views as regards specific costs for EFs as such.

94 According to the information provided by the EFC, central registry is not kept by France and Greece.

95 See Annex 2.

Finally, it should be noted that the option of the Statute with or without tax elements would not go beyond that which is necessary to satisfactorily achieve the objectives that have been set, therefore respecting the principle of proportionality. As an optional tool, it would not replace national legislation and would leave Member States the choice and possibility to uphold and develop their national legal forms.

4.4. Harmonisation of Member States' laws on foundations and the tax treatment of foundations and donors

4.4.1. Harmonisation of laws on foundations through a Directive

Description

This option would seek to align national laws on foundations either in respect of all issues relating to the establishment and operation of a public benefit purpose foundation or only in respect of those aspects which are most relevant and problematic for the cross-border establishment and operation of foundations. The latter would mean covering in particular those requirements that foreign foundations need to meet in line with the host national law to be able to register and operate in that country, i.e. the acceptable purposes of public benefit purpose foundation, minimum assets, registration requirements and some aspects of internal governance. Member States would have to allow foundations fulfilling harmonised criteria to operate in their country without imposing additional requirements for their entry.

Assessment

An extensive harmonisation would effectively remove all the relevant differences between national laws on foundations and ensure a high level of uniformity, thus increasing the trust in foreign foundations and reducing the costs of cross-border activities. New short- and medium-term administrative costs might arise that are associated with legal changes and with compliance to what could be new bodies of laws. Such costs can be assumed to be transitory and, in the long run, significant cost reductions could be expected. With harmonised rules, uncertainty as to whether a foreign foundation is recognised as a public benefit purpose entity in other Member States would be removed.

However, given that so far there has not been any harmonisation of laws on foundations and the fact that there are important differences between different legal systems, extensive harmonisation would be technically challenging. As extensive harmonisation would also require significant changes to national legislation, reaching an agreement would also be politically very difficult. One specific question that would need to be taken into account is how the harmonisation would apply to the common law systems: e.g. the UK distinguishes between charitable trusts, charitable companies and charitable incorporated organisations all with some similarities and some differences from a public benefit purpose foundation, but does not have a special legal form for a "foundation" as such. As the purpose of any EU action in this field is to tackle cross-border barriers of foundations, extensive harmonisation of laws on foundations would not meet the proportionality requirements. Extensive harmonisation could lead to an impoverishing of foundation traditions in Member States and possibly even to the relinquishing some of the currently accepted ways in which foundations operate. This is not a desired outcome of the EU action. For these reasons extensive harmonisation should be discarded.

Harmonisation of limited aspects of Member States' laws on foundations would offer a higher degree of uniformity among national legislations as compared to the baseline scenario. As the key element of what constitutes a public benefit purpose foundation would be harmonised, along with some other more problematic aspects, this approach could facilitate cross-border establishment and operations of foundations in all their areas of activities and reduce costs thereof, although to a more limited extent than extensive harmonisation. For the same reason, it could also provide foundations with more legal certainty that they will be recognised in other countries as public benefit purpose entities.

However, even a limited harmonisation approach would be likely to run into technical and political difficulties. Firstly, the law on foundations has developed differently across Member States, for different reasons and with different outcomes. As explained above no aspects of the laws on foundations are harmonised in the EU and even partial harmonisation could face resistance and be difficult to agree upon. Secondly, existing rules on foundations can be seen as a consistent set of rules. Harmonising only certain parts of the rules could be seen as changing the overall balance for foundations and donors, necessitating more legal advice and therefore, higher costs. Also, altering only some parts of the national laws on foundations and leaving some untouched could create legal uncertainty. The more diverse and complex the rules, the less likely they would be to increase donors' trust and their donations.

4.4.2. Harmonisation of tax treatment of foundations and donors through a Directive

Description

This option would seek to harmonise the tax treatment – and in particular the tax benefits - of public benefit purpose foundations and their donors across the EU by replacing the existing Member States' tax laws in this area with a uniform set of tax laws for foundations and their donors.

Assessment

Granting the same tax treatment to public benefit purpose foundations in all Member States would obviously reduce the costs of legal advice and increase legal certainty, as the rules would be the same everywhere. This would encourage cross-border activity for foundations and donations. However, this solution seems to be difficult to achieve. In fact, as already explained, Member States are free to determine which general interests they wish to promote and to design, to that end, tax advantages for foundations (and their donors) that pursue objectives linked to such interests. Moreover, national tax rules on foundations reflect the history and traditions of each of the Member States and can therefore still be very diverse. Trying to harmonise the tax treatment of foundations would go beyond what is necessary to attain the objective pursued. It could in addition be perceived by Member States as an unacceptable attempt to limit their tax sovereignty in an area which is particularly sensitive to them. As this option does not seem to be proportionate, it should be discarded.

Following the above analysis, the remaining solution under the overall harmonisation policy option would be a limited harmonisation of national laws on foundations.

5. COMPARING THE OPTIONS AND SUMMARY OF THE IMPACTS

5.1. Comparing the policy options on the basis of objectives (taking into account the political acceptability of each option)

Following a preliminary assessment, two policy options have so far been ruled out as not feasible: extensive harmonisation of laws on foundations and harmonisation of tax treatment of foundations and donors. Further policy options are compared below on the basis of their fulfilment of the chosen policy objectives. These options are: baseline scenario, an information campaign and a quality charter, the Statute for a European Foundation with or without tax elements (i.e. non-discriminatory tax treatment applied automatically), as well as the limited harmonisation of national laws on foundations.

- No policy change/baseline scenario

In general, this option would not achieve all the chosen policy objectives. It would have a positive, but limited impact on foundations and cross-border donations. On the one hand the current infringement proceedings against some Member States would remove the discrimination against foreign public benefit purpose foundations and their donors in the field of tax. On the other, the outcome may take some time and may not affect all Member States, therefore not sufficiently facilitating foundations' activities or encouraging donors to donate. This would have a limited impact on the funds foundations can allocate to public benefit activities.

Moreover, implementation of the Services Directive is having a positive impact on reducing obstacles and costs for the establishment of, and the cross-border provision of, services by foundations engaging in economic activities, but would not bring changes for those foundations carrying out non-economic activities (e.g. grant-making foundations). Therefore, the objective of reducing uncertainty concerning the public benefit status of a foreign foundation would hardly be achieved.

Given that this policy option does not bring any fundamental legal or administrative changes, its political acceptability appears to be high.

- Launching an information campaign and a quality charter

The effectiveness of this option would be marginal. It would facilitate cross- border donations to some extent by providing more information on the requirements that need to be fulfilled. In addition, drawing up common rules for foundations across the EU in the charter and granting a European label could also enhance the public authorities' and donors' trust in foundations' operations (to a limited extent as these are voluntary). It would nonetheless have a limited impact on national laws as it would not address the civil and tax barriers currently in place. Therefore, the barriers and costs encountered by foundations when channelling funds cross-border would remain largely unchanged. It would shed some light on the conditions to be fulfilled in order to be recognised as public benefit purpose foundations in other Member States, but without bringing about any practical solution as regards uncertainty. In terms of costs of running this policy option, they would be borne by whoever financed the information campaign.

Such an option may enjoy a high level of political acceptability for the above-mentioned reasons.

- Statute for a European Foundation without tax elements

This option would address the policy objectives set to a considerable extent. By introducing a single legal form across the EU, the Statute would offer more uniform conditions regarding recognition as a public benefit purpose foundation, thereby reducing legal uncertainty across the Member States. It would cut costs currently due to obstacles created by the civil laws of the Member States. It would encourage cross-border donations and foundations' cross-border activities alike, as the European label that the Statute offered would make FEs easily recognisable and, due to its legislative character and uniformity across the EU, it would inspire more trust for donors as compared to the voluntary quality label.

However, this policy option would not address the tax treatment of foreign foundations and donors, nor their related costs and, in particular, the uncertainty of being recognised as a public benefit purpose entity for tax purposes in another Member State. It might have some indirect positive effect if tax authorities were less strict in performing the "comparability test" due to higher trustworthiness of the European legal form.

The Statute being an alternative European legal form and not leading to any changes in national laws on foundations would be more politically acceptable than the harmonisation option. At the same time, reaching a unanimous agreement among 27 Member States on the provisions of the Statute may prove challenging. In fact in their replies to the 2009 public consultation and in CLEG discussions, some Member States underlined the potential difficulties to reach an agreement (and in particular on a definition of a public benefit purpose foundation) given the wide variety of national rules, quoting also the difficult negotiation experience with the previous Statutes.

- Statute for a European Foundation with non-discriminatory tax treatment applied automatically

This option appears to be the most appropriate one as it would best achieve all the three policy objectives set by clarifying the relevant national requirements for foundations and their donors and by removing both the civil and tax law related barriers and costs.

This policy option would provide the same benefits as mentioned above for the Statute without tax elements. In addition, by including tax rules and, in particular, applying non-discriminatory tax treatment without any need of an additional "comparability" test for foreign foundations and their donors, this policy option should lead to a bigger reduction in compliance and tax related legal advice costs . It would further diminish legal uncertainty, in particular for being recognised as a public benefit purpose entity across Member States for tax purposes. As a result, it would have a more positive impact on the cross-border activities of foundations, while giving a stronger incentive to donate as compared to the Statute without tax elements.

Like the Statute without tax elements, this policy option would be technically and politically more acceptable than harmonisation as it would not lead to changes in national laws.

- Limited harmonisation of national laws on foundations

This option would harmonise those aspects of national laws on foundations which are most relevant for foundations' cross-border operations, and in particular the definition of a public benefit purpose. Therefore it would score well as far as reducing uncertainty about being recognised as a public benefit purpose foundation for civil law purposes in another Member States and as far as civil law related costs encountered by foundations are concerned. However, this solution, by not including tax elements, would not bring any direct benefit in this area, although it may be argued that it could bring indirect benefits by leading to a situation where tax administration might be less strict in performing the "comparability test". For the same reason, even if donors' knowledge and trust in foundations were likely to increase due to the important aspects of laws on foundations being harmonised, the impact on cross-border donations would still be more limited as compared to the Statute with tax elements, due to remaining concerns regarding the tax treatment. To this extent, it would have a similar impact to the Statute without tax elements, although in contrast to the latter, it would not offer foundations a recognisable European label.

This option – requiring 27 Member States to reach a compromise on harmonised definitions, which in turn will affect national laws - is likely to be technically and politically difficult. Updating national laws on foundations could also potentially lead to uncertainty for foundations, given the need to comply simultaneously with partly harmonised rules and with national rules.

5.2. Comparing policy options on the basis of impacts on stakeholders (including administrative burden)

This section is based on the assumption that since activities of public benefit purpose foundations focus on the areas which are important for society (e.g. research and education, social and health services, arts, culture or environment[96]), the option which best facilitates both the expansion of foundations and donations in general will also bring the highest benefits for direct beneficiaries and EU citizens in terms of social, economic and environmental impacts.

- No policy change/baseline scenario or launching an information campaign and a quality charter

With no policy change or in the case of launching an information campaign and a quality charter, foundations and their donors would still encounter, as explained in the sections above, many of the current barriers to their cross-border activities and donations. This would mean that foundations may not be willing to develop many new cross-border projects and consequently, to employ additional employees or volunteers. This may, in turn, deprive direct beneficiaries and EU citizens as a whole of numerous social, environmental or economic benefits.

The above-mentioned options would have a marginal impact on national legislation (apart from the impact of infringement proceedings in the field of tax), therefore not leading to any additional compliance costs or administrative burden for the national authorities.

[96] See section 2.3.1 for more detailed information on foundations' activities.

- Statute for a European Foundation without tax elements

This policy option would significantly improve the situation for foundations as regards costs and uncertainty related to national civil law requirements – and therefore should facilitate foundations' activities. By providing foundations with a European label, it would be expected to make foundations more trustworthy for donors, therefore incentivising donations. Depending on the Statute's exact take-up and the number of new foundations and projects created as a result (see section 4.3 above), it should result in more activities and more positive impacts on direct beneficiaries and EU citizens as compared to both the non-legislative option and the legislative option of harmonisation.

However, its impact would be limited to the extent it would have hardly any – or potentially only some indirect impact – on costs and uncertainties related to tax treatment.

As regards impacts on national authorities, these would benefit from an efficient cross-border distribution of funds of foundations by collaborating more with them on certain projects for public benefit (see for instance the EFC League of Historical Accessible Cities project, aiming, through a partnership of nine foundations and six cities from five countries, to improve the accessibility of historical towns and promote sustainable tourism development). Member States will need to adapt their systems and train responsible staff to be able to deal with the new legal form of FE but this should not impose major administrative burdens, as illustrated in section 4.2.

- Statute for a European Foundation with non-discriminatory tax treatment applied automatically

The Statute with tax elements, as argued in section 5.1 above, should offer the best conditions – as compared to the other options, including the Statute without tax elements - for foundations to develop their cross-border activities and could best incentivise donations. To this extent, and depending on the interest in the Statute and to what extent it increased foundations' cross-border projects (see section 4.3 above), it can also be assumed that its impact on other stakeholders - direct beneficiaries and EU citizens - in terms of social, economic or environmental benefits would be likely to be higher than those under the other policy options.

For example, some potential beneficial impacts for EU citizens and society are likely to include:

- higher overall *social* benefit due to more funds being channelled to public benefit purposes (rather than being spent on administrative procedures); the exact benefit would depend on the amount by which the Statute with tax elements reduced administrative and legal costs for foundations (assumed in this report to amount to about €90 and €102 million a year, as explained above).

- beneficial *social* impact thanks to this Statute option encouraging and promoting more activities in the social area (which is likely given that social and health services are the second biggest area of public benefit purpose foundations' activities); and offering foundations opportunities to exchange experiences across the EU and to address more specifically EU-wide social issues. By increasing foundations' work in a number of areas of concern for citizens, the Statute with tax elements would also have a positive impact on protecting some

of the fundamental rights as defined by the Charter of Fundamental Rights of the European Union[97].

- positive *social* impact in terms of creating new employee and volunteer posts, in the latter case contributing to the development of volunteering at European level (which is one of the objectives of the European Year of Volunteering 2011). On the assumption that, for instance, half of foundations which want to expand their cross-border activities (between 25,000 and 30,000 according to the feasibility study) would do so through the Statute with tax elements and would need at least one extra employee and volunteer, one could estimate that there could be up to 15,000 new employment and 15,000 new volunteer posts. This is a ballpark figure only and other considerations would need to be taken into account (e.g. number of new projects; type of European Foundations, with more employees usually employed in operating foundations, and more volunteers in fund-raising ones). Apart from a direct impact, this Statute option would also have an indirect impact on the number of employees and volunteers in organisations and projects that FEs would support through funding. All such social impacts would be in line with - and contribute to achieving - the "inclusive growth" objectives under the EU2020 strategy.

- increased interest from foundations in developing cross-border activities in the areas of *research* and the *environment.* This would be likely due to the cross-cutting and EU-wide character of these issues, and – specifically in the research area – due to the currently fairly low level of cross-border foundation research activity despite interest among research foundations (as e.g. shown by the setting up of a European Forum on Philanthropy and Research Funding by the EFC). The more obstacles to these activities the Statute with tax elements would remove, the more it could contribute to increasing the overall level of research, development and investment in the EU, and, in turn, to higher economic growth. In the research area, the Statute with tax elements would directly respond to the recommendations of the 2005 expert group report[98] and the recent discussions between Member State representatives and foundations[99] (both calling for a more conducive EU-wide legal, fiscal and regulatory environment for the operation of foundations, including the introduction of a Statute for a European Foundation).

This policy option could lead to some additional costs, for instance, in terms of adapting systems and training responsible staff in the national taxation authorities but the bulk of the costs would be the same as under the Statute without tax elements.

- Limited harmonisation of national laws on foundations

Like the Statute without the tax elements, the option on limited harmonisation would have hardly any impact on costs related to the "comparability test" and uncertainty related to being recognised as a public benefit purpose foundation for tax treatment purposes. This would lead to a smaller reduction in costs for foundations and would give fewer incentives to donors, as compared to the Statute with tax elements. Giving fewer incentives to foundations to develop cross-border activities, this option would have a smaller social impact (in terms of new

97 OJ C 83, 30.3.2010, p.389.

98 See footnote 29.

99 Meeting report of the first workshop with Member State representatives and foundations on "The Role of Philanthropy in supporting Research and Innovation in Europe: Brussels, 13 October 2010".

employees and volunteers) and would result in more limited social, environmental or economic benefits for EU citizens than in the case of the Statute without tax elements.

Updating national laws on foundations following harmonisation would lead to short- to medium-term administrative and compliance costs on the national authorities and stakeholders concerned, even in the case of a limited scope of harmonisation.

5.3. Comparison tables

Objectives / **Policy option**	**Increase cross-border donations**	**Reduce costs for foundations of pooling and distributing funds cross-border for public benefit purposes**	**Reduce uncertainty as to whether a foreign foundation would be recognised as a public benefit purpose entity in other Member States**
No policy change	0	0	0
Launching an information campaign and a quality label	+	≈	≈
Statute for a European Foundation without tax elements	+	+	+
Statute for a European Foundation with non-discriminatory tax treatment applied automatically	++	++	++
Limited harmonisation of national laws on foundations	+/≈	+	+

Policy option	Impacts on stakeholders			
	Foundations	**Donors**	**Beneficiaries and EU citizens at large/ taxpayers**	**National authorities (administrative burden)**
No policy change	0	0	0	0
Launching an information campaign and quality label	+/≈	+	≈	0
Statute for a European Foundation without tax elements	+	+	+	≈
Statute for a European Foundation with non-discriminatory tax treatment applied automatically	++	++	++	≈
Limited harmonisation of national laws on foundations	+/≈	+/≈	+/≈	–

Magnitude of impact as compared with the baseline scenario (the baseline is indicated as 0): ++ strongly positive; + positive; +/≈ still positive but weaker impact; – – strongly negative; – negative; ≈ marginal/neutral; ? uncertain; n.a. not applicable

5.4. Conclusion

In the light of the above, it appears that the most appropriate option would be a Statute for a European Foundation with non-discriminatory tax treatment applied automatically. Compared to the other policy options, it would be more effective in terms of achieving the three objectives set.

Like the Statute without tax elements, it would not replace or harmonise national laws, but take the form of an alternative tool that leaves the Member States the opportunity to uphold and develop their own legislation, which makes both of these options preferable to the harmonisation policy option. At the same time, it would bring a clear and uniform tool that would reduce the current legal and administrative obstacles related to both civil and tax law matters and therefore enhance foundations' cross-border activities and cross-border donations to a larger extent than the Statute without tax elements.

As a result, it would bring more added-value for direct beneficiaries and EU citizens in terms of social, economic and environmental impacts as compared to the other options.

The administrative costs, although higher as compared to the baseline scenario or the information campaign and the quality charter, would not impose an unnecessary burden on national authorities (as would also be the case for the Statute without tax elements), when compared in particular to the limited harmonisation option.

The chosen Statute option would therefore be more suitable for achieving the objectives pursued and would not go beyond that which is necessary to attain them. Moreover, it may also prove to be more acceptable politically than the limited harmonisation of laws on foundations across the EU.

6. MONITORING AND EVALUATION

The Commission will monitor implementation of the chosen policy option and assess the results and the progress achieved according to the objectives set. In doing this, the Commission will be assisted by Member State company law experts (i.e. the Company Law Expert Group, CLEG). In particular, data will be gathered in collaboration with national authorities (through CLEG), the foundation sector (through the EFC) and any other relevant stakeholders such as academics active in this field. The provision of such information should not impose any unnecessary administrative burden either on the national authorities or on the foundation sector.

Monitoring

If the chosen policy option is the Statute, the Commission could focus on issues such as: the number of European Foundations established; areas of activities of established FEs; number of employees and volunteers in FEs; trends in the cross-border donations given to national foundations compared to those given to FEs; and variation in the cross-border activities of foundations.

If the preferred option is limited harmonisation, the monitoring would initially focus on implementation of the proposal (i.e. amendments of national rules), where the Commission may provide assistance (e.g. in the form of implementation workshops). Furthermore, the Commission would also gather data (e.g. numbers of new foundations established or trends in foundations' cross-border activities) in view of evaluating the impact of this legislative measure.

Evaluation

The evaluation process will aim at assessing the progress that has been made in applying the chosen policy option and will provide indications as to whether the desired objectives have

been successfully achieved. In this regard, an evaluation report would be undertaken seven years after the entry into force of the chosen policy option and it would be based on the information gathered during the monitoring exercise, and on additional input collected from the foundation sector, national authorities or other stakeholders concerned, as necessary.

In general, the evaluation could look at issues such as: (i) how many domestic foundations have decided to undertake cross-border operations following the implementation of the chosen policy option; (ii) what the remaining practical problems are for cross-border activities of foundations that have not been removed by the chosen policy option; (iii) to what extent the above-mentioned changes (positive or negative) are attributable to the chosen policy option; (iv) what the parallel changes were in the national foundation legislation and taxation rules related to foundations; and (v) whether there were any unexpected impacts of the chosen policy option.

ANNEX 1: NUMBER OF FOUNDATIONS

Country[100]	Number of foundations (2005)	Public benefit purpose foundations (2005)	Foundations per 1m inhabitants (2005)
Austria	3390[101]	n/a	
Belgium	665	400	63.14
Cyprus	35	35	44.9
Czech Republic	1503	1503	145.9
Denmark	14,000[102]	14,000	2556.7
Estonia	638	183	61.9
Finland	2,600	2,600	490.6
France	1,226	1,226	19.1
Germany	12,940	12,000	156.9
Greece	489	489	43.8
Hungary	22,255	16,707	2,213.8
Ireland	107	107	25.2
Italy	4,720	4,720	79.9
Latvia	584	145	172.5
Lithuania	1300[103]	1300	
Malta	57[104]	50	
Netherlands	163000[105], [106]	n/a[107]	n/a
Poland	6,000	6,000	157.4
Portugal	485	485	44.3
Romania	16 785[108]	16 785	
Slovakia	338	338	62.6
Slovenia	143	143	70.8
Spain	10,835	10,835	240.2
Sweden	14,495	11,501	1,579.1
UK	8,800[109]	8,800	145.2

Source: the feasibility study, with additional information from national experts cooperating with the EFC from Denmark, Lithuania, Malta and Romania.

100 No information for Bulgaria was included in the study due to lack of reliable data.

101 This figure includes 2,843 private foundations plus 550 public foundations. See Doralt-Kalss, Stiftungen im Österreichischen Recht (2001). In: Hopt, Reuter (Eds.) Stiftungsrecht in Europa.

102 As of April 2011 there were 1.346 registered enterprise foundations. It is difficult to provide precise figures for non-enterprise foundations as they are not registered in a national registry. Furthermore, it is difficult to give exact figures for public benefit purpose foundations, as most enterprise foundations have a public benefit purpose which is often combined with the purpose to own the shares of a specific company, and non-enterprise foundations may exist without a public benefit purpose (e.g. family foundations).

103 1300 charity/sponsorship funds were registered in Lithuania by the end of 2010 according to Non-Governmental Organisation Information and Support Centre (NISC).

104 According to the Public Registry in Malta, there are (as of March 2011) 57 registered foundations, of which 7 are private foundations.

105 Because of the special character of Dutch foundations, this number is excluded from the calculation of the total number of foundations.

106 See "The Politics of Foundations - a Comparative Analysis", Gouwenberg (page 242).

107 Although the exact number of public benefit foundations is unknown, according to country experts many Dutch foundations have no public benefit purpose but instead have a business one, mostly in the area of providing services.

108 A recent study of the non-profit sector in Romanian, p. 21: http://www.fdsc.ro/library/conferinta%20vio%207%20oct/Romania%202010_Sectorul%20neguvernamental1.pdf

109 Not included are 80,000 to 90,000 charities. These represent a special case because they are small and not incorporated and therefore cannot be regarded as equivalent to what would be a foundation with legal personality in civil law (irrespective of whether it is in the form of a limited not-for-profit corporation or a civil law foundation). For this argument see also Greyham Dawes on p. 21.

ANNEX 2: DESCRIPTION OF NATIONAL CIVIL AND TAX LAWS FOR FOUNDATIONS IN MEMBER STATES[110]

2.1. Civil law

Acceptable purposes

There are a number of different typologies used to classify foundations. Based on the purposes foundations pursue, the main types of foundations include:

Public benefit purpose foundations: these constitute the most predominant type of foundations and are present and recognised in all Member States. They are the only recognised foundation type in 13 Member States and the dominant one even in those Member States where other types are also accepted[111]. According to the definition elaborated in the feasibility study, a foundation which serves a public benefit purpose needs to benefit a broadly defined group of recipients (rather than just members of a family or a closed circle of beneficiaries). The distribution of profits to private parties (e.g. founders, directors or trustees) is not allowed[112].

In some Member States, specific types of public benefit purpose foundations exist, including university foundations (e.g. in France or Italy), endowment funds (e.g. in Czech Republic or France), or banking foundations (specifically in Italy).

Private benefit purpose foundations: in contrast to public benefit purpose foundations, thesebenefit a narrow group of recipients. This type of foundation is recognised in 14 Member States[113] and in most of these countries their number is relatively low (with the exception of Dutch foundations). Examples of private benefit foundations include, for example, family foundations (which promote the benefit of the family of the founder and are present in a number of Member States), foundations for the founder (which allow private distribution to the founder; this type of foundation is generally not accepted in most Member States except for Austria), pension funds, or enterprise foundations which aim to preserve and maintain an enterprise such as, for instance, in the Netherlands, Sweden or Denmark[114]. Dutch commercial foundations are an exception to the rule as they do not promote public benefit purpose, yet are numerous. They are non-profit service providing foundations and carry out functions which in other less liberal Member States would be fulfilled by other legal entities, e.g. cooperatives[115].

In addition, there are also **mixed-purpose foundations** that benefit both public and private purposes. Danish law provides a special legal form for foundations wishing to engage in major commercial activities by direct means or by holding controlling interest in commercial

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110 Information is based on the 2008 feasibility study and the EFC Comparative Highlights of Foundation Laws 2011 and EFC country profiles of 2011. In case of discrepancies, the most recent information has been used.

111 Member States which only recognise public benefit foundations are as follows: Czech Republic, France, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and United Kingdom. 9 Member States recognise foundations with "any lawful" purposes: Cyprus, Denmark, Estonia, Germany, Italy, Latvia, Malta, the Netherlands and Sweden; and Finland recognises foundations with "useful purposes". 4 Member States have different categories for "public benefit" and "private" foundations: Austria, Belgium, Bulgaria and Greece. Data from the feasibility study, pp. 52-53.

112 See Annex G "Definition of foundations" of the feasibility study for more detailed information.

113 Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Italy, Latvia, Malta, the Netherlands and Sweden.

114 See feasibility study, pp. 58-59.

115 See feasibility study, p. 14.

entities. The law also allows Danish commercial foundations to combine commercial and public benefit purposes and requires the charters of such foundations to include a regulation of distribution of profits. A number of Austrian private purpose foundations – which hold a substantial share of equity in Austrian corporations - are also hybrid entities, pursuing public benefit in line with other purposes.

Overall, the foundations with activities for private purposes represent a small proportion as compared to the overall size of the foundation sector. Even if they have an economic importance in their national economies, they are concentrated in only a number of Member States.

Internal governance

Concerning *internal governance*, all Member States accept as a rule that the founder has a wide scope of freedom concerning the content of the statutes. There are, however, certain mandatory requirements in Member States' legislations. For instance, as far as the *board* is concerned, in about half of the Member States[116], one board member is sufficient; the other half requires at least 3 board members[117]. In some Member States[118] only natural persons are allowed to become board members for public benefit purpose foundations, while most of the Member States[119] also accept legal persons as board members. Other mandatory personal requirements for board members are seldom explicitly stated in statutory law. As a general rule, in all Member States the founder is free to determine in the statutes how the board members are appointed. The duty of care and the duty of loyalty are recognised in all Member States and are part of each country's legal provisions. Some national laws provide special rules about self-dealing transactions which specify the duty of loyalty. On remuneration, some Member States[120] allow a reasonable level of financial compensation, some Member States[121] prohibit remuneration, and in the other Member States[122] there are no explicit restrictions in civil or tax law. In one Member State[123], the State supervisory authority may check whether the remuneration is appropriate and can reduce any remuneration deemed excessive. Generally, the founder is free to determine in the statutes in what circumstances a board member may be dismissed. Explicit restrictions of that rule are rare[124]. Normally in civil law countries, foundations do not have a *membership*. There is, however, one country[125] where foundations can have some membership structure; assets may not, however, revert back to the ownership of the said members. Participatory elements (several founders forming the board/advisory council) are also known in the growing sector of community foundations in several EU Member States.

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116 Austria (for public foundations), Estonia, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Sweden, United Kingdom (for private incorporated companies).

117 Austria (for private foundations), Belgium, Czech Republic, Denmark, Spain, Finland, France, Ireland, Latvia, Malta, Romania, Slovakia and Slovenia.

118 Austria (for public foundations), Czech Republic, Denmark, Finland, Hungary and Latvia.

119 Austria (for private foundations), Belgium, Bulgaria, Cyprus, France, Germany, Greece, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Sweden and United Kingdom.

120 Austria (for public foundations), Belgium, Denmark, Estonia, Finland, Germany, Latvia, Poland, Sweden and United Kingdom.

121 FR (for traditional foundations), Greece, Spain, Ireland, Luxembourg, Lithuania, Romania and Slovenia.

122 Austria (for private foundations), Bulgaria, Cyprus, Hungary, Italy, Lithuania, and the Netherlands.

123 Denmark.

124 In the Netherlands and Denmark a special reason is required.

125 In Italy there can be member-like participants in participatory foundations and banking foundations. In the first one an assembly of participants can have the right to elect a minority of the members of the governing body of the foundation. The latter ones have often originally been organised as associations and they are allowed to retain the assembly of "members" with restricted powers.

Supervision

With regard to supervision, a *supervisory board* is mandatory for all foundations in three Member States[126], only for larger foundations in four Member States[127], and for banking foundations in one Member State[128].

In all Member States there is a State supervisory authority for foundations. The State supervision is carried out by public administrative bodies, public independent bodies[129] or by a combination of a public administrative body and the court, where the administrative body monitors but the court takes any decisions on preventive supervision and enforcement. Supervision of foundations established for public benefit purposes is generally more extensive than for other types of foundations. Usually the State supervisory authority is only allowed to check whether the duties imposed by national applicable law and/or the statutes are being fulfilled and the extent of supervision depends on the extent of these duties. There are, however, differences in the extent of the supervision: in Austria the supervisory authority can inspect the administration of the assets of public benefit purpose foundations at any time while in France the authority has full jurisdiction to audit the reports and accounts of the foundations, as well as their use of the funds raised from the public or derived from legacies and gifts made to them. At the other extreme, in Cyprus there are no requirements for regulatory or supervisory control, foundations simply having to meet the annual filing and regulatory requirements. As a means of preventive supervision, the Board of foundation must send annual reports and annual accounts to the State supervisory authority in all Member States but the Netherlands, where the financial information is given to fiscal authorities.

Reporting, transparency and disclosure

Almost all Member States require each foundation to prepare an annual report and annual accounts on its activities. Most Member States require them to be disclosed to the public. In some Member States an external auditor is generally necessary[130], in others an audit is necessary only for larger foundations[131] or for certain kinds of foundations[132]. In eight Member States an auditor is not required.

Formation of a foundation

Regarding the *formation of a foundation*, there are different approaches as to how to establish a foundation, and in some Member States there are different procedures for different types of foundation[133]. Usually three requirements have to be fulfilled in all Member States: the creation of a foundation deed, the creation of a draft of the foundation's statutes and founding assets. In order to establish the foundation as a separate legal entity, a certain public act is usually required. In many Member States the foundation will be registered. If the foundation is established *inter vivos*, several Member States require the foundation deed in a specific

126 Estonia, Poland and Portugal.
127 Austria for larger private foundations, Czech Republic, Hungary and Slovakia.
128 Italy.
129 England and Wales.
130 Greece, Czech Republic, Cyprus, Finland, France, Lithuania, Sweden and Slovakia.
131 Belgium, Bulgaria, Spain, Hungary, the Netherlands, Poland (medium or large entities), United Kingdom.
132 Austria (private foundations), Denmark (commercial foundations), Estonia (larger private foundations), Ireland (incorporated foundations).
133 E.g. in Austria and Belgium.

form, either a public deed by a public notary[134] or by a written declaration. If the foundation is established *mortis causa*, the legally required form for a last will and testament is usually accepted in all Member States except for two[135], who only accept a testament in the form of a public deed. In England, Wales and Ireland making the declaration in writing is not always required in order to create a charitable trust.

There are differences regarding the question of whether a certain minimum of founding assets is necessary. In a few Member States[136], the law imposes a specific amount. In some others the law does not require a specific initial amount, but requires the capital to be adequate for the fulfilment of the purpose[137]. In a third group of Member States[138], founding assets are not required, but a foundation may be dissolved by court order if it lacks the means to achieve its purpose and there are no prospects of means in the future. Several Member States[139] have different rules for different types of foundations.

In all Member States, the amendment of the purpose of a foundation, and of its statutes in other respects, is possible only under prescribed conditions. In many Member States[140], amendment or modification of the statutes is possible if a majority of the board of directors of the foundation votes for it and the State supervisory authority approves the modification as being in line with the founder's intentions. In some Member States[141], an amendment of the purpose is permitted only under qualified conditions. Some Member States[142] allow an amendment in some cases by the board of directors without an approval of the State supervisory authority. A few Member States[143] permit the founder him/herself to be authorised in the statutes to amend those statutes without public intervention. Where there is fundamental reason for doing so, some Member States[144] empower the State supervisory authority to amend the purpose or administrative statutes of a foundation without the consent of the governing body, although sometimes the intervention of the court is required. Regarding the *particularity of the purpose*, some Member States[145]leave it to the founder to decide whether the foundation should have a broad purpose or a narrow purpose. In certain others[146], the law requires a more particular description as too broad a discretion given to the board of directors would conflict with the concept of the foundation as fulfiller of the founder's will.

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134 Belgium, Bulgaria, Czech Republic, Estonia, Greece, Italy, Latvia, Luxembourg, Malta, the Netherlands, Slovakia and Spain.

135 The Netherlands and Belgium.

136 Austria for private foundations, Czech Republic for traditional foundations, Denmark, Finland, Malta, Romania and Slovakia. In Spain the law presumes that an endowment of 30 000€ is sufficient to fulfil the foundation's purpose.

137 Austria for public foundations, Belgium for public foundations, France for traditional foundations, Germany, Greece, Hungary, Italy, Luxembourg, Portugal, Sweden except for fundraising foundations.

138 Bulgaria, Cyprus, Estonia, France for endowment funds, Ireland, Latvia, the Netherlands and United Kingdom.

139 Austria, Belgium, Czech Republic, Denmark, France, Hungary, Malta Romania, Sweden.

140 Cyprus, Denmark, and Finland; for public foundations: Germany, Latvia, Luxembourg, Austria, Belgium; and France for traditional foundations.

141 In Portugal the purpose cannot be amended substantially; in Finland the amendment of the purpose is possible only if the statutory purpose is impossible, very difficult, totally or essentially useless because of the low value of the assets or another reason, or is against the law or good practice.

142 Bulgaria, Italy, Malta, the Netherlands and Poland.

143 Austria for private foundations, Hungary in some cases, Ireland, and UK with a prior consent of the Charity Commission for the change of purpose, the rules on the application of assets on the dissolution and the provision of benefit to any trustees or members.

144 Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Italy and Poland. Not empowered in Finland, France, Hungary, and Luxemburg.

145 E.g. United Kingdom.

146 E.g. Denmark.

Liquidation

Concerning *liquidation*, some Member States[147] require the assets of the liquidated foundation to be transferred to a foundation with similar purpose in compliance with the original intentions of the founder. In some,[148] the remaining assets must be transferred to another public benefit purpose entity. In a third group of countries[149] it is left to the founder to determine in the statutes what is to be done with the residual assets. In these Member States tax-exemption will generally only be granted if the statutes provide that on termination of the foundation the remaining assets will be used for another tax-exempt purpose and that the transfer may be taxed according to gift tax laws.

Adequate and timely distribution for public benefit activities

Concerning the *adequate and timely distribution for public benefit activities,* the question is usually regarded as a matter of tax law. Civil law rules governing foundations are rarely explicit on distribution rules[150]. In tax law there are different approaches but even then only in a few Member States[151] are there explicit limits for what is deemed an adequate distribution. Most Member States do not have explicit rules, but unreasonable excessive accumulations may be regarded as an infringement of the general rule that a tax-exempt foundation has to promote its public benefit purpose. No Member State requires a foundation to spend a certain percentage of its overall assets. Some Member States have rules concerning the administration of the foundation's assets, notably on capital maintenance[152] and investments[153].

Permitted economic activities

The question of *permitted economic activities* is resolved in different ways. As regards the scope of permitted economic activities in civil law, some Member States allow foundations to carry out economic activities without special restriction[154], whereas other Member States restrict their economic activities in one way or another for reasons of creditor protection or the protection of the assets of the foundation. Those countries who restrict foundations' economic activities often subordinate any trading to the foundation's public benefit purpose in the sense that trade is allowed only when it directly furthers or facilitates that purpose and when any profit is not the foundation's main aim in undertaking the activity. Three Member States[155] only allow some very specific economic activities listed in law. As regards tax law, the profits of unrelated economic activities are usually subject to income tax in order to avoid an unfair

147 Czech Republic, Luxemburg, Portugal, Slovenia; Austria, Belgium, Bulgaria for the public benefit foundations; Cyprus, United Kingdom.

148 Denmark, France, Lithuania, Slovakia, Spain

149 Austria for private foundations; Bulgaria, Finland, Germany, Greece, Hungary, Italy, Latvia for private foundations; the Netherlands, Poland, Portugal.

150 With the exception of Spain where a foundation must pay out at least 70% of its net annual income for the furtherance of the foundation's public benefit purpose. In Czech Republic, the Court will wind up a foundation in case no grants have been distributed for two consecutive years.

151 In Finland, Germany and Spain, generally 70% of the annual net income has to be distributed. In Portugal 50% of all net income must be allocated within four years, in the United Kingdom income should be spent within three years. In Lithuania donations should be spent during period of three years, otherwise they will be treated as taxable income. In Sweden, a foundation must use approximately 80% of its income to pursue its public benefit purpose within a period of 5 years.

152 In Austria for public foundations, Czech Republic for traditional foundations and in Slovakia there is a requirement in law to maintain a prescribed minimum capital.

153 In Germany and Finland the law states that there should be a secure and profitable investment of the foundation's assets.

154 E.g. the Netherlands.

155 Czech Republic, Malta, Slovakia.

advantage in competition with taxable enterprises[156]. Most Member States allow a foundation to establish a separate trading company.

2.2 Tax law

National regimes

The most visible difference in the taxation of foundations is the level of corporate income tax which varies significantly among the 27 Member States. There are also big differences with regard to tax benefits, even in purely domestic situations. The most comprehensive tax benefit granted to public benefit purpose foundations is its full exemption from corporate income taxation. This is found in the vast majority of Member States. An alternative is partial exemptions for those items of income which are effectively connected to the public benefit purpose. Often there are ceilings for non-taxation. Either there is a non-taxation of the entire foundation if its income remains within the limits in the respective provision or a fixed amount of the income is tax free, even if the income is high. To the extent that states do not grant exemptions on the level of the tax base, they may offer reduced tax rates for all or certain items of income.

In all European jurisdictions, a crucial precondition for tax benefits is the type of purpose which the foundation pursues. In addition, the different national tax regimes contain additional requirements that are related to the running activities, and to the use of the funds and the remaining income/assets when the foundation is dissolved (so called asset lock). Regarding the purpose of the foundation, the scopes of national non-profit definitions are hardly comparable given that some Member States[157] use blanket clauses and leave the determination up to the tax authorities and the courts, while other countries have introduced clear-cut catalogues into their legislation. However, in substance most countries favour all types of third-sector foundations. Regarding a foundation's activities, some countries make a distinction in their tax legislation between endowment contributions and other contributions such as donations or gifts. If foundation retains the latter ones rather than spending them, it may forfeit its tax benefits. Many domestic tax systems require proper corporate governance of the foundation including efficient measures against fraud, bribery and corruption. Moreover, there are a number of formal requirements including certain notification requirements, book-keeping duties and other documentation requirements.

As to the treatment of donors, most Member States offer a deduction of qualifying donations from the tax base. In some Member States a certain percentage is treated like a pre-payment on income tax, i.e. it can be credited against the income tax. Most Member States offer deductions from both endowment contributions and donations. However, the percentage amounts, as well as the maximum deductions, differ in many countries. Many Member States have gift, inheritance and/or estate taxes, imposing a burden on the recipient or the donor/estate of the deceased. In general these types of taxes are currently in decline since a considerable number of Member States have abolished, or are considering abolishing them. Where inheritance, estate and gift taxes exist, tax benefits are often available in cases where the recipient is a non-profit foundation. As regards donors, almost all Member States provide tax benefits for donations to public benefit purpose foundations as regards inheritance, estate and gift tax.

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156 There is no taxation in Latvia or in Lithuania up to 300 000€ annual profit.

157 France, United Kingdom.

ANNEX 3: DESCRIPTION, ANALYSIS AND COMPARISON OF SUB-OPTIONS, AND INSTRUMENTS, FOR THE STATUTE FOR A EUROPEAN FOUNDATION

3.1. Description, analysis and comparison of sub-options for the Statute

This section analyses in detail the main issues to be covered by a potential Statute for a European Foundation. Possible solutions under each aspect are analysed according to the objectives defined in section 3.

3.1.1. Tax treatment of foundations and donors

Option A: European Foundations without tax elements

Description

Under this option the Statute for a European Foundation would only focus on civil law issues and leave the tax aspects uncovered.

Assessment

Almost two thirds of the respondents to the 2009 consultation were of the view that a Statute for a European Foundation without any tax elements would still be a useful instrument. The most common supporting argument for this view was that it would facilitate the cross-border work of foundations by reducing red tape irrespective of whether the Statute included any tax elements or not. Another approach was that taxation should be decided at national level, the natural consequence being that only an instrument without tax elements would be attractive. Furthermore, leaving the tax treatment of foundation out of the scope of the Statute would certainly increase the political acceptability of the European Foundation (with a couple of Member States having expressed reservations on this issue in the 2009 public consultation), while providing a legal tool which would remain useful for foundations.

If tax elements were not included in the Statute, the European Foundation (and its donors) would be entitled to the same tax benefits as those granted to domestic foundations (and their donors) by the Member Statein which it is registered and operates, provided that it can be considered as "comparable" to them. This non-discrimination principle comes directly from the TFEU. However, this would leave unsolved problems identified as hindering the cross-border operations of foundations (e.g. the "comparability test" would still be required). In contrast to the views expressed above, some of the other respondents to the 2009 consultation stated that tax matters would be a key driver for the introduction of a new legal vehicle and not including tax elements would limit its demand and potential take-up.

Option B: Statute for a European Foundation with tax elements

Option B1: Separate tax regime for European Foundations

Description

This option would mean that one single set of harmonised rules on the tax treatment of the European Foundations and their donors would be established and included in the Statute. This regime would be applicable in all 27 Member States regardless of the tax treatment they apply to domestic foundations and their donors.

Assessment

This solution would be the simplest for foundations (and their donors) as the applicable tax regime would be clear from the outset and would be the same in all 27 Member States. How beneficial it would be from an economic point of view would, of course, depend on how the regime were designed in terms of conferring tax benefits. Therefore, it might be more or less beneficial than the existing tax regime provided by a particular Member State with respect to their domestic foundations and these foundations' donors.

It would, however, remove all the uncertainties linked to the tax treatment of European Foundations and their donors and considerably reduce costs relating to the necessary legal counsel and information gathering on the different tax regimes across the EU.

Nonetheless, the political acceptance for this option is likely to be very low, as it would interfere with Member States' fiscal sovereignty which is particularly sensitive for Member States, especially in this sector, and would offer FEs a different treatment to the one available to national foundations.

Option B2: Non-discriminatory tax treatment applied automatically (without a "comparability test")

Description

This option would mean that a Member State would have to automatically grant the European Foundation the same tax treatment granted to domestic public benefit purpose foundations, without any need for the European Foundation to prove that it satisfies the "comparability test". The justification would be that the European Foundation is a trustworthy entity, which carries out activities that have been recognised as pursuing public benefit purposes by all Member States and which are subject to certain requirements and regulations which are public and have been approved by all Member States. Similarly, donors to any European Foundation would automatically obtain a tax deduction, if provided by their Member States of residence for domestic foundations, once the European Foundation is registered.

Assessment

This option would go beyond the mere application by Member States of the non-discrimination principle to which they are compelled by the TFEU. It would require Member States to apply the same tax treatment to the European Foundation (and its donors) as granted to domestic foundations without applying the "comparability test". It would therefore remove a burden which may be costly and time-consuming for both foundations and national authorities. It would not step into the area of tax harmonisation (politically unacceptable for Member States).

Comparison of the options

Option B would bring more added-value to the foundations than option A and should therefore be chosen even though the inclusion of tax elements may prove to be politically sensitive and challenging. As for the two sub-options on how to include tax elements, a non-discriminatory solution in option B2 should be chosen in order to avoid interfering with the Member States' fiscal sovereignty. It would remove the burden of the "comparability test" and it would represent a step forward compared to the current situation, thereby bringing most benefits to foundations.

3.1.2 Cross-border dimension

Option A: No cross-border dimension

Description

The FE could be created without any need to prove its cross-border dimension.

Assessment

This option would make the Statute accessible to all foundations, including those with purely domestic purposes and activities, and could therefore increase its use. Due to its wide scope, it could theoretically reduce costs and uncertainty for all these foundations and encourage cross-border donations (e.g. from migrants donating to a particular national cause).

However introducing a European legal form for purely domestic foundations could be challenged on the grounds of subsidiarity and might make it more difficult to convince Member States to include tax elements in the Statute. Putting the Statute in direct competition with national forms might not be acceptable to Member States due to concerns that it could be used to circumvent stricter domestic requirements. In addition, it is questionable to what extent purely domestic foundations would be interested in a European legal form – and therefore benefit from cost reductions and less uncertainty. These foundations would focus on activities in a particular Member State, and most often therefore they would neither face cross-border problems nor need a label to be recognised abroad.

Option B: Cross-border dimension requirement included in the Statute

Description

Foundations would need to prove cross-border dimension of their work in order to be able to opt for the Statute. In particular, foundations would need to have activities (e.g. economic activities, investments, donors or beneficiaries) in at least two Member States or would need to have an intention (stated in their statutes) of carrying out such activities in a Member State other than the country of registration.

Assessment

This option would focus on cross-border issues and would be in line with the main purpose of the initiative, i.e. to facilitate the cross-border operations of foundations. As the Statute would focus on foundations with cross-border activities (or the intention of such activities), it should be more acceptable to Member States (i.e. it would not be questioned from the point of view of subsidiarity and would not come in so much direct competition with national foundation forms).

Under this option, the Statute would help to diminish costs and increase legal certainty, not only for foundations which already carry out Europe-wide activities and experience problems in that context, but also for those who are active in one Member State but have the intention of carrying out activities abroad written into their statutes. Its impact on reducing uncertainty might in particular be relevant for the latter, as they are likely to be the ones who were discouraged from expanding across the EU due to uncertainties about rules in other countries. In contrast, the Statute under this option would not include domestic foundations with a

European public benefit purpose and active only in one country, which could potentially stand to benefit from this legal form.

However, the cross-border requirement based on *European activities* of foundations would be easier to define and interpret compared to a definition based on *European public benefit purpose* of foundations; for instance, in the latter case it might be difficult to make clear distinctions as to which purposes are European and which not, leading to lack of legal clarity. Under this option, monitoring and reporting might be necessary to a certain extent to ensure that the requirement of a "European dimension" is met, which could add some administrative obligations on FEs.

Comparison of the options

Option A would be more open than option B and could theoretically have bigger impacts in terms of reducing costs, uncertainty and cross-border donations, although it is uncertain to what extent purely domestic foundations would actually benefit. Option B – by including a requirement of a cross-border dimension – would respond to the main aspect of the problem at stake: foundations' cross-border operations. It would, in addition, be more acceptable politically, and at the same time, due to being flexible, would still open up the Statute to a large number of potentially interested foundations. Therefore, option B is the preferred one.

3.1.3. Minimum founding assets

Option A: No minimum founding assets

Description

The Statute would allow foundations to be established under this legal form without the need for any minimum founding assets.

Assessment

This option would make the legal form flexible and accessible to all foundations, in particular the small ones, and would reduce the costs of establishment for them. It would be in line with the laws in a number of Member States, who do not require any minimum founding assets or keep them at a symbolic level (£1 in common law Member States)[158]. At the same time, this option might not be acceptable to Member States requiring minimum founding assets, due to concerns that the new legal form could be used to circumvent national legislation or that the Statute could be more easily misused. Including provisions in the Statute according to which a foundation would be dissolved in case it lacked resources to achieve its purpose might not be seen as sufficient to provide legal certainty. The difficult negotiations on this issue in the context of the European Private Company (SPE) Statute show the potential difficulties involved. Similarly, the FE without any requirement of minimum founding assets may not contribute to the trustworthiness of such a type of foundation.

[158] For instance, Bulgaria, Cyprus, Estonia, Ireland, Latvia, Lithuania, the Netherlands, Slovenia or United Kingdom.

Option B: Specific founding assets equivalent to at least ***€25,000***

Description

The Statute would define a specific amount of founding assets equivalent to at least€25,000[159]

Assessment

By requiring FEs to have minimum assets, this option should make them more trustworthy in the eyes of donors and public authorities as the assets would be seen as proving the seriousness of the foundations' purpose. For instance, one of the reasons which affects philanthropic giving to university research appears to be the donors' belief in the financial and fiduciary integrity of the institution[160]; and requiring minimum founding assets could contribute to addressing this issue. Such a minimum requirement could also be seen as a way of ensuring that the new legal form is not easily misused. This would be particularly important given that the Statute should provide a model of a foundation with high standards on accountability. This option would also be in line with the views received during the 2009 public consultation where most of the respondents mentioned that some initial endowment should be required (with specific amounts quoted varying between €5,000 and €300,000).

At the same time, this amount of minimum founding assets would not make the FE too costly to establish and should keep this legal form accessible to smaller foundations, which was underlined as important in the replies to the 2009 public consultation, and which could prove important in practice, as small foundation projects can now be easily set up thanks to technological developments. This option would be in line with requirements in the majority of Member States, which require minimum assets below €50,000[161] or no assets at all. In particular, this would be important for the EU-12 Member States where in most cases there are no requirements or these are much lower than in the rest of the EU (one of the highest EU-12 requirements being €20,000 in the Czech Republic and lower ones including up to €2,000 in Hungary or up to €1,200 in Malta). In contrast, Member States with higher requirements (i.e. between €50,000 and €250,000[162], or as much as €1 million in the case of French traditional foundations) could question whether this amount of assets would be sufficient. Nevertheless, these countries might prove to some extent flexible regarding a proposed lower amount, as some of them also have lower (or no) minimum asset requirements for alternative legal forms to foundations in place at national level (e.g. "fonds de donations" in France for which no minimum assets are necessary).

Comparison of the options

Both options A and B would provide a uniform rule (no or specific amount of minimum assets) giving legal clarity and certainty. Although option A would be less costly and more flexible, introducing a specific requirement for minimum founding assets under option B

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159 A calculation on the basis of the data gathered in the feasibility study (on pp. 79-80), shows that this amount could be seen as approximately an average of what is required by Member States across the EU (including all countries regardless whether they have any requirements in place or not). It needs to be noted, however, that the calculation did not include highest (€1 million in France) and lowest (below €5,000) requirements, and that specific requirements were not available for all countries – therefore the calculation should be used as a ballpark example only.

160 Expert group "Engaging philanthropy for university research", 2008.

161 For instance, €25,000 in Finland, €30,000 in Spain, €33,500 in Denmark for non-commercial foundations or €25,000 required in practice in Belgium.

162 For instance, €50,000 required in practice in Germany, €100,000 in Italy or €250,000 in Portugal.

would be essential for the trustworthiness of FEs vis-à-vis donors and public authorities, and would be more easily acceptable for Member States. The proposed amount of €25,000 should provide a balanced option given the differences in approaches across the EU and should keep the Statute accessible to smaller foundations.

3.1.4 Employee involvement[163] in European foundations

Option A: Rules on employee involvement defined in the Statute

Description

The Statute would include an employee involvement regime designed specifically for European Foundations, including rules on the participation of employees.

Assessment

This option would follow the approach adopted for the European Company (SE) and European Cooperative Society (SCE) Statutes and would focus in particular on worker participation (board level participation or rights to influence the choice of members of the board). However, this approach would be disproportionate to the situation as regards employee involvement in national foundations and it would be inappropriate for FEs. Worker participation is much less frequent for foundations than is the case for companies. On the basis of the research carried out by the Commission[164], full board level participation in public benefit purpose foundations only exists in two countries (in the Netherlands through a recommendation mechanism, and in Norway), whereas it is present in twelve Member States for most private companies and in an additional nine countries for state-owned or other specific companies. The addition of a new procedure could be perceived as burdensome and make this legal form less popular.

Moreover, the issue of worker participation proved to be highly contentious during the negotiations on the SE Statute, Cross-Border Merger Directive and most recently, the European Private Company (SPE) Statute. In all these cases this matter had to be carefully balanced with the existing situation at national level. Reopening this debate in the context of the Statute for a European Foundation does not seem justified.

Option B: Rules on information and consultation of employees defined in the Statute

Description

The Statute would include provisions to ensure that employees and volunteers working for European Foundations are consulted and informed at the appropriate level, but would not include any provisions regarding board-level participation.

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163 Employee involvement encompasses information, consultation and board-level participation. As defined in the directives associated to European Statutes (Directives 2011/86/EC and 2003/72/EC), "*involvement of employees means any mechanism including information, consultation and participation, through which employees' representative may exercise an influence on decisions to be taken within the company*". Participation is defined as "*the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ*".

164 Research carried out by DG Employment and Social Affairs on the basis of answers of European Labour Law Network in December 2010 – January 2011.

Assessment

This option would be in line with the existing general framework for informing and consulting employees within the EU[165], which applies to undertakings under all legal forms including foundations. It would provide legal certainty by clarifying that transnational information and consultation rights are applicable to employees in European Foundations having a significant number of employees in different Member States, yet it would be a light and flexible solution to ensure that the rules do not impose unnecessary burdens and costs on foundations.

The Statute provisions related to this option would take into account that although in most EU countries there are no special national rules on employee information and consultation for foundations, there are special rules for entities with specific purposes (non-profit, charitable, religious) in a few Member States, according to which, employees are not consulted or informed as regards decisions about the purposes and objectives of the entities' activities[166]. In order to ensure that the rules are adapted to the specific situation of every FE, the concrete arrangements for the transnational information and consultation of employees would be defined primarily by means of an agreement between the parties in the FE. In view of the importance of volunteering in foundations, long term volunteers would be involved in the process of information and consultation in the FE.

Comparison of the options

Option B is chosen as it would be better suited to FEs than option A. Without being burdensome for foundations, it would help employees and volunteers to contribute more effectively to foundations' activities and support building their European dimension. It would be politically more acceptable as well, for the reasons illustrated above.

3.1.5 Supervision

Option A: Supervision at European level

Description

Given the specific characteristics of foundations – i.e. that their assets can only be used for the purposes stipulated in the statutes and that oversight mechanisms are weaker as compared to companies, with no equivalent of shareholders in foundations to supervise the management – supervision by state supervisory authorities is mandatory for foundations in all Member Sates and it is therefore important to include provisions regarding supervision in the Statute. In this case, European Foundations would be supervised by a new European supervisory and registration authority.

Assessment

The European level supervision would ensure a uniform approach across the EU and therefore, could be less costly for FEs, and increase the trust of public authorities and donors in European Foundations. This would certainly be helpful in trying to persuade Member States to automatically grant tax benefits to European Foundations (and their donors). This

165 Directive 2002/14/EC, OJ L 80, 23.3.2002, p. 29; Directive 2009/38/EC, OJ L 122, 16.5.2009, p. 28.

166 Finland, Germany, Slovakia and Sweden.

option was supported by the majority of respondents (mainly from the foundation sector) who replied to the 2009 public consultation.

At the same time, this option would involve potentially high costs for setting up and running a new European organisation/structure, difficult to justify before first checking how the national supervision mechanisms would work in this context. This option would also move the control over the foundations' activities away from the national level and for that reason it could encounter opposition from certain Member States as was indicated in the replies to the 2009 public consultation.

Option B: Supervision at national level

Description

Supervision of European Foundations would be carried out at national level by the national supervisory authorities, currently responsible for overseeing national foundations.

Assessment

This option would avoid a number of costs related to the European level supervision, as it would rely on the existing national authorities and well developed procedures. Another advantage would be that supervision would be carried out close to foundations by authorities who have easier access to oversee their activity, which should lead to more effective supervision. Although a dominant view in replies to the 2009 public consultation was in favour of EU level supervision, there was no strong opposition to the national level solution - a majority of the same respondents agreed that oversight could alternatively be delegated to national level too. In order to ensure that this option allowed for efficient supervision of FEs, it would be necessary to ensure good cooperation between responsible national authorities across the EU. At the same time, the minimum but robust supervisory powers would be set out in the Statute, which would limit divergences between national supervisory requirements and any related burdens on FEs.

The situation would be reviewed during the overall evaluation of the Statute in a few years time, when more information regarding the number of foundations having adopted the Statute would be available. The need and justification for European level supervision could then be analysed on the basis of practical experience with the Statute.

Comparison of the options

Although option A would be likely to score higher on the objectives of keeping the costs down and increasing certainty for FEs - and trust of donors - it would be politically more difficult and much more costly to set up. Therefore, option B, relying on the existing national supervision authorities, is preferred, with a possibility of revision in the future.

3.1.6 Economic activities

Option A: Only purpose related economic activities are allowed

Description

A European Foundation would be allowed to carry out only economic activities that are related to the public benefit purposes (directly contributing to the furthering of the public

benefit purpose, i.e. a museum running a bookshop or a foundation in the health sector running a hospital).

Assessment

This option would limit numerous economic activities currently carried out by foundations. This would be the case for unrelated economic activities (independent delivery of goods or services which do not *directly* serve the public benefit purpose of the foundation, i.e. a museum running a petrol station next door, foundations organising concerts to raise funds). Allowing only public purpose related activities would deprive foundations of an important source of income that could be channelled back to the public benefit activities.

In contrast, this option would respond to potential concerns that Member States with stricter provisions may have. For instance, according to the available information[167], three Member States[168] prohibit as a rule foundations from direct trading. Restrictions imposed may relate to creditor protection concerns, protection of assets or economic activities being sometimes perceived as risky. Moreover this option would facilitate the application of tax benefits to the FE, as most Member States allow national public benefit purpose entities to carry out related economic activities without losing their beneficial status, and exempt the income from these activities.

Nonetheless, this option would be more restrictive than that currently allowed in several Member States (Belgium, Cyprus, Estonia, Germany, Poland or Portugal[169]) and it therefore may also be questionable in terms of political acceptability.

Option B: Related and unrelated economic activities allowed as long as any profit is used in pursuance of the foundation's public benefit purpose and unrelated economic activites are limited

Description

A European Foundation would be allowed to carry out economic activities, both related and unrelated to the public benefit purposes, provided that any profit was exclusively used in pursuance of its public benefit purposes and that unrelated activities of the FE were only permitted up to a threshold, which would be defined in the Statute.

Assessment

This option would give European Foundations more choice in the types of activities they can carry out, by allowing them to benefit from more ways of increasing their funds. They would thus be able to engage in economic activities directly contributing to the furthering of the public benefit purpose, but also in non-related economic activities (not *directly* serving the public benefit) as long as the profits were used in pursuance of the public benefit purpose. This would also be in line with the views expressed by respondents to the 2009 public consultation. Nonetheless, it would go slightly further than that which is in place in certain

167 Feasibility study and information provided by the EFC.

168 In Czech Republic neither a foundation nor an endowment fund are allowed to carry out direct trading. Malta allows only a few trading activities in the context of fundraising. Slovakia allows limited exercise of economic activities.

169 These are the countries that also allow unrelated activities, see for more details feasibility study, page 88.

Member States[170] as it would also allow activities unrelated to the public benefit purpose. However, it would be in line with the rules in many other Member States which allow both related and unrelated economic activities, provided that the profit is used for the public benefit purposes of the foundation, and/or that the unrelated economic activities are ancillary to foundation's work[171].

The economic activities of the FE would have to respect a threshold to be defined in the Statute. By requiring that any profit from economic activities be channelled to the public benefit purpose and by restricting unrelated economic activities through a threshold, this option should provide a sufficient guarantee to donors and all other parties concerned that the profits of European Foundations will be spent on public benefit purpose objectives. These requirements, also in the light of the non-distribution provisions of the public benefit purpose foundation, should respond to concerns relating to misuse of the Statute.

It should be noted that the choice of whether to allow a European Foundation to carry out only economic activities that are related to the public benefit purposes it pursues or to allow also unrelated economic activities (subject to certain conditions) has important tax law implications. In fact, if the Member State concerned grants tax benefits only to domestic foundations that carry out only related economic activities whilst the European Foundation is allowed by its Statute to carry out also unrelated economic activities, the consequence in some Member States could be that all income that the European Foundation derived from the unrelated economic activities would be subject to taxation according to the general rules of the Member States concerned (i.e. tax benefits would not be applicable to this income). In order to distinguish the income arising from related and unrelated activities, the latter would need to be presented separately in the accounts. In other Member States with stricter laws, the consequence could be even more severe and could result in the refusal of the Member State concerned to grant tax benefits at all to the European Foundation. In other words the European Foundation could lose all the tax benefits that would normally be granted to it.

Comparison of the options

Option B is to be preferred to option A as it provides a good balance between flexibility for FEs on the one hand and addressing the concerns of public authorities and third parties on the other. Option A is unlikely to be politically acceptable and is a disproportionate solution to the problem.

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170 For instance, Bulgaria, Finland, Greece, Hungary, Romania.

171 Belgium allows even unrelated activities if they have a non profit purpose; Cyprus, Germany, Latvia, Poland, Portugal allow unrelated activities; UK allows unrelated economic activities at a small scale, etc. For further details see feasibility study, page 88.

3.1.7 Summary of the suggested suboptions for the content of the Statute

Sub-options for the content of the Statute	**Chosen sub-option**
1. Tax issues	Option B2: Non-discriminatory treatment applied automatically (without comparability test)
2. Cross-border dimension	Option B: Cross-border dimension requirement included in the Statute
3. Minimum founding assets	Option B: Specific founding assets equal to €25,000
4. Employee involvement in European Foundations	Option B: Rules on information and consultation of employees defined in the Statute
5. Supervision	Option B: Supervision at national level
6. Economic activities	Option B: Related and unrelated economic activities allowed, as long as the income is channelled into public benefit purpose, and unrelated econmic activites are ancillary

3.2. Instruments to be used for the Statute

Recommendation

A recommendation would render uncertain the achievement of the objectives being pursued, as it gives large flexibility to Member States in taking on board and enforcing the provisions proposed. It would therefore have a smaller impact in terms of reducing barriers and restrictions to foundations' cross-border operations (in particular on tax aspects) and would not ensure a sufficient level of legal certainty. More importantly, it would not set up a uniform set of rules in all Member States.

Directive

The directive would not guarantee a uniform application of the provisions across the EU, leaving the choice of form and methods to national authorities. It would not result in the introduction of a European legal form. Consequently, such an instrument would not be attractive for foundations and its effectiveness may be limited.

Regulation

A European legal form requires uniform and direct application of rules across the EU. The Regulation would be the most appropriate means to ensure the uniformity of the Statute in all Member States. All the existing European legal forms i.e. the European Company, the European Economic Interest Grouping and European Cooperative Society have been introduced by a Regulation.