

The European Foundation – A New Legal Approach

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European Foundation Project

Part 1: Private Law

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

Preamble

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

Art. 1 Definitions

1.1 General Definition

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

1.2 Public Benefit Purpose

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

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

- (a) Amateur sports;
- (b) Arts & culture;
- (c) Children and youth;
- (d) Civil or human rights;
- (e) Consumer protection;
- (f) Democracy;
- (g) Disaster relief;
- (h) Ecology & protection of the environment;
- (i) Education;
- (j) Elimination of discrimination;
- (k) European and international understanding;
- (l) Handicapped people;
- (m) Health & medical care;
- (n) Historical preservation;
- (o) Prevention and relief of poverty;
- (p) Protection or care for animals;
- (q) Refugees and immigrants;
- (r) Religion;
- (s) Science;
- (t) Social or economic development;
- (u) Social welfare;
- (v) Other public benefit purposes.

1.3 Distributions, restricted donations

Benefits shall not be distributed either directly or indirectly to any founder, director, officer or employee of the foundation other than by way of reasonable and proper

remuneration under a contract of service or a contract for services, nor extended to any related person thereof unless the latter belongs to a class of beneficiaries in the sense of Art. 1.2 (but cf. 4.1.1 para. 2).

The founder can restrict his donation in such a way that he, his spouse and his children are entitled to receive up to 30% of the foundation's available revenue for distribution from that source for their lifetime. In any year this private distribution shall not exceed the foundation's aggregate distribution for public benefit purposes.

The European Foundation shall distribute a reasonable portion of its available revenue in due time to its beneficiaries.

Art. 2 Legal Status

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

Art. 3 Formation

3.1 Right to Establish

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

3.2 Form of Establishment

The formation of a European Foundation ensues

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

3.3 Formation deed

The formation deed of a European Foundation must

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

3.4 No State Approval

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

3.5 Registration

Every European Foundation shall be registered in an independent national Public Register, certifying the acknowledgement of the foundation for the purpose of its recognition in all other member states of the European Union.

The initial registration entry and any later change of it are to be published in the Official Journal by the Public Registrar.

Everyone can inspect the Statutes and other documents of the European Foundation which are deposited with the Public Register without having to prove any specific interest.

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

3.6 Statutes

The Statutes of the European Foundation shall determine

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

If the formation deed or the Statutes of a European Foundation do not provide for the necessary and adequate organisation the State Supervision (see Art. 7.) has to make sure that the statutes are amended (see Art. 8.1.1).

Art. 4 Governance

4.1 Board of Directors

4.1.1 Responsibilities, Rights and Duties

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

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

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

The members of the Board of Directors and of the Supervisory Board are personally liable to the European Foundation.

4.1.2 Board members

The Board of Directors is composed of at least three competent independent and not related natural persons.

4.1.3 Appointment, Removal and Resignation

Members of the Board of Directors are elected by the Supervisory Board (where applicable) or by the Board of Directors or any other person/institution according to the statutes. The first Board of Directors is determined by the founder.

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

Members of the Board of Directors can resign at any time but they have to take care of the proper continuation of the foundation.

The electing organ (see Art. 4.1.3 para. 1) can dismiss a member of the Board of Directors by a 2/3 majority vote at any time.

The electing organ (see Art. 4.1.3 para 1) can dismiss a member of the Board of Directors for important reasons by a simple vote at any time.

4.2 Supervisory Board

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

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

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

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

In all other respects the regulations concerning the board of directors shall be applied by analogy.

4.3 Intervention Right of the Founder

The founder of a European Foundation and any subsequent donor of a significant contribution has the right to intervene with the State Supervision if the Board of

Directors and/or the Supervisory Board do not comply with their responsibilities; the State Supervision has to produce a substantive statement on this intervention within 60 days.

4.4 Intervention Right of the Beneficiaries

Any person with a legitimate interest as one of the beneficiaries of a European Foundation may submit a report to the State Supervision if the Board of Directors and/or the Supervisory Board do not comply with their responsibilities; the State Supervision has to produce a substantive statement on this report within 60 days.

4.5 Intervention Right of Third Parties

Creditors, employees, tenants and other third parties whose own interest are affected by the activities of a European Foundation may submit a notice to the State Supervision if in their view the Board of Directors and/or the Supervisory Board do not comply with their responsibilities; it is in the State Supervision's full discretion how to respond on this notice.

Art. 5 Reporting, Transparency and Disclosure

5.1 Reporting, Accounting

The Board of Directors has to deliver to the State Supervision (see Art. 7) every year within 6 months from the end of the accounting year an annual report and annual accounts (and where applicable an audit report).

The annual accounts for European Foundations are required to show a true and fair view. The foundations shall apply the International Financial Reporting Standards (IFRS), if applicable, or national or international standards commonly recognized for public benefit purpose institutions

European Foundations are obliged to keep complete and accurate records of all financial transactions.

5.2 Disclosure

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

5.3 Auditor

European Foundations may have an auditor.

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

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

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

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

Art. 6 Activities

6.1 Asset Management

European Foundations shall preserve the real value of their permanent capital against devaluation of money (inflation) and distribute only their revenue (income and capital gain) The Statutes can deviate from this rule.

6.2 Economic Activities

European Foundations may not carry out a business in their own name.

European Foundations may hold a controlling interest in a business enterprise (or in another undertaking which operates a business) only if this business is within their public benefit purpose (related economic activities) or in the circumstances described in the next paragraph.

European Foundations may hold a controlling interest in a business enterprise (or in another undertaking which operates a business) with a view to profit (unrelated economic activities) if any profits derived therefrom are used only in pursuance of its public benefit purposes and the economic activities themselves are only ancillary to those purposes as a means to that end.

6.3 Political Activities

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

European Foundations may not engage in fundraising or campaigning to support or oppose any political party or candidate for public office.

Art. 7 State Supervision

European Foundations are submitted to the supervision of a public authority (State Supervision).

If a European Foundation has no Supervisory Board (see Art. 4.2 para. 2) the State Supervision has to review the annual report.

If a European Foundation has no certified auditor (see Art. 6.3 para. 2) the State Supervision has to review the annual accounts.

The State Supervision has to intervene after violations of the law or the Statutes but has no right to review the Board of Directors' (and where applicable the Supervisory Board's) discretionary decisions. After a written notice of non-compliance has been given and an adequate opportunity to correct any defect has been provided, the State Supervision can take any measures necessary.

All decisions of the State Supervision shall be appealable to the courts.

Art. 8 Fundamental Decisions

8.1 Amendment of Statutes

8.1.1 Changes of Statutory Provisions

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

Changes of Statutes ensue in the same form as the establishment of the European Foundation (see Art. 3.2 lett. a) and have to be registered in the Public Register (see Art. 3.5).

The State Supervision (see Art. 7.) has to approve the change of Statutes in order to prevent the rights or interests of the founder, of the beneficiaries and of other persons affected from being compromised.

The Supervisory Board (see Art. 4.2), the founder (see Art. 4.3), the beneficiaries (see Art. 4.4) and other persons whose rights or interests are affected by the change of the Statutes may lodge an appeal with the competent court.

In the absence or inactivity of the Board of Directors the State Supervision may amend the Statutes. The Board of Directors may launch an appeal with the competent court against this amendment.

8.1.2 Changes of Purpose

If the original purpose of a European Foundation has acquired a completely different meaning or effect and as a result of this the foundation is obviously estranged from the intentions of the founder (especially if the purpose is incapable of achievement, inadmissible or unreasonable) the Board of Directors (or in its absence or inactivity the State Supervision) may amend the Statutes (see Art. 8.1.1) by changing the purpose of the foundation or cancelling or amending charges or conditions which impair the foundations purpose. The new and old purpose must be closely related to each other.

8.2 Liquidations

The Board of Directors and in its absence or inactivity the State Supervision has to liquidate a foundation as soon as the purpose cannot be achieved particularly when the purpose of the foundation can no longer be realised not even by changing the purpose (see Art. 8.1.2) or when, owing to the lack of adequate assets, the duties of the foundation can no longer be fulfilled or the duration specified in the Statutes of the foundation or in the foundation deed has expired.

Any proceeds of liquidation have to be transferred to a foundation with a similar purpose. If there is no foundation with a similar purpose the liquidation proceeds have to be delivered to the government which shall distribute it according to the purpose of the foundation.

Art. 9 Applicable Law

A European Foundation shall be governed

- a) by this regulation.
- b) in case of matters of foundation law, not regulated by this regulation, by the law of the member state, where the foundation was established.
- c) by the provisions of the foundation's statute.

The foundation is supervised by the state supervisory authorities of the state, where the foundation has its main office.

Art. 10 Miscellaneous

This law repeals *

This law shall take effect on *

Part 2: Tax Law

Part 2A: Harmonized Tax Law

Preamble

There is no basis within the laws of the European Union for a harmonization of the tax treatment of European Foundations. Nevertheless it seems worthwhile to explore a common tax treatment on the basis of tax law in Europe. Therefore this Part offers the solution of a complete harmonization of the tax law within the countries of the EU as a Model Law.

Art. 1 Definitions

1.1 General Definition

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

1.2 Public Benefit Purpose

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

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

- (a) Amateur sports;
- (b) Arts & culture;
- (c) Children and youth;
- (d) Civil or human rights;
- (e) Consumer protection;
- (f) Democracy;
- (g) Disaster relief,
- (h) Ecology & protection of the environment;
- (i) Education;
- (j) Elimination of discrimination ;
- (k) European and international understanding;
- (l) Handicapped people;
- (m) Health & medical care;
- (n) Historical preservation;
- (o) Prevention and relief of poverty;
- (p) Protection or care for animals;
- (q) Refugees and immigrants;
- (r) Religion;
- (s) Science;
- (t) Social or economic development;
- (u) Social welfare.

1.3 Non distribution constraint; restricted donations

Benefits shall not be distributed either directly or indirectly to any founder, director, officer or employee of the foundation other than by way of reasonable and proper remuneration under a contract of service or a contract for services, nor extended to any related person thereof unless the latter belongs to a class of beneficiaries in the sense of Art. 1.2.

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

Art. 2 Competence and procedural rules

The competence of tax authorities to determine whether the European Foundation serves public benefit purposes rests on the tax authority of the member state where the foundation is domiciled (see also 4.2).

Art. 3 Tax Benefits

3.1 Foundation

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

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

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

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

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

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

3.2 Donors

Individuals and communities giving to any European Foundation shall be entitled to deduct the net amount of donations/contributions from their personal income tax base up to the amount of Euro * or to a tax credit up to the amount of Euro *.

Companies and other corporate bodies giving to any European Foundation shall be entitled to deduct the net amount of donations from their corporate income tax base up to the amount of Euro * or to a tax credit up to the amount of Euro *.

3.3 Beneficiaries

Beneficiaries receiving a grant or other benefit from a European Foundation for a public benefit purpose according to Art. 1.2. are not taxed in respect of the benefit received.

3.4 Volunteers

Reasonable reimbursement of expenses incurred by volunteers shall not be regarded as income of the volunteer for income tax or social security purposes.

Art. 4 Use of funds and timely disbursement

4.1 De minimis rule

In case of deviation between public benefits allowed by Art. 1.2 Private Law and by Art. 1.2 Tax Law, the European Foundation does not lose its tax exempt status, if not more than 10% of its overall distributions in a tax year are directed to purposes according to Art. 1.2 Private Law which are not covered by Art. 1.2 Tax Law.

4.2 Timing rule

A European Foundation shall not in any year withhold an unreasonable part of its available income.

Art. 5 Economic Activities

5.1 Related Business income

European Foundations shall be exempt from income tax on income and capital gains derived from the conduct of a related business, where exemption of the related business is not likely to create distortion of competition such as to place at a disadvantage enterprises that are not tax-exempt.

5.2 Unrelated business income

European Foundations are allowed to run an unrelated business but cannot profit from tax privileges for this business income.

5.3 Ceiling

European Foundations shall be exempt from income tax on income and capital gains derived from the conduct of a small unrelated business or accessory economic activities up to the ceiling amounts of a profit of Euro * or a revenue of Euro *.

5.4 Passive Income

European Foundations shall be exempt from income tax for all passive income.

Art. 6 Restructuring

Any change of legal form into a European Foundation, restructuring of a European Foundation, and change of location of a European Foundation within the European Union, shall be tax neutral (especially by rolling over of basis and tax-exempt reserves) and shall not endanger existing tax privileges.

Part 2B: Non-Discrimination in a non-harmonized context

Preamble

There is no basis within the laws of the European Union for a regulation of the tax treatment of European Foundations. Nevertheless it seems worthwhile to explore a common tax treatment on the basis of tax law in Europe. Therefore this paper offers two solutions, a complete harmonization of the tax law within the countries of the EU as a Model Tax Law for the treatment of a European Foundation (Part 2A) and the introduction of non-discrimination rules and double tax treaty amendments within the context of national tax laws (Part 2B).

As it is unclear whether a general non-discrimination rule (as suggested in Part 2B) already follows from actual European Union law, this part proposes codified non-discrimination rules in order to provide a clear solution and avoid legal uncertainty.

Art. 1 Non-Discrimination rules

Within the scope of application of this Regulation, and without prejudice to any special provisions contained therein, European Foundations shall not be subject to any discrimination on grounds of nationality, domicile or residence.

1.1 Tax Treatment of the European Foundation (UNTERSCHIED zu Art. 3.1!!!)

In respect of taxes on income and capital gains, gifts and inheritances, capital or net wealth, transfer of assets, and occupation of real estate, any European Foundation shall be subject to the tax regime applicable to public benefit organisations established in the member state where it has its domicile.

Any branch of a European Foundation established in a member state other than in which it has its domicile shall be subject to the tax regime applicable to public benefit organisations established in that member state, provided that this

treatment shall not exclude any reliefs to which the European Foundation may be entitled under international agreements concluded by that member state.

1.2 Tax treatment of donors

Any individual or corporate donor giving to a European Foundation within or across borders shall receive the same tax reliefs as if the donation was given to a public benefit organisation established in the state in which the donor is resident.

1.3 Tax treatment of beneficiaries

Grants or other benefits received by individuals or public benefit organisations from a European Foundation established in any member state shall be treated as if they were given by a public benefit organisation established in the member state in which the recipient is resident.

Art. 2 Restructuring

Any change of legal form into a European Foundation, restructuring of a European Foundation, and change of location of a European Foundation within the European Union, shall be tax neutral (especially by rolling over of basis and tax-exempt reserves) and shall not endanger existing tax privileges.