

### Response to the European Commission proposal for a Regulation on the Statute for a European Foundation (FE)

15<sup>th</sup> November 2012

**The European Foundation Centre (EFC) welcomes the proposed Regulation on the Statute for a European Foundation (FE)** issued by the European Commission in February 2012. This is a major step towards having a new legal tool that will make it easier for foundations to support public-benefit causes across the EU. In times of economic difficulty, with increasingly tightened purse strings, it is critical that foundations have the right tools to enable them to leverage their valuable resources. The case for a European Foundation Statute (EFS) is well documented, notably in the Feasibility Study released by the European Commission Directorate-General for Internal Market and Services (DG MARKT) in 2009 and related public consultations. Already in 2005 the EFC issued recommendations on the core elements of a European Foundation Statute. The EFC believes that the proposed Regulation is ambitious and provides for a European instrument that will be both a useful tool for foundations/founders and represents a positive example of European integration. Accessible and tailored to foundations' needs, this tool would enable them to pool resources and give a European scale to their work, while also reducing costs and legal uncertainties. *It is now time for the Council and the European Parliament to adopt this long overdue instrument!*

#### A. General remarks

The EFC **welcomes the two basic principles** standing behind the European Commission's proposal for an EFS, namely **Easy Access** and **Credibility and Trustworthiness, and the key features of an FE** such as having: a public-benefit purpose, a cross-border component, a minimum capital requirement, a legal personality and broad legal capacity including the possibility to carry out economic activities. The proposal aims to facilitate foundations' establishment, their cross-border activities and operations in the Single Market with comparatively low costs. At the same time, it seeks to ensure credibility and trustworthiness with rules ensuring clearly defined duties set at an adequate level and mechanisms for their enforcement to avoid abuse and ensure high standards of good governance.

The proposal suggests that FEs would automatically get the same tax treatment as resident public-benefit foundations set up by the respective national laws. This element of the proposal is innovative and highly ambitious. However, the incorporation of tax elements in a company law Regulation may prove contentious and the EFC recommends reviewing this element carefully. The EFC advocated the adoption of a civil law instrument in 2005 as it appreciated that tax determination is within the competence of the Member States. Today, while we cannot presume the outcome of negotiations on this matter, we believe that in any case Member States could be encouraged to grant FEs automatic recognition of equivalency to a national public-benefit foundation. In this context, we consider that some core principles of the public benefit concept should be reflected in the Regulation to facilitate the determination of equivalency. Indeed, an EFC mapping among national foundation law experts during the summer of 2012 revealed that most core principles enabling a public benefit comparability test are covered in the current EFS proposal but that clearer wording may be required in some cases and the introduction of certain new elements to the regulation would be recommended.

#### B. EFC recommendations for clarification of/ amendments to key elements of the proposal

The EFC proposes a series of amendments to the proposal, with the aim of devising an effective and accessible public-benefit civil law instrument at European level whose core purpose is to facilitate the cross-border work of public-benefit foundations. This paper summarises the EFC's recommendations. A more detailed version can be found in the EFC's legal review of the EC proposal available from EFC secretariat and at [http://www.efc.be/programmes\\_services/resources/Documents/EFCLegalAnalysisEFS2012.pdf](http://www.efc.be/programmes_services/resources/Documents/EFCLegalAnalysisEFS2012.pdf).

##### 1. Terminology: The EFC recommends

- including definitions for the terms "activity" and "economic activity" in Article 2. The term "activity" (see Chapter I, Section 2, Article 6) should be understood in a broad sense, as illustrated in Chapter 1, Section 3, Article 10, but not limited to the aspects mentioned there which do not include, for instance, the carrying out of programme operations. It should be made clear in the Regulation that normal asset administration of FEs does not fall within the definition of "economic activities".
- clarifying the term "public interest at large" by rewording it as "general public".

##### 2. Core features:

- The EFC considers that the **cross-border component and the minimum assets should be maintained throughout the lifetime of the FE**. This needs to be clarified in the text (Chapter I, Section 2, Articles 6- 7).
- The EFC recommends that a **clearer non-distribution constraint** should be incorporated into Article 5 and that the related provision currently in place in Article 32 be removed. The non-distribution constraint could, for example, be worded as follows: *No benefit, direct or indirect, may be distributed to any founder, governing or supervisory*

board member, managing director or auditor, nor extended to any person having a business or close family relationship with them.

- In addition, it is recommended that new provisions on **reasonable board remuneration and timely disbursement of income** be added to Chapter I, Section 2, Article 5. A provision on reasonable board remuneration could, for example, be worded as follows: *Only reasonable and proportionate remuneration of board members is allowed. Reimbursement of expenses is permitted, as is payment of salaries of executive staff (including, where they exist, executive board members) and payment for services under contract.* Meanwhile, a provision on timely disbursement of income could be worded as follows: *The FE shall distribute a reasonable proportion of its income within a reasonable period of time, generally considered to be within four years.*

3. **Transparency and accountability of the FE:** Some transparency and accountability requirements of Chapter III, Article 34 should be reviewed to **take into account the aspect of proportionality and functionality**. The EFC recommends **extending the deadline for submitting activity and financial reports** from within 6 months of the end of the financial year to within 12 months. The EFC would also advise that **only “large” FEs should need to have their accounts audited** by an external auditor i.e. FEs with assets of more than €200,000 and/or income of more than €2,000,000 and/or an average number of at least 50 employees. For smaller FEs in terms of assets, income or employees an independent examiner could be used instead of an auditor. We also recommend that the requirement to publish grants lists in the annual activity report (Chapter III, Article 34) be reconsidered both for reasons related to the protection of the privacy of beneficiaries and for practical/administrative reasons.
4. **Tax treatment of the FE and its donors and beneficiaries:** Chapter VIII, Articles 49 – 51, as they currently stand, maintain that the tax treatment of FEs and their donors and beneficiaries would be equivalent to that granted to local resident foundations (and their donors and beneficiaries) in the relevant Member State, with automatic recognition of the FE as being equivalent to a local public-benefit foundation. These provisions may prove controversial and be the subject of much discussion. The EFC wishes to ensure that the EFS Regulation is adopted without delay. Member States should be encouraged to grant FEs automatic recognition of equivalency to a national public-benefit foundation. Some provisions detailing the core principles of the public benefit concept could be reflected in the Regulation with a view to facilitating the determination of equivalency, including a timely disbursement of income requirement and an explicit prohibition of disproportionate remuneration of board members. The provisions on the tax treatment of the FE, its donors and beneficiaries currently foreseen in the proposal - if not all adopted at this stage - could still be reviewed after an evaluation of the use of the Regulation as part of the official review process after its introduction.
5. **Registered office and its transfer:** The EFC recommends the revision of Chapter IV, Articles 35 - 37 to specify that the FE should have its **registered office and its central administration in the same EU Member State**. The EFC also recommends that while the FE shall, as per Chapter I, Section 2, Article 6, have activities in at least two Member States, this should include **relevant activities in the Member State in which the FE has its registered office/central administration**. The FE may also pursue activities outside the EU.
6. **Organisation of the FE:** In Chapter III, Article 28 it should be clarified that both **individuals and legal entities** represented by legal representatives **should be eligible to serve as board members**. The **conflict of interest rule** of Chapter III, Article 32 should be reworded. Instead of ex ante excluding certain related individuals from membership of the governing board it would be clearer to include provisions for dealing with situations in which specific conflicts of interest may arise and how those should be addressed. In addition, Article 32 as it is currently constructed appears to conflate **conflict of interest and non-distribution constraint** and greater clarity and effectiveness could be achieved by separating the two concepts (see point 2 above – provision for non-distribution constraint to be added to Chapter I, Section 2, Article 5).
7. **Registration of FEs:** The EFC understands that provisions on the registration of FEs (Chapter II, Section 3, Article 22) do not require **Member States** to set up new registries and that thus they **may designate existing foundation or company registers** for this purpose. The EFC recommends that the creation and ensuing registration of FEs (including by merger/conversion) be documented by Member States through listings or other appropriate means and shared with the European Commission.
8. **Member State Supervision of the FE:** Chapter VII, Articles 45 and 46 leaves it to the discretion of the **Member States to designate the supervisory authority for the purpose of supervising FEs** registered in that country. As it may be that more than one body is designated to supervise FEs, according to needs and practices established at national level, the EFC recommends that this clarification is introduced into Article Chapter VII, Articles 45 and 46. FEs should be subject to the same supervisory standards wherever they are based.
9. **Volunteers:** The EFC recommends that **current provisions on the matter of volunteers be removed** from the Regulation Chapter V Articles 38 and 39.