

**Opinion of the European Economic and Social Committee on the 'European Foundation Statute'
(own-initiative opinion)**

(2011/C 18/06)

Rapporteur: Ms HELLAM

On 16 July 2009, the European Economic and Social Committee, acting under Rule 29 (2) of its Rules of Procedure, decided to draw up an own-initiative opinion on the:

European Foundation Statute.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 30 March 2010.

At its 462nd plenary session, held on 28 and 29 April 2010 (meeting of 28 April), the European Economic and Social Committee adopted the following opinion by 134 votes to 2 with 1 abstention.

1. General recommendations and conclusions

1.1 This own-initiative opinion sets out some reflections and proposals on the development of a European Statute adapted to foundations, and proposes guidelines which could govern such a Statute.

1.2 A review of needs and opportunities confirms the necessity for a European company law project for foundations which would offer them an adapted instrument to facilitate their activities in the internal market. A recent study ⁽¹⁾ and practitioners ⁽²⁾ have indicated that the number of foundations and founders who want to develop transnational operations and cooperation has grown significantly over the last decade. They have also testified that foundations which conduct cross-border activities have to face several barriers, including legal barriers, which lead to increased transaction cost, therefore reducing the overall amount of their available funds on public good.

1.3 A European Foundation Statute has been repeatedly called for by the foundation sector and its representative organisations and networks at EU-level ⁽³⁾ as the most cost-effective solution for addressing cross-border barriers and thereby stimulating foundation activities across Europe.

1.4 In this context, the EESC urges the Commission to present a proposal for a Regulation on a European Foundation Statute to support public benefit activities for its adoption by the Council and the European Parliament in due course.

1.5 The EESC believes that the European Foundation Statute is an essential instrument to bring citizens at the heart of the internal market and bring Europe closer to the people.

1.6 The EESC sees that the EFS can serve as a new mechanism to support European public good and citizen actions, and address major European socio-economic concerns and pressing needs in such fields as knowledge and innovation, medical research, healthcare and social services, the environment and regional development, employment and vocational training, the conservation of natural and cultural heritage, the promotion of the arts and cultural diversity, international cooperation and development.

1.7 In order to make it effective and attractive, the new statute will have to provide clear and comprehensive rules regarding setting-up, operations and supervision and have a genuine European dimension. It will make cross-border operations, donations and cooperation smoother by providing an efficient management tool for public-benefit purposes, while offering a recognised European label.

2. General comments

2.1 Scope and institutional background

2.1.1 The purpose of this own-initiative opinion is to examine the potential development of a European Foundation Statute (EFS) that should help foundations and funders that are increasingly working across borders face both civil and tax law barriers and give a European scale from the outset to the creation of new foundations.

2.1.2 In November 2009, the European Commission Directorate-General Internal Market and Services released the results of a public consultation ⁽⁴⁾ on a European Foundation Statute (EFS) which generated a large number of responses especially from the non-profit sector and showed a strong support for a EFS from this sector.

⁽¹⁾ Feasibility Study on a European Foundation Statute, 2009.

⁽²⁾ The European Foundation Centre (EFC) the principal membership organisation for public benefit foundations at EU level has outlined this trend. Two Thirds of its members are active in other countries than their state of origin.

⁽³⁾ European Foundation Centre, Donors and foundations networks in Europe, Network of European foundations.

⁽⁴⁾ http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm.

2.1.3 In February 2009, the European Commission published a Feasibility Study on the European Foundation Statute ⁽⁵⁾. The Study set out the potential benefits of an EFS in terms of reducing or eliminating unnecessary financial costs and administrative burdens, thereby making it easier for foundations that wish to pursue their activities across different countries within the EU.

2.1.4 Two field recommendations also exist with regard to a European Foundation Statute:

— A 2005 proposal for a regulation on a European statute for foundations by the European Foundation Centre ⁽⁶⁾.

— A 2006 research project The European Foundation – a New Legal Approach, by foundation law and tax law experts ⁽⁷⁾.

2.1.5 On 4 July 2006 the European Parliament adopted a resolution on prospects in relation to company law ⁽⁸⁾ which calls on the Commission to continue its preparation of Community legislation for other legal forms, such as the European foundation.

2.1.6 In a 2009 opinion on diverse forms of enterprise ⁽⁹⁾, the EESC has welcomed the start of work on a European Foundation Statute and called on the Commission to conclude the impact assessment in early 2010 by presenting a proposal for a regulation that will enable foundations of European scope to operate on a level playing field in the internal market.

2.1.7 In 2006 the European Court of Justice has ruled ⁽¹⁰⁾ that the different tax treatment of resident and non-resident public benefit foundations constitutes an unjustified breach on the free movement of capital but only where the Member State recognises the public-benefit status of the foundation according to the Member State law.

2.1.8 In a case on cross-border donations ⁽¹¹⁾ the Court ruled that tax laws which discriminate against donations to public-benefit organisations based in other EU Member States are against the EC Treaty, as long as the recipient organisations based in other Member States are to be considered 'equivalent' to resident public benefit organisations.

⁽⁵⁾ http://ec.europa.eu/internal_market/company/eufoundation/index_en.htm.

⁽⁶⁾ <http://www.efc.be/SiteCollectionDocuments/EuropeanStatuteUpdated.pdf>.

⁽⁷⁾ http://www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_15347__2.pdf.

⁽⁸⁾ P6_TA(2006)0295.

⁽⁹⁾ OJ C 318 of 23.12.2009, p 22.

⁽¹⁰⁾ Stauffer case C-386/04.

⁽¹¹⁾ Persche case C-318/07.

2.2 Observations: the foundation sector in the EU

2.2.1 The European foundation sector is an important economic force ⁽¹²⁾ with assets between EUR 350bn and close to approx. EUR 1 000bn and annual expenditures of between EUR 83bn and EUR 150bn. Also a substantial number of European countries are on track for sustained foundation growth.

2.2.2 Foundations play an important role in the labour market. The 110 000 foundations identified by the Feasibility survey on the EFS provide direct full-time employment to between 750 000 to 1 million people in the EU ⁽¹³⁾. By giving grants or capital support to organisations and individuals they also support employment and voluntary engagement.

2.2.3 The vast majority of foundations in the EU are asset-based and public benefit purpose-driven. As a general rule, they have no members or shareholders and are separately-constituted non-profit distributing bodies. They have an established and reliable income source which is irrevocably dedicated to public benefit purposes. They can derive their income from an endowment, a capital sum provided by an individual, family, company or another organisation. It can take the form of 'movable' property: cash, shares, bonds, works of art, authorial rights, research licences or 'immovable' property: land and real estate such as museums, and care centres. They also acquire their income from other sources e.g. bequests and gifts, appeals to public generosity, self-generated income, contracts, lottery proceeds.

2.2.4 Foundations in the EU work on issues and projects which directly benefit people and are key to developing a citizens' Europe in areas ranging from knowledge, research and innovation, social services and healthcare, medical research, the environment, regional development, employment and vocational training, the conservation of natural and cultural heritage, to the promotion of the arts and culture, international cooperation and development.

2.2.5 An increasing number of foundations and funders are working across borders. However they face administrative, civil and tax law barriers, which are identified in the Feasibility Study including:

— Struggling with different national laws: new European initiatives are delayed or abandoned by lack of appropriate legal tools;

— Difficulty recognising foreign foundations' legal personality;

— Legal insecurity over national recognition of 'general interest' nature of resident foundations' cross-border work and public-benefit status;

⁽¹²⁾ Feasibility Study executive summary Ad1.

⁽¹³⁾ See footnote 12.

- Administrative burden and cost of setting up several branches in other countries;
- Lack of possibility of transfer of seat to another Member State;
- Fiscal barriers: non-resident bodies suffer tax discrimination.
- Enhance transparency;
- Provide for an effective management tool to support public-benefit purposes;
- Make donation procedures smoother, for cross-border activities of both natural and legal persons;

2.3 The need to set up a suitable tool for foundations

2.3.1 It would be unrealistic to hope for any harmonisation of the vast number of laws governing foundations in the Member States⁽¹⁴⁾, particularly in view of the differences between them as regards the purpose, requirements for establishment, governance and accountability⁽¹⁵⁾.

2.3.2 None of the existing European legal tools⁽¹⁶⁾ set up to support the growth of activities of - or cooperation between - private companies and public bodies across borders in the EU are suited to foundations needs and special features as private non profit distributing bodies which pursue a public interest objective and do not have shareholders or controlling members.

2.3.3 It has become necessary to consider the development of a European Foundation Statute that is accessible and tailored to foundations' needs, with a view to facilitating their operations and collaborative ventures within the single market, enabling them to pool resources from different countries and giving a European scale from the outset to the creation of European foundations to support public benefit activities.

3. For a European Foundation Statute: basic aims and structure

3.1 Aims and benefits

3.1.1 The European Foundation Statute (EFS) is a good policy option in order to foster the work of public benefit foundations across the EU because it would:

- Enhance the European legal framework for foundations;
- Reduce legal and administrative barriers;
- Encourage the creation of new activities;
- Facilitate cross-border work, giving partnership within the single market;

- Contribute to the economic integration process and consolidate a European civil society, in the current globalised context in which common challenges and threats call for a clear, disentangled European approach.

3.1.2 The advantages of an EFS would be multifold as follows:

- Efficiency and simplification: the Statute would allow the creation of a European Foundation (EF) registered in one Member State that would also be recognised in the other 26. It could operate EU-wide according to a single set of rules and a coherent management and reporting system. It would help overcome existing barriers and ease cooperation and work across borders.
- Accountability: the EFS would clarify the concept of foundation by providing a common definition of 'public benefit purpose foundations' across the EU as currently the term 'foundation' is much too loosely used to refer to very diverse undertakings. It could have positive effects on the general governance of foundations by providing a benchmark.
- Economic benefits: in addition to reducing their costs for cross-border activities, foundations that opt for the Statute would be recognised both by public administration and the general public, by having a trusted European 'label'. The EFS would facilitate the pooling of resources into activities for public good and could attract foreign investment. It could also have beneficial effects on the behaviour of donors and giving.
- Political and citizen benefits: the development of trans-national activity and cooperation would encourage European integration in those areas of direct interest to EU residents. The EFS could provide a robust and flexible management tool to support public benefit and citizen action at EU level to address pressing needs and global policy issues.

3.2 Core features

3.2.1 An effective EFS should fulfil a series of key principles and features. It would be an additional and optional public benefit tool governed mainly by European law and complementing national and regional laws.

⁽¹⁴⁾ EFC Legal and fiscal profiles of foundations in the EU. <http://www.efc.be/Legal/Pages/FoundationsLegalandFiscalCountryProfiles.aspx>.

⁽¹⁵⁾ EFC Comparative Highlights of Foundation Laws. <http://www.efc.be/Legal/Pages/Legalandfiscalcomparativecharts.aspx>.

⁽¹⁶⁾ The European Economic Interest Grouping, the European Company, the European Cooperative, the European Grouping of Territorial Cooperation.

3.2.2 An EFS could be devised along the following lines, which will have to be detailed in cooperation with the parties concerned. An EFS should:

3.2.2.1 Be an optional and additional instrument that funders and foundations active in more than one EU Member State may want to use instead of setting up several foundations according to national law in different EU countries. It would not replace existing Member States laws governing foundations.

3.2.2.2 Be simple and comprehensive as regards most aspects of foundation law and should only refer to national law in as few legal fields as possible. This will allow founders to save compliance costs by using one legal tool and arrange for a governing structure which would be comparable in all Member States.

3.2.2.3 Be easily accessible. The EF could be created in perpetuity or for a limited-time duration by will by any natural person resident in the EU, by notarial deed by natural and legal persons resident in the EU; by transformation into an EF of an existing public benefit foundation legally established in an EU Member State or by merger between public benefit foundations legally established in one or several EU Member State. A notice of the creation of the EF should be published in the Official Journal.

3.2.2.4 Allow to pursue public benefit purposes only. The description of public benefit could provide for an open list of public benefit purposes in order to allow for flexibility⁽¹⁷⁾. An EF would be regarded as being of public benefit if:

(1) it serves the public interest at large at European/international level either by operating its own programmes or by supporting individuals, associations, institutions or other entities; and

(2) the purpose for which it is established includes the promotion of the public interest in one or more fields determined to be of public benefit.

3.2.2.5 Set a European dimension: the EFS would be intended for activities which have a European aspect in the broad sense, i.e. involving activities of more than just in one Member State.

3.2.2.6 Set a minimum amount of capital. This could be a sign of the seriousness of the purpose and activities of the EF, and increase creditor protection, but should not prevent smaller initiatives to start operations.

3.2.2.7 Set no 'formal' membership but allow some participatory structure which however cannot substitute the rights and obligations of the governing structure.

3.2.2.8 Within the scope of the EF public benefit objective, allow to carry out economic activities directly or through another legal entity provided that any income or surpluses are used in pursuance of its public benefit purposes.

3.2.2.9 Set the right to hold movable and immovable property, to receive and hold gifts or subsidies of any kind, including shares and other negotiable instruments, from any lawful source.

3.2.2.10 Set the registered office inside the EU. It could be transferred to another Member State without the need for winding-up or the creation of a new legal entity.

3.2.2.11 Set clear transparency and accountability rules. An EF should keep records of all financial transactions, use formal financial channels and file annual statements of accounts and activity reports to the competent authority. Larger organisations would have their accounts audited.

3.2.2.12 Provide for clear governance rules and responsibility for the EF but the founders/the board should have flexibility to design the internal affairs in the bylaws of the EF. Model bylaws could be usefully proposed by way of an example. They should provide for the avoidance of conflicts of interest.

4. Applicable law

4.1.1 The proposal for an EFS would set out the various sources of law applicable: the EU Regulation on the EFS, the EF bylaws and other EU laws or national laws.

4.1.2 While the legislation on an EFS would need to be comprehensive, it should also be clear and simple. The grounds for this are obvious: clarity will help European Foundations to comply with the law, and those charged with supervision to enforce it.

4.1.3 The proposal on a EFS should establish the framework in which European Foundations are established, operate, and are accountable. In the areas that it would regulate (e.g. formation, registration, purpose, capital, registered office, legal personality, legal capacity, directors' responsibility, transparency and accountability requirements) the legislation should be comprehensive and not refer to national laws. This will ensure the unity, clarity and the security that the Statute should provide for third parties, partners and donors.

⁽¹⁷⁾ EFC's 2005 proposal for a EFS sets out an open list.

4.1.4 With regard to supervision, the oversight over EFs could be delegated to designated competent authorities in the Member States on the basis of the commonly agreed EFS standards regarding registration, reporting and supervision requirements set forth in the EFS Regulation.

4.1.5 On matters not covered by the EFS legislation, provisions of other Community law or law of the Member States would be applicable.

4.1.6 In respect of taxes, the competence to determine the tax treatment of the EF rests on the tax authority of the Member State where the EF is tax-liable.

4.1.7 EU Member States provide for special tax treatment for public benefit purpose foundations⁽¹⁸⁾. A difference of tax treatment between domestic and foreign public benefit/good bodies is considered as being potentially in conflict with the EC Treaty in particular as regards donations, inheritance or gift

tax for legacies and gifts, and foreign-source income of foundations. Thus a EF should also be able to benefit from the tax benefit which domestic legislators have granted to resident foundations including tax exemption on income tax, gift and inheritance tax, tax on the value/transfers of their assets⁽¹⁹⁾.

4.1.8 With respect to the tax treatment of EFs' founders/donors: any founder/donor giving to an EF within or across borders shall receive the same tax deduction or tax credit as if the donation were given to a public benefit purpose organisation in the donor's own Member State.

4.1.9 As regards indirect taxes, in an opinion on the Diverse forms of enterprise⁽²⁰⁾ the EESC had requested the Commission to encourage Member States to study the possibility of granting them compensatory measures on the basis of their confirmed public value or their proven contribution to regional development.

Brussels, 28 April 2010.

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⁽¹⁸⁾ A synthesis of foundations tax rules is available in 'Comparative Highlights of Foundation Laws', EFC 2009 <http://www.efc.be/Legal/Pages/Legalandfiscalcomparativecharts.aspx>.

⁽¹⁹⁾ See The European Foundation a new legal perspective. http://www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_15347__2.pdf.

⁽²⁰⁾ See footnote 9.