



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

From: General Secretariat
To: Permanent Representatives Committee
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Subject: Proposal for a COUNCIL REGULATION on the Statute for a European
Foundation (FE)
- Guidance for future work

I. INTRODUCTION

1. In April 2011, the Single Market Act I underlined that although foundations make a strong contribution to the financing of innovative initiatives of general interest, they still face difficulties in establishing themselves in other Member States or pooling their assets on a cross-border basis. When foundations decide to operate across borders, they have to spend part of the resources they collect on legal advice and fulfilling legal and administrative requirements laid down by the different national laws.
2. In order to overcome these difficulties and to facilitate the establishment and operation of foundations in the single market the Commission submitted, on 8 February 2012, a proposal for a Council Regulation on the Statute for a European Foundation (FE).

3. The particular objective of the proposal is to create a new European legal form (without replacing national legal forms for public benefit purpose foundations) allowing foundations to more efficiently channel private funds for public benefit purposes on a cross-border basis in the EU. The legal basis of the proposal is Article 352 of the TFEU which requires unanimity in the Council, as well as the consent of the European Parliament.
4. The proposal was introduced to the Working Party on Company Law (hereinafter referred to as “the Working Party”) under the Danish Presidency and the first examination of the proposal was completed under the Cyprus Presidency. The Irish Presidency presented the first compromise text on the proposal which was discussed by the Working Party on 25 June 2013. The second compromise text prepared by the Lithuanian Presidency was discussed by the Working Party on 9 September 2013.
5. From the early stages of examining the proposal discussions in the Working Party revealed that the most important outstanding issue is the tax treatment of European Foundations.
6. On 2 July 2013, the European Parliament adopted its Interim resolution expressing strong support for the Statute for a European Foundation, including the tax provisions. At the same time the European Parliament acknowledged that the approach is contentious in Council and therefore that it is appropriate not to discard possible alternative scenarios.
7. In order to make substantial progress in the negotiations between Member States in examining the proposal in the Working Party, the Presidency has decided to ask guidance from Coreper on these tax provisions.
8. To facilitate the discussion in Coreper, the Presidency has prepared a brief explanation on the tax treatment of European Foundations followed by a question under point II of the present note.

II. QUESTION ON THE TAX TREATMENT OF EUROPEAN FOUNDATIONS

1. The Commission proposal provides for an automatic application to European Foundations of the same tax treatment which is applicable to national public benefit purpose entities. In practice, this would mean that Member States would be required to regard European Foundations as equivalent to public benefit purpose entities established under their national legislation and that European Foundations would not need to prove that they were 'comparable' to national entities. Donors and beneficiaries of European Foundations would be treated as if they were donating to or receiving benefits from a public benefit purpose entity established in their own Member State.
2. The vast majority of delegations expressed concerns about the proposed tax treatment of European Foundations, especially in view of the impact it might have on national public benefit purpose entities. On the one hand, under the draft Regulation it might be easier in some Member States to meet the requirements of the Statute for a European Foundation as compared to fulfilling stricter national conditions for becoming a public benefit purpose foundation and benefitting from a preferential tax treatment. On the other hand, the draft Regulation provides that European Foundations shall benefit from the same tax regime as the one that each Member State applies to its national foundations. Therefore, the main concern expressed by Member States was that if the European Foundation Statute's requirements were less strict than those applicable to national public benefit purpose entities, the latter entities could be disadvantaged and the donors' confidence could be lowered.
3. In order to address the above-mentioned concerns, the Irish Presidency presented a compromise text on the tax provisions which introduced safeguards against potential disadvantages for national public benefit purpose entities. According to this compromise, Member States would be allowed to introduce more stringent non-discriminatory conditions, for instance as regards minimum assets or avoidance of conflicts of interest, that European Foundations would have to fulfil in order to benefit from the same tax treatment as national public benefit purpose entities.

4. However, most delegations still remained sceptical about the appropriateness of providing tax provisions in the Statute which is discussed in the Working Party on Company Law under the Competitiveness Council.

5. In view of the above, the following questions are submitted to Coreper:

1. Would you be able to accept tax provisions in the proposal and if yes, which of the following principles regarding the tax treatment of European Foundations should be included in the regulation:

- a) **granting the same treatment as the one available to national public benefit purpose entities without a need for a European Foundation to prove that it is equivalent to national entities, but with a possibility for national authorities to impose more stringent non-discriminatory requirements;**
- b) **referring to the principle of non-discrimination from the case law of the European Court of Justice¹ and therefore, simply confirming that the principles set out so far in the case law for foundations would also apply to the future European Foundations;**

or

2. Should the Statute for a European Foundation become a civil law instrument and tax provisions be removed from the proposal?

III. CONCLUSION

The Permanent Representatives Committee is invited to give guidance to the Working Party on Company Law on the issue of tax treatment of European Foundations on the basis of the questions set out in point II.

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¹ *C-386/04 Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften, C-318/07 Hein Persche v Finanzamt Lüdenscheid, C-25/10 Missionswerk Werner Heukelbach eV v État belge.*