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Feasibility Study on a European Foundation Statute

Final Report

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Executive Summary

This feasibility study covers seven major objectives according to the terms of references. It offers an overview of the main types of foundations in EU Member States (Objective 1); presents estimates of the economic scale of the European foundation sector, also in comparison with the United States (Objective 2); examines the main regulatory differences in the legal treatment of foundations across the EU (Objective 3); estimates cross-border activities as well as barriers and their economic relevance (Objective 4); analyses the importance and cost implications of these barriers (Objective 5); explores possible modalities of eliminating existing barriers (Objective 6); and assesses further possible effects of a European Foundation Statute (Objective 7).

For each objective key findings emerge, which we address in the concluding section of the feasibility study. Specifically:

- (1) The European foundation sector is a major economic force and makes significant contributions to the public good of Europe.
- (2) The public benefit foundation is the only type of foundation which is accepted in every Member State and in practice public benefit foundations are the most important foundation type.
- (3) In the 27 Member States considerable regulatory differences can be found. However, as regards the public benefit foundations there are also important similarities which overall are more substantial than the remaining differences.
- (4) There are legal barriers to cross-border activities of foundations of the Member States both in civil law and in tax law. As in company law, most of the barriers can be overcome, but this leads to compliance costs which will often be higher than they would be in company law, given that the legal and personal environments vary (foundation and tax laws of the Member States seem to have more legal uncertainties inter alia because of much less case law and fewer specialised lawyers, and because board members of foundations may be less experienced in legal issues).
- (5) The calculable cost of barriers against cross-border activities of European foundations ranges from an estimated € 90,000,000 to € 101,700,000 per year. Additionally, there are incalculable costs (costs of foundation seat transfer, costs of reduplication, psychological costs, costs of failure, etc.) which are certainly higher.
- (6) Five policy options emerge for addressing cross-border barriers and thereby stimulating foundation activities. These policy options differ substantially in terms of their cost effects as well as in their legislative and administrative implications. In comparing the various models, the European Foundation Statute seems to suggest itself as the preferable policy option.
- (7) Apart from the reduction of the costs for cross-border activities a possible European Foundation Statute would have further positive effects on the general governance of foundations and trusts; on the behaviour of donors and giving; on the corporate sector; and on the European economy, especially in the field of R&D.

Ad (1) As the empirical analysis shows, the European foundation sector is a major economic force and larger than has been documented by any previous research. Keeping differences in definition and classification in mind, Europe's foundation sector substantially exceeds the economic weight of US foundations in assets (by a factor of almost 2) and even more so in expenditure (by the at least a factor of 2.5). Allowing for all data uncertainty and validity problems, we estimate that the European foundation sector has assets of between € 350bn and close to approx. € 1,000bn (!) and annual expenditures of between € 83bn and € 150bn. By contrast, US foundations have assets of approx. € 300bn and expenditures of € 29bn. Additionally, growth patterns suggest that at least a substantial number of European countries are on track for sustained foundation growth.

Ad (2) The empirical analysis and the comparative legal analysis illustrate that the public benefit foundation is the only type of foundation which is accepted in every Member State, and that in almost all Member States it is the only or the most significant type of foundation. The only relevant exemption is the Netherlands, where numerous other foundations exist because of historical reasons (path dependency).

Ad (3) The comparative legal analysis shows considerable regulatory differences in the 27 Member States. Probably the most striking difference is that around about half of the Member States accept also other foundation types apart from public benefit foundations. If we analyse the similarities and differences, it seems to us that the similarities are overall more significant. The differences are often relevant only in their details and in specific cases. As regards the type of the public benefit foundation the most important different approaches regard the founding assets, the private supervisory instruments (i.e., auditing and disclosure) and in particular the scope of economic activities.

Ad (4) Legal barriers do exist both in civil law and in tax law. They are of varying natures and magnitude.

The highest barriers exist when a foundation considers transferring or has effectively transferred its seat to another Member State. Member States adhering to the real seat doctrine (*Sitztheorie*) will even require the foundation to dissolve itself in such a case. In the other Member States there are usually no rules which allow such a transfer. As a consequence, this route is either barred or at least burdened with high legal uncertainty and administrative efforts. Indeed, according to our findings, no such case has been reported yet.

Apart from this there are other civil law barriers in some Member States (e.g., recognition procedures), and in tax law the vast majority of the Member States only grant tax benefits to resident foundations but not to non-resident foundations. In practice, the usual way to overcome the existing tax law barriers seems to be to establish one or more other foundations or non-profit organizations which comply with national laws of the states in which they are to engage in activities.

Currently, there is a debate whether some or all existing barriers infringe the fundamental freedoms of the EC Treaty, especially the freedom of establishment and the freedom of capital movement. As regards the civil law barriers there is no adjudication by the ECJ, but there are good arguments that some foundations can enjoy the right of establishment of Art. 43, 48 of the EC Treaty so that the existing civil law barriers have to be justified according to Art. 46 of the EC Treaty or pursuant to the four-factor test set forth in *Gebhard*. The future application by the member states of the

real seat doctrine to foundations (that are within the ambit of the freedom of establishment provisions of Articles 43 and 48 of the EC Treaty) will depend on whether or not restrictions of a foundation's freedom of establishment, if any, that result from the real seat doctrine can be justified on the basis of the four-factor test established by the ECJ in *Gebhard*. In this context it must be taken into account that, due to their special nature and purposes, foundations and other not-for-profit associations are necessarily subject to state supervision. In contrast, Member States may impose registration requirements on foreign foundations, provided these requirements are not contrary to the four-factor test.

As regards the tax law barriers the analysis of the *Stauffer* decision confirms the existence of a non-discrimination rule concerning the income taxation of a non-resident foundation by the state of source. According to this non-discrimination rule, a non-resident foundation is entitled to receive similar tax benefits to a resident foundation, if the non-resident foundation meets all the requirements of the tax law of the state of source. There are good arguments that such a non-discrimination rule is also applicable to tax benefits for donations; the ECJ will decide this question soon in the *Persche* case which is just under review.

It seems possible that the current and future adjudications of the ECJ will facilitate the overcoming of the barriers in tax law: if a general non-discrimination rule were to be accepted by the ECJ, a new possibility to overcome existing tax barriers would be possible since any non-resident foundation could claim tax benefits under the condition that it can prove that it meets the requirements of the state of source (except its seat). However, such a “non-discrimination solution” is not easy to implement, because of several legal uncertainties stemming from the requirements of the tax laws of the Member States. It should also be noted that according to information from practitioners, ECJ case law may not give sufficient legal certainty to proceed since the ECJ can only interpret the law in specific cases, but not map out the more detailed legal rules that may be necessary for planning and carrying out complicated business transactions.

In light of the fundamental freedoms guaranteed by the EC Treaty, comparing the barriers for cross-border activities of foundations with the barriers for cross-border activities faced by companies, we find that their nature and magnitude are rather similar. Nevertheless, in the foundation sector there seems to be considerably more legal uncertainty (e.g., in the meaning of “economic” activities, comparability of tax law requirements, etc.) among other things, due to the fact that much less case law exists here than in company law. In comparison with company law, costs may be additionally increased by the different personal environment (board members of foundations may have less legal experience than board members of companies) and the fact that there are much fewer professional lawyers with specific expertise in national and foreign foundation law and in the provisions for national and foreign tax benefits for public benefit institutions. All these legal uncertainties lead to compliance costs which will often be higher than the overcoming of such barriers in company law.

This assumption is supported by the results of the field study which suggests that many foundations intend to carry out cross-border activities and that the level of perceived barriers is higher – especially for foundations with less experience in international activities – than the level of actual barriers, even though all but the largest foundations (probably because of their experience) report of the latter. Even if barriers could

basically be identified as surmountable and resolvable, this remains a costly endeavour which puts a high demand on the foundations' capacity to process complex information of the Member State jurisdictions.

Ad (5) The cost level is carefully assessed in differentiating calculable and incalculable costs. Among the least calculable are the psychological costs and the effects of philanthropic contributions foregone because of barriers or perceptions thereof. If endowment costs for affiliates, administrative costs of additional entities, as well as failure cases were calculable, they would certainly add substantially to the very conservative cost estimate which we place at a minimum of € 90m per year without and at a minimum of € 138m per year with endowment costs included (or, if the high end of our span is considered, between € 101.7m and € 178.7m per year). The growing potential for cross-border philanthropy in Europe suggests that these figures should be seen as a minimum level of costs when considering a dynamic perspective. The non-calculable costs will certainly add another substantial component to the total transaction costs incurred by cross-border activities of European foundations or by foregone activities of European donors. The potential for further growth in the philanthropic sector of Europe exists; therefore, we can expect a growing relevance of these cost estimates.

Ad (6) We debated the feasibility and desirability of five models for European public policy to address the current situation: (1) maintaining the status quo; (2) harmonization; (3) multilateral or bilateral treaties and the European Foundation Statute; (4) without tax-exempt status or (5) with tax-exempt status in all Member States (non-discrimination rule).

Under the *status quo model* some improvements, though only minor ones, are feasible. The ECJ will probably develop a general non-discrimination rule as regards tax law barriers, and some of the civil law barriers may be regarded as infringements of the EC Treaty in future. In addition, one could try to reduce some of the costs by information campaigns and/or by means of soft law (code of conduct, accreditation system). Nevertheless, it will be hard to reduce the current costs significantly: The very fact that 27 Member States are involved creates a substantial level of complexity by the number of possible combinations. The results of any such information approach would either have to be a fairly comprehensive online information portal on the Internet or a handbook-style publication, but certainly not a collection of information brochures. So the main part of the costs will remain even if we follow a very optimistic approach.

The other extreme to the implied 'no direct legal action' of the status quo model would be the *harmonization* of the various foundation laws and/or tax laws across Member States. While such harmonization could reduce the costs significantly it does not seem to be realistic. The same is true for the *treaty model*.

The *European Foundation* would be an additional and optional instrument like the European Economic Interest Grouping (EEIG), the European Company (Societas Europaea, SE), the European Cooperative Society (Societas Cooperativa Europaea, SCE), and most recently and in particular the proposed European Private Company (Societas Privatae Europaea, SPE).

The legal basis for a European Foundation Statute would be Art. 308 of the EC Treaty combined with the fundamental freedoms (i.e., freedom of establishment, freedom of capital movement) which seem to be applicable to most cross-border activities of

foundations. Existing national foundations would be entitled to transform into a European Foundation, if such a transformation is in line with the will of the founder. The Member States could provide for specific procedures allowing a transformation under the condition that the foundation's statutes can remain similar after the transformation.

Cost reduction is dependent on the scope of the European Foundation Statute: The more a European Foundation Statute is to look like the comprehensive draft of the proposed European Private Company (SPE) – and less like the more rudimentary statute of the European Company (SE) – the higher the cost reduction would be. Additionally, the more a national foundation is to be allowed to change into a European Foundation, the higher the cost reduction would be.

As regards the *civil law barriers* we estimate that a European Foundation Statute could lead to a cost reduction of 48m to 77m euros (96.5m to 137.2m euros, if we take the minimum capital also into account). Apart from this, there would also be a cost reduction of incalculable costs (costs of transfer of the foundations' seat, costs of reduplication, psychological costs, costs of failure, etc.).

Additionally, an option would be to establish a *European Foundation with a tax-exempt status* in all Member States. Such a model would need an additional implementation of tax law rules. As regards the scope of such tax benefits, there are various options. Instead of a harmonization it seems to us that only a non-discriminatory solution is both realistic and reasonable. Thus, a European Foundation would receive the same tax benefit as a tax-exempt foundation in the *same* Member State.

As regards the implementation of the additional tax law rules, there could be an implementation by the European Foundation Statute itself, by an additional treaty, or (automatically) by adopting the lowest common denominator of the national tax laws of the Member States. While the two first options do not seem to be very realistic, the third option may be worth considering: According to the new adjudication by the European Court of Justice in *Stauffer*, it is unlawful to deny tax-exempt status to a foreign foundation if this foundation meets all other requirements of a national tax-exempt foundation of the state in question. Thus, theoretically the European Foundation would be automatically tax-exempt in the Member States, if the European Foundation Statute were to combine all requirements of the tax law of the Member States (de facto lowest common denominator). The requirements of tax law could be mandatory for all European Foundations or be part of a supplementary 'model statute', leaving it open to the founder whether she/he wants the additional advantage of the status of a tax-exempt foundation in all Member States. At first sight, such a tax-exempt European Foundation may seem unrealistic, because it would be over-regulated and too 'bureaucratic'. However, according to the results of the comparative legal studies of the tax law of foundations, the similarities in tax law seem to be much greater than in foundation law. Thus, it is not unimaginable that even such a European Foundation could be a viable proposition and the price of more bureaucracy may be worth considering tax-exemption in all Member States.

As compared with the other models, such a European Foundation would mean the most expectable cost reduction effects (from the feasible models). Again the cost reduction is dependent on the details of the European Foundation Statute and the possibilities of transforming a national foundation into a European Foundation. The potential cost

reduction could add up to 91m to 101.7m euros (138m to 178.7m euros, minimum capital included). The approach would create the most far-reaching incentive for funding trans-national European causes and would have the greatest potential to foster science and research funding as well as other causes of European interest. It would also lead to a shared concept of a European public good, even though such a concept may be feasible for only a limited list of purposes mentioned in European Treaties, such as the goal to promote R&D and the competitiveness associated therewith.

Ad (7) Apart from the cost effects, the European Foundation may have the following *further effects*: it may encourage foundations to become internationally active and so be seen as a good example of governance; it could encourage a larger amount of private giving in Europe through much improved visibility of the legal form; it could be an incentive for more corporate giving and corporate social responsibility, it could attract more international (and extra-European) giving to foundations in the EU; and it could serve as an adequate vehicle to foster the special needs of the growing European research area.

Part 1: Introduction

A. The Idea of a European Foundation

Since the turn of the millennium there have been initiatives both in science and in practice to introduce a European Foundation as an additional supranational optional form.

The starting points were two comparative publications on foundation law¹ and empirical information about foundations,² each of which included country reports by experts from several Member States. As a result of these publications, the divergent wealth of European foundation law traditions became obvious. Three large foundations (Bertelsmann Foundation, ZEIT-Stiftung Ebelin und Gerd Bucerius and Compagnia di San Paolo) decided to finance a collaborative project on drafting a Statute for a European Foundation. The result of the project was a publication, including a draft for a European Foundation Statute, with commentaries and legal comparative views, written by 25 legal experts (foundation law and tax law) from 13 countries.³ In the meantime, the European Foundation Centre (EFC), as the European association of foundations, also undertook a parallel project and published its own recommendation for a European Statute.⁴

Meanwhile, the idea of a European Foundation was also part of the considerations of the High Level Group of company law experts set up by the European Commission in September 2001 to make recommendations on a modern regulatory framework in the EU for company law.⁵ According to the final report of the High Level Group, a European Foundation is worth considering⁶ but should not take priority in the short or medium term, because it would not be imperative for the conduct of cross-border activities. Additionally, national differences in foundation law had to be borne in mind. The High Level Group also referred to the results of a questionnaire from their interim report, which, among other things, asked whether a European Foundation should be introduced (Question 35a) and whether harmonization of national foundation laws would be desirable (Question 35b). While a large majority of the respondents said no to both questions, deeper analysis shows that the answers stemming from the foundation sector supported the introduction of a European Foundation while rejecting harmonization.

¹ See *Hopt/Reuter (eds.)*, *Stiftungsrecht in Europa*, Köln 2001, especially the contribution of *Hommelhoff*, p. 77 et seq., which however does not discuss the possibility of a European Foundation.

² *Schlüter/Then/Walkenhorst (eds.)*, *Foundations in Europe, Society, Management, and Law*, London 2001.

³ *Hopt/Walz/von Hippel/Then (eds.)*: *The European Foundation – a New Legal Instrument*, Cambridge 2003.

⁴ The EFC proposal is available at www.efc.be. See also *Machete/Antunes (eds.)*, as *Fundações na Europa - Aspectos jurídicos* (2008), discussing the two proposals for a European Foundation Statute.

⁵ See the Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe (2002), p. 1.

⁶ *High Level Group*, p. 120 et seq., especially p. 122.

In 2003 the European Commission took up the suggestion of a European Foundation in their Action Plan:⁷ “With respect to the possible development of a proposal for a Regulation for a European Foundation, before deciding to submit a proposal, the Commission intends to launch a study aimed at assessing in depth the feasibility of such a Statute. Such an assessment will have to take account of the lessons to be drawn from the adoption and use of the other European Statutes, so that it should best take place in the medium term.”⁸

From December 2005 until March 2006 the Directorate-General Internal Market undertook a further “Public consultation on future priorities for the Action Plan on the Modernisation of Company Law and Corporate Governance”,⁹ which also asked whether it would be considered useful to carry out an examination on the feasibility of a European Foundation Statute (Question 13). According to the published results of the consultation, 71 of the 217 statements (32.72 %) were issued by foundations, only discussing Question 13, and answering this question positively.¹⁰

In spring 2007 a call for tenders for the feasibility study on a European Foundation Statute was launched.¹¹ The Max Planck Institute for Comparative and International Private Law in Hamburg and the University of Heidelberg (particularly the Centre of Social Investment and Investigation [CSI] and the Law Faculty), Germany, decided to apply as a consortium for this feasibility study and eventually won the bid.

In autumn 2007 the consortium started its work and finalised the study in November 2008.

B. Objectives of this Feasibility Study

The purpose of this study is to provide the Commission with a comprehensive overview of the importance and of the role of the foundation sector in the European economy.

This includes an analysis of current barriers for cross-border activities in the Internal Market that could make such operations as the transfer of funds, cooperation, and joint action between foundations and their partners abroad less attractive and more costly. This study will analyse potential ways and means by which these barriers could be reduced, if not eliminated, and the effects they might have on foundations themselves and the purposes they serve.

⁷ *European Commission*, Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move forward, COM (2003), 284 final.

⁸ *European Commission*, COM (2003), 284 final, p. 22.

⁹ http://ec.europa.eu/internal_market/company/docs/consultation/consultation_en.pdf

¹⁰ See http://ec.europa.eu/internal_market/company/consultation/index_en.htm.

¹¹ According to the call for tenders this feasibility study should cover seven major objectives: an overview of the main types of foundations and foundation forms in EU Member States (Objective 1); estimates of the economic scale of the European foundation sector, also in comparison with the United States (Objective 2); the main regulatory differences in the legal treatment of foundations across the EU (Objective 3); estimated cross-border activities as well as barriers and their economic relevance (Objective 4); the importance and cost implications of these barriers (Objective 5); possible modalities of elimination existing barriers (Objective 6); and assessed possible effects of a European Foundation Statute (Objective 7).

For the purposes of this study, trusts and similar legal institutions and arrangements will be treated as functionally comparable to foundations and, therefore, included in the scope of the study.

In order to reach these objectives, the following issues will be addressed by the feasibility study:

- Empirical analysis of the main types of foundations (or trusts where appropriate) and analysis of their economic relevance in the EU and in the US (Part 2),
- Legal comparative analysis of the main regulatory differences as regards foundations (or trusts) across the EU (Part 3),
- Barriers to cross-border activities of foundations: their legal and economic relevance and estimated costs (Part 4),
- Analysis of possible modalities of elimination of these barriers (including introduction of a European Foundation Statute) and assessment of the possible effects of these modalities as regards the costs of cross-border activities and further effects (Part 5).

C. The Project Team

To meet these challenging objectives, it was necessary to combine legal expertise, economic know-how, and practical experience concerning foundations and the non-profit sector.

Due to the interdisciplinary nature of the study, the Max Planck Institute for Comparative and International Private Law in Hamburg, and the University of Heidelberg (particularly the Centre of Social Investment and Investigation [CSI] and the Law Faculty), Germany, decided to act as a consortium for this feasibility study. The acting persons of the consortium were:

1. Professor Dr. Dr. Klaus J. Hopt, Max Planck Institute for Comparative and International Private Law;
2. Priv. Doz. Dr. Thomas von Hippel, Max Planck Institute for Comparative and International Private Law (project coordinator);
3. Professor Dr. Helmut Anheier, University of Heidelberg, Centre of Social Investment and Investigation;
4. Dr. Volker Then, University of Heidelberg, Centre of Social Investment and Investigation;
5. Professor Dr. Werner Ebke, University of Heidelberg, Institute for German and European Corporate and Business Law;
6. Professor Dr. Ekkehard Reimer, University of Heidelberg, Institute for Finance and Tax Law;
7. Dr. Tobias Vahlpahl, University of Heidelberg, Centre of Social Investment and Investigation (project coordinator for empirical parts).

Because of the requirements for this study, an international and interdisciplinary team of additional experts was needed, including legal experts (with special knowledge of foundation law, taxation of non-profit organisations, and European law), economists and practitioners with practical experience in foundation matters. Thus, an expert group with 16 members from 12 Member States was established. This group acted as peer reviewer, reviewing the methodology of the different objectives and providing valuable

information about their discipline and the particular situation in the respective Member State.

Members of the core team of experts were (in alphabetical order):

| <i>Name</i> | <i>Institution</i> | <i>Country</i> | <i>Field</i> |
|------------------------------|--|----------------|-------------------|
| Professor Gianpaolo Barbetta | University of Milan | IT | Economy |
| Paul Bater | International Bureau of Fiscal Documentation (Senior Research Associate) | UK | Law |
| Francis Charhon | Fondation de France (Chief Executive Officer) | F | Practitioner |
| Professor Dr. Zoltán Csehi | Eötvös Loránd University | HUN | Law |
| Greyham Dawes | Horwath Clark Whitehill (Director of the Charity Unit) | UK | Law, Practitioner |
| Professor Tommaso Di Tanno | Banca Monte dei Paschi di Siena (Chairman of the Statutory Auditors) | IT | Law |
| Ludwig Forrest | King Baudouin Foundation | BEL | Practitioner, Law |
| Professor Xavier Greffe | Sorbonne University Paris | F | Economy |
| Professor Søren Friis Hansen | University of Southern Denmark | DK | Law |
| Professor Paavo Hohti | Council of Finnish Foundations (Managing Director) | FIN | Practitioner |
| Ewa Kulik-Bielinska | Stefan Batory Foundation (Director of Information and Development) | PL | Practitioner, Law |
| Rui Chancerelle de Machete | Fundação Luso-Americana para o Desenvolvimento (President) | POR | Practitioner, Law |
| Professor Jacques Malherbe | University of Leuven | BEL | Law |
| Ana Sastre | Fundación ONCE (Policy Officer) | E | Practitioner, Law |
| Professor Steen Thomsen | University of Copenhagen | DK | Economy |
| Professor Filip Wijkström | Stockholm School of Economics | SWE | Economy |

Finally, in order to receive comprehensive information about the details of foundation and tax law in all 27 Member States, several legal country experts were asked to contribute to the legal comparative analysis. Fortunately, the European Foundation Centre (EFC) has established a network of legal experts in every Member State, which was very helpful in providing the information in relatively little time. We would like to thank especially Dr. Victoria Athanassopoulou (Greece), Isabelle Combes (France), Professor Katerina Ronovska (Czech Republic) and Hanna Surmatz (EFC) for their valuable help.

Part 2: Empirical Analysis – The Economic Relevance and Function of Foundations in Europe and in the US

A. Introduction

This Part of the study offers an analysis of the economic dimension of the European foundation sector, including cross-border activities, relative to the United States. In doing so, we will focus on a series of questions:

- What are foundations?
- How many foundations exist?
- What are their total assets and annual expenditures?
- How many people are employed by foundations or volunteer for them?

In addressing these questions, we have to be mindful that the Member States of the European Union reveal a highly diverse field of institutions with a great variety of different foundation types and foundation-like forms.

I. Existing Material

Throughout this work, we have made many attempts to enlist every conceivable data source on foundations in Europe, and combined legal and economic analyses. The major building blocks are:

- Data on the economic weight of the foundation sector such as the EFC Research Task Force Data (2nd Survey 2005-2007), the Johns Hopkins Comparative Non-profit Sector Project, etc.;
- Case studies commissioned on specific foundation types;
- A survey of the legal treatment of foundations in Member States;
- A survey of cross-border barriers.

The last two points consist of a self conducted survey among foundations in Europe. The questionnaires were sent to 630 different European foundations of which 134 responded and participated in the survey. This led to a response rate of 21 percent. The result is the first field study in this area which provides individualised data of foundations and consists of 134 cases of foundations in 24 different countries of the European Union.

The data of the feasibility study was collected by post and is based on standardised questionnaires existing in different language versions.

The data used for the calculation is drawn mainly from our field study. Concerning size and weight, the foundations differ considerably, so that the sample covers the diversity of the foundation sector at least satisfactorily. However, due to the quota sample used for the selection of cases, it is not to be expected that distribution of attributes among the foundations observed will equal the distribution in the ground population. Therefore, a weighting factor was developed in order to get at least an impression of the sector.

Because of its small case number and the intended selection of simply large and well-known foundations, the survey serves more as an indicator than as a representative study. Therefore, the selection was not made stochastically as the standard required, but

when combined with the secondary data of the EFC, it is scientifically usable to demonstrate an impression of the sector.

II. The Problem of Inconsistent Definitions

A fundamental problem of the empirical analysis is the inconsistency of definitions used.

1. *General Remarks on the Problem of Different Legal Definitions*

The term “foundation” can have various meanings as becomes evident when one looks at the legal definitions of the Member States. As we have no harmonization of foundation law in Europe, there are more or less substantial differences in foundation law in the Member States, so that, for example, a Dutch “foundation” would not meet the stricter requirements of French foundation law. Such differences are common in the field of a comparative legal analysis. However, an empirical analysis needs to find a solution to work with the different national concepts of “foundations”.

The different legal requirements/definitions have consequences for the empirical data. When we look at the two extremes, we see, on the one hand, the *French* traditional foundation¹² complying with the high demands of French foundation law (pursuit of a public benefit purpose, minimum initial endowment of usually € 1,000,000, strong monitoring by the State supervisory authority). On the other hand, there are the *Netherlands* with much lower demands (pursuit of any lawful purpose, no minimum initial endowment required, only rudimentary control by the public attorney as the State supervisory authority, and with largely unconstrained economic activities). It is not very surprising that the number of *French* traditional foundations is much, much lower (1,226) than the number of *Dutch* foundations (163,000).

Fortunately, such big differences are more the exemption rather than the rule. However, it was necessary to cope with several problems arising from the different concepts of foundation law.

2. *Solution through a Functional Definition*

Because of the great degree of variation in the way that foundations are understood, as well as the detailed requirements of the different European foundation laws, the project team agreed from the outset that only a functional approach would serve the purpose of this study. This would establish common ground for the empirical analysis which could also be kept consistent with the legal definition used.

According to the findings of the legal comparative report (see Part 3) the lowest common denominator of the legal definition of a foundation is the following:

- an independent organization (generally with its own legal personality),
- which has no formal membership,
- is supervised by a State supervisory authority, and
- serves a public benefit purpose (in some Member States: any lawful purpose),

¹² Note that the French legislator recently (August 2008) decided to establish a new legal form of the “endowment fund” (*fonds de dotation*), which has much more liberal rules in comparison with the foundation law rules of many other civil law Member States.

- for which a founder has provided an endowment, and
- determined the foundation’s purpose and statutes.

This legal definition, on which we shall elaborate in detail in Part 3 of this study, is based on criteria which are largely also used for the empirical parts.¹³

3. *Special Cases – Individual Country Deviations*

As regards the empirical findings, we address a few key deviations in certain countries from this general legal definition elaborated in Part 3 of this study.

a) The Dutch Case

According to Dutch country experts, most of the numerous Dutch foundations do not promote public benefit purposes. The vast majority seem to act as “commercial” foundations and carry out functions which in other Member States less liberal than the Netherlands would be fulfilled by other legal persons (e.g., co-operatives). Unfortunately, there is no data which would allow us to distinguish between Dutch “commercial” foundations and other types of foundations which are also common in the other Member States. Thus, we finally decided to regard Dutch foundations as a “special” case, which is too different from the other Member States. This means that the data of all Dutch foundations could not be used in order to avoid an overrepresentation of a different type of “foundation”.

b) The Case of the United Kingdom and other Common Law Member States

Another problem is the common law countries (*Cyprus, Ireland, Malta* and the *United Kingdom*). The United Kingdom, for example, distinguishes between “charitable trusts”, “charitable companies” and the recently established “charitable incorporated organisation”. The three legal forms have some similarities with and some differences from a “public benefit foundation”: a foundation has no membership (like a trust) and legal personality (like a charitable company or a charitable incorporated organisation).

According to the invitation of tender, we have decided to compare foundations with trusts. However, as regards the data, it seems to be common in the *United Kingdom* to regard all “charities” as one single category (without a distinction between charitable trust, charitable company and charitable incorporated organisation). The result is that the number of “charities” is high in comparison with the average number of “foundations” in civil law countries. Moreover, the assets of “charities” are significantly higher than the assets of “foundations” in any other Member State.

Obviously, comparing “charities” with “foundations” is problematic. As experience shows, there are usually many more associations in the Member States than foundations. For example, in Germany there are ca. 600,000 associations (and 15,500 foundations). The number of German “charitable” (public benefit) associations is unknown, but it is probably much higher than the number of foundations – a number of 250,000 associations has been estimated, which seems to be realistic. Thus, if all “charities” were qualified as “foundations” for this empirical study, there would be a numerical overrepresentation of the “charitable” sector of the UK (containing all charities) in comparison with the “charitable” sector of the civil law countries

¹³ See Annex F.

(containing only charitable, and a very few non-charitable, foundations, but not charitable associations).

In our empirical approach we decided to follow an approach of the Charities Aid Foundation in its own research of the UK foundation sector. This approach counts as foundations those charities which make grants.¹⁴ In its dimension, this is however largely consistent with the charities which are audited (above a £ 500,000 threshold).¹⁵

c) The Case of the United States

This study also undertakes an empirical analysis of “foundations” in the US. In contrast to the common law Member States, where the term “foundation” has no legal meaning, in the US the term “foundation” does exist in the legal terminology. However, this meaning is different from the meaning in the civil law Member States:

The *civil law* Member States follow an organisational approach. In all these countries there exists a specific legal form which has rather similar conceptual criteria all across and which is usually called “foundation” alongside such other legal forms as the (non-profit) association, the company and the co-operative.

In the *United States*, a “foundation” is a sub-category of a tax-exempt “charity” (trust or non-profit corporation) defined by some functional criteria depending on the source of its income. The Internal Revenue Code distinguishes between “private foundations” (usually funded by an individual, family, or corporation) and public charities (other charities that raise money from the general public). Private foundations have more restrictions (e.g., prohibition from controlling affiliated enterprises) and fewer tax benefits than public charities.

In the *civil law* Member States, a comparable functional categorization according to the sources of funding does not exist.

Although the context of the legal definition in the civil law Member States (legal form) and in the *US* (tax law) is different, we have decided to tolerate these differences because of two reasons:

There is comparably good data about “foundations” in the *US*, which is very helpful in analysing their economic relevance. For nearly fifty years, the Foundation Center in New York has collected statistics on foundations, and the tax records of foundations are publically available and accessible on the Internet (and also via search services provided by private firms such as Guidestar and FoundationSearch)

In spite of the different contexts, a “foundation” in the *US* and a “foundation” in a *civil law* Member State can be rather comparable in practice. This is especially true as regards the traditional type of a granting foundation in a civil law Member State, financed only by its founder. Such an institution is also a “foundation” according to the functional definition of US tax law.

Differences exist, however, if we look at an “operational” foundation which provides services for a public benefit purpose. According to the functional definition of *US* tax law, such an “operational institution” is generally not regarded as a “private foundation”, but as a “public charity” (which means higher tax benefits). However, in

¹⁴ CAF, Grant-making by UK trusts and charities, January 2007, p. 3-4.

¹⁵ See part 2 below for this argument.

the civil law countries another legal form may also frequently be used in order to provide services for a public benefit purpose (e.g., a public benefit association or a charitable company).

At the end of the day, it seems possible to compare the data of the US foundations with the “foundations” in the civil law Member States, as long as the remaining differences are taken into account.

III. The Problem of Inconsistent Data

Even though we will present data and venture estimates (however crudely) in the following pages, we should sound a strong note of caution and stress that the current data situation on foundations in the EU is precarious. The UN Handbook on Non-profit Institutions (United Nations, 2003) may well offer long-term improvement in this regard, provided it is incorporated in the European System of National Accounts and implemented across Member States. In the interim, however, only a systematic and coordinated effort can remedy a data situation that unfortunately prohibits reliable, systematic comparisons of the kind needed here.

Clearly, the various data sources resulted from different projects, followed a range of purposes, and used varied definitions and approaches. While data from the EFC and its network of partner associations directly address foundations and are generated from national surveys of participating foundations, the Johns-Hopkins Comparative Non-profit Sector data are largely the result of calculations and imputations based on national account aggregates for non-profit institutions serving households, or NPISH. Likewise, the UN Handbook data are aggregations for the non-profit sector, and offer at best a breakdown for foundations as a subcategory of the International Classification of Non-profit Institutions. The Johns-Hopkins Project and the UN Handbook Project present data for the non-profit sector as a whole, and offer limited information on the foundation sector as part of this larger aggregate. They also provide data on the extent to which foundations fund other parts of the non-profit sector such as health or research. This breakdown includes the category of “philanthropy” or “giving”, which is larger than the foundation sector (by the volume of individual cash donations) but gives a maximum approximation of the weight of foundation expenditures. At the same time, the Johns-Hopkins Project and the UN Handbook Project identify only grant-making foundations as a separate category, and operating foundations are merged with the primary field of activity. For example, a hospital foundation would be classified as a hospital together with other non-profit organizations, or a research foundation as a research organization and not as a foundation.

The research of Anheier and Daly is based on survey data of national origin complemented by analyses of available aggregate data on the sectors. To develop their results, they involved an international network of corresponding colleagues working according to shared definitions and guidelines. However, their focal interest was the policy level, and they addressed issues of the economic importance of a foundation as background information only.

Some general remarks concerning the nature of the available data on foundations from EFC and partner sources need to be made. As a result of compiling data from different legal jurisdictions, subjecting the functional equivalent of a foundation as defined for

this study to different norms concerning assets, expenditures and above all accounting standards, means that the data presented suffer from inconsistencies which include:

- Assets are included in the data according to different accounting standards and may therefore reflect nominal value, book value or fair market value. For example, data provided by the Association of German Foundations may include foundation assets according to all three valuation approaches because there exists no national legal norm for foundation asset valuation. The Bosch or Bertelsmann foundations include assets in their balance sheet that certainly undervalue their share in the respective corporations (Bosch: 92 % of the corporation are held by the foundation, book value given at € 5.05bn; Bertelsmann 71 % of the corporation valued at € 622m.). As a result, we can expect significant underestimation of the real asset value of foundations.
- Foundation expenditures are a more reliable source, which, however, can also include serious challenges as to their validity. Depending on the share of operating foundations in a country, their expenditures can mean quite different things: they can refer to grant-making (and related costs thereof) in some cases. In other cases, they can refer to operating expenditures of foundations running institutions such as hospitals or care centres, and the corresponding issue is the sources of income of those foundations, which can consist of revenue generated on their assets, revenue generated (fee income, related business income), cash contributions by donors, or transfer payments from public budgets. Normally, the aggregate data from existing information sources do not differentiate among these categories. As a result, expenditures are not related to assets in any direct way.
- As a consequence of our definition of foundations for comparative purposes, we may face issues in certain countries as to which foundations should be included and which ones should not. This is the case when private benefit institutions have public benefit activities, and when legally independent foundations are controlled by public bodies or represent public budgets. The latter involves three sub-cases: foundations which are formally independent but directly controlled by their governing bodies; foundations that depend on annual resource allocations from government; foundations which have an asset base which has resulted from a privatisation process of public property and is under legal (e.g. the German “public law foundations” – öffentlich-rechtliche Stiftungen) or practical control of a public body (governance).
- All survey data provided by the EFC and its national partner organizations suffer from low response rates generally, and even lower ones when it comes to financial information. Usually, these surveys only have response rates of about one-third for financial information. Methodologically, no efforts have been made to date to calculate the weight and distribution of the respondents in relationship to the whole sector. Therefore, it is impossible to decide whether the survey samples were representative for the sectors in their countries and to extrapolate the total size of the sector from the existing data. For our own survey conducted for this project, however, we calculate the weight of the sample (see below) relative to the ‘universe’ of known foundations.

IV. Diversity of Types of Foundations

As a matter of fact, there are numerous typologies of foundations both in social sciences and in law.¹⁶

We have decided that for the purpose of this study a typology according to the foundation's purpose is helpful, as the purpose characterises the nature and the character of a foundation (see *infra* B II).

B. Foundations in Europe: An Empirical Portrait

As the following pages present a rich amount of information, it is useful to state the main empirical findings at the outset. According to the data available, we found that:

- The foundation sector in Europe consists of approximately 110,000 foundations.
- By far the largest numbers of them are public benefit foundations.
- The economic weight of the foundation sector is chronically underestimated, particularly with operating foundations included.
- Assets of foundations are estimated at 1,000bn euros.¹⁷
- Expenditures of foundations are estimated at 153bn euros.
- European foundations employ approximately 1m FTEs staff
- About 2.5m volunteers work for European foundations.

I. Size and Weight

1. *Number of Foundations*

Drawn mainly from EFC data and other published sources available to us, the number of foundations in the EU ranges between 90,000 and 110,000, or around 400 foundations per million inhabitants. As Table 1 shows, there is great variation in the number of foundations, ranging from a high of over 16,000 in Hungary, 14,000 in Denmark, and over 10,000 in each Germany, Spain and Sweden, to lows of 300 to 500 (public benefit foundations) in each Belgium, Greece and Portugal, and even lower numbers in the Baltic Member States. Unfortunately, not all countries are covered, as shown in Table 1, and we used the average ratio of number of foundations per million inhabitants for clusters of countries¹⁸ to estimate the number of foundations in Lithuania (1,531), Malta (65), and Romania (9,803). These estimates are shown in italics in Table 1.

¹⁶ See Annex G.

¹⁷ The figures for assets, expenditures and employment are estimates, based on our own survey, a secondary analysis of existing data, and an additional plausibility review, as described below.

¹⁸ The clusters are described in detail in Annex A.

Table 1: Number of foundations¹⁹ according to EFC / other data

| Country | Number of foundations (2005) | Public benefit foundations (2005) | Foundations per 1m inhabitants (2005) |
|----------------|-----------------------------------|-----------------------------------|---------------------------------------|
| Austria | 3390 ²⁰ | n/a | |
| Belgium | 665 | 400 | 63.14 |
| Cyprus | 35 | 35 | 44.9 |
| Czech Republic | 1503 | 1503 | 145.9 |
| Denmark | 14,000 (10,765 ²¹) | 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 | 1531 | 1531 | 455 |
| Malta | 65 | 65 | 160 |
| Netherlands | 163000 ^{22, 23} | n/a ²⁴ | n/a |
| Poland | 6,000 | 6,000 | 157.4 |
| Portugal | 485 | 485 | 44.3 |
| Romania | 9,803 | 9,803 | 455 |
| 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 ²⁵ | 8,800 | 145.2 |

¹⁹ Based on EFC data supplemented by recent additional data sources.

²⁰ 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*.

²¹ Including: 9,472 non-industrial foundations and 1,293 industrial foundations

²² Because of the special character of Dutch foundations, this number is excluded from the calculation of the total number of foundations.

²³ See "The Politics of Foundations - a Comparative Analysis", Gouwenberg (page 242).

²⁴ 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.

²⁵ 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.

2. *Assets*

Of course, while the number of foundations is a useful indicator of their absolute and relative frequency, it says very little about the economic weight of the sector. Therefore, one approach is to look at the assets foundations hold. Using estimates based on EFC data and other sources, we arrive at a range of asset values between 350bn (the lower limit of the EFC estimate) and approximately 3 trillion euros (the upper limit).

The estimated European total of foundation assets according to our weighted estimation approach requires some interpretation, as it is ten times the size of the EFC figure (Table 2). Any approach to apply a reality or plausibility test to the data provided has to proceed in several steps. From the existing EFC data, we start from a low threshold of European foundation assets of € 347bn in 16 (surveyed) and € 373bn in all 27 Member States (extrapolated), or € 350bn as a safe lower end estimate.

Since EFC data were only based on surveying a limited number of foundations in 16 countries, we calculated our own estimates based on the survey which we did for this feasibility study.²⁶ The estimation process is obviously highly dependent on the distribution of foundation sizes in each country. While we tried to account for that by creating two cohorts of the top 15 foundations by size and all other foundations, and also by running the estimations with two weights, on the one hand the asset size and on the other the expenditure size, we may still have overestimated the sectors in certain countries. From existing secondary data and knowledge, we can apply two kinds of criteria to evaluate the validity of the estimates: by considering the prevalent type of foundations in each country (operating or grant-making) and by considering knowledge available on single or extremely large foundations included in our survey sample, which could have distorted any calculation based on averages, even if done in terms of cohorts. The latter applies to the UK, Portugal and Italy, where the Wellcome Trust, the Gulbenkian Foundation, and the leading Italian banking foundations are institutions far bigger than any of their counterparts in the sector.

Therefore, they lead to substantially overestimated figures even among our top 15 cohort. Knowing their absolute size helps us to downsize the estimates for these countries. In the UK there is no other foundation even nearing the € 16bn of the Wellcome Trust, in Portugal there are less than 10 large foundations with assets of several hundred million euros, none equalling the Gulbenkian dimension of more than 4bn. In Italy, the foundations of banking origin represent a total of approx. € 70bn maximum, however, with no substantial number of the 4,700 foundations of other types even reaching their size.

In addition, we considered the figures for expenditures because they allow for an assessment of the situation by foundation type. Operating foundations basically have high annual budgets based on income for services, and at the same time their assets are comparatively low, while it is exactly the opposite with grant-making foundations. The estimation process should therefore lead to sectors characterised by comparatively large expenditures in countries with a large share of operating institutions, while in countries with a large share of grant-making foundations the asset size should be larger. In this regard, our sample gives an indication of the figures for Germany and Spain, which

²⁶ For the purpose of this summary, we cannot go into detail of the methodology applied in this paragraph (see Annexes A for detailed explanations).

have relatively high shares of operating institutions, representing the order of sizes as we would expect it. Since the survey results for these two countries include a number of different institutions, we can also see the figures as more indicative than in countries with a very weak response rate.

Therefore, we assumed that countries with foundation sectors smaller by numbers than Germany and Spain could not range substantially above in their asset size. As a result of these considerations, which were in addition supported by further evidence for the UK, we downsized the estimates to a maximum of € 200bn for the UK, to € 200bn for Italy, and to € 15bn for Portugal. Additional information which we have given for Denmark in our excursion on Danish corporate foundations provides us with figures for the total assets of corporate foundations which amount to DK 258bn (approx. € 32bn). These corporate foundations are at the same time very substantial institutions so that we cannot assume that the 9,472 other Danish foundations are substantially larger, rather on the contrary. Even if they were of the same size, the sector could only result in a total of ca. € 150bn. It seems well justified however, that most of them are substantially smaller and the sector will therefore rank in size closer to € 75bn.

As for the information on the UK available from the Charity Commission (provided by Greyham Dawes), the argument could be made in the following way: If we disregard the tiny (income below £10,000) charities numbering over 90,000, some 80,000 registered charities have an aggregate gross income of nearly £46bn (€ 55bn), and we would guess from estimates published some years ago that the asset base would be about twice that figure, thus of the order of € 110bn. If we then exclude all the charities below the current £500,000 gross income threshold for statutory audit, we are left with 11,000 auditable charities (75 % of them being corporate bodies, mainly charitable companies, thus broadly equating to foundations) with an aggregate gross income of £41bn (nearly € 50bn). If their asset base is of the order of € 100bn, it would seem that they represent 10 % of the EC population of 110,000 foundations, so that one might expect their asset base to be 10 % as well. That would yield a likely value of € 1,000bn for the assets of European foundations rather than the 300-3,000 range estimated.

On the other hand, one cannot help wondering to what extent the as yet largely unregulated annual financial reporting for the European foundation sector may depress any estimates made on the basis of the presently available information in countries other than Britain. A single example here may suffice: the IKEA Foundation was the subject of an Economist article in recent years which highlighted the dearth of information about major charities on the global stage. IKEA was conservatively estimated by the Economist to be worth at least £60bn, thus far larger than the world's known largest: the Bill and Melinda Gates Foundation.

This lends additional support to our estimate for total UK foundation assets to be in the range of € 200bn maximum. This is particularly important since the distortion introduced by the largest European foundation, the Wellcome Trust, into the UK estimate accounted for almost half of the total estimated assets. Since the small response rate of the sample does not allow us to consider further specificity for smaller countries (rather: countries with a smaller sector), we conclude this evaluation of our extrapolated estimates at an approximation for EU total foundation assets of € 1,000bn or one trillion. As a result, we can narrow the span of total EU foundations assets considerably

and assume that we have sufficiently provided for a correction of the potential over-representation of large foundations among our survey responses.

Table 2: Assets of foundations (own calculations on survey data)

| Country | Value of assets ²⁷ (total) | |
|-----------------------|---------------------------------------|---------------|
| | Sum | Mean |
| Belgium | 8,454,625,000 € | 21,136,563 € |
| Cyprus | 455,862,075 € | 13,024,631 € |
| Czech Republic | 5,163,720,984 € | 4,283,824 € |
| Denmark | 384,852,337,250 € | 27,489,453 € |
| Estonia | 614,227,548 € | 6,204,319 € |
| Finland | 25,959,730,796 € | 9,984,512 € |
| France | 33,333,920,614 € | 32,547,359 € |
| Germany | 137,168,316,887 € | 17,148,183 € |
| Greece | 2,533,258,372 € | 5,180,487 € |
| Hungary | 4,639,712,493 € | 555,921 € |
| Ireland | 294,563,530 € | 4,828,910 € |
| Italy | 527,917,140,697 € | 121,979,507 € |
| Latvia | 780,000,000 € | 6,000,000 € |
| Lithuania | 16,778,300 € | 47,938 € |
| Malta | 178,130,300 € | 445,326 € |
| Netherlands | 24,807,353,557 € | 22,090,252 € |
| Poland | 6,196,407,033 € | 1,290,112 € |
| Portugal | 22,895,641,330 € | 91,582,565 € |
| Romania | 215,167,325 € | 430,335 € |
| Slovakia | 249,265,608 € | 619,140 € |
| Slovenia | 17,433,600 € | 136,200 € |
| Spain | 261,780,990,543 € | 24,160,682 € |
| Sweden | 8,297,872,341 € | 553,191,489 € |
| United Kingdom | 1,299,629,615,095 € | 196,801,759 € |
| Total | 2,756,452,071,278 € ²⁸ | 41,684,320 € |

²⁷ Data weighed for assets. Please note that it makes no sense to weigh the data for expenditures and calculate the assets. As described above, the correlation between these two values is high but not exactly one.

²⁸ Please note that the figures in Table 2 are a mere starting point for the calculation process described above and not to be seen as absolute numbers.

3. *Expenditure*

Just as for the assessment of the asset base of European foundations, we start the line of argument from the existing EFC data sources. We have direct information for a sample of foundations from 10 countries, which we used to estimate an EU27 total based on an extrapolation. The sample shows a total expenditure of € 35.5bn, the extrapolation for the EU27 total results in € 83bn. By contrast, the comparable US figure is € 41 bn.

It is of great interest to note that in many European countries, the concentration ratio of the sector is extremely high, with the top 15 foundations contributing between 30 and 98 % of the national expenditures. If we look at the countries with a large sector (expenditures above € 1bn p.a.), the ratio is at approx. 40-60 % in France, Germany, Spain and the UK and at 30 % in Hungary (€ 1.1bn exp.). For Italy, the concentration ratio given by the EFC data is very low (below 10 %), which, however, results from a difference in the calculation approach. The top 15 data were only available for the foundations of banking origin, which are at the same time the Italian foundations with the largest assets. However, when it comes to expenditures, this approach distorts the picture because it ignores the very large operating foundations generating income for services. Only the contribution of those explains why the Italian sector can have total annual expenditures of € 11.5bn with the 15 largest (grant-making) foundations of banking origin contributing only approx. € 1bn. It can be assumed that Italy would be among the middle-level concentration countries if concentration data were calculated as for the other countries.

As we shall see in other parts of our argument, it is important to keep in mind that the large sectors include operating foundations with very substantial budgets generated as income from services or from public transfer payments. The data do not allow us to single out those budget elements, but we know from some of the largest German social welfare foundations, that in their cases the share of income from their endowment is as low as 5 %, while most of their annual budget comes from service fees.

We can also conclude from the data that the top average for Germany (which together with Spain far exceeds that of any other country) is far above the level of even the largest grant-making foundation in the country (which would be the Volkswagen Foundation at € 112m). To illustrate the dimensions, we should note that the largest private operating foundation has an annual budget of € 518m. (SRH Holding), the largest public law foundation is the Georg-August-University Goettingen at 822m.

Our own survey covers a sample total expenditure of € 1.9bn. From this basis, we estimate the foundation expenditures of the EU27 countries, using expenditure weights. The result is a total sector size of approx. € 343bn. As with our other estimates, this figure needs to be tested for its plausibility, especially by comparing the different country sizes of the sector. In commenting on individual countries, Denmark and the UK stand out for having far too large figures to be in a realistic ratio to the asset sizes on the one hand and the other countries on the other. Data already referred to above in the paragraph on assets for the UK and Denmark suggest that the UK has a total expenditure of approx. € 50bn and Denmark most likely of approx. € 4bn. In the Danish case, the 1,293 corporate foundations have total assets of approx. € 32bn, which can be assumed to yield an average of 5 % p.a., i.e., € 1.6bn. If the 9,472 non-corporate foundations are, on average, substantially smaller and have total assets of a similar size, they would generate at least another € 1.6bn. As a result, Danish expenditures can be

estimated at a maximum of € 4.0bn. With the two corrections for the UK and Denmark, total expenditures estimated are reduced to approx. € 173bn.

We next need to consider Spain and Hungary, two other countries with a substantial number of foundations. If, by way of analogy, the Spanish sector cannot be estimated to have a higher expenditure than the German sector (keeping in mind that both countries have a substantial number of operating foundations), the figure needs to be reduced from € 53bn to approx. € 20bn. For Hungary, the data from the EFC sample were already based on an almost complete coverage of the sector and were therefore left out of the extrapolation. Instead, we have provided the EFC data because they originated from a full coverage of the Hungarian foundation sector according to the national register. In total, expenditures can now be estimated to be approx. € 153bn. In a line of argument similar to that for the asset base, we manage to narrow the bandwidth and the margin of error of our estimates and can give a realistic dimension for the total annual expenditures of the European foundation sector.

Compared to the EFC data extrapolation results of € 83bn, our survey data extrapolation generated higher figures which certainly represent the upper end of the span. Whichever estimate comes closer to reality, they both indicate that the European foundation sector is substantially bigger than its US counterpart, whose annual figure is \$ 41bn (approx. € 29bn). This is again a result of the diversity and the different types of operating foundations which come into existence based on their assets but then generate substantial income from fees for services.

Table 3: Annual foundation expenditure by country (survey data weighted for expenditures)

| Country | Sum | Mean |
|----------------|------------------|--------------|
| Belgium | 1,021,753,163 € | 2,554,383 € |
| Cyprus | 277,769,745 € | 18,517,983 € |
| Czech Republic | 1,309,005,958 € | 1,043,033 € |
| Denmark | 84,246,443,925 € | 6,017,603 € |
| Estonia | 417,027,984 € | 3,283,685 € |
| Finland | 7,873,599,229 € | 3,028,307 € |
| France | 6,856,677,756 € | 9,019,206 € |
| Germany | 19,026,055,684 € | 2,907,728 € |
| Greece | 202,225,636 € | 413,549 € |
| Hungary | 19,842,865,542 € | 1,187,698 € |
| Ireland | 10,699,360 € | 175,399 € |
| Italy | 11,879,432,211 € | 2,516,829 € |
| Latvia | 221,000,000 € | 1,700,000 € |
| Lithuania | 1,149,390 € | 7,927 € |
| Malta | 43,035,600 € | 136,621 € |
| Netherlands | 3,105,782,568 € | 3,177,271 € |
| Poland | 5,560,219,922 € | 1,157,656 € |
| Portugal | 6,706,111,135 € | 18,247,921 € |

| Country | Sum | Mean |
|----------------|--------------------------|--------------------|
| Romania | 22,589,509 € | 85,243 € |
| Slovakia | 16,538,284 € | 48,930 € |
| Slovenia | 12,697,600 € | 99,200 € |
| Spain | 52,836,981,230 € | 4,876,510 € |
| Sweden | 122,872,335 € | 8,191,489 € |
| United Kingdom | 218,762,931,705 € | 24,859,424 € |
| | | |
| Total | 440,375,465,469 € | 5,887,648 € |

4. *Employment and Volunteering*

As with all previous calculations of assets and expenditures, we again proceed in three steps starting with existing EFC data from previous research for only eight countries. The documented 32,500 foundations in the sample of eight countries employ a total staff of 305,000. If that figure was extrapolated for the full sectors of those countries, 944,000 staff would be the result. If the same approach was taken for all EU27 Member States, the sector would employ a total of 1.4 million staff members. The same approach results in 232,000 volunteers employed in the sample and a total estimate of 1.5 million volunteers estimated for the EU27).

The second step is contributed by our own survey and again provides raw data and estimates based on the two weighting dimensions by assets and by expenditures. Comparing the results yields a dimension of staff and volunteer involvement in European foundations of approx. 1.5 million full-time staff and 2.5 million volunteers (weighted by expenditure). In addition to that, foundations involve approximately half a million part-time staff and almost a million freelancers, consultants etc. Since it is impossible to identify the FTE equivalent of the part time or freelance staff, we concentrate our argument on full time staff and volunteers.

Employment in European foundations is concentrated in a small number of countries where most of the foundation employees are involved: The United Kingdom, Germany and Spain account for two thirds of foundation employment in Europe, and Poland and Hungary also add a substantial share, so that 80 % of all European foundation employees work in those five countries. France, Denmark and Italy follow with approximately 50,000 employees in each of those countries. In all other countries employment in foundations is almost negligible with very low FTE numbers for Sweden, Slovenia, Slovakia, Romania, Malta, Lithuania, Latvia, Greece, Finland, Estonia, Belgium, Cyprus and the Czech Republic.

Rather than elaborating on the analysis in greater detail, we need to focus on a plausibility test of the estimation against other data and the interpretation of the results. It is interesting to note that the weighting by assets resulted in higher totals but in a substantially altered distribution by countries, which allows for some conclusions concerning the plausibility of the results. In countries like Germany or Spain, where the sector includes many large operating foundations of which several very large ones were included in the raw data sample, the extrapolation based on asset levels leads to a substantial overestimation of total employment. This is because the raw data averages

include the high employment levels typical for operating foundations, especially for those in health and care services. On the other hand, employment is more correlated to expenditure levels than to asset size, because operating foundations generate substantial income for services and do not exclusively rely on the yield of their endowment. Therefore, the figures given above based on weighting by expenditure are definitely a closer representation of reality than the even higher ones based on asset weights.

In the German case, we have the opportunity to test the resulting data against the more detailed data of the German Association of Foundations from their survey of all German foundations done every three years. Their figures show approximately 150,000 staff, against which our estimate of close to 200,000 clearly overstates the field. If the same overestimation was probable in other large sector countries for which we do not have data from independent sources, we would have to correct our estimates down by at least 25 %. This estimate is also supported by the fact that the survey respondents gave additional account of substantial part-time employment.

On the other hand, weighting by expenditure clearly overrates employment in countries like the UK with a predominant grant-making culture and hardly any operating foundations. This dimension is indicated by the huge difference between the two weighting approaches for the UK which suggest that the real figure may be closer to 100,000 than to the overestimated 500,000 when weighting by expenditures. It also seems unlikely that the substantially smaller Spanish foundation sector employs more people than its much larger German counterpart. We therefore have to assume that the Spanish figure needs to be corrected down to the dimension of the German sector at maximum. For Denmark, we have additional data as well, at least concerning the corporate foundations, which seem to suggest that the figures may have to be reduced by approximately 40 %. In conclusion, we can estimate the resulting full-time employment in foundations in Europe at between 750,000 and around one million people. It should be noted that this figure does not include any of the employment in related corporations in which foundations hold (majority) shares in certain countries. The figures only refer to the employment in the public benefit section of the activities.

Estimating the level of volunteer involvement is even more difficult because levels of volunteering reported in the raw data are based on very limited numbers of cases and limited levels of involvement, with the exception of Portugal. With the weighting approach applied without distinction to all countries, Portuguese results are most likely to be highly distorted. The totals (according to both weighting approaches) for Portugal and Denmark seem to be grossly overstating the case. Reducing the levels of those to countries to a dimension similar to the other countries (by the size of the population) would result in a volunteer level of again approximately one million people (counted as FTEs). Comparative insights into the whole non-profit sector are consistent with this suggestion because in the non-profit sector as a whole total staff time by professionals and by volunteers is also in a similar dimension. The data do not allow for any more detailed analysis because we do not have a sufficient level of independent data from other sources.

Table 4: Employment and volunteering in foundations, by country (based on expenditure approach)

| | Staff (full-time) | | Staff (part-time) | | Staff (freelancers, consultants, self employed) | | Staff (volunteers) | |
|-----------------------|----------------------|------|----------------------|------|---|------|-----------------------|------|
| | Sum | Mean | Sum | Mean | Sum | Mean | Sum | Mean |
| Belgium | 4,263 | 11 | 2,390 | 6 | 1,085 | 3 | 743 | 2 |
| Cyprus | 2,420 | 97 | 0 | 0 | 0 | 0 | 1,000 | 40 |
| Czech Republic | 7,207 | 6 | 1,992 | 2 | 5,208 | 4 | 23,560 | 19 |
| Denmark | 56,060 | 4 | 13,993 | 1 | 14,060 | 1 | 1,385,258 | 99 |
| Estonia | 6,885 | 38 | 1,358 | 8 | 37,352 | 210 | 4,480 | 25 |
| Finland | 7,220 | 3 | 6,639 | 3 | 128,078 | 49 | 127,958 | 49 |
| France | 45,183 | 37 | 37,265 | 30 | 5,310 | 4 | 55,054 | 45 |
| Germany | 199,695 | 17 | 73,634 | 6 | 21,016 | 2 | 123,226 | 10 |
| Greece | 4,171 | 9 | 1,643 | 3 | 1,959 | 4 | 3,223 | 7 |
| Hungary | 146,175 | 9 | 62,625 | 4 | 41,745 | 2 | 225 | 0 |
| Ireland | 0 | 0 | 76 | 1 | 15 | 0 | 122 | 1 |
| Italy | 48,558 | 10 | 4,397 | 1 | 18,490 | 4 | 855 | 0 |
| Latvia | 8,970 | 69 | 260 | 2 | 6,500 | 50 | 0 | 0 |
| Lithuania | 15 | 0 | 130 | 1 | 0 | 0 | 0 | 0 |
| Malta | 2,150 | 7 | 415 | 1 | 200 | 1 | 11,785 | 37 |
| Netherlands | 12,299 | 11 | 9,275 | 8 | 208 | 0 | 2,888 | 2 |
| Poland | 116,522 | 19 | 20,387 | 3 | 161,748 | 27 | 152,132 | 25 |
| Portugal | 50,368 | 104 | 24,910 | 51 | 12,925 | 27 | 457,193 | 943 |
| Romania | 915 | 3 | 30 | 0 | 165 | 1 | 0 | 0 |
| Slovakia | 452 | 1 | 6,977 | 17 | 1,313 | 3 | 9,735 | 24 |
| Slovenia | 256 | 2 | 0 | 0 | 384 | 3 | 384 | 3 |
| Spain | 284,234 | 26 | 8,656 | 1 | 450,112 | 42 | 36,788 | 3 |
| Sweden | 570 | 38 | 30 | 2 | 0 | 0 | 0 | 0 |
| United Kingdom | 520,375 | 69 | 217,195 | 29 | 59,255 | 8 | 125,730 | 17 |
| Total | 1,524,962 | 19 | 494,276 | 6 | 967,127 | 12 | 2,522,336 | 31 |

5. Growth Patterns of Foundations

In the past ten to fifteen years, the foundation sector in Europe has been experiencing a remarkable growth. Empirical data suggest a significant growth rate since the 1980s. Between 28 % and 40 % of all foundations in EU Member States such as Germany, Finland, France and Belgium were founded in the last decade. A recent survey of the European Foundation Centre (EFC) estimates that, at the turn of this century, there were some 16 foundations per 100,000 inhabitants in the EU. The data also show the colourful variety of the sector, which was further enriched by the enlargement of the European Union from 15 to 27 Member States.

There are several reasons for the remarkable growth in the number and the economic importance of foundations: First, there is a significant amount of private wealth that is and will be transferred from one generation to the next. Parts of this wealth will be

given to public benefit purposes. One other reason may be the tendency in many Member States to delegate several public functions to ‘private organisations’. These private organisations can be for-profit organisations (e.g., limited liability companies) as well as non-profit organisations (e.g., foundations or trusts). Another reason for the growth may be that many Member States have decided to reform their national foundation laws, charity laws and/or tax laws in order to encourage the use of foundations and trusts as instruments for private actions in the public interest. In the past years, such reforms have taken place in Austria, Belgium, England and Wales, France, Germany, Italy, the Netherlands, Scotland, Spain as well as in almost every Central and East European Member State.

II. Foundation Types

1. Public Benefit Foundations

What do foundations do? According to Table 1,²⁹ public benefit foundations are the only or the most significant type in most Member States (except Estonia, Latvia and the Netherlands).

As regards this type, two fields clearly dominate the profile of foundation activity in Europe: education and research, with an average of 30 % of foundation activity, and social service (25 %). Together, both fields account for over one-half of foundation activities so measured. In fact, education and research and social services are the main categories of foundation activity in the countries included in the present analysis and previous analyses (Anheier, 2001). Adding health care, with an average of 17 % of foundation activity, pushes the total share up to 71 %. In other words, two-thirds of foundations operate in just three fields, the same fields that also dominate the non-profit sector at large (Salamon et al., 1999).

The field of art and culture accounts for the next largest share of foundation activities. It is the most important area of activity of foundations in Spain, with 44 % of all foundations involved in this field, and is relatively prominent in Finland, Germany, Italy, Portugal, the Czech Republic and Poland. Some countries show clear concentration in one field in particular: this is the case for healthcare foundations in France, housing foundations in Ireland and to a certain extent also in Estonia, international activities in the Netherlands, and cultural foundations in Spain. Such concentrations are the result of specific historical developments, e.g., urgent demand for affordable housing in early 20th century Ireland, or institutional effect, such as the prominence of large healthcare research foundations in France, e.g., the Institut Pasteur and Institut Curie (Archambault et al., 1999).

2. Private Benefit Foundations

a) General Information

The general data in this report refer to public benefit foundations which account for the vast majority of all European foundations. Only about half the jurisdictions of the EU

²⁹ See supra B I 1.

accept private benefit foundations: *Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Italy, Latvia, Malta, the Netherlands and Sweden*. In most of these countries the number of non-public foundations is comparatively low. As regards the exemption of the *Netherlands* it can be referred to the introductory remarks above³⁰.

Generally, it is not possible to single out information on private benefit foundations as they were not explicitly targeted in the data available to us.³¹

b) The Case of Austria

The exemption, as regards the data situation, is Austria. Austria has somewhat more specific documentation on its 2,843 private benefit foundations,³² of which almost 90 % have been created since the Private Purpose Foundation Law passed in 1994.³³ Their total asset base is estimated to be € 40bn.³⁴ Higher estimates of the numbers may be distorted by including dissolved foundations and public benefit foundations established by federal or State laws.

According to research conducted at the Vienna University of Economics and presented in Table 5, a number of Austrian private purpose foundations are hybrid organizations in that they pursue public benefit purposes as well (369 foundations, 13 %) or were even established for public benefit purposes only (217 foundations, 7.6 %). The predominant areas of activity are culture, sports and leisure, education and research, and health and social purposes. Almost half of all private purpose foundations in Austria were created in Vienna.³⁵

The overall economic relevance of the private purposes foundations in Austria is difficult to assess because we do not have information on the breakdown of their assets. Scattered information points out that in 79 of the 100 largest Austrian corporations private purpose foundations hold significant equity.³⁶ However, such estimates may be too high as private purpose foundations hold a majority of equity in 23 of the top 200 Austrian corporations – which still amounts to a substantial share of equity capitalisation. The total turnover of these corporations is € 19.1bn, and the total number

³⁰ See above A I 3 a.

³¹ In Germany, the Bundesverband Deutscher Stiftungen estimates that 5% or 700 of the 15,000 existing German foundations are private benefit foundations and a further 3% were established for both private and public benefit purposes. Bundesverband Deutscher Stiftungen, Verzeichnis Deutscher Stiftungen, Berlin 2005, Zahlen Daten Fakten, p. A20.

³² Data produced by the Research Institute on Non-profit Organization, Wirtschaftsuniversität Wien, Vienna. By courtesy of Prof. Michael Meyer, to whom we are grateful for allowing us to use the research data of the Institute. Other data refer to 3,105 private benefit foundations, which may be including a number of dissolved foundations.

³³ Chancellor Gusenbauer, in: Der Standard, 12.12.2007, www.derStandard.at/Investor/Wirtschaft/Steuern

³⁴ Österreichischer Rundfunk 2008, www.orf.at; Other sources even refer to a total asset base of € 60bn., which could potentially be explained by different valuations depending on the accounting approach applied, see <http://diepresse.com/home/wirtschaft/economist/350486/index.do>

³⁵ Calculations by Research Institute for Non-profit Organizations, Wirtschaftsuniversität Wien, Vienna, by courtesy of Prof. Michael Meyer.

³⁶ Forum Privatstiftungen, www.forum-privatstiftung.at.

of employees is 119,000 (See Table 7 for details, calculations by CSI Heidelberg).³⁷ Related to the Austrian economy (total GDP of € 268.74bn),³⁸ the total assets of Austrian private purpose foundations represent approximately 15 %, and the turnover of the top 200 corporations controlled by private purpose foundations (equity majority) accounts for 7 % of the GDP.

Since we do not have information on the annual distribution of revenue for these private purpose foundations, it is impossible to provide for an estimate of their contribution to the Austrian economy. All that can be said is that private purpose foundations in Austria control companies whose turnover is in the range of 10 % of GDP. In addition, it may be a rough guess that due to the high concentration ratio which characterises the foundation sector in many countries. These foundations are at the same time among the top ones of their sector and therefore represent the larger part of the estimated assets of all private purpose foundations.

Table 5: Austrian hybrid private foundations by public benefit purposes and region

Private purpose foundations in Austria with public benefit purposes (according to their charters)

| Public benefit and hybrid purposes* | W | B | S | V | T | K |
|--|----------|----------|----------|----------|----------|----------|
| 1 Culture, sports, leisure | 46 | 2 | 9 | 0 | 1 | 3 |
| 2 Education and research | 48 | 2 | 14 | 0 | 4 | 7 |
| 3 Health | 12 | 0 | 3 | 1 | 1 | 0 |
| 4 Social purposes | 21 | 1 | 8 | 3 | 2 | 0 |
| 5 Environment | 9 | 0 | 1 | 0 | 0 | 0 |
| 6 Local communities and housing | 3 | 0 | 3 | 0 | 0 | 3 |
| 7 Law, advocacy and politics | 1 | 0 | 2 | 0 | 2 | 0 |
| 8 Philanthropy, giving, volunteering | 0 | 0 | 1 | 0 | 0 | 0 |
| 9 International issues | 9 | 0 | 2 | 0 | 0 | 0 |
| 10 Religion | 2 | 0 | 0 | 0 | 1 | 2 |
| 11 Professional associations, unions | 16 | 0 | 0 | 0 | 0 | 0 |
| 12 Other | 26 | 3 | 0 | 5 | 2 | 3 |

| Public benefit only* | W | B | S | V | T | K |
|-----------------------------|----------|----------|----------|----------|----------|----------|
| 1 Culture, sports, leisure | 24 | 1 | 4 | 0 | 1 | 2 |
| 2 Education and research | 29 | 1 | 8 | 0 | 3 | 6 |

³⁷ Note that Austrian Chancellor Gusenbauer claims that approximately 500,000 employees work in companies which are at least partly owned by private purpose foundations. Gusenbauer in: Der Standard, 12.12.2007

³⁸ www.bmwa.gv.at/BMWA/Wirtschaftsdaten/

Private purpose foundations in Austria with public benefit purposes (according to their charters)

| | | | | | | |
|--------------------------------------|----|---|---|---|---|---|
| 3 Health | 12 | 0 | 2 | 1 | 1 | 0 |
| 4 Social purposes | 14 | 0 | 1 | 2 | 2 | 0 |
| 5 Environment | 5 | 0 | 1 | 0 | 0 | 0 |
| 6 Local communities and housing | 3 | 0 | 2 | 0 | 0 | 3 |
| 7 Law, advocacy, politics | 1 | 0 | 2 | 0 | 2 | 0 |
| 8 Philanthropy, giving, volunteering | 0 | 0 | 1 | 0 | 0 | 0 |
| 9 International issues | 9 | 0 | 1 | 0 | 0 | 0 |
| 10 Religion | 1 | 0 | 0 | 0 | 1 | 2 |
| 11 Professional Associations, Unions | 10 | 0 | 0 | 0 | 0 | 0 |
| 12 Other | 7 | 1 | 0 | 3 | 1 | 2 |

| | | | | | | |
|--------------------------------------|----------|----------|----------|----------|----------|----------|
| Private benefit purposes only | W | B | S | V | T | K |
| | 1194 | 27 | 175 | 104 | 95 | 118 |

Table 6: Austrian private purpose foundations by regions

Total number of Austrian private benefit foundations (2007)

| Federal Länder | numbers 2007 | % - distribution 2007 |
|-------------------------|---------------------|------------------------------|
| Wien | 1420 | 49.95 % |
| Oberösterreich | 396 | 13.93 % |
| Niederösterreich | 217 | 7.63 % |
| Steiermark | 216 | 7.60 % |
| Salzburg | 208 | 7.32 % |
| Kärnten | 134 | 4.71 % |
| Vorarlberg | 113 | 3.97 % |
| Tirol | 107 | 3.76 % |
| Burgenland | 32 | 1.13 % |
| Total | 2843 | 100 % |

*) Note: Estimates in public run between 3000 PBFs and 3200 PBFs.

These estimates are most likely incorrect for two reasons:

a) Dissolved private purpose foundations remain in the organization register.

Without detailed analysis they tend to be included in counts.

b) Potentially included pure public benefit foundations established by Austrian federal or state laws are likely to distort the data.

Table 7: Corporations controlled by majority of private purpose foundations

| Top 200 Corporations in Austria with majority equity holdings by private purpose foundations (end 2006)³⁹ | | | | |
|---|---|--------------------------|--------------------------|------------------|
| Rank | Name | Equity Share in % | Turnover in bn. € | Employees |
| 16 | Hofer KG | 87.625 | 3.00 | 6,500 |
| 31 | Alpha Werke Alwin Lehner GmbH and Co.Kg | 100 | 1.98 | 8,900 |
| 41 | A-Tec Industries AG | 55 | 1.59 | 10,654 |
| 67 | Constantia Packaging AG | 60-75 | 1.06 | 6,154 |
| 69 | MCE AG | 91.5 | 1.04 | 8,072 |
| 70 | Kika-Leiner-Gruppe | 100 | 1.03 | 7,800 |
| 72 | MB Automobilvertriebs GmbH-Gruppe | 100 | 1.10 | 2,012 |
| 75 | Plansee Holding AG- Gruppe | 100 | 0.98 | 5,550 |
| 79 | Prinzhorn Holding GmbH | 91 | 0.90 | 4,000 |
| 89 | Spedition Trade Trans Holding GmbH | 100 | 0.78 | 1,200 |
| 97 | Lidl Austria GmbH | 100 | 0.71 | 1,100 |
| 114 | Doppelmayr Holding AG-Gruppe | 80 | 0.58 | 2,223 |
| 120 | Roxcel HandelsGmbH- Gruppe | 100 | 0.54 | 124 |
| 123 | Vivatis Holding AG- Gruppe | 100 | 0.53 | 1,691 |
| 132 | Trenkwalder Personaldienste AG | 99.9 | 0.49 | 42,000 |
| 138 | Kapsch Group BeteiligungsGmbH | 66.7 | 0.47 | 2,310 |
| 139 | Styvia Medien AG- Gruppe | 98.33 | 0.47 | 2,800 |

³⁹ www.news.at/trend/index.html?/articles/0724/580/175720.shtml

| Top 200 Corporations in Austria with | | | | |
|--------------------------------------|------------------------------------|-------|--------------|----------------|
| 161 | DMC DECO metall Intl. Trading GmbH | 85.77 | 0.41 | 50 |
| 166 | Kuhn Holding GmbH-Gruppe | 100 | 0.40 | 660 |
| 184 | Loacker Recycling AG | 95 | 0.37 | 435 |
| 193 | König Holding AG | 95 | 0.35 | 875 |
| 199 | Eybl Intl. AG | 56.4 | 0.34 | 4,050 |
| | Total | | 19.12 | 119,160 |

Note: Total turnover and no. of employees of corporations controlled by private foundations

3. Commercial Foundations

a) General Information

The definition of foundations as used in this study has established a non-distribution constraint for surplus generated. Yet given their grounding in the concepts of charity and philanthropy, to what extent can or should foundations engage in economic activities, irrespective of how the gains are to be used? This question is of particular relevance to operating, corporate and fund-raising foundations.

At one level, there is a good understanding in the economics literature and the System of National Accounts on this point. According to this, the delivery of goods or services at economically significant prices reflecting the cost of production would be a necessary element of what is regarded as an economic activity. More complex is the legal treatment of economic activities such as trading and of activities regarding the administration of assets. Many Member States have different legal rules in organizational laws and/or tax laws for these sets of activities. However, it is not always easy to decide whether a specific activity constitutes 'trading' or 'administration of assets' (e.g., leasing, shareholding). For the purpose of this feasibility study, it is useful to distinguish the following 'economic activities' in a broader sense:

Purpose-related trading refers to the independent delivery of goods or services in markets at or above cost and for revenues that serve or otherwise enhance the public benefit purpose of the foundation. In the US, this type of activity and the revenue yield associated is called related business income, and it is not subject to taxation. An art museum that operates an in-house cafeteria, bookstore or catalogue business would be an example. Non-preferred activities may increase revenue and consolidate organizational finances but, at the same time, they can have negative consequences: they may distract from the central mission.

Unrelated trading refers to the independent delivery of goods or services in markets and to revenues which do not directly serve the public benefit purpose of the foundation. An example would be a museum running a petrol station next door. The tax laws in many

countries include provisions on income unrelated to the charitable or tax-exempt purpose of non-profit organizations. The US Internal Revenue Service defines UBI as income generated from activities, either directly by the non-profit organization itself or indirectly with other organizations or individuals that is unrelated to the exempt purpose, trade or business, and carried out regularly. In the US, activities must meet all three criteria to be treated as UBI, whereas other countries have either stricter or more lenient requirements. In most cases, however, engaging in UBI activities will not jeopardise the tax-exempt status of foundations, although some tax laws establish guidelines on the overall extent of UBI relative to total revenue. Tax authorities impose unrelated business income tax (UBIT) on non-profit organization engaged in UBI activities. UBIT rates tend to be similar to tax on the net income of for-profit corporations.

Asset administration is normally not considered an ‘economic activity’ in a narrow sense, but there are prominent cases in Europe where the exact delimitation is rather complex, even ambiguous. Foundations tend to regard asset administration as a cost, and the yield of portfolio investments as a return to support stated charitable activities. In the US, the tax law stipulates that costs of asset administration are qualifying contributions toward the annual payout requirement of 5 % of the fair market value of all assets that have to be spent on the dedicated charitable purpose of the foundation.

Holding Structures involve legal constructions where the foundation is major shareholder/partner in a company whose commercial activities are not related to the public benefit purpose of the foundation. This is normally not considered to constitute an economic trading activity, but rather regarded as asset administration (e.g., Bertelsmann Foundation) unless the foundation exercises ‘influence’. Such holding structures are not allowed in the US.

Apart from the special case of the Dutch foundation (see above⁴⁰), a further special case of this distinction of purpose-related and unrelated economic activities is represented by the Danish commercial foundations. These constitute a separate legal form to allow for both public benefit and private benefit commercial activities in one legal entity using separate accounts but being governed by one board.

b) The Danish Case

A particular feature of Danish foundations is the possibility to engage in major commercial activities and use a special legal form to do so. The Act of 1991 on Commercial Foundations established the legal framework for foundations to either directly engage in commercial activities or hold controlling interest in commercial entities.⁴¹ 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 distributing profits.

Table 8 shows that the Danish foundation sector includes a substantial number of such commercial foundations which have a share of 12 % of the Danish foundations sector by their number and a share of 19 % of the equity of all companies in Denmark. Commercial foundations related to the number of all companies in Denmark only have a

⁴⁰ See above A I 3 a.

⁴¹ EFC, Foundations’ Legal and Fiscal Environments, p. 59.

share of 0.75 %, which means that commercial foundations control rather larger Danish companies and represent highly concentrated investments. If the comparison is only made to limited companies, the number of commercial foundations is equivalent to 3.16 % of all Danish limited companies.

The sector of commercial foundations is itself highly concentrated with the 76 largest commercial foundations amounting to more than two thirds of the equity of all commercial foundations. In absolute terms, the total equity of Danish commercial foundations amounts to about € 34.6bn, that of the 76 largest ones to almost € 24.6bn, while the total equity of all companies in Denmark as of 2005 was approximately € 183bn.⁴² The total equity of commercial foundations is equivalent to 16.6 % of GDP (2005, current prices).⁴³

The number of people employed by companies controlled by those 76 largest commercial foundations totals 294,367, which is a share of 25.8 % of all employees. However, the employees actually working in all foundations directly only amount to 2.15 % of the total workforce.

By way of a brief summary, Danish commercial foundations hold a very substantial part of Danish corporate equity, are a highly concentrated sector, and through the companies they control contribute to the employment of a quarter of all employees in private companies in the country. For detailed references see Table 8 on Danish foundations by Steen Thomsen.⁴⁴

The Danish case next to the one on Austrian private purpose foundations shows that in those countries which do have special legal provisions for foundations to own or control for-profit corporations these holdings amount to a substantial share of the whole economy. In the corporations controlled by those foundations, we can also identify substantial shares of overall employment.

However, this situation cannot be generalised. Austria and Denmark are two special cases providing for such structures. The legal situation in Germany also allows for foundations to control the majority of a corporation, even though the number of cases in which this applies is small, however prominent the corporate names of the controlled companies may be. There are only five foundations which hold the majority of stock in substantial corporations (Robert Bosch GmbH, Bertelsmann AG, Körber AG, Possehl and Co., Fresenius AG). They have total assets of € 8.581bn of the total estimated € 60bn. If three prominent minority holdings by foundations in large corporations (SAP AG, KruppThyssen AG) are included, the assets controlled by the eight cases are € 14.5bn. In absolute terms this represents a small fraction of the economy but indicates that the foundation sector is highly concentrated and the top foundations account for a very substantial share of all assets invested.⁴⁵

⁴² Exchange rate as of May 28th, 2008: 1 Kr. = 0,13405 €

⁴³ Statistics Denmark, Denmark in Figures, www.dst.dk/asp2xml/puk/udgivelser/get_file.asp?id=11111&sid=dod2

⁴⁴ Steen Thomsen kindly provided this data summary of Danish foundations, based on his own calculations.

⁴⁵ Calculations from annual reports and data of the German Association of Foundations, by CSI:

Assets by:

- Bosch Foundation € 5.050 m
- Bertelsmann Foundation € 622 m

In this context it is important to note that the asset figures given underestimate the fair market value of the assets substantially, because all foundations used book values more or less far below market prices. We have no information for other European countries.

Table 8: Commercial foundations in Denmark

| Commercial foundations in Denmark | |
|---|-------------|
| Number of | 2007 |
| Non-commercial foundations | 9,472 |
| Commercial foundations | 1,293 |
| Limited companies | 40,932 |
| All companies in Denmark [†] | 172,306 |
| <i>Ratio</i> | |
| Commercial foundations/ Limited companies | 3.16 % |
| Commercial foundations/ All companies | 0.75 % |
| Commercial foundations/ All foundations | 12.01 % |
| Total equity of all (in million DKK) | |
| Commercial foundations* | 257,849 |
| 76 biggest commercial foundations** | 183,627 |
| All companies in Denmark [†] | 1,365,700 |
| <i>Ratio</i> | |
| 76 biggest commercial foundations/ companies | 13.45 % |
| Commercial foundations/ companies | 18.88 % |
| Estimated number of employees of all | |
| Non-commercial foundations*** | 17,739 |
| Commercial foundations*** | 6,751 |
| 76 biggest commercial foundations ^{††} | 294,367 |
| All companies in Denmark [†] | 1,141,132 |
| <i>Ratio</i> | |

-
- Körber Foundation € 300 m
 - Possehl Foundation € 209 m
 - Else-Kröner-Fresenius Fdn. € 2.400 m
 - Klaus-Tschira Foundation € 823 m
 - Dietmar-Hopp Foundation € 4.396 m
 - Krupp Foundation € 703 m

| Commercial foundations in Denmark | |
|---|---------|
| Commercial foundations/ All companies | 0.59 % |
| 76 biggest commercial foundations/ companies | 25.80 % |
| All foundations/ All companies | 2.15 % |
| † 2005. Agriculture, fishing, quarrying, public and personal services companies are not included | |
| † † The figure is consolidated, i.e., it includes employees in the companies controlled by the 76 biggest commercial foundations (control implies > 33 % of the votes). | |
| * Values are not always consolidated. | |
| ** Estimated consolidated value | |
| *** The values are not consolidated. | |
| Sources: Ministry of Economics and Business; The Danish Statistical Office; Center for Corporate Governance | |

C. Foundations in the US

The introductory remarks above provide information on the different approaches of definition.⁴⁶

I. Introduction

This section maps the US foundation sector, in particular with regard to the role of the foundation sector in the economy and to what extent foundations undertake economic activities.

The following questions are addressed:

- How many foundations exist?
- How big are the total assets of foundations?
- How big is their annual expenditure?
- How many people are employed by foundations?
- How many volunteers are active in foundations?
- How important are the economic activities of foundations?
- To what extent is this legal form used to control US corporations?

If one compares the total assets of foundations in the USA and the EU and converts US \$ to €, the two sectors are approximately equal in size (the EU total comes to € 347bn and the US total to € 302bn), while the GDP of the EU is larger than that of the USA (\$ 16,830bn viz. \$ 13,844).⁴⁷ If we compare the annual expenditures rather than assets, the

⁴⁶ See above A II 3 c.

⁴⁷ IMF, World Economic Outlook Database, data for 2007.

figures are even more striking. Total expenditures in the EU can be estimated at € 83bn while total USA expenditures are at \$ 41bn (€ 26.3bn). These estimates for the EU (compared to reliably reported figures from the USA, however!) have to be treated with great caution but seem to indicate that the different structure of the European foundation sector has two consequences on which we can only formulate hypotheses but do not have the data to test them: First, the large share of operating foundations in Europe results in a substantial stream of revenue generated from those operations. And secondly, European foundations may receive substantial transfer payments from public budgets or obligatory social security systems for their services. To indicate the limitations of the comparative look at the USA, we need to point out that these activities by operating foundations are represented by different types of organizations in the USA such as public charities, hospitals and educational institutions or, in most cases, operating non-profits, which are separate categories of organizations in US tax law. If we are to maintain a workable definition for European purposes, we cannot include all these categories of institutions in the assessment because this would require us to include different legal forms in the EU as well.

II. Existing Material

The following data on the US foundation sector are available: (1) National registers and statistics, (2) Survey data of the US Foundation Center, (3) Survey data of other research projects.

1. *National Registers and Statistics*

The IRS Form 990 offers a lot of information for tax-exempt charitable organisations and is open to the public.

2. *Survey Data of the US Foundation Center*

The following data on the US foundation sector are available:

- *Foundation Growth and Giving Estimates: Current Outlook*: The Foundation Center’s study “Foundation Growth and Giving Estimates: Current Outlook” is based on a survey of more than 875 large and mid-size foundations across the US, combined with year-end economic indicators. Survey respondents also provided information on their changing grant-making strategies and on their engagement in direct charitable activities. The report also presents findings on actual 2005 giving and assets tracked by the Foundation Center for the more than 71,000 independent, corporate, community, and grant-making operating foundations in the United States.
- *Foundation Giving Trends (2007 Edition)*: The Foundation Center’s publication “Foundation Giving Trends (2007 Edition)” provides a comprehensive analysis of all grants of \$ 10,000 or more awarded by 1,154 of the largest private and community foundations in the United States in 2005 and has been tracking changes in funding trends since 1996. Grant dollars awarded by these funders totalled \$ 16.4bn and represented roughly half of the overall U.S. foundation giving. The report examines giving by subject focus, recipient type, type of support, population group served, and geographic focus. It also details

differences in funding trends by foundation size, region, and type, and includes brief reports on giving in the aftermath of the Gulf Coast hurricanes and the Indian Ocean tsunami disaster. Foundation Giving Trends is part of the Foundations Today Series of annual research reports on foundation growth and trends in foundation giving.

- *The Foundation Center's Research Database*: The Foundation Center's Research Database contains a wealth of foundation and grant information updated annually by the Center. This authoritative national data source includes financial and programmatic information on all active U.S. grant-making foundations as well as a large sample of foundation grants.
- *Foundation Yearbook: Facts and Figures on Private and Community Foundations*: This yearbook documents the growth in number, giving and assets of all active U.S. foundations from 1975 to 2005.

3. Data of Other Research Projects

There are also several other research projects (e.g., the already stated Johns Hopkins Comparative Non-profit Sector Project), which usually focus on 'non-profit organisations', which also include 'foundations'.

III. Size and Weight

In contrast to EU Member States, we have much better data on US foundations.

1. Number of US Foundations

The number of foundations in the USA nearly tripled from 22,484 foundations in 1978 to over 71,000 foundations in 2005. The number of foundations per million inhabitants increased from 100 foundations in 1980 to more than 200 foundations in 2000. Ninety per cent of the foundations are grant-making, six percent are operating, four percent corporate, and one percent community foundations. While all foundation types have shown substantial increases in their numbers, the number of grant-making foundations has increased most and has nearly tripled since the late 1970s.⁴⁸ Table 9 shows the increase in the number of foundations for that time period:

⁴⁸ See Foundations in the United States. A quantitative overview, page 6

Table 9: Number of foundations by year

| Year | Number of foundations |
|------|----------------------------------|
| 1978 | 22,484 foundations ⁴⁹ |
| 2003 | 66,398 foundations ⁵⁰ |
| 2005 | 71,059 foundations ⁵¹ |

The density of the foundation sector in the US is somewhat lower than in Europe (if calculated for all countries). However, this comparison – as well as those for assets and expenditures below – has to be treated with caution, and we have to keep in mind that the foundation sector in the US is made up of grant-making institutions primarily, whereas in Europe, many operating foundations such as hospitals or nursing homes would be included. In other words, from a US perspective, the European foundation sector includes ‘non’ foundations, i.e., operating establishments of many kinds, that in the US would be treated as non-profit corporations. The reason for this very different classification is the ‘negative definition’ established in 1969 under the Tax Reform Act. According to this act, foundations are tax-exempt organizations under section 501(c)(3) of the International Revenue Code, seen as organizations that receive most of their resources from one source and are as such considered to be donor-controlled.

Thus, if an endowed non-profit organization receives more than 50 % of its revenue from sources other than its own assets, it would not be regarded as a foundation but as a public charity. For example, many private universities in the US have endowments larger than many grant-making foundations, but such endowments and the organizations who own them would not be included in the American foundation sector. Harvard University has an endowment of over \$ 30 billion, which is nearly three times the size of the endowment commanded by the Ford Foundation, one of the largest in the country. In other words, if we look at the assets of American foundations (see below), we need to recall that they exclude the sizable assets of many US non-profit organizations (i.e., public charities).

By contrast, we have European foundations with large expenditures and revenues from various sources but comparatively small endowments. As a result, the relationship between asset size and expenditure in US foundations is positive and linear, whereas it is much less clear in the European case, where one has to look at the relationship between total revenue and expenditure to assess the current economic contribution of foundations. Moreover, since the 1969 Tax Reform Act, foundations are required to pay out annually about 5 % of the fair market value of their total assets in support of their charitable objectives (so-called qualifying contributions made up by grants plus administrative costs).

⁴⁹ Foundation in the United States. A quantitative overview, page 6

⁵⁰ Highlights of Foundation Giving Trends – 1,263 larger foundations

⁵¹ Facts and Figures from the Non-profit Almanac 2008

2. Assets of US Foundations

U.S. foundations reported consecutive years of double-digit annual giving increases for period from 1996 to 2001, and multiple factors contributed to this growth. A return to strong gains in the stock market in 2006, following minimal increases in 2005, helped to boost the resources of existing foundations and raise the level of new gifts coming into foundations. The rate of establishment of new foundations picked up after slowing in the early 2000s, thereby raising the levels of foundation assets and giving. Foundations overall have been paying out at a higher rate relative to their assets than was true in the past, which in part reflects an expansion in the number of foundations being established by “younger” donors who pass giving through their foundations but are not yet ready to fully endow them.⁵²

Foundation assets grew 7.8 % in 2005, from \$ 510.5 billion to a record \$ 550.6 billion. This figure allows us to calculate an average of \$ 7.7m of assets per foundation. Despite minimal stock market gains, strong growth in gifts from donors to their foundations, and an increase in the number of new grant-making foundations helped to boost foundation asset growth several points above inflation. The latest increase in foundation assets followed a 7.1 % rise in 2004 and 9.5 % gain in 2003. Assets grew for 40 of the top 50 foundations in 2005, down slightly from the 42 foundations that reported asset growth in the prior year. Together, assets of the 50 largest endowed foundations grew 4.8 %, surpassing the prior year’s 3.5 % gain for these foundations.⁵³ As of 2007, assets stand at \$ 615 billion. Table 10 lists the largest thirty foundations and illustrates the high concentration of assets in a relatively small number of very large organizations.

Table 10: Largest US foundations, 2008

| Thirty largest U.S. foundations, 2008 ⁵⁴ in US \$, and year of establishment | | |
|---|--|----------------|
| 1999 | Bill and Melinda Gates Foundation (WA) | 38,921,022,000 |
| 1936/ | The Ford Foundation (NY) | 13,798,807,066 |
| 1954/ | J. Paul Getty Trust (CA) | 10,133,371,844 |
| 1936/ | The Robert Wood Johnson Foundation (NJ) | 10,094,684,000 |
| 1966/ | The William and Flora Hewlett Foundation (CA) | 9,284,917,000 |
| 1930 | W. K. Kellogg Foundation (MI) | 8,402,996,155 |
| 1937 | Lilly Endowment Inc. (IN) | 7,734,860,156 |
| 1964 | The David and Lucile Packard Foundation (CA) | 6,350,664,410 |
| 1970 | John D. and Catherine T. MacArthur Foundation (IL) | 6,178,196,933 |
| 1969 | The Andrew W. Mellon Foundation (NY) | 6,130,849,710 |
| 2000 | Gordon and Betty Moore Foundation (CA) | 5,836,161,877 |
| 1996 | The California Endowment (CA) | 4,773,842,000 |
| 1909 | The Rockefeller Foundation (NY) | 3,810,308,770 |
| 1924 | The Kresge Foundation (MI) | 3,329,856,115 |
| 1948 | The Annie E. Casey Foundation (MD) | 3,326,105,746 |
| 1958 | The Starr Foundation (NY) | 3,300,622,910 |
| 1911 | Carnegie Corporation of New York (NY) | 3,137,026,487 |

⁵² Foundation growth and giving estimates. Current outlook, p. 1

⁵³ Foundation growth and giving estimates. Current outlook, p. 2-3

⁵⁴ <http://foundationcenter.org/findfunders/topfunders/top100assets.html>, viewed on 9/7/2008.

| Thirty largest U.S. foundations, 2008 ⁵⁴ in US \$, and year of establishment | | |
|---|---|---------------|
| 1998 | Tulsa Community Foundation (OK) | 3,136,698,010 |
| 1924 | The Duke Endowment (NC) | 2,981,737,964 |
| 1937 | Robert W. Woodruff Foundation, Inc. (GA) | 2,715,991,495 |
| 1989 | The Annenberg Foundation (PA) | 2,685,286,093 |
| 1926 | Charles Stewart Mott Foundation (MI) | 2,629,297,079 |
| 1950 | John S. and James L. Knight Foundation (FL) | 2,618,700,006 |
| 1966 | Casey Family Programs (WA) | 2,490,713,955 |
| 1959 | The Harry and Jeanette Weinberg Foundation, Inc. (MD) | 2,278,259,681 |
| 1953 | The McKnight Foundation (MN) | 2,213,867,840 |
| 1947 | Richard King Mellon Foundation (PA) | 2,088,186,647 |
| 1965 | Ewing Marion Kauffman Foundation (MO) | 2,067,471,575 |
| 1923 | The New York Community Trust (NY) | 2,042,798,738 |
| 1985 | Eli and Edythe Broad Foundation (CA) | 1,964,521,000 |

3. Annual Expenditure of US Foundations

Annual expenditures by US Foundation range around 5 % of total asset value but are usually somewhat higher and include loans, program-related investments, and other program expenses. In 2007, foundations paid out \$ 43 billion in grants, which amounts to 6.9 % of their total assets.⁵⁵ Table 11 lists the 20 largest U.S. grant-making foundations ranked by total giving, based on the most current audited financial data of the Foundation Center's database as of October 12, 2006.⁵⁶

Table 11: The Top 20 US Foundations ranked by Expenditure

| Rank | Name (country) | Total exp. in \$ | Year |
|------|---|------------------|----------|
| 1. | Bill and Melinda Gates Foundation (WA) | 1,356,327,000 | 12/31/05 |
| 2. | Merck Patient Assistance Program, Inc. (NJ) | 519,998,639 | 12/31/04 |
| 3. | The Ford Foundation (NY) | 516,907,177 | 09/30/05 |
| 4. | The Bristol-Myers Squibb Patient Assistance Foundation, Inc. (NJ) | 506,639,972 | 12/31/04 |
| 5. | Lilly Endowment Inc. (IN) | 427,465,199 | 12/31/05 |
| 6. | The Robert Wood Johnson Foundation (NJ) | 372,500,000 | 12/31/05 |
| 7. | The William and Flora Hewlett Foundation (CA) | 319,916,093 | 12/31/05 |
| 8. | Janssen Ortho Patient Assistance Foundation, Inc. (NJ) | 289,783,393 | 12/31/04 |
| 9. | The Annenberg Foundation (PA) | 251,663,628 | 06/30/05 |

⁵⁵ • Foundations are not the only sources of charitable giving. US giving as a whole (including individual and corporate donations) increased by 2.7% to an estimated \$260.3 billion in 2005, capturing an estimated 2.1% of the GDP. This total includes giving by individuals, corporations and foundations. Individuals give most of this money: \$199 billion in 2005, or 76.5% of all giving. Bequests added up to another \$17.44 billion.

• Corporations increased their giving in 2005, up 22.5%, to \$13.77 billion.

• A large part of individual giving goes to religious organizations, which received \$93.2 billion in 2005.

⁵⁶ [<http://www.un.org/partnerships/YStatTop20USFdnExp.htm>]

| Rank | Name (country) | Total exp. in \$ | Year |
|------|--|------------------|----------|
| 10. | Gordon and Betty Moore Foundation (CA) | 225,986,140 | 12/31/04 |
| 11. | W. K. Kellogg Foundation (MI) | 219,862,847 | 08/31/05 |
| 12. | The Andrew W. Mellon Foundation (NY) | 199,340,000 | 12/31/05 |
| 13. | John D. and Catherine T. MacArthur Foundation (IL) | 194,500,000 | 12/31/05 |
| 14. | The Roche Patient Assistance Foundation (NJ) | 174,463,465 | 12/31/05 |
| 15. | The Annie E. Casey Foundation (MD) | 171,354,926 | 12/31/04 |
| 16. | The Starr Foundation (NY) | 168,167,773 | 12/31/04 |
| 17. | Wal-Mart Foundation (AR) | 154,537,406 | 01/31/05 |
| 18. | The California Endowment (CA) | 153,242,789 | 02/28/05 |
| 19. | The David and Lucile Packard Foundation (CA) | 150,115,645 | 12/31/05 |
| 20. | Boehringer Ingelheim Cares Foundation, Inc. (CT) | 147,996,554 | 12/31/05 |

4. Employment in US Non-Profit Organizations

Due to the different bases used, comparisons of employment and volunteering figures are not very meaningful. An international study conducted in the 1990s showed that 8,555,980 FTE employment in the US non-profit sector. This was 6.3 % of the economically active population.⁵⁷ Comparable European figures are, on average, not very different and range between over 14 % for the Netherlands and just around 2-3 % in Scandinavian countries.⁵⁸

Table 12: Number of Employees⁵⁹

| Item | Number | As % of US economy |
|--------------------------|-----------------|--------------------|
| Paid workers | 9.4 million | 7.2 % |
| Volunteer workers (FTEs) | 4.7 million | 3.9 %* |
| Total workforce | 14.1 million | 10.5 %* |
| Wages (\$ billions) | \$321.6 billion | 6.6 % |

*Volunteers added to total employment to compute percentage of total workforce.

5. Volunteers in US Foundations

Figures for 1995 state that the equivalent to 7,246,856 FTE was performed by volunteers,⁶⁰ and more recent 2005 estimates state that 65 million adults volunteer.

⁵⁷ The Johns Hopkins Comparative Non-profit Sector Project (www.jhu.edu/cnp)

⁵⁸ Employment in America's Charities: A profile; Lester M. Salamon and S. Wojciech Sokolowski

⁵⁹ Employment in America's Charities: A profile; Lester M. Salamon and S. Wojciech Sokolowski

Sources: Data on paid employment and wages from Quarterly Census of Employment and Wages (QCEW) accessed through the U.S. Bureau of Labor Statistics. Data on volunteer workers from U.S. Census Bureau, *Current Population Survey*, (<http://www.census.gov/cps/>). Volunteer time converted into full-time equivalent (FTE) workers by dividing the total number of hours volunteered by the number of hours in a typical work year.

Volunteers' hours equivalent in full-time employees decreased from a peak of with 8,086,000 FTEs in 2004 to 7,568,000 FTEs in 2006. The assigned value of the total volunteer time is worth \$ 15,615,300. Broken down by activity, 20 % are administration and support, 18 % social service and care, 14 % travelling, 11 % meetings, conferences and training, and 7 % participating in performance and cultural activities.⁶¹

In 2006, 26.7 % of adults volunteered with an organization. These volunteers spent a total of 12.9 billion hours volunteering in 2006. This figure is down slightly from 2003–2005, when volunteer rates remained steady at 28.8 %. Total hours volunteered have declined in each of the last two years considered (2005 and 2006). About 6.5 % of the population volunteered on an average day in 2006, which translates to a figure of more than 15 million volunteers per day. The average person who volunteered spent 2.31 hours volunteering that day. In total, about 12.9 billion hours were volunteered in 2006. Assuming an ordinary full-time employee works 1,700 hours per year, these volunteer hours would be the equivalent of 7.6 million full-time employees. If we assume that these employees would have earned the average private nonfarm hourly wage, the volunteers' time would be worth \$ 215.6 billion in 2006.⁶²

IV. Comparing the US and the EU

If we compare the US foundation sector (based on the narrower definition described above⁶³) to the European foundation sector (based on a broader definition), we have to keep in mind that foundation means something different in each case. In both instances, assets are concentrated among a small group of foundations.⁶⁴ Education, health and social welfare attract the biggest share of total grants from all foundations. We can observe the same concentration phenomenon for US foundations as for European ones. A comparably small number of foundations hold an impressive share of the overall assets of the sector.

However, looking beyond the number and limitations of empirical comparisons, it is the different institutional grounding of US foundations that sets them apart from Europe – a difference that reaches back to the 19th century. Between the late 1880s to the 1950s, US foundations emerged as private institutions serving public benefit at a time when the capacity, if not legitimacy, of government in a relatively broad range of fields was underdeveloped if not absent: health care, social welfare and higher education are cases in point. In these fields, foundations met few other institutional actors with comparable flexibility, independence, resources and visions; they could operate in a relatively open environment. Foundations were in a position, given their relative size and the absence of government agencies, to engage in basic policy intervention, become institution builders par excellence, with the American university system, research, and arts and culture as the best example.

⁶⁰ The Johns Hopkins Comparative Non-profit Sector Project (www.jhu.edu/cnp)

⁶¹ Facts and Figures from the Non-profit Almanac 2008

⁶² The Non-profit Sector in brief. Facts and Figures from the Non-profit Almanac 2008: Public Charities, Giving, and Volunteering, p.1

⁶³ See supra Part 2 A II 3 c.

⁶⁴ Foundation in the United States. A quantitative overview, page 3

Until the Great Depression and World War II, the organizational capacity to respond to public problems of many kinds (with the exception of fields like public order and security) was largely in private corporations, foundations, non-profit organizations and local communities. This changed dramatically with the rise of the modern state, especially in the fields of education, research, health care, and social welfare. Between the 1950s and 1990s, foundations shifted roles to focus on incremental innovations and policy improvements in the context of a complementary relationship to government. The basic model became that of leveraging limited philanthropic resources to achieve disproportionate impact.

With the reorganization of welfare and the quasi-marketization of many government services, the role of foundations' changed again, in part brought about by the results of innovations they promoted over previous decades. School voucher programs, community organising, health behaviour and the various social movements foundations supported are cases in point. Nonetheless, by the 1990s, foundations, experiencing renewed growth in numbers and resources, found themselves in more diversified and highly complex institutional environments, populated largely by other institutions that had grown even more in their capacity. In response, foundations now search for new roles in serving often specialised demands and seek greater diversity of purposes than in the past. Today, foundations move forward with a multitude of approaches and a renewed emphasis on social entrepreneurship and the capacity of civil society for self-organisation rather than having government as a central reference point. The European development of foundations was very different, being included in governmental agendas more than in the US.

D. Main Findings of Part 2

The empirical analysis of the foundation sector in Europe consists of an extensive secondary analysis of existing data as well as the conduction of an own survey among foundations in Europe, carried out by the CSI Heidelberg.

From the synthesis of these different data sources, we learn that the foundation sector in Europe is, in economic terms, a major force that should not be neglected by the political sphere.

Because of the differences in legally defining the term "foundation", we determined the following as the lowest common denominator of the legal definition of a foundation:

- an independent organization (generally with its own legal personality),
- which has no formal membership,
- is supervised by a State supervisory authority, and
- serves a public benefit purpose (in some Member States: any lawful purpose),
- for which a founder has provided an endowment, and
- determined the foundation's purpose and statutes.

This legal definition is based on criteria which are largely also used for the empirical part.

The European foundation sector is a major economic force and larger than documented by any previous research. Keeping differences in definition and classification in mind, Europe's foundation sector probably exceeds the economic weight of US foundations in assets and even more so in expenditure. Allowing for all the data uncertainty and validity problems, we suggest that the European foundation sector has assets of between

€ 350 and close to € 1,000bn (!) and annual expenditures of between € 83 and € 150 bn. By contrast, US foundations have assets of approximately € 300bn and expenditures of € 29bn.

The number of institutions in Europe's foundation sector is around 110,000 (compared to 71,000 foundations in the USA). Even considering that the EU27 GNP is larger than that of the USA, Europe has developed a large and remarkable foundation sector in its own right. It is important to keep in mind that the much higher presence of operating foundations in Europe also points to differences in what foundations do and whom they serve: European foundations are much more likely to provide services of many kinds (e.g., research, education, welfare, health, culture), whereas US foundations predominantly act as grant-makers distributing funds.

Growth patterns suggest that at least a substantial number of European countries are on track for sustained foundation growth. This may have been the result of recent changes in national foundation law towards a more favourable and encouraging framework for philanthropy in many Member States. It also seems to be a consequence of the democratization and the economic development in many countries of Central and Eastern Europe. In addition to that, several old Member States are currently in the midst of a substantial transfer of economic wealth to the next generation (with unprecedented high levels of inherited wealth).

The European Foundation sector employs between 750,000 and 1,000,000 million full-time employees. In addition, it enjoys the support of a similar number of volunteers (calculated as FTEs). Both this level of professional and voluntary staff involvement and the other figures describing the size of the European foundation sector merit some further qualification. Most European countries have a longstanding and strong tradition of operating foundations. As a consequence, we see figures for expenditures that could never be explained by the mere management of endowed assets in order to make grants. European operating foundations employ thousands of people in their larger institutions and run annual operating budgets of several hundred million euros, with some even reaching a single-digit-billion figure.

The public benefit foundation is the only type of foundation which is accepted in every Member State. As regards this type, there exists a comparably high similarity among the Member States. In practice, in most Member States the public benefit foundation is the only or the most significant type of foundation.

All Member States accept the public benefit foundation type. Although in many Member States "public benefit" is not defined by law according to the findings of the legal comparative analysis, there seems to exist a remarkable amount of similarity both in foundation law and in tax law. With respect to further characteristics of this foundation type, there are many similarities in most, if not all Member States: E.g. no membership, state supervision, only moderate requirements for the internal structure. Comparatively high divergence only exists in a few points (e.g., initial founding assets, requirements for registration, accounting and auditing).

Apart from the public benefit foundation there exists a number of further foundation types which are much less significant in practice than the public benefit foundations and often only tolerated by comparatively few Member States. Examples are the family foundation (generally not significant), foundations for the founder (only in *Austria*), or pension funds (only in the *Netherlands* and *Sweden*).

Examples of such special types are the case vignettes of countries like Austria or Denmark which represent private purpose foundations (*Austria*) and foundations of a hybrid nature serving both private (commercial) and public benefit purposes (*Denmark*). Compared to the size of the whole European sector, these cases represent a small, rather marginal proportion. They have economic weight in their national economies; yet given their low frequency and scale, as well as concentration in only a very few Member States, they do not suggest a potential for general abuse of the foundation form, or diversion of funds for commercial or other private benefit purposes. This general conclusion is not altered by the fact that we can identify very prominent individual cases of the use of the legal form of the foundation for the establishment of corporations in other countries, too (See e.g. the Dutch IKEA Foundation and the German Lidl Foundation).

These so-called “commercial foundations” or “corporate foundations” are significant and occur in several forms. We need to distinguish them according to the relationship between the foundation and the enterprise or the commercial activity: The enterprise purpose foundation is a very rare example (only in **Denmark**), and the same is true for the example of the non-public benefit, but non-profit service-providing foundation resembling a co-operative (only in the **Netherlands**). Much more frequent and accepted by almost all Member States are public benefit foundations which are owners or majority shareholders of an enterprise.

Part 3: Legal Comparative Analysis

A. Introduction

This legal comparative analysis contains a general report. This report provides an overview of the main characteristics of foundation law in the 27 Member States. This will also include a short overview of tax law, because tax questions are regarded as important in case of cross-border activities. The general report is supplemented by several comparative charts.

I. Existing Legal Comparative Contributions about Foundation Law

There exist several recent comparative legal studies, which are presented in chronological order. Please note that several parts of the older contributions are outdated because of later reforms in foundation laws and tax laws in the Member States.⁶⁵

1. *Alfandari/Nardone, Associations et Fondations en Europe (1994)*

This publication contains short country reports on the older Member States.

2. *Communication of the Commission on Promoting the Role of Voluntary Organizations and Foundations in Europe (1997)*

The Communication of the Commission on Promoting the Role of Voluntary Organizations and Foundations in Europe (1997) contains country profiles of the then 15 Member States (i.e., Belgium, Denmark, Germany, Greece, France, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Finland, Sweden, the UK, and Spain).⁶⁶ The law of associations is the dominating part of the Communication's study, and the law of foundations and elements of taxation are part of the country profiles. Several parts of the Commission's study are outdated because of later reforms in foundation laws and tax laws in the Member States.

3. *Hondius/van der Ploeg: Foundations (2000)*

The publication 'Foundations' is a chapter of the International Encyclopaedia of Comparative Law. It contains no country reports, but a general report with references from some European countries and the US, depending on the specific topic.

4. *Hopt/Reuter: Stiftungsrecht in Europa (2001)*

The publication 'Stiftungsrecht in Europa',⁶⁷ which contains a number of country reports (including Austria, Belgium, Denmark, Germany, England, France, Greece, Spain, Italy, the Netherlands, Portugal, Sweden and Spain) as well as an analysis of

⁶⁵ Apart from the contributions presented here, there are also some other publications, e.g. *Council of Europe (ed.)*, *Associations and Foundations* (1998).

⁶⁶ See http://ec.europa.eu/enterprise/library/lib-social_economy/orgfd_en.pdf.

⁶⁷ *Hopt/Reuter (eds.): Stiftungsrecht in Europa*, Köln (2001).

selected foundation law topics gives a profound insight into the colourful variety of foundation laws. Because of recent legal reforms in various Member States, some of the individual country information will be outdated. The comparative analysis is considered a milestone for analysis and debate of European foundation law among legal scholars.

5. *Hopt/Walz/von Hippel/Then: The European Foundation (2006)*

The European Foundation publication of 2006⁶⁸ includes a thorough analysis of the rationale, the function and the reality of European foundation laws. Besides giving recommendations on what a European legal form for foundations could look like, the publication contains a profound comparative analysis of all relevant aspects of foundation laws and the laws on foundation taxation (but not selected country reports). The publication also compares the overall European approach with the legal environment for foundations in the US.

6. *Richter/Wachter: Handbuch des internationalen Stiftungsrechts (2007)*

The “Handbuch des internationalen Stiftungsrechts” of 2007⁶⁹ contains some extensive country reports (including Austria, Belgium, Denmark, Germany, England, France, Greece, Italy, Luxemburg, the Netherlands, Portugal, Sweden and Spain) as well as analyses on tax law and European law topics.

7. *EFC Country Profiles (2007)*

The most recent publication is the hard copy publication of the EFC Country Profiles which was published in May 2007.⁷⁰ The publication contains an overview of the diverse legal and fiscal environments of foundations across the 27 EU Member States, which were drafted by national country experts. Standard sections across all profiles cover specific legal and tax issues for foundations across the EU Member States. The profiles have widened in scope since the previous EFC country profiles publication in 2002. The structure has been redesigned by the EFC membership in co-operation with legal experts. The tax treatment of foundations is also discussed.

II. Methodology

The five studies mentioned above cover most aspects of the law of foundations. However, some additional research needed to be undertaken: The first four studies do not cover all EU Member States, the older studies could not take into account the new reforms, and some relevant questions are not covered by all the publications (e.g., some aspects of cross-border activities).

Additionally, research is not always easy, because sometimes there is a certain amount of legal uncertainty (both in foundation civil law and in tax law), because in many Member States codified law is comparatively short, providing for ongoing discussion whether the few explicit rules are accompanied by some implicit rules (analogy, fundamental principal of law, etc.).

⁶⁸ *Hopt/Walz/von Hippel/Then (eds.): The European Foundation, Cambridge (UK) (2006).*

⁶⁹ *Richter/Wachter (eds.): Handbuch des internationalen Stiftungsrechts, Angelbachtal (2007).*

⁷⁰ *European Foundation Centre: Country Profiles (2007).*

Thus, it was important to use a network of legal experts in all the countries. Because of the speciality of the topic, it was not easy to find experts in all Member States in a comparatively short time period. Some experts could be found because they have worked with the members of the core team in comparative legal research projects in the past. Fortunately, it was possible to use the contacts of the European Foundation Centre with foreign legal experts in order to get information from the remaining Member States.

The following general report will analyse these topics: Definition and Characteristics of a Foundation, Governance and State Supervision, Formation, Liquidation and Fundamental Decisions, Activities of Foundations, and Tax Law in form of an overview.

B. Definition and Characteristics of a Foundation

I. The Different Legal Approaches of Civil Law and Common Law

As regards the meaning of “foundation” there are different approaches in the civil law and common law Member States.

1. The *civil law* Member States follow an organizational approach. In all these Member States, there exists an institutional legal form having rather similar conceptual criteria,⁷¹ which is usually called “foundation” alongside such other legal forms as the (non-profit) association, the company and the co-operative.

Some Member States have different laws or categories for “public benefit” foundations on the one hand and “private” foundations on the other (e.g., *Austria, Belgium, Bulgaria, Greece*). Additionally, several Member States distinguish (alternatively or cumulatively) between “traditional foundations” and “endowment funds” (e.g., *Austria, Czech Republic, France*), “traditional foundations” and “fundraising foundations” (Sweden), “commercial” foundations and “non-commercial” foundations (*Denmark*), “open” and “closed” foundations (*Hungary*), or between different types of foundations (e.g., *Italian* banking foundations) or, as in the *French* case, between several recently introduced foundation types (e.g., university foundations). In the *Czech Republic* there exist traditional foundations and endowment funds and an additional third legal form, the institution (Anstalt), which has many similarities to the foundation in the other civil law Member States.⁷²

The status of a foundation does not usually suffice to qualify it for tax benefits; the foundation is only tax exempt if it meets the separate requirements of tax law, which can also be met by other organizations (e.g., associations and companies as is the case in *Germany* and *the Netherlands*, for example). Some Member States, however, impose prerequisites on a foundation comparable to those of tax-exempt organizations (e.g., *Spain*). In these cases the foundation’s status may indicate that it will usually also have tax benefits.

⁷¹ See II *infra*.

⁷² From a theoretical point of view such an institution is traditionally not regarded as a “foundation category” but as a “third category” apart from foundations and associations. From a functional point of view, however, the institution has no members and is significantly more similar to a foundation than to a membership-based association. Thus the *Czech* institution would be regarded as “foundation type” in the other civil law Member States not having the legal form of the institution.

2. The *common law Member States (Cyprus, Ireland, United Kingdom)* do not have any special legal form for a “foundation”.⁷³ The approach is to focus on the “charitable” character of the organization. To be a charitable institution, an organization must have exclusively charitable purposes and it must be administered for public benefit. Charities may take a number of legal forms (unincorporated association, limited or unlimited company, declaration of trust, will trust, body incorporated by act of Parliament or Royal Charter, and the new Charitable Incorporated Organization). Because there is no special legal form for a “foundation” in the *common law Member States* we will discuss in what follows the trust as the traditional and mainly used legal form for charities.

Their charitable status makes charities eligible for tax benefits. Registration as a charity is conclusive proof of charitable status, and a registered charity will therefore be accepted by the Inland Revenue as entitled to claim these tax privileges. While there is no necessary link between charitable status and tax relief, it has long been established in policy and practice.

3. Some *civil law Member States (Finland, France, Germany, Greece, Hungary)* also know foundations without a legal personality, which can have some similarities with the trust form.

II. Conceptual Criteria Characterizing a Foundation

1. The definitions in the *civil law Member States* given by statute or offered by legal scholars show that there exist a number of conceptual criteria which are rather similar.

Thus a foundation is

- an independent organization (generally with its own legal personality),
- which has no formal membership,
- and serves a specific purpose
- for which a founder has provided an endowment, and
- determined the foundation’s purpose and statutes.

Furthermore, the foundation typically (but not necessarily)

- has an unlimited duration,
- is under the review of a State supervisory authority, and
- must not make distributions by way of profit or gain to its founder(s) or the members of its organs of government.

2. The *common law* approach would see such an organization as just one kind of charity if its purpose is “charitable”.

III. Legal Personality

1. In the *civil law Member States*, a consequence of the organizational independence is usually that foundations have full legal personality, which includes limited liability and full transactional capacity.

⁷³ In the common law Member States the term “foundation” is nevertheless traditionally used when referring to grant-making charities (however constituted) having secure funding.

The only civil law Member State which has restrictions on the acting capacity of the legal personality is *Luxembourg*. In *Luxembourg* a foundation is only allowed to hold immovable property if it is necessary for the furtherance of the foundation's (public benefit) purpose. The reason for this is the old fear of the "dead hand" or "mortmain". Some Member States have had comparable provisions, but abolished them recently (e.g., *Italy* in 1997 and *Belgium* in 2002). In *France* the strict rules regarding the possession of real property for public benefit associations do not apply to foundations.

Some Member States require approval by the State supervisory authority if a foundation wishes to acquire certain assets (e.g., donations, immovable property). It is arguable whether such rules should be regarded as a restriction on legal capacity or as a measure of (preventive) State supervision. We follow the latter approach, for the rationale behind these rules seems to be less the fear of the "dead hand" and more the wish to prevent abuse (which is also the rationale for other rules of preventive State supervision). Consequently, these rules are discussed along with the other measures for State supervision.⁷⁴

2. In the *common law Member States* (and also a few civil law jurisdictions) there are charitable trusts which have no legal personality. The advantage of a legal personality is only available if the charity is incorporated as another legal form: (1) by Act of Parliament or (other than the Irish Republic) Royal Charter, (2) under company law (as a "charitable company"), or (3) as Charitable Incorporated Organization (CIO).

IV. Types of Foundations According to Their Purpose

1. Nature of the Purpose

All Member States require that an endowment is dedicated to a specified purpose. However, there are differences between the Member States as to the nature of that purpose.

There are three main kinds of restriction:

- (1) "public benefit" purposes (*Czech Republic, France, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, Spain* and the *United Kingdom*),
- (2) "useful" purposes (*Finland*), and
- (3) "any lawful" purposes (*Cyprus, Denmark, Estonia, Germany, Italy, Latvia, Malta, the Netherlands* and *Sweden*).

Some Member States have different laws or categories for "public benefit" foundations on the one hand and "private" foundations on the other; the latter are allowed to pursue any lawful purpose (*Austria, Belgium, Bulgaria, Greece*).

Chart 1: Permitted Purposes

| Country | What purposes are foundations legally permitted to pursue? |
|----------------|---|
| Austria | Public foundations: only public benefit purposes Private foundations: any lawful purpose |

⁷⁴ See C III 3 *infra*.

| Country | What purposes are foundations legally permitted to pursue? |
|-----------------------|---|
| Belgium | Public foundations: only public benefit purposes Private foundations: any lawful purpose |
| Bulgaria | Any lawful purpose |
| Cyprus | Any lawful purpose |
| Czech Republic | Public benefit only |
| Denmark | Any lawful purpose |
| Estonia | Any lawful purpose |
| Finland | "Useful" purposes |
| France | Public benefit only |
| Germany | Any lawful purpose |
| Greece | Any lawful purpose |
| Hungary | Public benefit only |
| Ireland | Public benefit only |
| Italy | Any lawful purpose |
| Latvia | Any lawful purpose |
| Lithuania | Public benefit only |
| Luxembourg | Public benefit only |
| Malta | Any lawful purpose |
| Netherlands | Any lawful purpose |
| Poland | Public benefit only |
| Portugal | Public benefit only |
| Romania | Public benefit only |
| Slovakia | Public benefit only |
| Slovenia | Public benefit only |
| Spain | Public benefit only |
| Sweden | Any lawful purpose |
| United Kingdom | Public benefit only |

A closer look shows that the wording of the statutory definitions can be misleading sometimes. On the one hand, the mere fact that foundations must pursue a public benefit purpose does not necessarily mean that any private distribution is prohibited.⁷⁵ The converse is also true. Even the Member States which allow “any lawful purpose” often have restrictions as regards private distributions to the founder herself/himself or to her/his family or as regards “Enterprise Purpose Foundations”. Such restrictions are sometimes explicit in statutory law, but there are also examples of implicit restrictions.

⁷⁵ See B IV 4 infra.

2. *Public Benefit Foundations*

a) Relevance of Public Benefit Foundations

From a legal comparative perspective, public benefit foundations are one type of foundation which is accepted in every country. Moreover, according to the empirical analysis of this study, the public benefit foundation generally seems to be the most relevant type of foundation in the Member States which permit every lawful purpose.

b) Definitions of Public Benefit

Against this background it is important to clarify whether the term “public benefit purpose” is comparable in the different Member States. This question is not easy to answer.

At first it should be noted that the term “public benefit” can (but need not) have a different meaning in civil organizational law (which decides whether a foundation can be established) and tax law (which decides whether the established foundation will have tax privileges). Generally, however, a public benefit foundation (under civil law) will also be a tax-exempt foundation under tax law.

As regards the legislative definition of the public benefit purpose, three different solutions have been adopted by Member States that have defined the promotion of a public benefit purpose in their civil law and/or tax law legislation:

- (1) a closed list of public benefit purposes
- (2) an open list of public benefit purposes
- (3) no definition at all

Most Member States have no definition or an open list of public benefit purposes. One of the few Member States which has tried to implement a closed list of public benefit purposes in civil law is *Hungary*. According to Hungarian law, public benefit includes:

1. health preservation, disease prevention, therapeutic and medical rehabilitation activities,
2. social activities, family counselling, care for the elderly,
3. scientific activities, research,
4. school instruction and education, personal ability development, dissemination of knowledge,
5. cultural activities,
6. preservation of cultural heritage,
7. preservation of historical monuments,
8. nature preservation, animal protection,
9. environmental protection,
10. children and juvenile protection, children and juvenile advocate services,
11. promotion of equal opportunity within society for underprivileged groups,
12. protection of human and civil rights,
13. activities in connection with ethnic minorities living in the state and with nationals of state living outside its borders,
14. sports, not including sports activities involving professionals and those performed under contract within the framework of a civil law relationship,
15. protection of public order and traffic safety, voluntary fire fighting, rescue, and disaster preparedness and response activities,
16. consumer protection,
17. rehabilitative employment,

18. promotion of employment and training for underprivileged groups in the labour market, including placement by the hiring-out of workers, and associated services,
19. promotion of the country's Euro-Atlantic integration,
20. services provided to and available solely for non-profit organizations;
21. activities associated with flood and water damage control; and
22. activities associated with the construction, maintenance and operation of public roads, bridges and tunnels.

c) Conceptual Criteria Characterizing a Public Benefit Purpose

In order to clarify the term "public benefit" more exactly several legal country experts were consulted. According to the result of that consultation there are common conceptual criteria characterizing a public benefit purpose.

Thus, a public benefit purpose is

- one of a catalogue of several purposes, which are in all or in most countries regarded as a public benefit purpose
- which supports public (and not private interests)

aa) Catalogue of Public Benefit Purposes

The extensive catalogue of Hungarian law was given to the country experts in order to find out which examples of the catalogue would be regarded as a "public benefit purpose" in their country. The result shows that there are many similarities both in civil law as well as in tax law:

The following purposes seem to be accepted in every Member State (both in civil law and in tax law):

1. health preservation, disease prevention, therapeutic and medical rehabilitation activities,
2. social activities, family counselling, care for the elderly,
3. scientific activities, research,
4. school instruction and education, personal ability development, dissemination of knowledge,
5. cultural activities,
6. preservation of cultural heritage,
7. preservation of historical monuments,
8. nature preservation, animal protection,
9. environmental protection,
10. children and juvenile protection, children and juvenile advocate services,
11. promotion of equal opportunity within society for underprivileged groups.

The following purposes seem to be accepted in most, but not in all Member States:

1. protection of human and civil rights (not in **France**, not under **Irish** tax law,⁷⁶ and probably not under **Belgian** tax law),
2. activities in connection with ethnic minorities living in the state and with nationals of your state living outside its borders (not under **Italian** tax law)
3. sports, not including sports activities involving professionals and those performed under contract within the framework of a civil law relationship (generally not under **Irish** tax law⁷⁷),

⁷⁶ Certain internationally recognised human rights organisations qualify for the same tax reliefs as charities in Ireland (see section 209 Taxes Consolidation Act 1997).

⁷⁷ Non-profit amateur sporting bodies are eligible for income tax exemption under Section 235 of the Taxes Consolidation Act 1997. The promotion of amateur sport is not a charitable purpose *per se* under

4. protection of public order and traffic safety, voluntary fire fighting, rescue, and disaster preparedness and response activities (not in **France** and not under **Belgian, Italian** and **Irish** tax law),
5. consumer protection (not in **France**, not under **Irish, Italian**, and **Swedish** tax law, probably not under **Belgian** tax law),
6. rehabilitative employment (not under **Italian** and **Swedish** tax law, probably not under **Belgian** tax law),
7. promotion of employment and training for underprivileged groups in the labor market, including placement by the hiring-out of workers, and associated services (not under **Swedish** tax law),
8. promotion of the country's Euro-Atlantic integration (not in **Greece, Italy** and **Latvia**, unclear in **Slovakia** and the **United Kingdom**, not under **Czech, Irish, Portuguese** and **Swedish** tax law, probably not under **Belgian** tax law),
9. services provided to and available solely for non-profit organizations (not in **France, Italy** and **Latvia**, unclear in **Slovakia**, not under **Czech, Portuguese** and **Swedish** tax law, probably not under **Belgian** tax law),
10. activities associated with flood and water damage control (not in the **Czech Republic, France, Italy**, not in **Irish, Portuguese** and **Swedish** tax law),
11. activities associated with the construction, maintenance and operation of public roads, bridges and tunnels (not in **Bulgaria, France, Italy** and **Latvia**, unclear in **Slovakia**, not under **Czech, Irish** and **Swedish** tax law, probably not under **Spanish** tax law).

The reason for the non-acceptance of these purposes in some Member States may be that some of the aims are regarded as the public authorities' responsibilities, which do not depend of private initiative.

bb) Promotion of “the Public”

The public has to be supported. This means that the beneficiaries must not be limited too narrowly. This general principle seems to be widely accepted in the Member States. Nevertheless, there may be some differences in detail. In order to learn more about how this principle is understood, the country experts were asked to tell us whether they would regard certain examples as “public benefit” (in civil law and/or tax law). The answers show that sometimes there is a comparatively high legal uncertainty.

Chart 2: Limitation of Beneficiaries of Public Benefit Foundations

| Do the following purposes promote the public at large? | | | | | | |
|--|---|--|---|--|---|--|
| Country | For the benefit of the inhabitants of a city with 1,000,000 inhabitants | For the benefit of the inhabitants of a city with 10,000 inhabitants | For the benefit of the employees of a company | For the benefit of the members of a family | For the benefit of the students of a university | Award for the best student of a university |
| | | | | | | |

Irish common law but sporting activity can be a means to promote another purpose recognised as charitable (e.g., education or health).

| Country | For the benefit of the inhabitants of a city with 1,000,000 inhabitants | For the benefit of the inhabitants of a city with 10,000 inhabitants | For the benefit of the employees of a company | For the benefit of the members of a family | For the benefit of the students of a university | Award for the best student of a university |
|-----------------------|---|--|---|--|---|--|
| Austria | yes | yes | no | no | yes | yes |
| Belgium | probably yes | unclear ⁷⁸ | no | no | yes | yes |
| Bulgaria | yes | yes | no | no | no | no |
| Cyprus | unclear | unclear | unclear | unclear | unclear | unclear |
| Czech Republic | unclear | unclear | no | no | yes | probably yes |
| Denmark | yes | probably no ⁷⁹ | no | no | probably yes | no |
| Estonia | unclear | unclear | no | probably no | probably yes | probably yes |
| Finland | yes | yes | generally no | no | yes | yes |
| France | yes | yes | no | no | yes ⁸⁰ | no |
| Germany | yes | yes | no | no | yes | yes |
| Greece | yes | yes | probably no | probably no | yes | yes |
| Hungary | yes | yes | yes | Only health purposes | yes | yes |
| Ireland | yes | yes | no | no | yes | no |
| Italy | unclear | unclear | generally no | generally no | yes | yes |
| Latvia | yes | yes | no | probably no (unless | probably yes | most probably no |

⁷⁸ The criterion “public at large” is not relevant to determine whether tax exemption and income tax deduction should be granted or not. In the above mentioned examples, the income tax exemption for gifts might not be granted in some of the cases, since for some types of charities enumerated by the law there are conditions regarding the geographical scope of activity of the foundation which might not be met (second line). For the first line, this criterion would be met if we take the example of Brussels, which is a city, but also a “region” in the sense of the Belgian law. Universities (lines 5 and 6) do not meet the criterion of geographical scope, but are explicitly mentioned by the law as eligible for tax benefits.

⁷⁹ According to a Guideline of the Ministry of Finance, the group of beneficiaries must not be geographically or otherwise limited to less than 40,000 persons.

⁸⁰ Provided it benefits also future students of the university.

| Country | For the benefit of the inhabitants of a city with 1,000,000 inhabitants | For the benefit of the inhabitants of a city with 10,000 inhabitants | For the benefit of the employees of a company | For the benefit of the members of a family | For the benefit of the students of a university | Award for the best student of a university |
|-----------------------|---|--|---|--|---|--|
| | | | | poor family) | | |
| Lithuania | yes | yes | yes | yes | unclear | unclear |
| Luxembourg | unclear | unclear | probably no | no | probably yes | probably yes |
| Malta | N/A | N/A | N/A | N/A | N/A | N/A |
| Netherlands | N/A | N/A | N/A | N/A | N/A | N/A |
| Poland | yes | yes | no | no | yes | yes |
| Portugal | N/A | N/A | N/A | N/A | N/A | N/A |
| Romania | N/A | N/A | N/A | N/A | N/A | N/A |
| Slovakia | unclear | unclear | unclear | unclear | unclear | unclear |
| Slovenia | N/A | N/A | N/A | N/A | N/A | N/A |
| Spain | yes | yes | probably no | no | probably yes | probably yes |
| Sweden | N/A | N/A | N/A | N/A | N/A | N/A |
| United Kingdom | N/A | N/A | N/A | N/A | N/A | N/A |

cc) Differences exist regarding hybrid structures and split-endowment interests (see B IV 4 infra).

3. Other Types

Apart from the Public Benefit Foundation, some Member States also accept other types of foundations pursuing another purpose.

Chart 3: Types of Foundations According to Purpose

| What types of foundations (apart from public benefit foundations) exist in your country? | | |
|--|--------------------------------|---|
| Country | Family foundations | Others |
| Austria | yes (only private Foundations) | Foundation for the founder |
| Belgium | yes (only private Foundations) | no |
| Bulgaria | yes (only private Foundations) | no |
| Cyprus | no | no |
| Czech Republic | no | <i>Specific types of public benefit foundations: endowment fund</i> |

| Country | Family foundations | Others |
|----------------|--------------------------------|---|
| Denmark | yes | Enterprise purpose foundations |
| Estonia | yes | no |
| Finland | yes | Pension funds |
| France | no | <i>Specific types of public benefit foundations:</i> university foundations, corporate foundations, foundations for scientific cooperation, university foundations (<i>fondations universitaires</i>), partnership foundations (<i>fondations partenariales</i>), endowment funds (<i>fonds de dotation</i>), foundations with no legal personality created under the aegis of some public benefit foundations duly authorised in that respect (<i>fondations sous égide</i>) |
| Germany | yes | Public foundations, church foundations |
| Greece | yes (only private foundations) | no |
| Hungary | no | no |
| Ireland | yes (as private trust) | no |
| Italy | yes | <i>Specific types of public benefit foundations:</i> Banking foundations, music foundations, universities' foundations, participatory foundations |
| Latvia | no | no |
| Lithuania | no | no |
| Luxembourg | no | no |
| Malta | yes | no |
| Netherlands | yes | Enterprise purpose foundations, pension funds |
| Poland | no | no |
| Portugal | no | no |
| Romania | no | no |
| Slovakia | no | no |
| Slovenia | no | no |
| Spain | no | Religious foundations |
| Sweden | yes | Enterprise purpose foundations, pension funds |
| United Kingdom | yes (as private trust) | no |

In the following sections some examples of such foundations types are presented.

a) Family Foundations

Several Member States accept the family foundation, which is a foundation for promoting the benefit of members of the family of the founder. Some Member States do not allow such foundations, some only with certain restrictions.

While it is consistent that Member States which require a public benefit purpose usually do not permit a foundation to have the purpose of promoting the benefit of members of the founder's family, even most of the Member States which in principle allow "any lawful" purpose have certain restrictions regarding family foundations, e.g., needy family members (e.g., *the Netherlands, Italy*), close relatives (e.g., *Denmark*), or is of limited duration (e.g., *Austria, Denmark*, see also *Ireland* and *UK* as regards private trusts). Only in a few Member States are family foundations allowed without such restrictions (e.g., *Germany* according to the prevailing view).

b) Foundation for the Founder

Almost every Member State seems to require a "non-distribution" constraint for foundations, in the sense that no private benefits (distributions made without adequate compensation) may be provided to the founder or to the members of the board of directors. Thus, a foundation for the founder is generally not accepted in the Member States.

The only clear exemption from this rule is to be found in the *Austrian* private foundation, where the statutes can allow distributions to the founder ("Stiftung für den Stifter").

But even in some of the Member States which generally accept the non-distribution constraint, two minor exemptions are possible: split-interest endowments⁸¹ and the liquidation of the foundation.⁸²

c) "Enterprise Purpose" Foundations

An "enterprise purpose" foundation is a foundation with the purpose to preserve and maintain an enterprise.

Such a foundation is only accepted in a few Member States. In *Sweden*, a foundation can be established for the sole purpose of preserving and maintaining an enterprise.⁸³ In *Denmark*, there are foundation with hybrid purposes (having both a public benefit purpose and the purpose of preserving and maintaining an enterprise).

The *German* view is, in the main, that such "trade protection" foundations ("Unternehmensselbstzweckstiftungen") are not allowed, because the assets of a foundation should be subordinate to its purpose⁸⁴. The same view also holds sway in *Austria*.⁸⁵ In these countries it becomes rather complicated when a foundation's purpose is not only to preserve and maintain an enterprise, but also, for example, a public benefit

⁸¹ See B IV 4 infra.

⁸² See D II 3 infra.

⁸³ *Olsson*, p. 249 et seq.

⁸⁴ See *Münchener Kommentar/Reuter*, Vor § 80 BGB, Rn. 17; *Staudinger/Rawert*, Vorbem. zu §§ 80 BGB Rn. 9 et seq.

⁸⁵ *Kalss*, in: *Doralt/Nowotny/Kalss*, § 1 PSG, Rn. 34.

or the promotion of culture within the enterprise. In practice, however, the problem can be overcome without any great difficulty.

Please note that almost all Member States accept foundations which are the majority shareholder of an enterprise.⁸⁶ However, such “holding foundations”⁸⁷ have to promote another purpose (usually a public benefit purpose) than the mere promotion of that enterprise.

d) Pension Funds

In a few Member States the legal form of a foundation can also be used as a pension fund (“pension foundation”), e.g. *Finland, the Netherlands and Sweden*.

e) Others

There are several other examples of types. Such examples are saving banks (e.g., in *Spain*), church foundations, public foundations (established by the government by a legal act), etc.

4. Hybrid Structures and Split-Interest Endowments

The mere fact that foundations must pursue a public benefit purpose does not necessarily mean that any private distribution is prohibited. Some Member States accept hybrid structures and split-interest endowment in civil law and/or tax law in certain cases, even if they require a “public benefit” purpose.

Thus, the Supreme Court of *Portugal* has decided that the founder can restrict the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.⁸⁸ Such a rule would also be accepted in *Estonia* (civil law and tax law).

In addition, a charity in *England and Wales* can have assets in which its interest is restricted in a certain way by the donor to preserve a pre-existing private benefit. The founder of a charity can, for example, retain a beneficial *reversionary* interest in the capital of a property or other asset given on trust to the charity to retain for its own continuing use or financial benefit (whether for some specific purpose or for its general purposes). Such a reversionary interest would also be accepted in *Estonia* (civil law and tax law), and under certain conditions also in *France* (civil law and tax law).⁸⁹

In *England and Wales*, alternatively, the gift can be of only the *freehold reversion* (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favour of (say) the donor as tenant. However, the rule against perpetuities cannot be evaded. A restriction attached to a charitable gift, constituting a trust in favour of non-charitable objects, as, for instance, a requirement that the charity must grant a lease to private individuals for 95 years, or a lease in perpetuity to the relatives of the founder, is void.⁹⁰ However, such partgifts, unless comprising a

⁸⁶ See E III 2 *infra*.

⁸⁷ Please note that the terminology regarding “Enterprise Foundations” is inconsistent.

⁸⁸ Supreme Court of Portugal, 24 October 1996, 10 *Revista de Legislação e Jurisprudência*, p. 111 et seq.

⁸⁹ Provided the reversionary interest is limited to a specific length of time or to the life of the founder *and* the interest reverts to the foundation at the expiration of the above referred period.

⁹⁰ See *Warburton*, para. 3-020, with further references.

separable legal interest that the donor disposes of *completely*, may give rise to tax problems. Such a provision is also possible in *Spain* (civil law and tax law) and under certain conditions in *France* (civil law and tax law),⁹¹

In *Germany*, a restriction on the use of the endowment is possible in different ways, to the extent that full tax relief is given to a foundation which distributes up to one-third of its income to the founder or his family (§ 58, no. 5, German General Fiscal Code). Similarly in *Denmark* and probably also in *the Netherlands* tax authorities may tolerate that a tax-exempt foundation distributes a small part of its income to the founder and her/his family.

However, the civil and tax laws of most Member States make no explicit reference to such hybrid structures or split-interest endowments. Thus, country experts are uncertain whether such provisions would be accepted for a public-benefit foundation (e.g., *Greece, the Netherlands*), while most country experts do not believe that such provisions would be tolerated (e.g., *the Czech Republic, Finland, Hungary, Lithuania and Slovenia*).

C. Governance and State Supervision

In all Member States there are some general similarities as regards governance and state supervision:

Regarding *internal governance*, all Member States as a rule accept that the founder has a wide freedom of scope. He can usually specify certain rules in the statutes, though this may be difficult to accomplish in those Member States which require the founder to accept a model set of statutes (*France*).

A foundation is generally required to be supervised by a *State supervisory authority*.

Some differences exist as regards mandatory *private supervisory mechanisms*, e.g., internal supervision (independent directors, internal supervisory boards), public accountability and disclosure, and monitoring by auditors or other third parties. Some Member States have almost no obligation of any private supervisory mechanisms. Other Member States (especially those states where the position of the State supervisory authority is comparatively weak) know more or less mandatory private supervisory mechanisms.

Chart 4: Mandatory Requirements for the Foundation's Internal Organs

| Country | Minimum number of the board members | Mandatory supervisory board |
|-----------------|---|--|
| Austria | Public foundations: 1 Private foundations: 3 | Only for large private foundations ⁹² |
| Belgium | 3 | no |
| Bulgaria | 1 | Only for public benefit foundations |
| Cyprus | 1 | no |

⁹¹ Cf. note 89.

⁹² The supervisory board is mandatory if the private foundation has more than 300 employees or heads domestic corporations or holds shares of more than 50 % in a domestic corporation which has on average more than 300 employees.

| Country | Minimum number of the board members | Mandatory supervisory board |
|-----------------------|--|---|
| Czech Republic | 3 | Only for large foundations ⁹³ ; if there is no (voluntary) supervisory board a comptroller is mandatory. |
| Denmark | 3 | no |
| Estonia | 1 | yes, at least 3 members |
| Finland | 3 | no |
| France | traditional foundation: 7-12 ⁹⁴ endowment funds: 3 | no ⁹⁵ |
| Germany | 1 | no |
| Greece | 1 | no |
| Hungary | 1 | Only for large public benefit foundations ⁹⁶ |
| Ireland | 3 | no |
| Italy | 1 | Only for banking foundations |
| Latvia | 3, if there is no supervisory board, otherwise 1 | no |
| Lithuania | N/A | N/A |
| Luxembourg | 3 (though not expressly provided for in the law) | no |
| Malta | 3 | no |
| Netherlands | 1 | no |
| Poland | 1 | no |
| Portugal | 1 | yes |
| Romania | 3 | no |
| Slovakia | 3 | supervisory board or inspector |
| Slovenia | 3 | no |
| Spain | 3 | no |
| Sweden | 1 | no |
| United Kingdom | 1 | no |

I. Board of Directors and Other Organs

As already mentioned, as a rule there is a wide freedom of scope for the founder to specify the internal governance in the foundation's statutes. However, in some Member States there are minor mandatory requirements regarding the board of directors.

⁹³ If the endowment exceeds CZK 5 million (approx. € 200,000), there is no mandatory supervisory board in the case of endowment fund.

⁹⁴ There is no official minimum under *French* law; it is suggested, however, that there be at least seven and no more than 12 board members, see Art. 3 of the new French model statutes nos. 1 & 2.

⁹⁵ Foundations can choose between a supervisory board and an executive board, or a managing board.

⁹⁶ If the annual income exceeds HUF 5 millions (approx. € 20,000).

1. Number of Board Members

According to the foundation laws of about half of the Member States, one board member is sufficient. However, as Chart 4 shows, there seems to be a tendency in modern legislation to prescribe at least three members for the board of directors.

2. Appointment

In some Member States only natural persons are allowed to become board members (*Austria* for public foundations, the *Czech Republic*, *Denmark*, *Finland*, *Hungary*, *Latvia*) while most Member States also accept legal persons as board members (*Austria* for private foundations, *Belgium*, *Bulgaria*, *Cyprus*, *France*, *Germany*, *Greece*, *Hungary*, *Ireland*, *Luxembourg*, *Malta*, *the Netherlands*, *Spain*, *Sweden*, *the United Kingdom*).

While all Member States allow the founder to be a member of the board, only a few Member States explicitly restrict the influence of the founder within the board: in *Hungary*, the founder and his relatives have to be the minority, and in *Sweden*, the founder must not be the sole board member.

Other mandatory personal requirements for board members are seldom explicitly stated in statutory law: persons who supervise a foundation must not be its board members in the *the Netherlands* and in *Austrian* public foundations; beneficiaries are excluded in the *Czech Republic* and in *Austrian* private foundations; employees are excluded in the *Czech Republic* and *Slovakia*; and persons guilty of particular offences are excluded in *Malta* and in the *United Kingdom*.

As a general rule, in all Member States the founder is free to determine in the statutes how the board members are appointed. He usually appoints the initial members of the board of directors, and may specify whatever appointment system within the formation deed (or other governing document) she/he deems suitable. Thus, the power to appoint new directors may rest with the founder herself/himself, with another natural or legal person, with the supervisory board of the foundation (if existing), or with the members of the board of directors (co-option/self-perpetuating). Mandatory specific requirements regarding the procedure of appointment are rare. Only a few Member States restrict the influence of the founder: In *Denmark*, the majority of the board members must be persons not appointed by the founder or by other persons closely connected with the founder; in *France*, the founder is limited to the appointment of a third of the board members in the case of a traditional foundation;⁹⁷ and in *Austria*, the initial members of the board of directors of a public foundation are appointed by the State supervisory authority as proposed in the foundation documents (by the founder), if these persons are legally capable and trustworthy. In the case of an *Austrian* private foundation, the supervisory board (if existing) can only have the power to appoint the board of directors if beneficiaries do not have more than 50 % of the seats on the supervisory board.

3. Rights

The board of directors generally have the task to manage the foundation and are legal representatives of it.

⁹⁷ No limitation in the case of endowment funds.

4. Duties

The duty of care and (to a lesser extent) the duty of loyalty are recognised in all Member States and are part of each country's legal provisions.

a) Duty of Care

A few Member States have special rules regarding asset management⁹⁸ which can be regarded as specifications of the general duty of care.

b) Duty of Loyalty

As regards the duty of loyalty, some national laws provide special rules about self-dealing transactions which specify the duty of loyalty.

Most Member States accept self-dealing in cases where it is fair ("duty of fair dealing"). However, several Member States have additional limitations, which can be broken down into five distinct kinds:

(1) The most restrictive approach can be found in the common *law of trusts*, which does not allow any "unauthorised" trustee benefits, including self-dealing transactions between the trust and its trustees or persons closely connected with them. Thus, in *England and Wales* such a transaction or contract is generally voidable regardless of the fairness of the price or of other circumstances. However, the settler can allow self-dealing transactions in the trust document if the price is fair. The Charity Commission can additionally authorise certain self-dealing transactions but will do so only where strict requirements are met.

(2) Other Member States prohibit only some self-dealing transactions. In the *Czech Republic*, the sale of assets or the leasing of real-estate constituting part of foundation property are not allowed. In *Estonia*, a foundation may not give credit to or provide a credit guarantee for its founders, board members, council members, or persons sharing economic interests with them. In *Sweden*, loans and loan guarantees to the founder or to the management of the foundation cannot be granted. In *Germany*, according to a general rule some self-dealing transactions are generally prohibited, if the statutes do not permit them.

(3) Some Member States impose general rules to prevent bias on the part of board members, e.g., *Greece*.⁹⁹ In *Dutch* law, it is accepted that the prohibition on dealing in a conflict-of-interest situation derives from the general law on representation. Moreover, in *Germany*, there is rudimentary provision in the General Part of the Civil Code¹⁰⁰.

(4) Sometimes there are special rules regarding the procedure of self-dealing transactions. One example is *Estonia*, where a member of the supervisory board must not participate in voting if she/he has a personal interest. One example is *Bulgaria* as regards public benefit foundations.

⁹⁸ See E II 2 *infra*.

⁹⁹ Art. 61-77, Greek Civil Code, contain general provisions for all private legal persons; see further *Georgiadis/Stathopoulos*, Art. 109, Greek Civil Code, p. 170.

¹⁰⁰ § 181, German Civil Code.

(5) In some countries the consent of the State supervisory authority is needed in cases of self-dealing, e.g., *Spain* and some *German* provinces.¹⁰¹ These checks can be seen as one example of preventive State supervision.¹⁰²

5. *Liability and Standard of Diligence*

The general rule is that board members can be held liable for damages suffered by the foundation where a loss is deemed to have been caused by a breach of duty. This is generally also true, if the board member is a volunteer. Some *German* Provinces restrict the liability to gross negligence, but it is controversial whether the Provincial legislator has the competence to establish such rules.

6. *Remuneration*

The existing solutions may be categorised as follows:

(1) Most Member States accept that an adequate level of financial compensation is allowed if there is no contrary provision in the statutes of the foundation. Examples are the *Austrian* private foundation, *Estonia*, *Finland*, *Germany*, the *Netherlands* and *Slovenia*.

(2) Other Member States generally prohibit remuneration. Consequently, in *France* in the case of traditional foundations,¹⁰³ and generally also in *Spain*, the members of the board must be unpaid. Similarly in *England and Wales*, the general legal principle is that charity trustees are not entitled to retain any direct or indirect personal benefit they may derive from their trusteeship unless specially authorised. Charity trustees can be paid for their service as trustees where this is authorised by the court, the Charity Commission, or the charity's constitution; authorisation will generally be given where this is in the best interests of the charity.

(3) In *Denmark*, the State supervisory authority may check whether the remuneration is appropriate, and can reduce any remuneration deemed excessive.

(4) In the other Member States there is no explicit regulation in civil law or tax law. However, it is likely that at least in the case of a public benefit foundation (which usually has additionally the status of a tax-exempt organization) there exists an implicit restriction that only a reasonable remuneration is allowed.

Chart 5: Remuneration and Administration Costs

| Country | Is remuneration of board members allowed in civil law and in tax law? If remuneration is allowed, are there any limits in civil law or/and in tax law? | Is there a maximum amount that can be spent on office/administration costs in civil law and in tax law? |
|---------|--|---|
|---------|--|---|

¹⁰¹ See, e.g., Art. 22, Bavarian Foundation Law 2001, which generally requires the consent of the State supervisory authority. Since 2001 the general rule has been liberalised to the extent that the foundation's statute can allow (some) self-dealing transactions.

¹⁰² See also C III 1 *infra*.

¹⁰³ Such a prohibition does not exist for endowment funds. However, tax law provides for a general limitation to $\frac{3}{4}$ of the legal minimum salary, otherwise the tax-exempt status of the funds would be challenged.

| Country | Is remuneration of board members allowed in civil law and in tax law? If remuneration is allowed, are there any limits in civil law or/and in tax law? | Is there a maximum amount that can be spent on office/administration costs in civil law and in tax law? |
|-----------------------|--|--|
| Austria | Public foundations and tax law: the remuneration must be reasonable. Private foundations: no explicit restriction. | no explicit restriction |
| Belgium | The remuneration must be reasonable. | tax law: 20 % of the resources |
| Bulgaria | no explicit restriction | no explicit restriction |
| Cyprus | no explicit restriction | no explicit restriction |
| Czech Republic | General rules for administration costs (see right) | The foundations' statutes must contain an explicit maximum limit for administration costs. |
| Denmark | The remuneration must be reasonable. | According to a ministerial decree, the administration costs (including the remuneration for the board members) for non-commercial foundations must be approved by the foundation authorities if they exceed 12 % of the yearly gross income of the foundation. |
| Estonia | The remuneration must be reasonable. | no explicit restriction |
| Finland | The remuneration must be reasonable. | no explicit restriction |
| France | Traditional foundation: prohibited by model statute. Endowment fund: no prohibition in the legal provisions; under tax laws, the remuneration must be limited to ¼ of the legal minimum salary, otherwise the tax-exempt status of the fund will be challenged. | no explicit restriction |
| Germany | Tax law: the remuneration must be reasonable. | no explicit restriction |
| Greece | prohibited by foundation law | no explicit restriction |
| Hungary | no explicit restriction | no explicit restriction |
| Ireland | no explicit restriction | no explicit restriction |
| Italy | no explicit restriction | no explicit restriction |
| Latvia | The remuneration must be reasonable. | Public benefit organizations must not spend on administration more than 25 % of general donations. |
| Lithuania | no explicit restriction | Such limitations have been abolished. |
| Luxembourg | no explicit restriction | no explicit restriction |
| Malta | N/A | N/A |
| Netherlands | no explicit restriction | no explicit restriction |
| Poland | The members of a foundation's audit and supervision body may, for the performance of duties in such a body, be reimbursed for any reasonably incurred costs, or be | no explicit restriction |

| Country | Is remuneration of board members allowed in civil law and in tax law? If remuneration is allowed, are there any limits in civil law or/and in tax law? | Is there a maximum amount that can be spent on office/administration costs in civil law and in tax law? |
|-----------------------|--|--|
| | remunerated at a rate not exceeding that specified in Article 8, Clause 8 of the Act of Law of March 3rd 2000, on the remuneration of individuals managing certain corporate entities | |
| Portugal | N/A | N/A |
| Romania | N/A | N/A |
| Slovakia | Membership in the board shall be an honorary position; board members are entitled to reimbursement of costs and expenses incurred by them in the course of performance of their tasks. | no explicit restriction |
| Slovenia | N/A | N/A |
| Spain | The board members/trustees cannot be paid for being part of the governing board. They can be remunerated for any other professional services provided to the foundation. | The Foundations Regulation (Real Decreto 1337/2005) Article 33, establishes that “administration cost” should not exceed the higher of the two following figures: either 5 % of the foundation equity or 20 % of the net income of the foundation. |
| Sweden | N/A | N/A |
| United Kingdom | Generally no, only under certain conditions | no explicit restriction |

7. Administration Costs

As Chart 5 shows, we can again distinguish between five approaches:

- (1) A few Member States have explicit maximum limits for administration costs in the civil law or tax law (*Belgium, Latvia, Spain*).
- (2) Some Member States have a general clause that the administration cost should be “reasonable”, which is more flexible than a maximum limit (e.g., *German tax law*).
- (3) In the *Czech Republic* one finds the formal approach, where the statutes must contain an explicit maximum limit for administration costs.
- (3) In *Denmark* there exists a specific procedural requirement: According to a ministerial decree, the administration costs (including the remuneration of the board members) for non-commercial foundations must be approved by the foundation authorities if they exceed 12 % of the yearly gross income of the foundation.
- (4) The majority of the Member States do not have any explicit restriction (e.g., *Austria, Bulgaria, Estonia, Finland, France, Germany, Greece, Hungary, the Netherlands, Poland, Slovakia and the United Kingdom*). However, as in the case of remuneration, at least in the case of a public benefit foundation, the courts will hardly accept unreasonably high administration costs.

8. *Removal*

Again the rule seems to be that 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. In the *Netherlands*, because of general rules of company law, a special reason (good cause) is necessary. A comparable rule exists in *Denmark*. In *Austria* and *Germany*, which do not have an explicit restriction, it is a controversial point as to whether a special reason (good cause) is needed (in order to protect the autonomy of the foundation), or whether the statutes can allow full discretion.

Note that in certain cases the *State supervisory authority* has the right to remove a member of the board. These rights can be seen as part of State supervision.¹⁰⁴

9. *Supervisory Board and Other Organs of the Foundation*

As Chart 4 shows, most Member States leave it to the founder whether a supervisory board is to be established. Only *Estonia* and *Portugal* require a supervisory board for all foundations, whereas some Member States require a supervisory board only for some foundations: greater foundations (*Austria, Hungary*), public benefit foundations (*Bulgaria*), and banking foundations (*Italy*).

10. *No “Formal” Membership*

In the civil law countries, the doctrine is that a foundation does not have a membership. This distinguishes a foundation from the legal forms of an association (cf. the traditional separation under Roman law between *universitas personae* and *universitas bonorum*). However, some civil law countries (e.g. *Bulgaria*, the *Netherlands*, *Sweden* and *Denmark*) regard the formal distinction between foundations (without members) and associations (with members) as a fine one in practice. One reason for this blurring in such countries may be that the liberal foundation law allows foundation structures in which the founder or the directors have a position more or less comparable to membership of a non-profit association (no “formal” membership, but a “quasi-membership”).

Rather more complex is the situation in *Italy*. It is often said that an Italian foundation can have “members”. There are basically two different types of foundations that could be considered to have such member-like participants: (1) participatory foundations and (2) banking foundations. In the first case, these participants can be called “members”, “supporters”, or “adherents” of the participatory foundation and normally may take part in an assembly of participants that has the right to elect a minority of the members of the governing body of the foundation. Concerning the members or associates of “foundations of banking origin”, it is noteworthy that their existence is due to the fact that some of the entities transformed by the Italian legislation into foundations had originally been organised as associations. These foundations are allowed to retain the assembly of “members”,¹⁰⁵ however, the power of those membership assemblies is restricted. For instance, the members in general assembly can elect part of the foundation’s governing body – but only a minority. As the comparative view shows, in

¹⁰⁴ See C III 4 *infra*.

¹⁰⁵ Art. 4(1)(d), Legislative Decree no. 153 of 17 May 1999.

other countries those rights could also be given to the board of directors or to an additional board. Therefore, from a comparative viewpoint, the difference between Italian “foundation-members” and board-members in other civil law countries, where a foundation cannot have “formal” foundation members, seems to be more conceptual than substantive.

In the common law countries, there is no comparable distinction between “non-profit” foundations and associations. Thus in *England and Wales* a charitable trust as such does not have a membership.

II. Rights of the Founder, Beneficiaries and Third Persons

1. *Founder*

Most Member States accept that the founder has the possibility of reserving a wide range of rights in the statutes (e.g., membership of the Board of Directors, election and dismissal of board members, amendment of the statutes).

However, legally binding information and enforcement rights specifically for founders as such (or for subsequent substantial donors) are very rare, and the courts seem to be reluctant to uphold them.

In the UK, the settler of a trust may have enforceable rights. If, because of the charitable nature of the trust, what is at issue is the enforcement of a *public* right, the settler could petition the Attorney General to intervene as the guardian of the public interest; alternatively, he could apply to the court, provided that the court is satisfied that either the Attorney-General has consented to the action or that the petitioner has established some special interest beyond that possessed by the public generally. Where the enforcement of a *private* right is at issue, the founder need only persuade the court that she/he has a legitimate interest.¹⁰⁶

2. *Beneficiaries*

In general, the position of beneficiaries of a public benefit foundation is rather weak in all Member States. They are usually not entitled with enforcement rights.

3. *Third Parties*

In most Member States, the legislation on foundations contains no provision for third-party rights. Usually, third parties are unable to claim any specific rights, because the state supervisory authority must act *ex officio* if there is justification in the form of suspicious facts.

However, in a few Member States (where there is little State supervision) there are also provisions concerning “interested” third parties. This is true in the *Netherlands*, where a person with a justified interest (e.g., employee, creditor) is also entitled to invoke State supervisory action against the members of the board of directors of the foundation. Comparable rules exist in the *Czech Republic*, *Poland*, and *England and Wales*. In

¹⁰⁶ Following *Re Hampton Fuel Allotment Charity* [1988] 2 All E.R. 761 (C.A.)

Sweden, a director can be sued by a third party who has suffered a loss caused by the director who contravened the foundation act or the foundation deed.

III. State Supervision

In all Member States there is a State supervisory authority for foundations. As a rule, State supervision is mandatory.

Usually the State supervisory authority is only allowed to check whether the duties imposed by foundation law and/or the statutes are being fulfilled. Consequently, the extent of supervision also depends on the extent of these duties.

Some Member States have two different supervisory systems for different types of foundations (e.g., *Austria*, *Sweden*). Supervision of foundations established for public benefit purposes is generally more extensive in all Member States (extent, degree of strictness, competent bodies, etc.).

Note that tax-exempt foundations are supervised by the tax authorities as regards their status as a tax-exempt organization.

1. State Supervisory Authority

A State supervisory authority means a body which monitors foundations and also has the necessary competence to protect the foundation by means of preventive supervision (e.g., consent for any amendment of the statutes), by enforcing compliance (e.g., legal behaviour), or by taking specific measures (e.g., dismissal of a director).

We can distinguish between three main types of supervision by a State supervisory authority:

- (1) *Public administrative bodies* (e.g., ministries or regional bodies) which have the right to monitor the foundation and the power to enforce compliance with the rules without the help of a court (i.e., having to apply for a court order).
- (2) *Public independent bodies* which stand outside the hierarchy of public administration and have all necessary competence. This is the solution adopted for *England and Wales*, where the main charity regulator is the Charity Commission.
- (3) *Combined supervision by a public administrative body and the court*. The administrative body monitors, but is not allowed to encroach on, the foundation. The court takes any decisions on preventive supervision and enforcement measures. However, such a procedure needs first to be applied for by the foundation (e.g., for any amendment of the statutes), the monitoring body or some other party with an interest in the matter.

Chart 6: State Supervisory Authority

| Country | What public body acts as a state supervisory authority? |
|-----------------|--|
| Austria | Public foundation: public administrative body Private foundation: court |
| Belgium | Public foundation: ministry and court Private foundation: court |
| Bulgaria | Public administrative body (central registry in the ministry of Justice) and court |

| Country | What public body acts as a state supervisory authority? |
|-----------------------|--|
| Cyprus | Public administrative body (registrar) and court |
| Czech Republic | Registration court |
| Denmark | Public administrative body (ministry) |
| Estonia | Combination of a governmental body (ministry) and a court |
| Finland | Public administrative body (National Board of Patent and Registration) |
| France | Public administrative body (Ministry of Interior for foundations, and regional body – <i>préfet</i> - for endowment funds) |
| Germany | Public administrative body (regional) |
| Greece | Public administrative body (ministry) |
| Hungary | Combination of a state prosecutor and a court |
| Ireland | Public administrative body (ministry) ¹⁰⁷ |
| Italy | Public administrative body (regional or ministry) |
| Latvia | Public administrative body (registrar) |
| Lithuania | N/A |
| Luxembourg | Public administrative body (ministry) |
| Malta | Public administrative body (commissionaire) |
| Netherlands | Combination of a governmental body (Public Prosecutor) and a court |
| Poland | Combination of a governmental body (ministry or regional) and a court |
| Portugal | Combination of a governmental body (ministry or regional) and a court |
| Romania | Public administrative body (ministry) |
| Slovakia | Public administrative body (ministry) |
| Slovenia | Public administrative body (ministry) |
| Spain | Combination of a governmental body (regional body) and a court |
| Sweden | Public administrative body (regional) |
| United Kingdom | Public independent body (Charity Commission) |

2. Information and Inquiries

One part of State supervision is the right to obtain information and to start inquiries.

a) Provision of Annual Reports and Annual Accounts

In almost all Member States, the Board of the foundation must send annual reports (summarising the nature and purpose of the foundation and the progress of its work) and annual accounts (financial statements) to the State supervisory authority as a means of preventive supervision. The only exception seems to be *the Netherlands*.

¹⁰⁷ The Charities Bill 2007 currently before the Irish Parliament proposes to establish an independent regulator, the Charities Regulatory Authority.

b) Special Inquiries

In some places, we also find the right of the competent public authority to information and to inspection of legal acts and documents of the foundation. Supervision is also carried out in such a way that the public authority responsible for supervision can appoint an auditor (e.g., *Slovenia*) or a so-called “compulsory manager” (e.g., *Poland*). In certain cases *Dutch* law has a similar inquiry procedure by which one or more external auditors may investigate a foundation and report to the court.¹⁰⁸ In the UK, the Charity Commission has the power to initiate an inquiry of a charity and generally publishes the results of its inquiries on its website. The Commission has a range of protective powers often used in inquiries, including the freezing of bank accounts, the appointment of an interim manager to run the charity, and the suspension, removal and replacement of charity trustees.

c) Right to Attend at Board Meetings

In most Member States the representatives of the state supervisory authority do not have the right to attend board meeting of a foundation. The exceptions are the traditional foundation in *France*¹⁰⁹ (but not the new endowment fund) and *Greece*.

3. Approval for Certain Decisions of the Board of Directors

Supervision can also be of a preventive nature. Legislation thus specifies that in some cases only the approval of the competent public authority is required for certain decisions of the governing bodies of the foundation.

Typical cases are (1) important decisions concerning asset management, (2) conflicts of interest, and (3) amendment of the foundation’s statutes - especially its purpose - or the liquidation of the foundation.

4. Enforcement Measures

In all Member States, there are enforcement rules to ensure that the foundation will indeed be able to further its purposes. However, there are different legal and procedural requirements.

IV. Reporting, Transparency and Disclosure

1. Annual Reports and Accounts

Almost all Member States require each foundation to prepare an annual report on its activities and annual accounts (sometimes in two separate documents, sometimes combined).

¹⁰⁸ This procedure applies only to foundations that, pursuant to the law on works councils, are obliged to have a works council.

¹⁰⁹ Until 2003 at least one-third of the members of the board of directors of a french foundation were government officials. Under the revised model statutes, government officials still have the right to attend board meetings.

Chart 7: Reporting and Accountability

| Country | What are the requirements regarding reporting and accountability? |
|-----------------------|--|
| Austria | <i>Public foundations:</i> Annual accounts filed with foundation authority. <i>Private foundations:</i> Annual accounts reviewed by accountant. Annual accounting report to be audited by a certified auditor appointed by the court, which has the right to initiate a special investigation. |
| Belgium | <i>Small private foundations, small public utility foundations and large public utility foundations:</i> Accounts and annual budgets filed with the commercial court. <i>Large private foundations:</i> Accounts filed with the National Bank of Belgium/ <i>Banque Nationale de Belgique</i> . Public utility foundations and large private foundations must keep yearly accounts and they must be reviewed by statutory auditors. |
| Bulgaria | Annual Activity Report and Accounts submitted to Central Registry at Ministry of Justice. Large public benefit organizations are subject to an independent audit. Annual financial reports to the National Revenue Agency and National Statistical Institute. |
| Cyprus | Accounts are fully audited and reports are filed with the relevant government departments. |
| Czech Republic | <i>Traditional foundations:</i> Annual report including financial information must be filed with the Register Court, and to supervisory (local tax) authorities upon request. Annual statements have to be verified by an auditor. <i>Endowment funds:</i> Annual report and financial information must be filed with the Register Court, and to supervisory (local tax) authorities upon request. An auditor must be appointed if the annual resources exceed 3mil. CZK or if endowment fund assets exceed 3mil.CZK |
| Denmark | <i>Non-commercial foundations:</i> Annual reports filed with local tax authorities, large foundations need an independent auditor. <i>Commercial foundations:</i> Annual accounts using the same principles that apply to joint-stock companies. |
| Estonia | A report of financial activities and an auditor's statement is filed with the Registry of Non-Profit Organizations and Foundations. |
| Finland | Accounts and annual reports submitted annually to the registration authority. Annual income tax returns filed with the taxation authorities, who decide on the non-profit status on an annual basis. |
| France | <i>Traditional foundation:</i> Annual report and financial statements filed with the administrative authorities. An auditor and a substitute must be appointed. <i>Endowment funds:</i> Annual report and financial statements filed with the administrative authorities. An auditor and a substitute must be appointed if the annual resources exceed € 10,000 euros. |
| Germany | Foundations must present annual reports to the relevant state authorities or, if they wish to receive tax privileges, to the relevant financial authorities. |
| Greece | Financial records are filed, the budget is approved by the Ministry of Finance in advance. Annual reports of revenues and expenses are filed with the Ministry of Finance and published in local daily press. |
| Hungary | Activity reports need to be filed only by tax-exempt public benefit foundations |
| Ireland | Audited accounts must be provided to Revenue Commissioners if annual income exceeds € 100,000. |
| Italy | Annual and financial reports must be filed. Onlus and banking foundations have to file them with the Onlus |

| Country | What are the requirements regarding reporting and accountability? |
|-----------------------|--|
| | Supervision Authority. |
| Latvia | An annual report must be submitted to the tax administration office and to the State Register. Public benefit foundations also have to submit annual and financial reports to the Ministry of Finance. |
| Lithuania | Activity and financial reports are filed and accounts are audited. |
| Luxembourg | Budgets and annual accounts have to be filed annually with the Ministry of Justice. |
| Malta | Accounts must be kept; no new regulations are expected soon. |
| Netherlands | Financial records are filed. |
| Poland | Annual and financial reports are filed with relevant ministries. |
| Portugal | Annual report and accounts must be filed with the government and have to be available for review by the tax authorities. |
| Romania | Annual balance sheet must be submitted to the authorities. |
| Slovakia | Annual report including financial information must be submitted to the authorities. |
| Slovenia | Annual report and accounts must be filed with the body competent for foundations, which may demand an audit. |
| Spain | Activity reports need to be filed with the relevant authorities. An external audit is required for large foundations. |
| Sweden | <i>Larger business foundations:</i> Annual report must be filed. Accounts must be audited and sent to the foundation authority. <i>Non-business and smaller business foundations:</i> Simple accounts, but must also be audited. Reports do not need to be made publicly available. |
| United Kingdom | Annual return filed with the Charity Commission, including annual accounts and an annual report. For larger charities a professional audit is required. |

2. Disclosure

Most Member States require disclosure (to the general public) of the annual accounts and a report (sometimes in two documents, sometimes combined). In the remaining Member States, public disclosure is generally not required by civil law regulations.

Chart 8: Disclosure

| Country | What kind of information is made publicly available? |
|-----------------------|--|
| Austria | No obligation to make documents publicly available. |
| Belgium | Original statutes, modification of statutes, decisions of dissolution and liquidation, conversion of private foundation into public benefit foundation, decision of appointment or revocation of directors or modification of their powers should be published in the Belgian official Gazette. These documents can be consulted on the web. |
| Bulgaria | Documents are published and open to the public. |
| Cyprus | N/A |
| Czech Republic | Documents are published and open to the public. |
| Denmark | <i>Non-commercial foundations:</i> Reports do not need to be made publicly available. |

| Country | What kind of information is made publicly available? |
|-----------------------|--|
| | <i>Commercial foundations:</i> Annual accounts are made publicly available. |
| Estonia | Reports are made publicly available upon request. |
| Finland | Reports and accounts are publicly available upon request. |
| | <i>Traditional foundations</i> receiving annual gifts of at least € 153,000 or receiving financial support from public authorities have to make their annual reports and financial reports publicly available. <i>Endowment funds</i> have to make their annual reports and financial reports publicly available. |
| France | |
| Germany | Reports do not need to be made publicly available. |
| Greece | Annual reports of revenues and expenses are published in local daily press. |
| Hungary | Activity reports need to be made publicly available only by tax-exempt public benefit foundations. |
| | Accounts information is available to the public through the Companies Registration Office. Foundations set up as trusts do not file annual returns and their accounts are not available to the public. |
| Ireland | |
| Italy | Reports do not need to be made publicly available. |
| | No general obligation for foundations to publicise their reports. Reports of public benefit foundations are published on website of the Ministry of Finance. |
| Latvia | |
| Lithuania | Reports are available to the public. |
| Luxembourg | Budgets and accounts are published in the <i>Mémorial</i> (official gazette). |
| Malta | N/A |
| Netherlands | Larger commercial foundations have to publish their records. |
| Poland | Annual and financial reports are made available to the public. |
| Portugal | Reports do not need to be made publicly available. |
| Romania | N/A |
| Slovakia | The auditor's report is published in the official Commercial Journal. |
| Slovenia | Annual report and accounts do not need to be made publicly available. |
| Spain | Documents have to be made available to the public. |
| | <i>Larger business foundations:</i> Annual report must be made available to the public. <i>Non-business and smaller business foundations:</i> Reports do not need to be made publicly available. |
| Sweden | |
| United Kingdom | Annual accounts and annual report |

3. Auditor

In some Member States an external auditor is generally necessary (*Cyprus, Czech Republic, Estonia, Finland, Latvia, Lithuania and Sweden*).

In other Member States, an audit is necessary only for larger foundations (*Belgium*¹¹⁰, *Czech Republic*¹¹¹ *Bulgaria*¹¹², *Hungary*¹¹³, *Spain*¹¹⁴, *United Kingdom*¹¹⁵ and *France* as

¹¹⁰ Subjection to auditing depends, in particular, on whether two out of three criteria are met: 50 employees, € 6,250,000 total receipts, € 3,125,000 total balance sheet.

¹¹¹ An auditor must be appointed if the annual resources exceed CZK 3,000,000.

¹¹² See Art. 39, §.3, Bulgarian Act on non-Profit Legal Entities 2000: “Any non-profit legal entity pursuing activities for public benefit, and which is registered with the Central Registry at the Ministry of Justice, shall be subject to an independent audit under the Accountancy Law if it exceeds at least one of the following thresholds: (a) balance sheet assets total from the preceding year – BGN 500,000; (b) total

regards endowment funds¹¹⁶), or for certain kinds of foundations (*Austrian* private foundations, *Danish* commercial foundations and *French* traditional foundations). In *Romania*, an auditor or an auditing committee is needed.

In the remaining twelve Member States an auditor is not required.

D. Formation, Liquidation and Fundamental Decisions

I. Formation

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 (e.g., *Austria*, *Belgium*).

Usually three requirements have to be fulfilled in all Member States:

- (1) The creation of a foundation deed,
- (2) The creation of a draft of the foundation's statutes, and
- (3) Founding assets.

In order to establish the foundation as a separate legal entity, usually at least a certain public act is required and in many Member States the foundation will be registered.

1. Foundation Deed

a) If the foundation is established *inter vivos*, several Member States require the foundation deed of a specific form. We distinguish three different solutions:

- (1) Most Member States require the form of a public deed by a notary public (*Belgium, Bulgaria, Czech Republic, Estonia, Greece, Italy, Latvia, Luxembourg, Malta, the Netherlands, Slovakia, Spain*).
- (2) Several other Member States only require a written declaration (*Finland*,¹¹⁷ *France*,¹¹⁸ *Germany, Hungary*).
- (3) In *England and Wales* and *Ireland* making the declaration in writing is not always required in order to create a *charitable trust*.

b) If the foundation is established *mortis causa*, the legally required form for a "last will and testament" is usually accepted in all Member States. An exception is *Dutch* law and *Belgian* law, which only accept a testament in the form of a public deed. This unusual

of the revenue for the activity and the net revenue from sales, together with that of the preceding year – BGN 1,000,000." (BGN 1,000,000 equal approx. € 510,000)

¹¹³ If the annual income exceeds HUF 60 million (approx. € 200.000).

¹¹⁴ Subjection to auditing depends, in particular, on whether two out of three criteria are met: (1) the value of assets exceeds € 2,400,000; (2) the total gross income of a financial year stemming from all activities, including the economic ones, exceeds € 2,400,000, (3) the average number of employees of the foundation exceeds 50.

¹¹⁵ Subject to size exemptions in the Charities Act 1993, s.43, and Companies Act 1985, ss.249A-249E.

¹¹⁶ Subjection to auditing depends on whether the total resources of a financial year exceeds € 10,000.

¹¹⁷ The signature of the founder must be attested by two persons.

¹¹⁸ Under certain conditions, a notarial act for the initial donation is necessary because of the general rules for donations.

restriction is a logical consequence of the fact that only the notary controls the establishment of the foundation.¹¹⁹

2. *Foundation Statutes*

Typically, all laws have minimum requirements for the statutes of a foundation, which are rather similar. All Member States require the distinctive characteristics of the foundation, such as the name, the purpose and the address, to be set out.

3. *Founding Assets*

Greater differences exist regarding the question of whether a certain minimum of founding assets is necessary.

There are three main solutions:

(1) In a few Member States, law imposes a *specific amount* (e.g., the *Czech* traditional foundation¹²⁰ and the *Austrian* private foundation¹²¹).

(2) In other Member States, the law does not require a specific initial amount, but requires the capital to be *adequate for the fulfilment of the purpose*. In some Member States, the competent State authority will only accept that the assets of the foundation are adequate if amounting to a specified value.¹²² Sometimes administrative practice can be comparably strict (e.g., *France* as regards traditional foundations).

(3) In a third group of Member States, founding assets are *not required* (e.g., *Estonia*, the *Netherlands* and *Poland*, or only in a symbolic form (e.g., in the *common law Member States* a trust can be established with £1). Also the newly introduced French endowment fund seems to be possible without founding assets.¹²³ However, even in the Member States of this group 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.

Please note that several Member States have different rules for different types of foundations (e.g., *Austria*, *Czech Republic*,¹²⁴ *Denmark*,¹²⁵ *France*,¹²⁶ *Malta*, *Romania*,¹²⁷ *Hungary*,¹²⁸ *Sweden*¹²⁹).

¹¹⁹ See D I 4 infra.

¹²⁰ CZK 500,000 (ca. € 20,000).

¹²¹ € 70,000.

¹²² A compromise between solution (1) and (2) can be found in *Spanish* law: foundations require an initial endowment that may consist of any type of assets but must be adequate and sufficient to fulfil the foundation's purpose. The law presumes that an endowment of € 30,000 is sufficient. If the endowment is of smaller value, the founders have to justify that it is adequate and sufficient by presenting a program of activities and an economic report that provides evidence that the foundation can be operationally viable with these resources.

¹²³ The wording of the law does not provide for any minimum for founding assets. However, there might be additional legislation in future.

¹²⁴ A Czech endowment fund only needs a symbolic initial endowment.

¹²⁵ DKK 250,000 (ca. € 33,500) for a non-commercial foundation, and DKK 300,000 (ca. € 40,000) for a commercial foundation.

¹²⁶ Traditional foundations and endowment funds.

¹²⁷ According to Art. 15, §. 2, Romanian Ordinance on Associations and Foundations 2000, the value of the initial endowment of the foundation should be at least 100 times the minimum gross salary specified for the national economy as at the date when the foundation is established. According to Art. 15, §. 3, Romanian Ordinance on Associations and Foundations 2000, a foundation that raises funds for another

Chart 9: Founding Assets

| Country | Does the law stipulate a minimum capital requirement for the establishment of a foundation? | Do the founding assets have to be sufficient to fulfil the purposes of the foundation? | In practice, do the competent public authorities require a minimum amount as capital for the establishment of a foundation? |
|-----------------------|---|--|---|
| Austria | Public foundations: no Private foundations: €70,000. | Public foundations: yes ¹³⁰ Private foundations: no | no |
| Belgium | no | Public foundations: yes Private foundations: no | Public foundations: €25,000 Private foundations: no |
| Bulgaria | no | no | no |
| Cyprus | no | no | no |
| Czech Republic | Traditional foundations: CZK 500,000 (ca. € 20,000) ¹³¹ Endowment funds: no | no | no |
| Denmark | Non-commercial foundations: DKK 250,000 (ca. € 33,500). Commercial foundations: DKK 300,000 (ca. € 40,000) | no | no |
| Estonia | no | no | no |
| Finland | € 25,000 | yes | no |
| France | no | Traditional foundations: yes Endowment funds: probably no | Only for traditional foundations: € 1,000,000 |
| Germany | no | yes | € 50,000 |
| Greece | no | yes | no |
| Hungary | no | yes | ca. € 400- € 2,000 |

foundation or association need only have an initial endowment of 20 times the minimum gross salary specified for the national economy.

¹²⁸ Thus, foundations can be either "open" foundations, where the founder has permitted other donors to contribute to the assets of the foundation by joining the foundation, or "closed" foundations where the founder has prohibited this possibility in the foundation's statutes. A "closed" foundation needs enough assets to achieve its aims (see § 74/A, para. 1, clause 3, Hungarian Civil Code: "A foundation shall provide sufficient assets for achieving its objectives"), while an "open" foundation should have assets to at least a value sufficient for the commencement of its operations (§ 74/B, para. 4, Hungarian Civil Code).

¹²⁹ A foundation normally also needs sufficient assets to promote the foundation's purpose. However, there also exists a special type of fundraising foundation which does not require initial capital and for which special provision is made in the Foundation Act.

¹³⁰ For an endowment fund a minimum capital is not required.

¹³¹ For an endowment fund the founding assets do not have to be sufficient.

| Country | Does the law stipulate a minimum capital requirement for the establishment of a foundation? | Do the founding assets have to be sufficient to fulfil the purposes of the foundation? | In practice, do the competent public authorities require a minimum amount as capital for the establishment of a foundation? |
|----------------|---|--|---|
| Ireland | no | no | no |
| Italy | no | yes | € 100,000 |
| Latvia | no | no | no |
| Lithuania | no | N/A | N/A |
| Luxembourg | no | yes | ca. € 100,000 (also depends on the aim of the foundation) |
| Malta | ca. € 240 for social purpose foundations and € 1,200 for other foundations | no | no |
| Netherlands | no | no | no |
| Poland | no | N/A | If foundation is planning economic activities ca. € 265 is required. |
| Portugal | no | yes | € 250,000 |
| Romania | At least 100 times the minimum gross salary in the national economy on the date of creation | no | no |
| Slovakia | SKK 200,000 (ca. € 6,600) | no | no |
| Slovenia | no | N/A | N/A |
| Spain | € 30,000 is normally presumed sufficient. | yes | no |
| Sweden | no | yes, unless it is an fundraising foundation | no |
| United Kingdom | no | no | no |

4. Formation Procedure

With respect to the formation procedure, the participation of a public authority usually is necessary.

We distinguish between five different solutions:

(1) The traditional way of establishing a foundation was *discretionary State approval*. Meanwhile only a few Member States still have this solution (*France* for traditional foundations, *Greece* and *Luxembourg*).

(2) In a number of Member States, official approval is not discretionary, but the State supervisory body must approve the formation if the legal requirements are met (*State approval without discretion*). Examples of this solution are *Germany* and *Spain*.

(3) What is intrinsic to official approval without discretion is a *registration system* to enable the registration authority (usually a court) to check that the legal requirements are met.¹³² However, a frequent difference between approval by an administrative body without discretion and the registration system is that the administrative body is often also involved in the ongoing supervision of the foundation, whereas the registration authority is not. This solution can be found in a relative majority of the Member States (e.g., *Czech Republic, Denmark, Estonia, Finland, Hungary, Lithuania, Romania*).

(4) Less often there is no monitoring by a court or an administrative body, but the *form of a public deed* is necessary. The notary public must ensure that the legal requirements are met. Examples of this solution are *Belgium* and the *Netherlands*.¹³³

(5) In a few Member States it is possible to establish a foundation as a legal entity *without any formal public act* (e.g., *Sweden*¹³⁴). In *England and Wales* and *Ireland*, charitable trusts can come into existence without any kind of State action. However, the trust as such is not a separate legal entity.¹³⁵

The nature of State authorisation is very different. Examples are *Germany*, where the law of the Province in which the foundation is to be domiciled determines the competent public authority. In *Slovenia*, it is the ministry most closely connected with the foundation's purpose. In *Finland*, approval is needed from the National Board of Patents and Registration, which also maintains the register.

Chart 10: Formation Procedure

| Country | Is State approval required for the establishment of a foundation? | Is registration with a public authority required for the establishment of a foundation? | Discretion of the public authority |
|-----------------------|---|---|------------------------------------|
| Austria | Public foundations: yes. Private foundations: no | yes | no |
| Belgium | Public benefit foundations: yes. Private foundations: no | yes, court registration | no |
| Bulgaria | no | yes, court registration | no |
| Cyprus | yes | yes | yes |
| Czech Republic | no | yes, court registration | no |
| Denmark | no | yes, State registration | no |
| Estonia | no | yes, State registration | no |
| Finland | yes | yes, State registration | no |

¹³² There is a traditional distinction between a concession system, where State approval is required, and a normative system, where a public body enters the organisation in a register if the legal requirements are met. However, the concession system is only *functionally* the opposite of the normative system where the State authority has discretion.

¹³³ Note that in some Member States a notarial deed (as an additional form requirement) is necessary in order to create a separate legal entity.

¹³⁴ Some foundations have to register, but the registration is a consequence of the existence of a foundation.

¹³⁵ Note also that in *England and Wales* most charities are required to register with the Charity Commission; however, this registration is not a prerequisite for the existence of the institution itself.

| Country | Is State approval required for the establishment of a foundation? | Is registration with a public authority required for the establishment of a foundation? | Discretion of the public authority |
|-----------------------|--|--|---|
| France | Traditional foundation: yes Endowment fund: no | Traditional foundation: yes, State registration Endowment fund: yes, declaration with the supervision authority | Traditional foundation: yes Endowment fund: no |
| Germany | yes | no, only informal lists | no |
| Greece | yes | yes, state registration | yes |
| Hungary | no | yes, court registration | no |
| Ireland | no | no ¹³⁶ | no |
| Italy | yes | yes, State registration | no |
| Latvia | no | yes, State registration | no |
| Lithuania | no | yes, court registration | no |
| Luxembourg | yes | yes, State registration | yes; with judicial review |
| Malta | Only if the foundation is to be registered as a voluntary organization | Only if the foundation is to be registered as a voluntary organization | N/A |
| Netherlands | no | yes, registration in the Register of Commerce | no |
| Poland | no | yes, court registration | no |
| Portugal | yes | yes, | N/A |
| Romania | no | yes, court registration | no |
| Slovakia | no | yes, State registration | no |
| Slovenia | yes | yes, State registration | no |
| Spain | yes | yes, State registration | no |
| Sweden | no | generally no ¹³⁷ | no |
| United Kingdom | Charity Commission approval is required. | Most foundations have to register with the Charity Commission | no |

5. Registration

As Chart 10 shows, most Member States require foundations to be registered. Note that registration is sometimes independent of the acquisition of legal personality.

II. Amendment of a Foundation's Purpose and Statutes

In company law, general meetings of the members (who effectively retain ongoing founders' rights, being the ultimate owners) decide all fundamental questions of their company, thus counterbalancing the power of the board of directors. As a foundation

¹³⁶ If a charity number is required for tax purposes, the foundation must register with the Revenue Commissioners.

¹³⁷ Some foundations must register with the supervision authority, but registration is not a prerequisite for establishment.

does not have this facility, some other body with the competence to be able to decide fundamental questions of the foundation needs to be found.

1. Procedure of Amendment

In all Member States, amendment of the purpose of a foundation, and of its statutes in other respects, is possible under prescribed conditions.

Four different ways can be distinguished. Please note that these procedures can be *alternative* or *cumulative* in the different Member States.

(1) In many Member States, 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 (e.g., *Germany, Latvia, Luxembourg, Austria* and *Belgium* as regards public foundations, *Cyprus, Denmark, Finland* and *France* as regards traditional foundations.). In *Lithuania* a notary approval is necessary.

In some Member States, an amendment of the *purpose* is permitted only under qualified conditions. Examples are *Portugal*, where the purpose must not be amended substantially, and *Finland*, where an amendment of the purpose is only possible if the statutory purpose is (a) impossible, (b) very difficult, (c) totally or essentially useless because of the low value of the assets or another reason, or (d) against the law or good practice.

(2) Some Member States also allow in some cases an amendment by the board of directors without an approval of the State supervisory authority (e.g., *Bulgaria, Italy, Malta, the Netherlands, Poland*).

(3) A few Member States permit the *founder* herself/himself to be authorised in the statutes to amend those statutes without public intervention (*Austria* as regards private foundations, *Hungary* in certain cases,¹³⁸ *Ireland, United Kingdom*¹³⁹). In *Bulgaria* the reservation of a veto right is possible.

(4) Where there is fundamental cause for doing so, some Member States empower the *State supervisory authority* to amend the purpose or administrative statutes of a foundation without the consent of the foundation's governing body, although sometimes the intervention of the court is required (e.g., *Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Germany, Greece, Ireland, Italy, Poland*), while other Member States do not empower the State supervisory authority (e.g., *Finland, France, Hungary, Luxembourg*).

Please note that in several Member States there seems to be legal uncertainty whether the founder may be authorised in the statutes to amend those statutes, whether the founder may amend the conditions for an amendment of a competent organ, and/or whether the founder may authorise other organs or third persons to amend the statutes (e.g., *Estonia, Germany, Slovakia, Spain*).

¹³⁸ Aim and assets cannot be amended.

¹³⁹ The prior consent of the Charity Commission is required for any alteration of the purposes of a charity or of the provisions in its constitution concerning the application of assets on its dissolution or the provision of benefit to any trustees or members.

2. Particularity of the Purpose

Related to the amendment of the purpose is the particularity of the purpose. An amendment of the purpose becomes more important, the more the purpose is/has to be described in a particular way.

Some Member States leave it to the founder whether the foundation should have a broad purpose or a narrow purpose (e.g., *United Kingdom*). In other Member States, the law requires a more particular description (e.g., *Denmark*). The justification for that is usually that too broad a discretion given to the board of directors as regards the fulfilment of the foundation's purpose would conflict with the concept of the foundation as a "servant" of the founder's will.

3. Liquidation

Three different solutions are to be found.

(1) Some Member States require the assets of the terminated foundation to be transferred to a foundation with similar purposes in compliance with the original intentions of the founder (the *Czech Republic*, *Luxembourg*, *Portugal* and *Slovenia*, *Austria* for public benefit foundations, and *Belgium* and *Bulgaria* for public benefit foundations.). This accords with the established principle under *common law* for the variation of charitable trusts, the so-called *cy-près* rule or doctrine – an obscure Norman-French term meaning "the next best thing" (*Cyprus*, *United Kingdom*).

(2) In other Member States the remaining assets must be transferred to another public benefit institution for a public benefit purpose (*Denmark*, *France*, *Lithuania*, *Slovakia*, *Spain*).

(3) A third group of Member States leave it to the founder to determine in the statutes what is to be done with the residual assets. In some Member States, the founder may even stipulate that the remaining endowment of a (non-tax-exempt) foundation is to revert back to herself/himself. This is especially important in Member States where the founder can reserve the right to dissolve the foundation without showing any special cause (e.g., *Austria* for private foundations, *Bulgaria* for private foundations, *Finland*, *Germany*, *Greece*, *Hungary*, *Italy*, *Latvia* for private foundations, *the Netherlands*, *Poland*, *Portugal*). But note that 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 the gift tax laws.

E. Activities of the Foundation

I. Activities for the Promotion of the Foundation's Purpose – Timely Disbursement

The question of adequate distribution for public benefit activities is usually regarded as a matter of tax law. For foundations that are not tax-exempt, only rather vague rules normally seem to apply, thus specifying ultimate distribution, but not the precise point in time.

1. *Foundation Law Rules*

European civil law governing foundations is rarely explicit on distribution rules.

The only Member State which seems to have a strict rule under foundation law is *Spain*,¹⁴⁰ where a foundation must pay out at least 70 % of its net annual income for the furtherance of the foundation's public benefit purpose. The law makes the pay-out requirement somewhat flexible by allowing up to four years for the distribution, starting from the end of the financial year in which the income is obtained.

Another restriction is on the accumulation of income, the reason being to promote distributions. While in tax law some Member States have such rules, in civil law there are usually no - or only very vague - rules. For example, some Member States allow a foundation (as regards civil law) to accumulate capital as long as that is not its very purpose ("Verbot der Selbstzweckstiftung") (see, e.g., *Austria, Germany*).

2. *Tax Law Rules*

In tax law there are different approaches.

(1) Only in comparatively few Member States are there explicit limits for what is deemed an adequate distribution. In *Finland, Germany* and in *Spain*, generally 70 % of the annual net income has to be distributed.¹⁴¹ In *Lithuania*, donations should be used/spent during period of three years, otherwise they will be treated as taxable income.

(2) Most Member States do not have explicit rules. Again the lack of explicit rules does not necessarily mean that the tax authorities and the courts would accept *any* accumulation. Unreasonably excessive accumulations may be regarded as an infringement of the general rule that a tax-exempt foundation has to promote its public benefit purpose.

In order to exemplify the different approaches, the country experts were asked whether they believe that the civil law/tax law of their country would accept that a foundation accumulates its income for five years and only makes distributions on the sixth towards its public benefit purpose.. The country experts of the Member States where no explicit rules exist believe that such an accumulation for a limited period may generally be tolerated by state supervision authorities and tax authorities.

II. Administration of Assets

Apart from the distribution rules some Member States also have other rules concerning the administration of the foundation's assets.

1. *Rule of Capital Maintenance*

It is generally accepted that the founder can prescribe capital maintenance in the statutes.

¹⁴⁰ An explanation for this is probably that a Spanish foundation will usually receive tax benefits, and it is noteworthy that in a tax law context such rules can be found more frequently.

¹⁴¹ The tax authorities may accept an accumulation, if there is a specific justification, e.g., in order to finance a specific capital project (e.g., the construction or improvement of a building) in due time.

Another question is whether the foundation's statutes require such a rule. In most Member States this is not seen to be the case as the founder is entitled to prescribe that the foundation may spend down its capital in due time. Only in *Slovakia*, for *Austrian* public foundations, and *Czech* traditional foundations does legislation require the foundation to maintain a prescribed minimum capital which is comparatively low.¹⁴²

2. *Investment Rules*

Most foundation laws of the Member States do not contain specific investment rules.

If there are such rules at all they are usually very general and vague. Examples of such general rules can be found in *Finland* and *Germany*, where the law states that there should be a secure and profitable investment of the foundation's assets.

More detailed rules can only be found for *Czech* traditional foundations and for *Italian* banking foundations, and are issued by decree for *French* endowment funds. In *Lithuania*, the assets of the foundation must be maintained in credit institutions.

Again the lack of specific investment rules in most countries does not mean that the board members have total discretion in how to invest the assets of the foundation. In all Member States, a visit to the gambling house will very probably be regarded as a violation of a general investment rule, even if there is no explicit prohibition to invest in this way.

3. *Approval of Certain Transactions by the State Supervisory Authority*

Apart from the capital preservation rule (but often related to it), some jurisdictions restrict the acquisition, investment or disposition of assets by requiring administrative approval.¹⁴³

4. *Administration Costs*

See supra C I 7.

5. *Restrictions on the Ownership of Corporations*

See infra E III 2.

III. Economic Activities (Trading)

A permanent trading activity is one where the trader provides goods or services on a continuing basis in return for valuable consideration on an economic basis.

A foundation could have various reasons for wishing to undertake such economic activities.

- The economic activity may be a means of furthering the public benefit purpose (related economic activity).

¹⁴² Czech Republic: CZK 500,000 (ca. € 20,000), Slovakia: SKK 200,000 (ca. € 6,600), Austria: "sufficient" assets, see D I 3 supra.

¹⁴³ See C III 3 supra.

- The economic activity may be merely a source of profit that can be used to further the public benefit purpose of the foundation (unrelated economic activity).
- The founder may wish to use the legal form of the foundation as a shelter to preserve and maintain control over an enterprise for the future.¹⁴⁴

The question of trading by foundations is resolved in different ways. We should distinguish between (1) the scope of the permitted trading and (2) the conditions imposed on the foundation involved in it (e.g. registration in the commercial register, accounting, etc.).

1. Scope of the Permitted Economic Activities by Foundations

a) In *civil law*, some Member States allow a foundation to trade without special restriction, whereas other Member States restrict its economic activities in one way or another. The reasons for restrictions are sometimes creditor protection, sometimes protection of the assets of the foundation, because such economic activity is inherently more risky than investment.

We find three main solutions:

(1) In some Member States there is *no restriction* at all. One example is *the Netherlands* where one can find many foundations expressly carrying on trading activities. The traditional view is that the creditors are protected sufficiently by the non-distribution constraint. However, there is a tendency in modern legislation to make general provision for all organizations undertaking economic activities.

(2) In other Member States, any trading must be *subordinated* 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 (*Nebenzweckprivileg*). One example of this are *Spanish* foundations which may only develop economic activities of their own if these activities directly further the foundation's purpose or are complementary or ancillary to it, provided in both cases that the rules on fair trading are respected. This rule, therefore, permits trading not only as a subordinated or ancillary activity, but also as its main activity, provided that its object in doing so can be considered to be the promotion of a public benefit purpose (e.g., economic activities in the culture or health sectors).

(3) Two Member States are even stricter. *Malta*, as a rule, prohibits a foundation from any direct trading, permitting only a few trading activities in the context of fundraising. In addition, in the *Czech Republic* neither a Foundation nor an Endowment Fund is allowed to carry out direct trading. But note that the *Czech* public benefit institution (which is very similar to a foundation) is allowed to carry out ancillary trading.

¹⁴⁴ As already stated, only a few Member States permit the establishment of a foundation which has as its only purpose to preserve and maintain control over an enterprise ("enterprise purpose foundation"), see B IV 3 c supra.

Denmark has different rules for different types of foundations: In a non-commercial foundation only ancillary trading is allowed, whereas for commercial foundations there is no restriction.

b) As regards *tax law*, the profits of unrelated economic activities are usually subject to income tax in order to avoid an unfair advantage in competition with taxable enterprises.

Chart 11: Economic Activities

| Country | Are economic activities permitted if the profits are used for the foundation's purpose? | Is income from economic activities ¹⁴⁵ taxed? |
|-----------------------|---|--|
| Austria | <i>Public foundations:</i> yes, if within the objectives of the public benefit foundation. <i>Private foundations:</i> yes, if they are purpose-related and ancillary. | yes |
| Belgium | yes, even unrelated activities, if they have a non-profit purpose. | no, as long as they remain ancillary |
| Bulgaria | yes, if they are purpose-related and ancillary | yes |
| Cyprus | yes, even unrelated | no, if related to the purpose |
| Czech Republic | Generally no, but some exceptions exist (real estate leases and organizing lotteries, raffles, public collections, cultural, social, sport and educational events) | No, but only up to CZK 300,000 (€ 12,000) and economic activities are only allowed in a few cases. |
| Denmark | Yes, even non-commercial foundations may have small - scale economic activities, at a larger scale they are considered commercial foundations. | yes |
| Estonia | yes, even unrelated | No, unless it is being distributed outside the foundation. |
| Finland | Yes, but only if it is stipulated in foundation statutes/bylaws and this activity is ancillary and purpose-related. | No, but unrelated economic activities are taxed. |
| France | Yes, provided they support the public benefit purpose of the foundation. | Yes, if not ancillary (i.e., corresponding income is less than € 60,000). |
| Germany | yes, even unrelated | No, but unrelated economic activities are taxed if they exceed € 35,000. |
| Greece | Yes, if they are purpose-related. | No, but net real property rental income and net income from securities is taxed. |
| Hungary | Yes, if they are purpose-related. | Yes, tax free only up to HUF 10 million (approximately € 41,000). For priority public benefit foundations, the threshold is 20 million HUF (approximately € 82,000). |

¹⁴⁵ An economic activity is one where the trader provides goods or services on a continuing basis in return for valuable consideration on an economic basis

| Country | Are economic activities permitted if the profits are used for the foundation's purpose? | Is income from economic activities ¹⁴⁵ taxed? |
|-----------------------|--|---|
| Ireland | Yes, if they are purpose-related or carried out by beneficiaries. (Charities are allowed to engage in economic activity so long as this is directly in pursuance of their objectives, or provided the activity is carried out by people who are the intended beneficiaries of the foundation.) | No, as long as they support charitable purposes. |
| Italy | Yes, if ancillary and not in conflict with foundation's objectives. Onlus: only specific institutional activities, banking foundations: related activities only | yes, except for some tax exemptions received by Onlus foundations |
| Latvia | yes, even unrelated | no |
| Lithuania | Yes, profits have to be used for the foundation's purpose. | no, but only up to an annual profit of € 300,000 |
| Luxembourg | Yes, but this must not be the primary goal of the foundation. | yes |
| Malta | Generally no, only limited trading activities in the context of fundraising are allowed. However, foundations may hold commercial property in a passive manner, receive rents, dividends and royalties. | yes |
| Netherlands | yes, if they are related to the purpose. | yes |
| Poland | Yes, even unrelated | yes |
| Portugal | yes, even unrelated. | No, but unrelated economic activities are taxed. |
| Romania | Yes, if they are ancillary and purpose-related. | Yes, if it exceeds € 15,000. |
| Slovakia | No, but some exceptions exist (leasing out real estate and organizing cultural, educational, social or sports events) . | Yes, but only limited activities in line with the purpose are allowed and exempt. |
| Slovenia | Yes, but income from them must be limited to less than 30 % of all income. | yes |
| Spain | Yes, if they are purpose-related or ancillary. Any other type of economic activity has to be carried out through a shareholding/holding structure. | No, if they support foundation's purpose and are ancillary and complementary in nature. |
| Sweden | yes | yes |
| United Kingdom | Yes, if purpose-related; unrelated activities only at small scale. Otherwise they have to establish a for-profit subsidiary trading company. | No, if income for related economic activity and ancillary economic activity |

2. Subsidiary Trading Companies

Most Member States allow that a foundation establishes a subsidiary trading company. A prohibition only exists in *Lithuania*, *Slovenia*, and (with certain exceptions) in the *Czech Republic*.

In the Member States which restrict direct trading activities by a foundation establishing a trading subsidiary company in order to conduct economic activities can often be an alternative. Examples are *England and Wales*, *Malta* and *Greece*, where a foundation can in principle undertake direct economic activities where this is in accordance with its statutes, but because of the strict budget rules for foundations a foundation itself does not usually undertake any trading in practice but does so through a subsidiary company¹⁴⁶.

Chart 12: Shareholding

| Country | Is majority shareholding by public benefit foundations in companies permitted? | Is majority shareholding by public benefit foundations in companies taxed? |
|-----------------------|---|--|
| Austria | Public foundations: no Private foundations: yes, if they are not extensively involved in the management of the company. | No. If the foundation invests its assets in resident company shares or participation, the dividends are not taxed. |
| Belgium | yes | Dividends are taxed with the tax on legal entities (25 % or 15 %). |
| Bulgaria | yes | yes |
| Cyprus | yes | no |
| Czech Republic | probably no (but few exceptions) | N/A |
| Denmark | Yes, but then they are governed under a separate act as a commercial foundation. | No, dividends from Danish companies in which the foundation holds at least 15 % of the shares are exempt. If the foundation holds a substantial majority of shares, the income of the company for tax purposes is treated as income of the foundation. |
| Estonia | yes | no |
| Finland | yes | No, major shareholding is not considered to be economic activity and is tax-exempt. |
| France | Yes, if it is in line with the foundation's purpose | No, but "influential" shareholding is. |
| Germany | yes | no, but "influential" shareholding is. |
| Greece | yes | no |
| Hungary | yes | no |
| Ireland | yes | No, as long as it is in support of charitable purposes. |
| Italy | Yes, but foundations of banking origin: only for instrumental enterprises. Onlus: only in companies active in certain fields. | yes |

¹⁴⁶ Georgakopoulos, in Hopt/ Reuter (eds.), *Stiftungsrecht in Europa*, p. 359, 362.

| Country | Is majority shareholding by public benefit foundations in companies permitted? | Is majority shareholding by public benefit foundations in companies taxed? |
|----------------|--|--|
| Latvia | yes | no |
| Lithuania | No. Foundations' assets must be maintained in credit institutions. | N/A |
| Luxembourg | Yes, if related to the main objectives of the foundation. | Yes, if qualifying as commercial/industrial activity (which is unlikely). |
| Malta | yes | yes |
| Netherlands | yes | No, but "influential" shareholding is. |
| Poland | yes | no |
| Portugal | yes | no |
| Romania | yes | yes |
| Slovakia | yes | yes |
| Slovenia | no | N/A |
| Spain | yes | no |
| Sweden | yes | yes |
| United Kingdom | yes | no |

3. Regulation of Permitted Economic Activities

Some Member States apply some or all of the standards for business corporations to foundations whose dominant activities are economic. There are several solutions:

- (a) A few Member States have special rules for foundations undertaking economic activities (including standards comparable to those of a business organization). The clearest example of this solution is the *Danish* approach of having two acts for foundations: For those qualifying as commercial foundations,¹⁴⁷ a number of special rules apply with regard to, for example, the capital of the foundation, the governance of the foundation, and employee representation. A commercial foundation is subject to the same rules with respect to accounting and auditing that apply to small and medium-sized public and private limited companies. If a commercial foundation ceases its business activities, it can change its status so that it comes under the rules for non-commercial foundations. Some of the other Member States also make special provision in their foundation law to cover Commercial Foundations (e.g., *Sweden*).

¹⁴⁷ According to § 1, para. 2, Act on Enterprise Foundations 1985, a foundation is considered to be an enterprise foundation if it (1) provides goods or intangible rights, services or the like for which the undertaking normally receives consideration, or (2) carries on business by selling real property or letting out real property for rent, or (3) has control of a public or private limited company as set out in § 2, para. 2 of the Companies Act (see paras. 4 and 5 thereof) or of another undertaking carrying on business as in (1) or (2) above (parent foundation), or (4) exercises a dominant influence over another undertaking pursuant to its statutes, bylaws or articles or by agreement with it and has a substantial share in its operating profit or loss without having control as in (3) above. The foundation is not, however, considered to be an enterprise foundation if the activities of the subsidiary company are of limited scope or if the holding that comprises a controlling interest only constitutes a minor part of the net assets of the foundation.

(b) In other Member States, the rules of commercial law are applicable to foundations involved in economic activities. A clear example of this approach is in the *Netherlands*. Modern legislation has developed different legal rules, regulating economic activities regardless of the legal form. Examples are registration in the commercial register, special inquiries and accounting matters.

IV. Cross-Border Activities

See *infra* Part 4 B.

F. Overview: Basic Features of Tax Law

I. Introduction

Tax aspects are crucial for both the evaluation of the current financial situation of foundations in Europe and for any further development on the EC level. According to the design of the feasibility study as required by the Commission, however, tax aspects shall be covered only in connection with the analysis of the present situation. Taking into consideration the requirement of unanimity of all members of the ECOFIN Council (Art. 94 EC, read in connection with Art. 95 (2) EC), there is but a minimal chance to enact uniform tax rules for European foundations and/or their donors.

Tax law functions both as an incentive and a disincentive for (potential) donors, but it has also a significant impact on the investments of the foundations as such. This is mainly true for income taxation on both levels (foundation, donor) but it also applies to other types of taxes. Most types of taxes (including income tax on both levels) are not subject to much harmonization. An important exception applies to Value-Added Tax (VAT) which has been fully harmonised.

The following overview collects a set of basic tax rules which can be found, in one way or the other, in most Member States.¹⁴⁸

Although the domestic tax systems of all 27 Member States vary considerably, some common features may well be identified. All states have introduced income taxes which apply both to corporations (including foundations) and individuals (including donors). In most Member States, privileges on both levels are provided for non-profit activities of a charitable character. Most, but not all, Member States levy inheritance and/or estate taxes which, too, are of tremendous relevance for foundations.

II. Income Taxation

Most Member States impose separate income taxes on individuals (personal income tax) and on corporations (corporate income tax). The following analysis reflects this fundamental dichotomy and departs from the taxation on the level of the foundation before the “persons behind”, i.e., the benefactors (donors) and/or the beneficiaries, come into play.

¹⁴⁸ This is the starting point for a detailed analysis of existing deficits in this area of law, particularly with regard to cross-border activities within the EU. It should be noted, however, that issues of taxation have already appeared in other sections of this study as well (see e.g. *supra* B IV 1 as regards some aspects of the public benefit purpose and *infra* part 4, B II as regards barriers to cross-border activities).

1. Taxation on the Level of the Foundation(s)

As foundations are usually treated as corporate bodies, the burden of tax depends on the design of the national corporate income tax act. In the absence of full harmonization, the most visible difference is the ordinary level of corporate income tax which varies significantly among the 27 Member States.

The comparison gains much more complexity because of tremendous differences with regard to tax privileges, even in purely domestic situations.¹⁴⁹

Some countries grant far-reaching privileges including full personal exemptions while others offer selective benefits only like, e.g., reduced tax rates. Likewise, the substantive preconditions vary. This is true with regard to the range of qualifying public-benefit purposes but also with regard to a number of further substantive requirements. Any of these requirements may affect the by-laws of a foundation, its actual management, or both. Lastly, many jurisdictions require multi-step tests which include exemption from privileges for profitable entrepreneurial branches under the umbrella of public benefit.

a) Types of Tax Privileges Granted

aa) Full Personal Exemption

The most comprehensive tax privilege granted to public benefit foundations is its full exemption from corporate income taxation. As a rule, this privilege can be found in the vast majority of EU Member States today.

bb) Exemption of Certain Items of Income

An alternative is partial exemptions for those items of income which are effectively connected to the public benefit purpose. Equivalently, some Member States provide re-exceptions to the full-exemption rule which apply to income derived by entrepreneurial activities of a public benefit foundation.

States which have adopted the system of a dual income tax (DIT) may restrict the tax exemption to assessed income but maintain withholding taxation at source. This approach has tremendous relevance for capital yields (interest, royalties) and in some instances also for capital gains from the alienation of assets.

cc) Thresholds and Tax-Free Allowances

Independent from certain items of income, tax legislators have often offered ceilings for non-taxation. These ceilings come in two types. Type 1 provides for non-taxation of the entire foundation if its income remains within the limits fixed in the respective provision. If it exceeds the threshold, the entire income will be taxable. In contrast, Type 2 provides for a tax-free allowance which will be granted unconditionally, i.e., a fixed amount of the income is tax free, even if the income is high.

dd) Reduced Rates

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.

¹⁴⁹ The following analysis confines itself to such purely domestic situations. The particularities of cross-border constellations (domestic foundations in outbound cases; foreign foundations in inbound cases) will be analysed separately in part 4, B II.

ee) Indirect Benefits

Eventually, there may be indirect benefits. They are labelled as “indirect” because they do not affect the tax treatment of the foundation itself but stem from a deduction of grants, donations or sponsorship money on the level of the donor.

b) Substantive Requirements

In all European jurisdictions, a crucial precondition for tax privileges is the type of purpose which the foundation pursues. In addition to the definition of such qualifying purposes,¹⁵⁰ however, the different national tax regimes contain a wide range of further substantive requirements. These additional requirements can be categorised into two main groups, i.e., requirements relating to the running activities, and requirements relating to the dissolution of the foundation. Even though there is a considerable overlap, a third group of requirements should be dealt with separately, i.e., requirements focusing on the relationship between the foundation on the one hand and the founder(s) or manager(s) on the other.

aa) Regarding the Purpose of a Foundation

(i) Technical Design of Purpose-Related Rules

The scopes of national non-profit definitions are hardly comparable, given that some countries use blanket clauses (*France, United Kingdom*) and leave a determination up to the tax authorities and the courts, while other countries have introduced clear-cut catalogues into their legislation. These catalogues might be exclusive (*Hungary*). In most cases, however, they are non-exclusive (e.g., *Germany, Netherlands, Spain*). Even if there is a clear-cut catalogue, some countries have entitled the tax authorities to extend these catalogues and to extend the tax benefits to further (i.e., unnamed and unlisted) purposes (*Germany*).

(ii) Comparison in Substance

In spite of the great variety of technical approaches, the actual results differ less than one would have expected. In recent years, a strong tendency of spontaneous approximation and partial convergence can be observed. Unlike the past when many states had restricted the range of privileged activities to a small core of charitable aims, most countries favour all types of third-sector foundations today.

bb) Regarding a Foundation’s Activities

While a rather strict restraint is required in all EU jurisdictions as to the qualifying purposes of the foundation (regarding mixed activities), a large set of further requirements appears in some, but not all EU Member States. This is particularly true with regard to the foundation’s day-to-day activities (as opposed to its final dissolution or other singular restructuring measures).

Some countries make a distinction in their tax legislation between endowment contributions (i.e., addenda to the stock of the foundation) and other contributions (i.e., donations or gifts which have not been given as endowment contributions). If so, such contributions are subject to the requirement of speedy use. If the foundation retains such

¹⁵⁰ See supra B IV 1.

contributions rather than spending them, it may forfeit its tax benefits (e.g., *Austria, Germany*).

Many domestic tax systems require a proper corporate governance of the foundation. Such requirements include the full observance of the by-laws of the foundation as well as efficient measures against defalcation, fraud, bribery and corruption. In all, foundations have to meet substantive standards of compliance.

Moreover, there are a number of formal requirements. They include, but are not restricted to, certain notification requirements, book-keeping duties (including requirements as to the place where the books should be kept and stored), and other documentation requirements.

cc) Regarding the Relationship between a Foundation and its Founders/Donors

While some states are rather restrictive in assigning tax privileges to entities of the third sector, others grant full personal exemptions or impose taxes only on business-like activities of the entity. In any case, the crucial criterion is the type of activity and the degree of altruistic investment of the respective entity. It goes without saying that there is a great variety in practice, ranging

- from business foundations (i.e., situations where a senior entrepreneur pursues immortality of his enterprise by transferring all shares into a private, but fully profit-oriented foundation)
- via mixed foundations (oriented towards a charitable aim, but also obliged to distribute a certain portion of its profits to the donor and/or his heirs)
- up to entirely altruistic foundations which pursue a charitable purpose exclusively.

In accordance with the overall design of this feasibility study, the tax treatment of profit-oriented business foundations will be ignored in the following survey. Mixed foundations are taken into account, however.

c) By-Laws and/or Actual Management of the Foundation as Checkpoints

In addition, many domestic tax systems require proper corporate governance of the foundation. Such requirements include the full observance of the by-laws of the foundation as well as efficient measures against breach of trust including defalcation, bribery and corruption.

2. *Taxation of Persons behind a Foundation*

The second arena of income taxation is the tax treatment of the persons (or body of persons) behind the foundation. Here, a basic distinction is required between two constellations in which these persons might be affected. The first constellation concerns the contribution to the foundation which a person might make either as a (co-)founder or as a sponsor. This category is referred to as the tax treatment of donations. The second constellation is inverse. It concerns any situation where a person (usually the donor, but possibly a third person) receives actual or potential benefits from the foundation.

a) Treatment of Donors

At the time when a donation of any kind has been made, he who has given money or non-cash assets to the foundation (the donor/benefactor) might be able to deduct this donation, or parts thereof, from his income tax base or even from the tax itself.

At the same time, two basic types of donations need to be distinguished here. The donation might be made in the form of an endowment contribution or in the form of a non-specific contribution.

aa) Point of Deduction

Most EU countries offer a deduction of qualifying donations from the tax base. Under progressive tax rates, this approach implies that the effective tax benefit differs – the more the taxpayer earns, the lower is his net contribution to the respective donation. This interdependence is a mere reflection of a flexible marginal tax rate. Nevertheless, it has sometimes (in the authors' view, in a highly questionable way) been criticised as unfair.

For this reason, some states (e.g., Hungary) have designed their tax law in a way that donations are not deductible from the tax base. Rather, a certain percentage (in Hungary 30 per cent) of the donation is treated like a pre-payment on income tax, i.e., it can be credited against the income tax, as it would have been assessed otherwise.

bb) Distinction Between Different Types of Contributions

Where the donation is made in the form of an endowment contribution, it functions as an addendum to the stock of the foundation. The foundation must not spend this amount. By contrast, other (non-specific) contributions are donations or gifts which have not been given as endowment contributions. The use of these donations is at the discretion of the foundation which might spend the money immediately, at a later date, or feed it to the capital stock.

Most EU states grant deductions for both types of donations. However, the percentage amounts as well as the ceilings (maximum deductions) differ in many countries. Usually, endowment contributions are privileged while there are lower limits for ordinary (non-specific) contributions.

b) Treatment of Distributions Made to Affiliated Beneficiaries

A much more intricate aspect concerns the question if, and in how far, profits of a foundation may be taxable on the level of its beneficiaries. As a rule, a beneficiary is every person, or body of persons, who receives benefits in money or in kind from the foundation. In the context of the present study, however, we will ignore the tax treatment of beneficiaries who are not affiliated or related to the benefactors (e.g., of people in need) and focus on beneficiaries who are personally affiliated or associated with, or related or even identical to, the donors.

The tax treatment of those “affiliated beneficiaries” plays an enormous role in the context of foundations which pursue any private benefit purpose, such as family foundations. Although the general focus of this study is restricted to public purpose foundations, the tax treatment of private purpose foundations and its related beneficiaries deserves to be mentioned here, given that it might gain high relevance in

cross-border situations where some of the states concerned may not agree on the characterization of a foundation as “public purpose” rather than “private purpose”.

Similarly, some states, like *Denmark* and *Germany* and probably also the *Netherlands*, have no objections and continue to grant comprehensive tax benefits, if a public purpose foundation distributes a minor part of its yields (e.g., up to one third) in the private interest of the donor and/or his family. These distributions to the donor and/or his family, either in cash or in kind, may be subject to income taxation on an accrual basis.

Taxation on an accrual basis means that benefits are taxed only if, and not earlier than, the beneficiary has actually derived them. Such restriction can be found where a state provides for comprehensive corporate income taxation on the level of the (private purpose) foundation. This constellation is similar to the ordinary dichotomy of company taxation. Therefore, the applicable tax schemes are usually identical to the schemes that relate to company taxation.

This means that most states, in one way or another, aim at mitigating the double burden which would arise in case of a full imposition of tax both on the level of the corporation (foundation, company) and on the level of its beneficiaries (founders, shareholders, etc.). The different EU Member States use highly different mechanisms in this respect, including

- the exemption of corporate profits, combined with exclusive (but full) taxation of the shareholders on distribution (e.g., Estonia),
- a moderate taxation of corporate profits, combined with a moderate taxation of the shareholders upon distribution (e.g., Germany, Ireland),
- a full taxation on both levels, combined with a pro-rata credit of corporate income tax against the individual income tax of the respective shareholder.

c) Potential Benefits

Alternatively, states might even go further and ignore the existence of the foundation under tax law completely, i.e., treat the foundation as a transparent entity and, consequently, tax the entire income of the foundation’s profits on the level of the beneficiaries behind the foundation. This concept does not require any distribution of benefits to the persons behind the foundation. Rather, all items of income which have been derived by the foundation are assigned directly to the person(s) behind the foundation as so-called “deemed income”. From a private law viewpoint, such assignment of income to the beneficiaries is mere fiction. From a tax law perspective, national legislators (particularly in capital-exporting countries with relatively high income tax rates) have frequently used such concepts, often motivated by cross-border tax planning schemes where the investor transfers assets to a non-resident private foundation in a low-tax jurisdiction like, e.g., Liechtenstein.

In order to combat such schemes, the state where the beneficiary resides may

- consider the transfer of assets to the foundation as an *abuse de droit* on the basis of a general anti-avoidance rule (GAAR), or
- insert an explicit clause into its domestic tax legislation, providing for a treatment of the foundation as a transparent entity.

It should be stressed, however, that the concept of transparency (and its consequence, the taxation of deemed income on the level of the beneficiary) cannot be found in all

Member States. And even in the states which do employ such a concept, it remains a rare exception.

III. Inheritance Taxation

Many European states have introduced gift, inheritance and/or estate taxes, imposing a burden on either the recipient (heir, beneficiary) or the donor/the estate of the deceased as such.

In general, however, these types of taxes (hereinafter collectively referred to as inheritance taxes) are in decline at the moment, since a considerable number of EU Member States have abolished, or are considering abolition of, their inheritance taxes.

1. Taxation on the Level of the Foundation(s)

And even where inheritance taxes exist, tax benefits (including full personal exemptions) are often available in cases where the recipient is a non-profit foundation. In fact, these benefits constitute a cornerstone within the set of incentives for charitable giving.

An intricate problem is the interaction between gift and inheritance taxation (on the side of the recipient foundation) on the one hand, and corporate income taxation on the other, provided that foundations are basically subject to both of these taxes at all. Most countries avoid the double burden in one way or the other – either by exempting the respective assets from the corporate income tax or from the inheritance tax (*Sweden*), or by granting a credit of one type of tax against the other. There are, however, a few cases where a state (e.g., *Germany*) does levy both corporate income tax and inheritance tax if a non-tax-exempt corporation (e.g., a business foundation) obtains an asset *causa mortis*.

2. Taxation of Donors

As regards the donors, almost all Member States have privileges for donations to public benefit foundations as regards inheritance tax. In Member States that impose gift and inheritance taxes solely on the recipient foundation there may be no effect on the donor at all (but on the foundation).

G. Main Findings of Part 3

I. General Characteristics and Tendencies

1. Legal Uncertainty

One characteristic feature (both in foundation civil law and in tax law) is a certain legal uncertainty, because in many Member States the written law is comparatively short, creating an atmosphere of debate whether the few explicit rules are accompanied by some implicit rules (analogy, fundamental principal of law, etc.).

2. *Tendency of Liberalization*

There seems to be a tendency in Member States with traditionally comparatively strict foundation law to liberalise their rules (especially by implementing new foundation types) in order to increase the possibilities to establish foundations. Examples are the reforms in *Austria* (1995), *Belgium* (2000) and most recently *France* (2008) and the current proposal in the *Czech Republic* (2008). As a result of this tendency there is a certain convergence of foundation law as well as tax benefits.

II. Evaluation of the Similarities and Differences

1. *Types of Differences According to their Significance*

If you compare 27 Member States, it is not surprising that you will find several differences. But not all differences have the same weight. You can distinguish between certain kinds of differences:

- Some differences are of a *structural* nature: At first sight they seem to be substantial, but if you look at them through the functional approach, the differences can be mainly explained as a consequence of a different structure. Whether such differences are significant depends on the question whether it is possible to reach a relatively comparable result by using certain means of the different structure ('purely' structural difference with low significance), or whether the different structure really will lead to different results ('substantial' structural difference with high significance).¹⁵¹
- Some differences are *particular* differences and only relevant in very specific cases. Such differences are only highly significant, if this particular question plays an important role in practice, otherwise the significance is comparatively low.
- Some differences are only of *terminological* nature, if you compare them via a functional approach they are not significant at all.¹⁵²

Thus a difference is only significant, if it is relevant in practice (no particular difference) and relevant via a functional approach (no terminological difference or purely structural difference).

It is necessary, therefore, to evaluate how significant the existing differences are.

2. *Definition and Characteristics*

What is common to all Member States is that a foundation¹⁵³ is defined by all of them as an independent organization (generally with its own legal personality¹⁵⁴), which has

¹⁵¹ An example of such a structural difference is the different approach of the civil law (foundations and associations) and the common law (trusts and other charitable forms). As the comparative analysis has shown this difference is of relatively low significance, because the legal forms of the charities are so flexible that they create organisations which are always similar to a 'typical' civil law foundation.

¹⁵² A good example of such a purely terminological difference is the term "membership", see supra C I 10.

¹⁵³ The common law member states do not have the legal form of a foundation, but other 'foundation-like' organisational forms (the trust, the charitable company, etc.).

no formal membership,¹⁵⁵ is supervised by a State supervisory authority, and serves a specific purpose, for which a founder has determined the foundation's purpose and statutes and usually provided an endowment.¹⁵⁶

As regards the eligible purpose, we can find both similarities and differences: What is similar is that all Member States accept public benefit purposes. Although the wording of the law often does not specify what purposes are regarded as "public benefit", according to our results it is observed that there exist a surprisingly high number of purposes which are traditionally regarded as "public benefit" in every Member State. Apart from this common core of "public benefit foundations", we can find purposes which are regarded as public benefit only in most Member States, whereas about half of the Member States also accept other types of foundations apart from public benefit foundations, which is a significant difference. However, as the empirical analysis shows, in reality the public benefit foundation is the dominant type even in most of the Member States which allow any lawful purpose.

3. *Governance and State Supervision*

If we look at the governance and the state supervision of foundations, we find both similarities and differences.

As regards *internal governance*, we find that in almost all Member States there exist, as a rule, comparatively moderate requirements for the internal structure in leaving the founder a certain discretion (e.g., as regards the appointment or dismissal of board members, necessity of a supervisory board) and there are no mandatory substantial rights for founders, beneficiaries or third parties.

Of course, as already described, one can find a number of exceptions to this general rule, but most of the differences are only of relatively low significance. Some of them are very particular (e.g., a few Member States have certain personal requirements for board members, still leaving the founder a very broad discretion so that the similarities are still much more significant than this difference¹⁵⁷).

At first sight, perhaps the most 'significant' difference seems to be the French model where foundations are much more regulated by 'factual binding' model statutes with comparatively strict requirements for internal governance than in the other Member States. However, these differences are less significant, too, if you take into account two structural differences: First, the French foundation is a very 'exclusive' legal form, to be used only by a few hundred organisations with a remarkable endowment (founding assets of at least € 1,000,000). While such strict rules may be explainable for 'big' foundations, it is not very surprising, that the other Member States, which usually also accept much 'smaller' foundations (and thus have a much higher number of foundations) will not have comparatively strict rules. Second, the French legislator has

¹⁵⁴ The trust has no legal personality, but it is possible to establish other legal forms which have legal personality (e.g., the charitable company). So this difference is of low significance.

¹⁵⁵ But note that the term "membership" can be understood differently (terminological difference), see supra C I 10.

¹⁵⁶ Note that some Member States do not require any founding assets. However, also in this Member States the foundation is usually believed to have an endowment sooner or later. In some Member States a foundation without any assets may be deleted from the register after a certain period of time.

¹⁵⁷ See supra C I 2.

recently discovered that his strict approach means an ‘entrance barrier’ for ‘smaller’ public benefit initiatives. Thus, the new Endowment Fund has recently been introduced which is apparently used for such ‘smaller’ initiatives and will thus probably only require symbolic founding assets and consequently leave much more discretion to the founder as regards the foundation’s internal governance. Consequently, after the introduction of the new Endowment Fund, the French foundation law has become much more similar to the other Member States than it was before, making the structural differences of comparatively low significance.

Other clear differences exist with respect to minimum requirements for governance: A mandatory number of at least three board members are necessary in about half of the Member States, about half of the Member States also require mandatory external auditors (sometimes only for ‘big’ foundations) and/or mandatory disclosure, a few Member States even require a mandatory supervisory board. However, this differences are explainable as well: most Member States which require such stricter private supervisory mechanisms often have comparatively little monitoring by state supervisory authorities in practice, while other Member States have more extensive monitoring by the state supervisory authorities, but (almost) no mandatory rules as regards private supervisory mechanisms. Thus, although different governance philosophies exist, the results are comparable since all Member States have a certain minimum level of governance by using different instruments. Therefore, the significance of the structural differences is lower than might seem at first sight.

As regards remuneration and administration costs, the usual rule of most Member States for public benefit foundations seems to be that the expenses have to be reasonable. However, a few Member States prohibit remuneration for board members (but not for executive officers and other employers!) or have certain limits.

4. Formation, Liquidation and Fundamental Decisions

When it comes to *formation*, there exist varying procedures, but there are several common basic elements to the Member States: As a matter of fact a foundation deed will usually be necessary. In addition, a certain participation of a public authority is necessary in all Member States except for Sweden, and in almost all Member States the public authority has no discretion on whether it permits the formation of a foundation provided that the requirements of the foundation law are fulfilled (right of establishment).

As regards the requirements of establishment, the most apparent difference (apart from the already presented differences with respect to the eligible purpose of the foundation) can be found in the requirement of founding assets. Although all Member States expect that a foundation may possess assets, a foundation can be established in several Member States without any foundation assets while in other Member States one needs an initial minimum endowment of up to at least 250,000 euros, as is the case in Portugal.¹⁵⁸

With respect to liquidation, some Member States require the assets of the terminated foundation to be transferred to another foundation or other public benefit organization

¹⁵⁸ The strictest requirement seems to be for French traditional foundations (1,000,000 euros), but a French founder can also establish the alternative foundation type of the endowment fund, which probably only needs a symbolic initial endowment.

with similar purposes in compliance with the original intentions of the founder, or at least for another public benefit purpose. Other Member States leave it to the founder to determine in the statutes what is to be done with residual assets. Note, however, that if the liquidated assets were used for non-public benefit purposes in these Member States, this may easily lead to harmful tax effects, so that in practice all public benefit foundations probably require that the assets of a terminated foundation still be used for a public benefit purpose.

As regards fundamental decisions, all Member States have rules for amendments to a foundation's statutes. Most Member States accept an amendment or modification of the statutes if a majority of the board of directors of a foundation votes in favour of it and the State supervisory authority approves the modification as being in line with the founder's intentions. Apart from this, there exist alternative or additional procedures in some Member States, while in others there seems to be legal uncertainty whether the founder is authorised in the statutes to amend those statutes, whether the founder may amend the conditions for a modification of a competent organ, and/or whether the founder may authorise other organs or third persons to amend the statutes.

5. Activities of the Foundation

With reference to the *administration of assets*, there are surprisingly few differences. The rule is that there are no strict obligations. So, there is no strict obligation to maintain the foundation's capital in almost all Member States (except the Czech Republic, Slovakia and for Austrian Public Foundations). Nor is there a rule of timely disbursement in the foundation laws of the Member States (except Spain) and there are usually no detailed rules on the investment of the foundation's assets (except the Czech Republic, Lithuania and in some cases in France and Italy).

As regards *economic activities* we find some similarities and some differences.

The similarity is that all Member States, except the Czech Republic, allow economic activities by a foundation and/or a subsidiary company of the foundation in at least certain cases.

The special case of the *Czech Republic* is explainable: Obviously, the *Czech* legislator was afraid that the assets of the foundation could be diminished because of losses caused by unsuccessful, 'risky' economic activities. Thus, a foundation has to be entirely separated from any institution which carries out economic activities. However, several public benefit purposes are necessarily connected with the provision of services and/or goods (e.g., hospitals, schools, etc.). Consequently, there are some ways in practice to ensure that a foundation/endowment fund may also promote such purposes (requiring 'economic' activities) by a 'network' of 'joint institutions', including foundations, endowment funds and associations, public benefit institutions or even (in a few cases) for-profit institutions.

Example 1: A foundation (but not an endowment fund) may be the founder of a public benefit institution. This concept is often used in practice, e.g., if the foundation is a founder of hospital, which has a legal form of a public benefit institution, and the foundation is one of the main sources of financing for such a subject.

Example 2: The endowment fund is often founded by commercial companies to support their various public benefit activities.

The examples show that the main reason for the restriction in Czech law seems to be the protection of the foundation from losses from economic activities and not the protection of the potential creditors of a foundation which carries out such economic activities.

Apart from this similarity there are differences as regards the nature of the economic activities:¹⁵⁹ Some Member States allow economic activities without any direct restriction. Other Member States allow a foundation to carry out purpose-related economic activities and ancillary purpose-unrelated economic activities. Almost all Member States allow a foundation to have an affiliated company which carries out the economic activities.

6. Tax Law

As regards tax law, the parallels seem to be even stronger as in the case of civil foundation law. This is especially true with respect to the requirements for tax benefits and the benefits in the field of income taxation and inheritance taxation, while certain differences remain vis-à-vis the amount of tax benefits for donors.

III. Overall Evaluation

If we look closer at the public benefit foundation type, however, we find a lot of similarities at least as regards general structure. The following points are similar in all or almost all Member States: (1) A foundation¹⁶⁰ has legal personality,¹⁶¹ (2) it has no formal membership,¹⁶² (3) it is supervised by a state supervisory authority, (4) the founder determines the foundation's purpose and statutes, (5) there is a common core of purposes regarded as "public benefit", (6) there is an establishment procedure consisting of a private act (foundation deed) and the participation of a public authority (usually without discretionary power), (7) there is a certain level of governance assured by a combination of private supervisory means and state supervision, (8) there usually exist comparatively moderate requirements in leaving the founder a certain discretion for the internal structure (e.g., as regards the appointment or dismissal of board members, necessity of a supervisory board), (9) there are no mandatory substantial rights for founders, beneficiaries or third parties, (10) there are no detailed mandatory rules on investment of assets in almost all Member States, (11) a foundation is entitled to carry out at least ancillary economic activities in almost all Member States, (12) a foundation can be the major shareholder of a business company in almost all Member States.

On the other hand, we can find the following differences even in the case of public benefit foundations: (1) The nature of the involved State supervisory authority varies (governmental body, charity commission court, notary public), (2) there are some purposes which are regarded as "public benefit" only in certain Member States, (3) in a few Member States the State supervisory authority has discretion whether a foundation

¹⁵⁹ See supra E III.

¹⁶⁰ The *common law Member States* do not have the legal form of a foundation, but other 'foundation-like' organisational forms (the trust, the charitable company, etc.).

¹⁶¹ In the *common law Member States* the trust has no legal personality, but it is possible to establish other legal forms which do (e.g., the charitable company). Therefore, this difference is of low significance.

¹⁶² The term "membership" can be understood in various ways, but these differences are purely terminological.

can be established, (4) some Member States require a certain amount of founding assets, (5) a few Member States do not accept any remuneration for board members, (6) some Member States require a certain minimum of (comparatively moderate) private supervisory means, e.g., at least 3 board members (about half of the Member States), mandatory personal requirements for board members (seldom), a mandatory supervisory board (very seldom), auditing (sometimes only for larger foundations), disclosure (about half of the Member States), and there are different approaches as regards the standards of accountancy, (7) the competence of the State supervisory authorities differs in details (e.g., specific approval procedures for certain fundamental acts in some Member States as a means of preventive supervision), (8) some Member States generally allow economic activities, other Member States only ancillary economic activities.

If we analyse the similarities and differences, it seems to us that the similarities are overall more significant in the case of the public benefit foundation. The differences are often relevant in the detail and in specific cases. Probably the most important difference for public benefit foundations can be found in the different approaches regarding the founding assets, the private supervisory instruments (i.e., auditing and disclosure), and the scope of economic activities.

Part 4: Cross-Border Activities – Barriers and their Economic Relevance

A. Introduction

I. Reasons for Cross-Border Activities

Although foundations traditionally have often only been active regionally, the globalisation of the economy has had some influence on the foundation sector as well. The number of foundations, founders and donors already engaged in cross-border activities or who want to develop transnational cooperation has grown significantly over the last decade.

First, more and more (potential) founders (natural persons or corporations, respectively) have assets in several countries which may become part of a foundation's endowment. Foundations themselves often have a diversified and international asset administration in several countries and fund-raising may be undertaken in several countries. Second, foundations have reported increased cross-border activities in their grant-making and operational activities. Some foundations concentrate on pursuing transnational issues (e.g., environmental protection, foreign aid) or specifically intend to contribute to the European public good. In addition, some foundations solicit activities in many countries (e.g., alumni organizations or foundations promoting a single purpose of cultural value). Some foundations undertake economic activities (usually in the health or social services sector) in several countries. Third, foundations connected with a transnational enterprise are often part of the corporate identity of the company. Therefore, such a foundation will often operate in every country in which the enterprise is present. Such tendencies can be especially observed in the case of US enterprises because the concept of 'corporate citizenship' is popular in the United States, but also within European enterprises. Fourth, foundations and funders have stated their willingness to create more synergies by collaborative efforts and joint initiatives.

II. Types of Barriers

A foundation which conducts cross-border activities has to face several barriers, which may lead to transaction costs. We distinguish three types of such barriers.

1. Legal barriers, e.g. recognition procedures, discrimination as regards tax benefits.
2. Psychological barriers e.g. lower acceptance by foreign donors because of the unknown legal form.
3. Other barriers, e.g. different languages.

A European Foundation cannot overcome all these barriers. As a legal instrument it focuses on the overcoming of legal barriers. Apart from this, as a kind of side effect, it may be helpful in order to overcome also psychological barriers.

At first, this part will provide a legal comparative overview of the main legal and administrative barriers (infra B) and analyse whether the existing national legal barriers infringe the EC Treaty (infra C). Furthermore, we give insights of the economic

relevance of international activities of foundations (infra D) and estimate the costs of barriers against those activities by introducing a model calculation (infra E).

B. Legal Comparative Overview about the Main Legal and Administrative Barriers

Two kinds of legal barriers can be identified:

- (a) civil law barriers, i.e., cross-border recognition and establishment of foundations and trusts (e.g. recognition of legal personality, recognition of public benefit purposes, establishment of branches, etc.).
- (b) tax law barriers, e.g., transfer of funds across borders; investments in other EU Member States.

It is conceivable that at least some of these barriers may infringe upon the fundamental freedoms of the EC Treaty.¹⁶³

I. Civil Law Barriers

1. Cross-Border Activities

One central question is whether the civil law of a Member State allows a domestic foundation to engage in activities abroad. As a general rule, all Member States allow such activities¹⁶⁴.

Theoretically, foundations have several options to structure and organise their cross-border activities. A foundation can

- operate in a state other than its state of formation (*i.e.*, home state) as a foreign foundation;
- operate in a state other than its home state through independent subsidiaries (e.g., a foundation);
- operate in a state other than its home state through representatives, agents or branches;
- transfer its center of administration (*centre d'administration*, *siège réel* or *effektiver Verwaltungssitz*) from their home state to another state;
- transfer its statutory seat from its home state to another state.

2. Recognition of Foreign Foundations

As a general rule, all Member States recognise a foundation that has been validly formed in accordance with the laws of one Member State as a foundation. If the state of formation grants a foundation the status of a legal entity (*juristische Person*), the status will also be recognised by all other Member States. As a legal person, a foundation may, as a general rule, enter into contracts, and it may sue and be sued. In principle, it is

¹⁶³ See infra C.

¹⁶⁴ The only explicit “restriction” seems to exist in the *Czech Republic*: According to the Act on Public Benefit Collections, the organizations (including foundations) carrying out public benefit collections to support activities abroad need to have an approval by the Ministry of Foreign Affairs. The aim of the rule is probably to ensure that the activities are consonant with the *ordre public* of the Czech Republic.

for the foundation to determine to what extent, if any, it wishes to engage in activities outside of its home state and, if so, how it wishes to structure and organise its cross-border activities.

In the *Czech Republic*, however, a registration by the foreign foundation with local authorities is required. The right of the foreign foundation to operate in the territory of the Czech Republic commences on the date of the registration of its branch established in the territory of the Czech Republic in the official register, and ceases to exist when the branch is struck off the official register. Additionally, a foreign foundation may evolve its activities in the territory of the Czech Republic under identical conditions and in the identical scope as foundations or endowment funds established in accordance with the Czech Act on Foundations.

Other Member States apply a special recognition proceeding, which is the case, for instance, in *Estonia*, *Italy*, and *Spain*. According to the *Spanish* Foundation Act, recognition is given to all foundations legally constituted in another country, and occasional activities are allowed without any additional requirements, but permission to operate regularly in Spain requires¹⁶⁵: (1), establishing a formal delegation in Spain, (2) registration with the competent public body, and (3) purposes of general interest and accomplishment of legal requirements for foundation according to Spanish law. When the foreign foundation's sole activity in Spain is fundraising, civil law does not allow formal registration.

In *Poland* and in *Bulgaria*, foreign foundations are required to comply with special recognition proceedings and to establish a representative office in the country, if they want to carry out activities in these Member States. Thus, according to Article 38, par. 2 of the *Bulgarian* Non-profit Legal Entities Act “[F]oreign non-profit legal entities may perform public benefit activities through their branches in the country under the conditions of this Act”.

Chart 13: Recognition of Foreign Foundations

| Country | Do you recognise the legal personality of a foreign foundation in your country? |
|-----------------------|--|
| Austria | yes |
| Belgium | Yes, but foreign foundations which have a physical presence in Belgium (office) are subject to registration rules. |
| Bulgaria | Yes, but it is necessary to establish a branch office. |
| Cyprus | yes |
| Czech Republic | Yes, but registration requirements. |
| Denmark | yes |
| Estonia | Special recognition procedure necessary |
| Finland | yes |
| France | yes |
| Germany | yes |
| Greece | yes |
| Hungary | yes |
| Ireland | yes |

¹⁶⁵ Art. 7 Spanish Foundation Law 50/2002.

| Country | Do you recognise the legal personality of a foreign foundation in your country? |
|----------------|---|
| Italy | Special recognition procedure necessary |
| Latvia | yes |
| Lithuania | yes |
| Luxembourg | yes |
| Malta | yes |
| Netherlands | yes |
| Poland | If the foundations carries out activities in Poland, a representative office has to be established (specific recognition procedure necessary) |
| Portugal | yes |
| Romania | yes |
| Slovakia | yes |
| Slovenia | yes |
| Spain | generally special recognition procedure necessary |
| Sweden | yes |
| United Kingdom | yes |

3. Recognition of Trusts

Difficult problems arise if a foreign Trust wishes to operate in a civil law country. As a Trust generally has no legal personality under the laws of its home Member State, the host Member State cannot recognise the existence of such a legal personality. A more fundamental issue exists in those Member States that do not recognise the Trust form as such. The Hague Convention of 1985 on the Law Applicable to Trusts and on their Recognition was ratified by only few Member States (*e.g., Italy, Luxembourg, Malta, The Netherlands* and the *United Kingdom*) whereas the majority of Member States has not ratified the Convention.

4. Cross-Border Transfer of the Real Seat

Problems can arise in Member States that apply a conflict-of-laws principle commonly referred to as the “real seat doctrine” (*Sitztheorie* or *siège réel doctrine*), or a variation thereof, for purposes of determining whether a foundation is to be characterised as a domestic entity or a foreign entity. If the foreign activities of a foundation in a Member State other than its home Member State become so dominant that the principal place of business or “real seat” of such a foundation is effectively abroad, the foundation may be legally considered as having in fact transferred its seat which, under the real seat doctrine, will usually give rise to certain legal issues¹⁶⁶.

Most Member States apply, with or without variations, general principles of conflict-of-corporate-laws to determine the legal status and the nationality of a foundation (*lex societatis*). While they are codified in some Member States, the conflict-of-corporate-laws principles are based on case law in most Member States. Member states have traditionally differed as to what law governs the internal affairs and the nationality of a corporate entity or foundation. As a general rule, two fundamentally different

¹⁶⁶ See *infra* B I 4. a)

approaches can be observed in the EU: the “real seat doctrine” and the “state of incorporation doctrine” (which sometimes is also referred to as “internal affairs doctrine”).

Chart 14: Conflict of Laws

| Country | How are conflicts of laws relating to foundations decided by reference to the law applicable? |
|-----------------------|---|
| Austria | real seat theory |
| Belgium | real seat theory |
| Bulgaria | incorporation theory |
| Cyprus | incorporation theory |
| Czech Republic | N/A |
| Denmark | incorporation theory |
| Estonia | Incorporation theory |
| Finland | real seat theory |
| France | real seat theory |
| Germany | real seat theory, but reform proposal (incorporation theory) |
| Greece | real seat theory |
| Hungary | incorporation theory |
| Ireland | incorporation theory |
| Italy | real seat theory, if the real seat is in Italy |
| Latvia | real seat theory |
| Lithuania | real seat theory |
| Luxembourg | incorporation theory (due to governmental approval requirement) but not provided for by the law |
| Malta | N/A |
| Netherlands | incorporation theory |
| Poland | real seat theory |
| Portugal | real seat theory |
| Romania | real seat theory |
| Slovakia | real seat theory |
| Slovenia | incorporation theory |
| Spain | real seat theory |
| Sweden | incorporation theory |
| United Kingdom | incorporation theory |

a) Real Seat Doctrine

The real seat doctrine had a long tradition in several Member States (*e.g.*, *Belgium*, *France*, *Germany*, *Poland*, *Romania*, *Slovakia* and *Spain*). The real seat doctrine, recognises that only one state should have the authority to regulate a foundation’s internal affairs, while the most plausible state to supply that law is the state in which the foundation has its real seat (*effektiver Verwaltungssitz* or *siège réel*). The term “real seat” is commonly understood as referring to the place where the fundamental decisions by the foundation’s management are being implemented effectively into day-to-day activities. Thus, the term real seat refers to the principal place of business (*centre d’exploitation*) of an entity.

The real seat doctrine is based upon the assumption that the state in which an entity has its real seat is typically the state that is most strongly affected by the activities of the entity, and therefore should have the power to govern the internal affairs of that entity. The real seat doctrine stresses the importance of uniform treatment by requiring that all foundations having their real seat in a particular state be formed under that state's law. Thereby, the real seat doctrine creates a level playing field and prevents foundations from evading that state's legal controls through formation in a jurisdiction that has less stringent laws. As a result, under the real seat doctrine all foundations concerned are subject to the same rules and principles of the law of foundations and related laws.

Most Member States that apply the real seat doctrine typically require a foundation not only to have its registered seat (*Satzungssitz* or *siège social*) in the state of formation but also its principal place of business or real seat (*effektiver Verwaltungssitz* or *siège réel*). Under the real seat doctrine, the transfer of the principal place of activities (*centre d'exploitation*) or real seat across state borders from the state of formation (Member State A) to another Member State (Member State B) results, as a general rule, in the loss of the foundation's legal status granted by the state of formation ("emigration" or "exit" case). In such a case, the foundation would be required to reincorporate itself in Member State B in accordance with that Member State's laws. Similarly, from the perspective of Member State A, a foundation that has been formed in accordance with the law of Member State B and has moved its real seat from Member State B to Member State A ("immigration" or "entry" case) is considered to have lost its legal status as a foundation in Member State A; provided, both Member State A and Member State B apply the real seat doctrine.¹⁶⁷

b) State-of-Incorporation Doctrine

Obviously, the approach of the real seat doctrine is fundamentally different from the conflict-of-corporate-laws principles employed by courts in *Bulgaria*, *Cyprus*, *Denmark*, *Estonia*, *Ireland*, *the Netherlands*, *Sweden*, *the United Kingdom* and, of course, by courts in the *United States of America*. Thus, for example, under the laws of *Denmark*, *the Netherlands*, and *the United Kingdom* the founders of a corporate entity are free to choose the state of incorporation. According to the choice-of-corporate-law principles of these countries, the existence of a foundation, as well as its subsequent dissolution, are governed by the law of the state of incorporation ("state-of-incorporation doctrine" or *Gründungstheorie*). The importance of the law of the state of incorporation is greatly enhanced by the fact that the law of the state of incorporation also applies, with rare exceptions, to the internal affairs of the entity. Obviously, the state-of-incorporation doctrine emphasises, as a general rule, the founders' freedom to choose the proper law of foundation. Thus, the *lex societatis*, or in the language of English law the *lex domicilii*, is the result of the founders' own volition. Moreover, the state-of-incorporation doctor real seat across state borders without any effect on their legal status as a corporate entity under the law of the state of incorporation; provided, the registered office (*Satzungssitz*) remains in the state of incorporation.

¹⁶⁷ If the two countries involved apply different conflict-of-laws principles (e.g., the real seat principle and the state-of-incorporation doctrine), courts are likely to apply the principle of *renvoi*.

c) Policy Considerations

Clearly, Member States that apply the real seat doctrine aim at effectuating material legal, economic, and social values of the country having the most significant relationship with a particular company. States that recognise a political, or even a constitutional, need to protect certain (local) interests will favour the real seat doctrine. In contrast, states that support the idea of party autonomy in corporate and foundation law matters will, at least in principle, be in favour of the state-of-incorporation rule or similar choice-of-corporate-law principles. If viewed from this perspective, conflict-of-laws rules are, to some extent, a reflection of the general attitude of a legal culture towards the socio-economic role of corporations and foundations and the function of complementary substantive and procedural rules of the pertinent laws for purposes of protecting and furthering the multifarious, and sometimes hard to reconcile, interests of all those affected by a legal entity.

It is important to keep in mind that conflict-of-laws rules, like other legal institutions of all legal systems, are shaped not only by efficiency considerations, but also by history and politics. Initial conditions, determined by the accident of history or the design of politics, influence the path that a conflict-of-laws rule will take. In the EU, path dependency, or institutional persistence, is, however, not the only force influencing the direction and objectives of a Member State's conflict-of-laws rules. Rather, the conflict-of-laws principles of a Member State, like complementary legal institutions that aim at enhancing the pre-existing conflict-of-laws rules, need to be in compliance with the supreme law of the EU, especially with the freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty.

Thus far, however, the ECJ has not had an opportunity to rule on a foundation's right of establishment, and there is no evidence that such cases have arisen in practice.

5. *Cross-Border Transfer of a Foundation's Registered Seat*

It is unclear what the legal situation is if a foundation wants to transfer its registered seat (*Satzungssitz* or *siège social*) from one Member State to another. The national laws of the Member States do not regulate these cases. In practice, these cases do not seem to exist. Consequently, there is a lack of court decisions or administrative practices concerning this question.

According to some country experts, a transfer of the registered seat of the foundation may constitute massive barriers in several Member States. Thus, in *Germany* most commentators suggest that a foundation needs to be liquidated and reincorporated if it wants to transfer its registered seat to another Member State.

At first glance, the barriers mentioned do not seem to be very relevant in practice: There are no public complaints or even discussions regarding the problems of the transfer of a foundation's registered seat. The reasons for the lack of interest in the subject are not entirely clear. There may be a lack of effective control by the competent authorities in the case of a "factual" transfer of the foundation's real seat, or foundations may find ways to avoid such a transfer (*e.g.*, by establishing a subsidiary or another foundation in the other Member State).

It is not inconceivable, however, that some foundations may be interested in a transfer of their registered seat and/or their real seat.

Example: According to the foundation's statutes its purpose is to support students of a particular African or Asian country¹⁶⁸. The support shall be implemented by employees of the foundation. The foundation was established in EU Member State A where most students lived at that time. Some years later, because of changes in the factual or legal environment, only few students continue to live in Member State A whereas most students live in Member State B.

Given the foundation's purpose, there would be good reasons for transferring the registered seat of the foundation to Member State B.

Another possibility is to leave the formal main office in Member State A and to establish a branch in Member State B which carries out most of the activities of the foundation. Even in the latter scenario, some Member States, applying the "real seat doctrine", may regard the fact that the main activities of the foundation are carried out by the branch office in Member State B as a transfer of the foundation's real seat.

6. Conclusion

The preceding chapter illustrates that cross-border activities may be subject to various civil law barriers of a different nature and magnitude. If a foundation engages in activities in another country without transferring its seat to that country, it very often faces national measures and prerequisites that go beyond the requirements imposed by its home country. Thus, it is not uncommon for member states to impose national recognition procedures on out-of-state foundations. If, however, a foundation decides to transfer, or has effectively transfers, its *siège réel* or *effektiven Verwaltungssitz* to another member state, member states applying the real seat doctrine (*Sitztheorie*) will require the foundation to dissolve itself and to reconstitute itself in the other member state; provided, of course, the dissolution is permitted in the first place or approved by the competent government authority. As the dissolution and liquidation of a foundation effectively terminates the will of the original benefactor or trustor, the board's decision to dissolve and liquidate the foundation will, as a general rule, require government approval. Formation of a new foundation in another member state, in turn, will be subject to a set of entirely new and different laws that may be based on a totally different perception and conception of non-profit organizations and foundations. The same is true with regard to the formation of a subsidiary organization in another member state if a foundation decides not to dissolve itself in its home state and reconstitute itself in another member state but rather form a subsidiary organization in the other member state in which its wants to engage in activities.

II. Tax Law Barriers

Starting from the basic features on the current tax treatment of foundations and its donors, the present chapter focuses on critical tax issues which arise in cross-border cases.

There are two kinds of barriers:

¹⁶⁸ Other examples would be the support of refugees or workers from a specific country in Europe.

- Barriers on the level of *substantive tax law*, amount to a higher level of taxes
- Barriers on the bureaucratic increase compliance costs in order to avoid a higher level of taxation.

In both cases, two constellations of cross-border transactions ought to be distinguished:

- In the *inbound constellation*, a Member State restricts or discriminates against certain activities of non-resident foundations within its territory.
- The *outbound constellation* concerns the treatment of a foundation by its state of residence which might hinder the foundation to collect, invest, or spend its money out of area.

At first this section analyses barriers on the level of substantive tax law, including (1) income taxation, (2) gift and inheritance taxation, and (3) other taxes. Afterwards barriers on the bureaucratic level are analysed (4).

1. Income Taxation

a) Tax Treatment of Foundations

aa) Tax Treatment of Non-Resident Foundations by the State of Source (inbound constellation)

The first group of discriminatory rules are rules which provide that non-resident foundations be denied all or some tax benefits which domestic legislators have granted to resident foundations¹⁶⁹. Such rules or equivalent administrative practice seem to exist in most Member States (*Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden, and the United Kingdom*).

Other countries are less strict but still maintain different sets of rules for resident and non-resident foundations. *Spain*, for example, has an explicit provision in its domestic law according to which a local representative office of a non-resident foundation is placed on equal footing with a resident foundation. Similar rules can be found in *Bulgaria, Ireland, Lithuania, and Poland*. In *France* a foreign foundation will be entitled to receive similar tax privileges if it performs its activities on French territory and is regarded as having a public benefit purpose in France.

Chart 15: Tax Treatment of Inbound Constellations

| Country | Is accordance with the wording of your tax law a foreign foundation entitled to receive the same tax benefits as a tax-exempt national foundation, if the foreign foundation fulfils all (other) requirements of your national tax law? |
|----------------|--|
| Austria | no |
| Belgium | As far as corporate tax exemption is concerned the answer is yes, but only on one legal basis. The Belgian branch of a foreign foundation can be exempted from non-resident corporate tax in case it performs only incidentally economic activities (art 182 of the Belgian ITC, but it cannot be exempted if the reason for exemption is solely based on art 181 of the Belgian ITC (non-profit activities that belong to the so-called |

¹⁶⁹ On this constellation, see von Hippel & Walz, General Report, in: Walz & von Auer & von Hippel (eds.), *Spenden- und Gemeinnützigkeitsrecht in Europa* (2007), p. 112.

| Country | Is accordance with the wording of your tax law a foreign foundation entitled to receive the same tax benefits as a tax-exempt national foundation, if the foreign foundation fulfils all (other) requirements of your national tax law? |
|-----------------------|---|
| | "privileged sector", listed by the income tax code). This restriction might be in conflict with the Treaty of Rome (based on the argumentation in the Stauffer case). |
| Bulgaria | generally no, only if the foundation sets up a local branch according to national law |
| Cyprus | no |
| Czech Republic | no |
| Denmark | no |
| Estonia | no |
| Finland | no |
| France | generally no, only if the foreign foundation performs its activities on the French territory and is regarded as having a public benefit purpose in France. |
| Germany | no |
| Greece | no |
| Hungary | no |
| Ireland | generally no, only if the foundation sets up a local branch according to national law and to the extent it operates locally. |
| Italy | no |
| Latvia | no |
| Lithuania | generally no, only if the foundation sets up a local branch according to national law |
| Luxembourg | no |
| Malta | no |
| Netherlands | no |
| Poland | generally no, but the operations of a representative office of the foreign foundation is treated similarly as the national foundation in regard to taxes. However, if it runs economic activity, it is subject to separate regulations governing the conduct of economic activity on the territory of Polish Republic by the representatives of foreign entities |
| Portugal | no |
| Romania | no |
| Slovakia | no |
| Slovenia | no |
| Spain | generally no, but a foundation will receive the same tax benefits if it establishes a formal delegation in Spain, which is registered by the competent public body, promotes purposes of general interest and accomplishes the legal requirements for foundation according to the Spanish law. If the foreign foundation sole activity in Spain is fundraising, civil law does not allow formal registration therefore not special tax regime will be applicable. |
| Sweden | no |
| United Kingdom | no |

In either case, such rules constitute inbound discriminations. This is particularly true where they create higher tax burdens for incoming non-resident foundations, as compared to resident foundations in a *ceteris paribus* situation.

It also applies, however, where an equal level of taxes is available but where this equal treatment in substance is subject to significant bureaucratic efforts (e.g. establishment of a local representative office).

Many foundations have experienced barriers which do not arise from substantive law but from procedural law – in other words, the barriers do not (or not necessarily) consist of a burden to pay taxes but of too extensive compliance requirements.

bb) Tax Treatment of Resident Foundations Acting out of Area (outbound constellation)

In the second constellation, the critical issue is in how far the Member State where a foundation has been established, and/or where the foundation has its place of actual management, might discriminate any out-of-area activities of the foundation (and income derived in connection with such activities) vis-à-vis purely domestic activities of the same type.

The majority of the Member States seem to not have any restriction to activities abroad (*Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovenia, Slovakia, Spain, the United Kingdom*).

In the other Member States, there exists a more or less intensive discrimination for activities abroad¹⁷⁰. Such discrimination can be twofold:

- The state of residence might still grant benefits to the foundation with regard to its domestic items of income, but refuse to extend these benefits to foreign-sourced income (**Latvia**, and, under certain conditions, **France** as regards tax benefits for donors).
- In other Member States, however, the foreign activities can even bring the state of residence to revoke all tax benefits of the respective foundation. This is, under certain conditions, true for **Austria, Germany, Portugal, Sweden** and **Belgium** as regards tax benefits for donors.

Chart 16: Tax Treatment of Outbound Constellations

| Country | Do activities abroad put the tax-exempt status of public benefit foundations at risk? |
|-----------------------|---|
| Austria | yes, but only if foundations are operating mainly abroad |
| Belgium | Activities performed abroad do not put the Belgian corporate tax exemption at risk. However for some of the categories of organizations mentioned in the Belgian income tax code (scientific research, protection of monuments...) the eligibility to receive tax deductible gifts could be put at risk if these organizations carry out their activities, even partially or incidentally, outside Belgium. |
| Bulgaria | no |
| Cyprus | no |
| Czech Republic | no |

¹⁷⁰ These negative sanctions might be triggered merely on the basis of the by-laws of the foundation or, alternatively, on the basis of factual activities of the foundation out of area.

| Country | Do activities abroad put the tax-exempt status of public benefit foundations at risk? |
|----------------|---|
| Denmark | no |
| Estonia | no |
| Finland | no, if the purpose of these activities is in the public interest and such activities are of a non-profit nature |
| France | generally no, but tax benefits for donors are not granted, if the foundations do not conduct the main part of their activities in France. As an exception to that principle, French foundations collecting funds and organizing humanitarian missions abroad, as well as French foundations collecting funds to promote French language, culture and scientific knowledge outside France are deemed to be performing their activities in France in that sense |
| Germany | no, but they need to have a positive impact for the German public |
| Greece | no |
| Hungary | no |
| Ireland | no |
| Italy | no |
| Latvia | no, but tax exemption is not applicable to activities abroad |
| Lithuania | no |
| Luxembourg | no |
| Malta | no |
| Netherlands | no, if the activities are charitable |
| Poland | no |
| Portugal | yes, if the activities only benefit foreigners |
| Romania | no |
| Slovakia | no |
| Slovenia | no |
| Spain | no |
| Sweden | yes, a foundation pursuing activities wholly outside Sweden might lose/not obtain special tax status |
| United Kingdom | no |

A closer look shows, that the conditions, under which the tax benefits may be not granted seem to differ:

- Some Member States seem to follow a “*territorial test*”: According to this approach a foundation will not receive tax benefits, if it operates “wholly abroad” (**Sweden**) “mainly abroad” (**Austria, France**), or even “incidentally abroad” (**Belgium, Latvia**).
- Other Member States seem to follow a more “*personal test*”, which means that not only foreigners may be beneficiaries (**Portugal**) or that there should be a positive impact for the national public (**Germany**).
- As a matter of fact, there is a lot of legal uncertainty to perform such a test in a concrete case. Apart from this it is questionable whether a strict territory approach is/would be an infringement of the fundamental freedoms of the EC Treaty¹⁷¹.

¹⁷¹ See infra C II 2 a bb..

b) Tax Treatment of Donors

aa) Resident Donors of Non-Resident Foundations

While almost all Member States (exemptions are *Slovakia* and *Sweden*) provide far-reaching benefits for resident individuals who donate money to resident foundations, donations to non-resident foundations have traditionally often been excluded from these benefits. This is still true in most Member States (*Austria, Belgium, Czech Republic, Estonia, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Romania, Spain, United Kingdom*).

However there is a recent tendency in some Member States to allow deductions also for donations to non-resident public-benefit foundations, if they fulfil the requirements of a national tax-exempt foundation. Examples are *Denmark*, the *Netherlands, Poland*, and *Slovenia*. Also in *Finland*, there will be a tax-exemption, if the donation is made by corporations, if the recipient organization is approved by Ministry of Finance to be a public benefit organization by similar criteria to national foundations. In some other Member States, similar tax benefits seem to be possible under additional conditions. (*Cyprus, Greece, Ireland, Italy, and Portugal*).

Chart 17: Cross-Border Donations

| Country | Are donations to foreign-based public benefit organizations income tax deductible for the donor? |
|-----------------------|---|
| Austria | no |
| Belgium | no, but it should be noted that the European Commission is challenging the Belgian legislation on this point. Belgium accepted this statement but did not yet amend its legislation |
| Bulgaria | no |
| Cyprus | no, but some exceptions |
| Czech Republic | no |
| Denmark | Yes (act recently amended) |
| Estonia | no |
| Finland | Generally no, but exemptions for donations made by corporations, if the recipient organization is approved by Ministry of Finance to be a public benefit organization by similar criteria to national foundations |
| France | no |
| Germany | no |
| Greece | no, but some specific exceptions |
| Hungary | no |
| Ireland | no |
| Italy | no, but some exceptions |
| Latvia | no |
| Lithuania | no |
| Luxembourg | no |
| Malta | no |
| Netherlands | yes, as long as the recipient is recognised as charitable (implementing rules still to be approved) |

| Country | Are donations to foreign-based public benefit organizations income tax deductible for the donor? |
|-----------------------|---|
| Poland | yes |
| Portugal | no, but exceptions possible |
| Romania | no |
| Slovakia | N/A no tax incentives at all |
| Slovenia | yes |
| Spain | no |
| Sweden | N/A no tax incentives at all for individuals |
| United Kingdom | no |

bb) Non-Resident Donors of Resident Foundations

The opposite case (i.e., a situation where a local foundation receives donations from abroad) has usually been conceived as less problematic. Unless the donor does not earn any income in the state where the foundation has its seat or place of actual management, she/he will hardly try to obtain any tax privileges (e.g., a positive refund payment) in this state – simply because she/he will not have to pay any taxes there anyway.

However, as soon as the non-resident donor does earn local income (e.g. because he is employed there, yields dividend income there, or rents out real property situated in this country), he may be taxable there on a territorial basis. If so, she/he may try to obtain tax benefits for donations made to local foundations but will usually be frustrated as most states do not offer the deduction of personal expenses (including donations to public-benefit foundations, but also deductions for the costs of living, family allowances etc.) but leave it up to the state of taxpayer’s residence to take these personal expenses into account (which, in turn, might deny any deduction¹⁷²).

The ability of the donor to obtain effective tax relief for such a donation may be constrained by the interaction of the tax systems of the two states where the donor’s state of residence taxes its residents on their worldwide income using the credit method of relieving double taxation. In such cases, where the donation is deductible in the state where the foundation resides (State F) but not in the donor’s residence state (State D) the deduction will reduce the amount of income tax paid by the donor in State F that can be credited against his or her income tax liability in State D. The net result is that the increase in the donor’s total income tax liability in State D cancels part or all of the tax relief in State F for the donation.

cc) Non-Resident Donors of Non-Resident Foundations

Lastly, it should be noted that the two constellations just mentioned might even coincide. A Member State can affect non-resident donors of non-resident foundations if, and to the extent that, these donors are subject to domestic income tax because they derive income from sources within this State. This constellation may obtain relevance in cases where the world-wide income of the taxpayer (which is usually the basis for his income tax due, or at least the tax rate, in his state of residence) is zero or negative (so

¹⁷² See supra II 1 b aa.

that the state of residence will not impose income tax on him) but where there is positive local income of the taxpayer in another Member State. In this situation, this Member State will often deny that it has a substitutional obligation to allow the donation for deduction which, eventually, brings the taxpayer to the result that the donation is deductible in neither state. Here, he has to pay taxes simply because of the fact that his income stems from more than one jurisdiction – while no tax would have been due had he earned his entire income within one state¹⁷³.

c) Treatment of Affiliated Beneficiaries

As already shown, Member States which do not acknowledge a given foundation as a qualified public-benefit foundation for tax purposes might impose income taxes on the level of the foundation. Alternatively, they might collect taxes from a person whom they regard as a (legal or factual) “affiliated” beneficiary of the foundation. This does not only apply with regard to actual yields or benefits which have been distributed to this person. Rather, taxation may occur even with regard to deemed income of this person, i.e., based on the fiction that (from a tax perspective) the foundation is transparent and all income derived by the foundation shall be assigned immediately to the beneficiary, irrespective of whether or not this person has actually received it under private law.

While such taxation may be legitimate and reasonable if the foundation is a “foundation for the founder” or (legally or factually) comparable to such a foundation, it constitutes a significant risk wherever the states disagree on the categorization of the foundation as public purpose-related or private purpose-related.

2. *Inheritance Taxation*

Rather similar to the barriers which exist for the treatment of cross-border cases under income tax rules, cross-border donations are made difficult also by virtue of gift and inheritance taxation. However, the burden of inheritance tax may depend on much more jurisdictions, including

- the state(s) where the testator (donor) resides or resided last,
- the state(s) where the foundation resides (has its seat and/or actual place of management),
- the state(s) where the assets transferred are located. This might be the state(s) where real property is situated, but also the state(s) where a company resides of which the testator (donor) held shares or bonds.

The interplay of these jurisdictions gives rise to a complex number of constellations and problems which often result in the imposition of gift or inheritance taxes even though the assets are being transferred to a public benefit foundation. Furthermore, such gift/inheritance taxation can be levied in more than one state. Unlike under income tax law where bilateral (or in the case of the Nordic countries, a multilateral) conventions on the avoidance of double taxation remedy, the network of gift/inheritance tax treaties is highly fragmentary and incomplete.

According to the country experts, only a minority of the Member States (where a gift and inheritance tax exist) accepts a inheritance tax exemption for donations to non-resident public-benefit foundations of another Member State (*Belgium, Ireland, Italy,*

¹⁷³ For solutions on the basis of the fundamental freedoms, see *infra*

Slovenia) while the majority refuses a general tax-exemption (*Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Portugal, Romania, United Kingdom*).

Chart 18: Cross-Border Donations

| Country | Is there a Gift and inheritance tax exemption for donations to non-resident public-benefit foundations (apart from specific reciprocity agreements and double tax treaties)? |
|-----------------------|---|
| Austria | N/A no such tax |
| Belgium | yes, if donation is given to a comparable non-profit entity in another EU country |
| Bulgaria | no |
| Cyprus | N/A. no such tax. |
| Czech Republic | no, in this case donor is tax liable, but exemptions exist for lifetime donations to humanitarian and charitable NGOs (local tax authorities decide) |
| Denmark | no |
| Estonia | N/A. no such tax. |
| Finland | no, the beneficiary is tax liable according to Finnish law |
| France | no |
| Germany | no |
| Greece | only as far as reciprocity exists |
| Hungary | no, the beneficiary is liable |
| Ireland | yes, provided the foreign charity pursues purposes that are charitable in Irish law |
| Italy | yes |
| Latvia | no |
| Lithuania | no |
| Luxembourg | no, only informal gifts are exempt but if donor dies within one year, inheritance tax is due |
| Malta | N/A. no such tax. |
| Netherlands | yes, for foreign qualifying organizations (not yet in force) |
| Poland | N/A. Gift and inheritance tax only applies to individuals |
| Portugal | no, beneficiary is liable for a substitute tax (stamp duty) but some exemptions are foreseen |
| Romania | no |
| Slovakia | N/A. no such tax. |
| Slovenia | yes, if given to a charity organization that is registered in a EU Member State to conduct charitable activity |
| Spain | N/A. Gift and inheritance tax only applies to individuals. |
| Sweden | N/A. no such tax. |
| United Kingdom | no |

In particular where a donor has assets which are widespread over several countries, the transfer of his estate (or parts thereof) to a public-benefit foundation deserves diligent

tax consulting, which is a challenging occupation and triggers high costs to the parties involved.

3. *Further Taxes*

a) Capital Taxation

In contrast, there are no extra barriers which stem from capital taxation. With regard to specific property taxes which are confined to certain types of assets (like, e.g., real property), its taxation usually follows a strict territoriality principle.

But even the (few) Member States which still maintain comprehensive net wealth taxes, will grant border tax adjustments, either unilaterally (laid down in their respective domestic tax law) or on a bilateral basis (in a convention on the avoidance of double taxation). Any remaining problems and barriers are similar to the ones analysed in the context of income taxation.

b) Transfer taxes

Most states levy taxes on the transfer of specified assets, in particular real estate located in the state concerned and shares. Such taxes are generally called transfer taxes, registration taxes or stamp duties. It is common for states to exempt gifts of such assets to resident foundations without extending the exemption to non-resident foundations. The problems and barriers are similar to those analysed in the context of income taxation.

c) VAT

On the field of VAT, there are fewer barriers than on the area of direct taxes. VAT law is subject to comprehensive harmonization. This is mainly due to the lack of a formal distinction between resident and non-resident taxpayers (entrepreneurs). Under VAT law, the decisive factor in a cross-border case is the place where a transaction has been performed. In doing so, the Council has basically avoided any discrimination of non-resident suppliers or recipients on the grounds of their respective nationality, residence or the like.

It is only indirectly that such criteria do gain relevance also on the field of VAT. This is true on a twofold level.

aa) Tax Exemptions

Firstly, the status of a foundation is decisive for a number of tax exemptions. For instance, transactions of a foundation are exempt from VAT where a transaction is closely linked to welfare and social security work¹⁷⁴. This rule includes, but is not restricted to, foundations which run old people's homes. It applies only if the foundation is established under, and governed by, public law or if it is recognised by the Member State concerned as being devoted to social wellbeing.

Under similar preconditions, tax exemptions apply to foundations which

¹⁷⁴ Art. 132 (1)(g) of the Common System Directive.

- run hospitals, centers for medical treatment or diagnosis and other duly recognised establishments of a similar nature and which, in doing so, supply hospital and medical care and closely related activities¹⁷⁵,
- work on the protection of children and young persons¹⁷⁶,
- provide children's or young people's education, school or university education, vocational training or retraining, including the supply of services and of goods closely related thereto¹⁷⁷,
- as religious or philosophical foundations, supply staff for the above-mentioned activities and with a view to spiritual welfare¹⁷⁸,
- supply services to their members in their common interest in return for a subscription fixed in accordance with their rules¹⁷⁹,
- supply services closely linked to sport or physical education to persons taking part in sport or physical education¹⁸⁰.

It is remarkable, however, that the Directive itself contains very precise rules on the range of qualifying public purposes. However, this is true only for some (but not all) of the above-mentioned tax exemptions. E.g., certain supplies are exempt from VAT only if the foundation is a non-profitmaking organization with aims of a political, trade-union, religious, patriotic, philosophical, philanthropic or civic nature¹⁸¹. Moreover, some (but not all) exemptions apply only if they are not likely to cause distortion of competition¹⁸². Nevertheless, many of the provisions contained in the Directive make recourse to domestic characterization of the respective foundation as “recognised” for the respective public purpose.

bb) Reduced Tax Rates

Secondly, the status of a foundation as a public purpose foundation under domestic law gains relevance with regard to the tax rates. According to no. 15 of Annex III to the Directive, the Member States may offer reduced VAT rates for supply of goods and services by organizations recognised as being devoted to social well-being by Member States and engaged in welfare or social security work.

The ability of charitable organizations to qualify for these reduced rates will become more important if the recent European Commission proposal to expand the categories of goods and services that are eligible for reduced rates is implemented.

4. “Bureaucratic Barriers” in Order to Avoid Tax Discriminations

As the analysis has shown there are several barriers on the level of substantive tax law in case of *direct* cross-border transactions (income taxation of the foundation itself and

¹⁷⁵ Art. 132 (1)(b) of the Common System Directive.

¹⁷⁶ Art. 132 (1)(h) of the Common System Directive.

¹⁷⁷ Art. 132 (1)(i) of the Common System Directive.

¹⁷⁸ Art. 132 (1)(k) of the Common System Directive.

¹⁷⁹ For details, see Art. 132 (1)(l) of the Common System Directive.

¹⁸⁰ Art. 132 (1)(m) of the Common System Directive.

¹⁸¹ Art. 132 (1)(l) of the Common System Directive.

¹⁸² Art. 132 (1)(l) of the Common System Directive. The competition proviso was designed in a more comprehensive way under Art. 13 A (2)(b), 2nd indent of the 6th VAT Directive (77/378/EEC) of 17 May 1977 (OJ L 145 of 13 June 1977, p. 1).

its donors, as well as the gift and inheritance taxation of gifts by a donor (testator) to a foundation).

a) Tax Planning Structures

In practice these rules have given rise to various tax-planning structures. The aim of such structures is to avoid tax discriminations because of the described barriers by carrying out *indirect* cross-border transactions. In order to carry out an indirect cross-border transaction it is necessary to establish another public benefit institution in the other Member State, which is the place of payment or the place of destination of the specific cross-border transaction.

Two basic types of tax-planning structures ought to be distinguished here.

- Firstly, the “parent foundation” might establish, or promote the setting up of, local sub-entities in the country of destination, i.e., in the country where the public benefit purpose should be realised. This case might be referred to as the interposition of an active agent (*outbound transaction*).
- Secondly, the “parent foundation” may set up money-collecting entities (“supporting” organizations like other foundations, associations, trusts, non-profit companies, etc.) in the countries where (potential) donors reside. This scheme might be referred to as the interposition of a passive (merely money-receiving) agent¹⁸³. (*inbound transaction*).

From a practical viewpoint, the fact that there are network-like structures which bring the “parent foundation” in a position to circumvent the barriers mentioned above is certainly a fact which mitigates the difficulties but does not away with them.

b) Compliance Costs

Even if, from a legal standpoint, most of the described barriers on the level of substantive tax law barriers might be avoidable for the taxpayer, but the costs both for setting-up such tax planning structures and for maintaining such structures year by year (including compliance efforts) are significant as there will be costs for reduplication and for the compliance of different law systems which will be further described below¹⁸⁴.

C. Do the Existing National Legal Barriers Infringe the EC Treaty?

European law as interpreted by the European Court of Justice (ECJ) is gaining more and more influence on the Member States’ national laws. One main objective of the decisions of the ECJ concerning business and other associations is to identify barriers and restrictions resulting from national legal rules and principles that make the exercise of the fundamental freedoms guaranteed by the EC Treaty, especially the freedom of establishment, less attractive.

I. Civil Law

The Court’s seminal rulings on the right of establishment include its decisions in *Centros*¹⁸⁵, *Überseering*¹⁸⁶, and *Inspire Art*¹⁸⁷. As a consequence of these rulings of the

¹⁸³ E.g., a so-called *Förderorganisation* under § 58 no. 1 of the German General Tax Code.

¹⁸⁴ See E I *infra*.

¹⁸⁵ Judgement of 9 March 1999, Case C-212/97, *Centros*, [1999] ECR I-1459.

ECJ, it is clear that the 'real seat doctrine' ('*Sitztheorie*' or '*siege reel doctrine*') can no longer be applied to deny the legal capacity of foreign companies that are entitled to the right of establishment under Art. 43¹⁸⁶ and 48¹⁸⁷ of the EC Treaty.

It is necessary to analyse the impact of the pertinent case law on not-for-profit foundations.

1. Freedom of Establishment: General Principles According to Case Law

The question of whether a foundation that has been validly formed in accordance with the laws of a Member State may operate or engage in activities in another Member State is a question of both substantive law and conflict-of-laws principles. A Member State's substantive law and conflicts-of-laws principles relating to cross-border activities of not-for-profit foundations need to be in conformity with EU law, in particular with the right of establishment pursuant to Articles 43 and 48 of the EC Treaty.

a) Inbound Cases ("Immigration" Cases)

The ECJ has interpreted Articles 43 and 48 of the EC Treaty in a series of seminal decisions involving corporations. The Court has never had the opportunity, however, to apply these Treaty provisions to conflict-of-laws issues involving foundations.

aa) Centros

Thus, in *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*,¹⁹⁰ the Court took exception to a Danish authority's refusal to register a branch of a company validly incorporated in the *United Kingdom*. According to the Court, the refusal to register the branch constituted a restriction of the English company's right of establishment pursuant to Articles 43 and 48 of the EC Treaty which could neither be justified under Article 46 of the EC Treaty nor under the four-factor test set forth in *Gebhard v. Consiglio dell'*

¹⁸⁶ Judgement of 5 November 2002, Case C-208/00, *Überseering BV*, [2002] ECR I-9919.

¹⁸⁷ Judgement of 30 September 2003, Case C-167/01, *Inspire Art*, [2003] ECR I-10155.

¹⁸⁸ Article 43 of the EC Treaty reads as follows:

Within the framework of the provisions set out below, 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.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

¹⁸⁹ Article 48 of the EC Treaty provides:

Companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

¹⁹⁰ Case C-212/97, *Centros Ltd. v Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459.

*Ordine degli Avvocati e Procuratori di Milano*¹⁹¹ and expressly reconfirmed in *Centros*. While it is debatable whether the English company in *Centros* had actually transferred its seat from England to Denmark, that is, whether the case involved the “primary” or “secondary” right of establishment, there can be no doubt that Centros Ltd. had, and continued to have, its registered office in the *United Kingdom* whilst its principal place of business or real seat had been in *Denmark*. In light of the Court’s holdings in *Centros*, a corporation that is validly incorporated in a Member State enjoys, in principle, the freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty even if it never intended to do any business in its state of incorporation but was formed in one Member State only for the purpose of establishing itself in a second Member State where its main, or indeed entire, business is to be conducted. Thus, the freedom of establishment is triggered by the valid incorporation in any of the 27 EU Member States; provided, the registered office of the corporation is, and continues to be, in its state of incorporation. In light of *Centros*, the reasons for which a company chooses to be incorporated in a particular Member State are, as a general rule, irrelevant with regard to application of the rules on freedom of establishment.

bb) *Überseering*

Similarly, in *Überseering BV v. NCC Nordic Construction Baumanagement GmbH*,¹⁹² the ECJ held that *Überseering B.V.*, which was validly incorporated in the *Netherlands* and had its registered office there, was entitled under Articles 43 and 48 of the EC Treaty to exercise its freedom of establishment in *Germany* as a company incorporated under the law of the *Netherlands*. According to the Court, the lower German courts’ refusal, under the German version of the real seat doctrine (*i.e.*, the *Sitztheorie*), to recognise the legal status of *Überseering B.V.* as a Dutch corporate entity on the ground that the corporation had effectively transferred its principal place of business or real seat (*effektiver Verwaltungssitz*) to *Germany*, constitutes a restriction on the company’s freedom of establishment which, in principle, is incompatible with Articles 43 and 48 of the EC Treaty. Under Articles 43 and 48 of the EC Treaty, a Member State is required to recognise the legal personality of a corporation validly incorporated in another Member State as provided for by the *lex societatis*. Most importantly, the Member State in which the sister state corporation has its real seat (establishment) may not disregard the legal personality of that corporation as provided for by its *lex societatis* and substitute it by resorting to local forms of business associations. Also, the Member State may not deny a corporation validly incorporated in another Member State the right to sue or to be sued.

cc) *Inspire Art*

Überseering laid the ground for a much broader application of the freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty as is evidenced by the Court’s decision in *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire*

¹⁹¹ Case C-55/94, *Gebhard v Consiglio dell’ Ordine degli Avvocati e Procuratori di Milano* [1993] ECR I-4165.

¹⁹² Case C-208/00, *Überseering BV v NCC Nordic Construction Baumanagement GmbH* [2002] ECR I-9919.

*Art Ltd.*¹⁹³ The dispute in *Inspire Art* arose because Inspire Art Ltd. was not registered in the *Netherlands* as a formally foreign corporation as required by the Dutch Law of 17 December 1997 on Pseudo-foreign Corporations (*Wet op de Formeel Buitenlandse Vennootschappen*). Inspire Art Ltd. was formed in the legal form of a private company limited by shares under the law of *England and Wales*, had its registered office at Folkestone (*United Kingdom*) and a branch in Amsterdam where it carried on business under the business name Inspire Art Ltd. in the sphere of dealing in *objets d'art*. Taking the view that Inspire Art Ltd. should be registered as pseudo-foreign corporation, the Chamber of Commerce of Amsterdam applied to the *Kantongerecht* (District Court) of Amsterdam for an order that there should be added to the registration of Inspire Art Ltd. in the commercial register the statement that it is a formally-foreign corporation.

In accordance with its holding in *Centros*, the ECJ noted that it is “immaterial”, with respect to the application of the European rules on freedom of establishment, that Inspire Art Ltd. was formed in the *United Kingdom* only for the purpose of establishing itself in the *Netherlands*, where its main, or indeed entire, business is being conducted. The Court also pointed out that the fact that Inspire Art Ltd. was formed in the *United Kingdom* for the sole purpose of enjoying the benefits of more favorable legislation with regard in particular to minimum capital and the paying-up of shares, does not mean that the establishment by Inspire Art Ltd. of a branch in the *Netherlands* is not covered by freedom of establishment as provided for by Articles 43 and 48 of the EC Treaty even if the company conducts its activities entirely or mainly in the *Netherlands*. “While in this case Inspire Art was formed under the company law of a Member State ... for the purpose in particular of evading the application of *Netherlands* company law, which was considered to be more severe, the fact remains”, the Court opined, “that the provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary ...”.

The Court refused to accept the argument that Inspire Art’s freedom of establishment was not in any way infringed by the *Netherlands’* Law on Formally-Foreign Corporations. The government of the *Netherlands* had argued that, under the Law on Formally-foreign Corporations, foreign companies are fully recognised in the *Netherlands* and are not refused registration in the business register, the Law having the effect of simply laying down a number of additional obligations that were characterized as “administrative”. However, according to the ECJ, the effect of the Law is, in fact, that the Dutch company law rules on minimum capital and directors’ liability are applied mandatorily to foreign companies such as Inspire Art Ltd. when they carry on their business activities exclusively, or almost exclusively, in the *Netherlands*. Therefore, the Court concluded that the Law’s provisions relating to minimum capital (both at the time of formation and during the life of the company) and to directors’ liability constitute restrictions on freedom of establishment as guaranteed by Articles 43 and 48 of the Treaty. The reasons for which the company was formed in the other Member State, and the fact that it carried on its activities exclusively or almost

¹⁹³ Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.* [2003] ECR I-10155.

exclusively in the Member State of establishment, do not deprive, the Court ruled, the company of the right to invoke the freedom of establishment guaranteed by the Treaty, “save where abuse is established on a case-by-case basis”. Having concluded that the Law’s provisions relating to minimum capital and directors’ liability constitute a restriction of the freedom of establishment of Inspire Art Ltd., the European Court of Justice addressed the question of whether there is any justification for such restriction. While it did not engage in a neat factor-by-factor analysis, the ECJ made it clear in *Inspire Art* that the restriction of Inspire Art’s freedom of establishment provided for by Articles 43 and 48 of the EC Treaty could not survive scrutiny under the four-prong test of *Gebhard* and *Centros*.

The immediate lesson from *Inspire Art* is that, within the EU, both capital requirements and directors’ liability are governed by the law of the corporation’s state of incorporation. In light of *Überseering* and *Inspire Art*, it is also fair to conclude that all other internal affairs of a corporation that is incorporated in one Member State but carries on business in another Member State are also governed by the law of the state of incorporation, its *lex societatis*. Thus, within the EU, the real seat doctrine has been effectively put to rest by the ECJ in regard to corporations formed in any of the 27 Member States. Yet, even after *Inspire Art*, the question remains whether and to what extent a Member State can take measures to prevent certain of its nationals from attempting, under cover of the rights created by the EC Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law. As the Court noted in *Überseering*, “[i]t is not inconceivable that overriding requirements relating to the general interest, such as protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment”.

b) Outbound Cases (“Emigration” Cases)

It is important to emphasise that *Centros*, *Überseering* and *Inspire Art* concern “inbound”, “immigration” or “entry” cases. Thus far, the ECJ has ruled only indirectly on the question of whether a corporation that is validly incorporated in a Member State may invoke freedom of establishment under Articles 43 and 48 of the EC Treaty to transfer its principal place of business or real seat from its state of incorporation to another Member State (“outbound”, “emigration” or “exit” case). In *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*,¹⁹⁴ the Court addressed the issue for the first time.

aa) Daily Mail

In *Daily Mail*, the Court held that a company could not rely upon the right to freedom of establishment in order to transfer its central management and control to another Member State (the *Netherlands*) for the purpose of selling a significant part of its non-permanent assets and using the proceeds of that sale to buy its own shares without having to pay the tax normally due on such transactions in the Member State of origin (the *United Kingdom*). The Court rejected the company’s view that the tax authorities had infringed

¹⁹⁴ Case C-81/87, *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] ECR 5483.

the right of establishment. The Court **concluded** that “in the present state of Community law” Articles 43 and 48 (ex 52 and 58) of the EC Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State. In paragraph 23 of its decision in *Daily Mail*, the Court observed that “the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions”.¹⁹⁵

bb) Überseering

Distinguishing *Überseering* from *Daily Mail*, the ECJ held in *Überseering* that, despite the general terms in which paragraph 23 of *Daily Mail* is cast, the Court did not intend to recognise a Member State as having the power, *vis-à-vis* companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law.¹⁹⁶ The *Überseering* Court saw no grounds for concluding from *Daily Mail* that, where a company formed in accordance with the law of one Member State and with legal personality in that state exercises its freedom of establishment in another Member State, the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that state.¹⁹⁷

In *Überseering*, the ECJ made it also clear that the exercise of the freedom of establishment is not dependent upon the adoption of a convention on the mutual recognition of companies within the meaning of Article 293 of the EC Treaty.¹⁹⁸ According to the Court, Article 293 of the EC Treaty gives Member States the “opportunity” to enter into negotiations with a view, *inter alia*, to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one Member State to another. Pointing to the “so far as is necessary” clause in Article 293 of the EC Treaty and the Opinion of the Advocate General in *Überseering*, the Court concluded that Article 293 of the EC

¹⁹⁵ Case C-81/87, *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*, [1988] ECR 5483 (para. 23).

¹⁹⁶ Case C-208/00, *Überseering BV v NCC Nordic Construction Baumanagement GmbH* [2002] ECR I-9919 (para. 72).

¹⁹⁷ Case C-208/00, *Überseering BV v NCC Nordic Construction Baumanagement GmbH* [2002] ECR I-9919 (para. 73).

¹⁹⁸ Article 293 of the EC Treaty provides:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: ...

- the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another ...

Treaty does not constitute “a reserve of legislative competence vested in the Member States”. It follows that the fact that no convention on the mutual recognition of companies has yet been adopted on the basis of Article 293 of the EC Treaty¹⁹⁹ cannot be used by the Member States to justify limiting the full effect of freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty.

cc) Further Developments

The Court’s recent holdings in *Sevic Systems AG v. Amtsgericht Neuwied*²⁰⁰ can also be cited in support of the legal proposition that Article 43 and 48 of the EC Treaty prohibit restrictions “on entering” or “on leaving” national territory. In light of the Court’s holdings in *Hughes de Lasteyrie du Saillant v. Ministère de l’Économie, des Finances et de l’Industrie*²⁰¹ and *Cadbury Schweppes*²⁰² it is also inconceivable that the Court would construe a corporation’s freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty in the event of cross-border transfer of the real seat, principal place of business or center of administration to another cases (“emigration” or “exit” case) more restrictively than in an “immigration” or “entry” case such as *Überseering* or *Inspire Art*. To be sure, the negation by a Member State of the right of a cross-border transfer of the actual center of administration, principal place of business or real seat (“emigration”) and the requirement to reincorporate in the other Member State (*i.e.*, the state of establishment) would be tantamount to outright negation of freedom of establishment that Articles 43 and 48 of the EC Treaty are intended to ensure.

dd) Cartesio

This proposition is supported by the opinion of the Avocate General *Poiares Maduro* of May 22, 2008 in the matter of *Cartesio*²⁰³ which the ECJ is likely to decide in the near future. In *Cartesio*, a limited partnership (*betéti társaság*) constituted in accordance with the law of *Hungary* and registered in the Hungarian city of Baja, submitted an application to the commercial court to amend its registration in the local commercial register so as to record an address in *Italy* as its new operational headquarters (“központi ügyintézés helye”). The court, however, rejected *Cartesio*’s application on the grounds that Hungarian law did not offer companies the possibility of transferring their operational headquarters to another Member State while retaining their legal status as a company governed by Hungarian law. Therefore, in order to change its operational headquarters, *Cartesio* would first have to be dissolved in Hungary and then reconstituted under Italian law. In the subsequent proceedings pursuant to Article 234 of the EC Treaty the Hungarian court submitted, *inter alia*, the question of whether regulation of the transfer of a company’s seat is within the scope of Community law or, in the absence of the harmonization of laws, national law is exclusively applicable.

¹⁹⁹ The Convention on the Mutual Recognition of Companies and Bodies Corporate of February 29, 1968 did not enter into force for lack of ratification by the Netherlands. It is highly unlikely that the Convention will be “revitalised” despite proposals for a “more positive reappraisal” of such a Convention.

²⁰⁰ Case C-411/03, *Sevic Systems AG v. Amtsgericht Neuwied*, [2005] ECR I-4321.

²⁰¹ Case C-9/02, *Hughes de Lasteyrie du Saillant v. Ministère de l’Économie, des Finances et de l’Industrie*, [2004] ECR I-2409.

²⁰² Case C-196-/04, *Cadbury Schweppes plc & Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenues*, [2006] ECR I-7995.

²⁰³ Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, [2008] ECR ____.

As Advocate General *Poiares Maduro* stated in his opinion of May 22, 2008 in *Cartesio*, it is impossible to argue on the basis of the current state of Community law that Member States enjoy an absolute freedom to determine the ‘life and death’ of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment. Otherwise, Member States would have *carte blanche* to impose a ‘death sentence’ on a company constituted under its laws just because it had decided to exercise the freedom of establishment.

ee) Trusts

Similar considerations may apply where the foundation takes the form of a common law trust. Typically, a trust migrates to another (usually common law) jurisdiction by replacing the existing trustees with new trustees resident in the new host state and moving the administration of the trust to the new state or a tax neutral jurisdiction. In some states the act of emigration results in a deemed disposal of the trust’s assets at their market value on the date of migration. Such an “exit tax” on unrealised capital gains is imposed in the UK and Ireland.

c) Cross-Border Transfer of the Registered Seat

The cross-border transfer of the registered seat (*Satzungssitz*) is, of course, a different and more complicated issue.

aa) Case Law

For such a transfer, a corporation needs to acquire legal personality in the other Member State and lose it in the home Member State in order to avoid any complications arising from its being registered in two countries. In light of the holdings of the European Court of Justice in *Centros*, *Überseering*, *Inspire Art*, *Sevic*, *Hughes de Lasteyrie du Saillant* and *Cadbury Schweppes* it is unclear whether the retention of legal personality in the event of cross-border transfer of the *registered* seat is possible within the EU or whether secondary Community legislation, such as a coordination Directive under Article 44(2)(g) of the EC Treaty, needs to be adopted for these cases.²⁰⁴ Such legislation would have to provide appropriate safeguards in the Member States to allow companies to exercise their freedom of establishment by transferring their registered office, thereby acquiring legal personality under the law of the other Member State in order to be governed by that law and without having to be wound-up in the home Member State. The objective of such a Directive should be to facilitate the cross-border transfer, by way of freedom of establishment, of the registered office of a corporation already formed under the law of a Member State.

bb) Draft 14th Directive

²⁰⁴ In *Centros*, *Überseering* and *Inspire Art*, the registered office of the company in question had remained in the company’s state of incorporation. In its final report, the High-Level Group of Company Law Experts recommended that the EU Commission consider adopting a proposal for a Directive on the transfer of the registered office. See High-Level Group of Company Law Experts *Report on a Modern Regulatory Framework for Company Law in Europe* (4 Nov 2002) at 101 (available at <http://www.europa.eu.int>).

The EU Commission outlined its views as to the proposal of a 14th Company Law Directive on the Cross-border Transfer of the Registered Office of Limited Companies in a public consultation. According to the Commission, each Member State would have to recognise the right of a corporation governed by its own law to opt, by decision of the general meeting taken in accordance with the formalities and procedures for altering the articles of incorporation and the by-laws, to transfer its registered office to another Member State without acquiring a new legal personality in place of its original one. The decision of the general meeting would not in itself entail the removal of the company from its home Member State's commercial register so long as the company has not acquired registration in the host Member State. To protect those who are particularly affected by the transfer, notably minority shareholders and creditors, the general meeting's decision to transfer the registered office would have to be disclosed publicly in advance, as must its consequences. The home Member State should also have the power to ensure special protection of the rights of certain categories of person, particularly minority shareholders and creditors, in accordance with the principle of proportionality laid down by the ECJ.

Obviously, the host Member State could not refuse to register a company which, on the basis of the decision taken by its general meeting and in particular of the changes of its articles of incorporation and its by-laws, satisfies the essential substantive and formal requirements for the registration of domestic companies. As the EU Commission has pointed out, the Directive should coordinate supervision by the home Member State of the validity of the decisions taken by the general meeting and supervision by the host Member State of the substantive and procedural requirements of its own law for the company to be recognised under its law and to be registered. Registration in the host Member State should result in the company losing its incorporation in the home Member State and being removed from the commercial register there, without losing the legal personality itself. The transfer of the registered office should be recorded both in the home state and in the host state. The EU Commission emphasises correctly that the cross-border transfer of a company's registered office should be "tax-neutral" in accordance with the principles adopted for cross-border mergers by Directive 90/434/EEC.²⁰⁵

Upon re-evaluating the issue, Commissioner McCreevy concluded in December of 2007 that no legislative action was needed at EU level. Consequently, work on the 14th Directive was discontinued.²⁰⁶

2. Application to Foundations

It is still a largely unsettled question whether and to what extent, if any, the right of establishment is applicable to foundations.

a) General Observations

If and to the extent that Articles 43 and 48 of the EC Treaty can be applied to foundations, the principles developed by the ECJ in its jurisprudence are not only applicable to companies but also to foundations. As a result, restrictions by Member

²⁰⁵ Directive 90/434/EEC, OJ L 225/1 (20 Aug 1990).

²⁰⁶ http://ec.europa.eu/internal_market/company/seat-transfer/index_en.htm.

State legislation “on entering” or “on leaving” national territory would be prohibited, regardless of whether those restrictions are substantive or procedural in nature or part of the conflicts-of-laws regime, which would allow a foundation to engage in cross-border activities, including the transfer of its (real) seat from one Member State to another while retaining its legal status as a foundation under the law of the state of formation. It appears to be equally clear from the ECJ’s case law regarding the right of establishment that the effective exercise of the freedom of establishment requires at least some degree of mutual recognition and coordination of the various systems of rules.

It should also be emphasised that, according to the ECJ’s case law, Member States may take measures to prevent “wholly artificial arrangements, which do not reflect economic reality” and which are aimed at circumventing national legislation. In particular, the right of establishment does not preclude Member States from being wary of “scam” foundations. This follows from the principle of abuse of Community law the applicability of which in the context of Articles 43 and 48 of the EC Treaty was expressly mentioned in *Centros* and *Inspire Art*, even though the Court continues to use the notion of abuse with considerable restraint. In addition, restrictions by Member State legislation on the freedom of establishment of a foundation may be justified on grounds of general public interest, such as the prevention of abuse or fraudulent conduct, or the protection of the interests of individuals affected by the activities of a foundation or the tax authorities.

b) In Search of an Answer

As stated above, the ECJ has never had the opportunity to rule on the issue of whether and to what extent Articles 43 and 48 of the EC Treaty apply to recognition of foreign foundations or to the cross-border mobility of foundations within the EU. The Court has, however, interpreted Articles 43 and 48 of the EC Treaty in the contexts, for example, of taxation²⁰⁷ and Community competition law.²⁰⁸ Consequently, answers need to be developed in light of the pertinent European law as well as relevant case law, taking into account the opinions of legal commentators.

aa) Literal Interpretation

In view of the language of Article 48(2) of the EC Treaty, an argument could be made that only foundations carrying on a commercial (“for-profit”) activity are subject to the right of establishment. Thus, charitable foundations and other not-for-profit foundations engaged in cultural, scientific or social activities would not be entitled to invoke the right of establishment under Articles 43 and 48 of the EC Treaty as those activities are not commercial in nature. Such an interpretation of Articles 43 and 48 of the EC Treaty would seem to be rather narrow, however, and inconsistent with other case law.

bb) Functional Approach

Alternatively, rather than construing Article 48(2) of the EC Treaty only based upon its language, one could apply a functional approach taking into account the EC Treaty’s

²⁰⁷ Cf. Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203.

²⁰⁸ Case C-222/04, *Ministero dell’Economia e delle Finanze v. Cassa di Risparmio di Firenze and Others* [2006] ECR I-289.

provisions, for example, on competition or EU legislation (e.g., Council Directive 77/187/EEC) and the case law interpreting these provisions.

Thus, for example, the Court held in *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*²⁰⁹ that the fact that the Automobile and Touring Club of Greece (ELPA) does not seek to make a profit does not prevent the courts from treating it as an undertaking for purposes of Community competition law.

Similarly, it should be noted that in *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze and Others* the Court stated that the fact that the offer of goods or services is made without profit motive does not preclude a court from characterizing as being an undertaking an entity that carries out those operations in the market, since that offer exists in competition with that of other actors who do seek to make a profit. “[W]here a banking foundation, acting itself in the fields of public interest and social assistance uses the authorisation given it by the national legislature to effect the financial, commercial, real estate and asset operations necessary or opportune in order to achieve the aims prescribed for it”, the Court opined, “it is capable of offering goods or services on the market in competition with other operators, for example in fields like scientific research, education, art or health”.²¹⁰ On that hypothesis, which is subject to the national court’s assessment,²¹¹ the Court concluded that the banking foundation must be regarded as an undertaking, in that it engages in an economic activity, notwithstanding the fact that the offer of goods or services is made without profit motive, since that offer will be in competition with that of profit-making operators.

cc) Application

As applied to Article 43 and 48 of the EC Treaty, this case law would seem to suggest that, notwithstanding the fact that their offer of goods or services is made without profit motive, not-for-profit foundations may be entitled to the right of establishment if and to the extent that they engage in an economic activity in a market by offering goods or services that are in competition with offerings of commercial offerors seeking a profit.

In that regard it must be pointed out that, according to the case law,²¹² the mere holding of shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset. On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking.

²⁰⁹ Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio*, [2008] ECR

²¹⁰ Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze and Others* [2006] ECR I-289 (para. 122); see also Case 382/92, *Commission v. United Kingdom*, [1994] ECR I-2435.

²¹¹ Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze and Others* [2006] ECR I-289 (para. 123).

²¹² Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze and Others* [2006] ECR I-289 (para. 111-112).

Similarly, the Court held in *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften* that in order for the provisions relating to freedom of establishment to apply, it is generally necessary that the property of a foundation located in another Member State is “actively” managed by the foundation.²¹³ Thus, if, for example, a foundation having charitable status under the law of *Italy* is the owner of real property located in *Germany* and the services ancillary to the letting of that property are provided by a property management agent in *Germany*, the provisions governing freedom of establishment are not applicable as the foundation has not secured a permanent presence in the host Member State.

The actual scope of the concept of economic activity is illustrated in *Didier Mayeur v. Associations Promotion d’Information Messine (APIM)*. In this case, the Court held that a private non-profit-making association which had legal personality separate from that of the city may be characterised, for purposes of Council Directive 77/187/EEC of February 14, 1977 on the Approximation of the Laws of the Member States relating to the Safeguarding of Employees’ Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses,²¹⁴ as engaging in economic activity if it carries out publicity and information activities on behalf of the city in connection with the services that the latter offers to the public.²¹⁵ Thus, the transfer of activities formerly carried out by an organization or entity organised under public law to a not-for-profit organization formed under private law does not prevent the activity from being characterised as economic activity.

dd) Summary

In light of the foregoing case law it is fair to conclude that a foundation the activities of which are financed neither through its own business operations nor by means of an “active” management of its property is not engaged in economic activities. Consequently, such a foundation would not be able to claim the benefits of the right of establishment pursuant to Articles 43 and 48 of the EC Treaty.

As to the expenditures of a non-profit foundation, one needs to differentiate between grant-making and operating foundations.

- An operating foundation carries out self-directed not-for-profit projects. If, in the course of such a project, goods or services are being exchanged for value (consideration), small or large, the foundation is to be qualified as engaging in economic activities. As a result, such an operating foundation would be subject to Articles 43 and 48 of the EC Treaty.
- The activities of a grant-making foundation, by contrast, is often limited to the distribution of money or similar financial means to individuals, institutions or projects. A grant-making foundation typically does not offer goods or services in exchange for money and is not competing against for-profit organizations.

²¹³ Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203 (para. 19).

²¹⁴ OJ 1977 L 61 p. 26.

²¹⁵ Case C-175/99, *Didier Mayeur v. Associations Promotion d’Information Messine (APIM)*, [2000] ECR I-7755 ; cf. Joined Cases C-173/96, *Francisca Sánchez Hidalgo and Others v. Asociación de Servicios Aser and Sociedad Cooperativa Minerva* and C-247/94, *Horst Ziemann v Ziemann Sicherheit GmbH and Horst Bohn Sicherheitsdienst*, [1998] ECR I-8237.

Hence, a pure grant-making foundation normally does not fall within the ambit of Articles 43 and 48 of the EC Treaty.

In sum, a foundation can only invoke freedom of establishment pursuant to Articles 43 and 48 of the EC Treaty if it operates a business or if it is „actively“ managing its assets or property or if, in the course of its not-for-profit activities, it offers goods or services in exchange for money or similar financial means. If it does not meet any of the aforementioned prerequisites, the foundation will not fall within the ambit of Articles 43 and 48 of the EC Treaty.

c) Cross-Border Activities: Setting up Branches and Agencies

If, however, a foundation is entitled to invoke freedom of establishment under Articles 43 and 48 of the EC Treaty, the question arises to what extent, if any, Articles 43 and 48 of the EC Treaty can be utilised to overcome existing civil law barriers.

aa) Setting up Subsidiaries

Freedom of establishment includes the right to set up and manage subsidiaries under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. Thus, the formation of a legally independent subsidiary of a foundation requires an act by the foundation or its founders in accordance with the law of the Member State in which the establishment is to be effected. The formation is governed solely by the law of the state of establishment which will differ, more or less, from the law of the Member State in which the foundation has been formed.

bb) Setting up Branches

Freedom of establishment also includes the right to set up agencies or branches. Obviously, agencies and branches are not legally independent entities. Rather, agencies and branches of a foundation are governed by the law of the state where the foundation was formed. It follows that non-profit foundations that can invoke freedom of establishment (*see supra*) are entitled to set up agencies or branches in another Member State. To the extent that the activities of an agency or branch are within the scope of the foundation's purpose or purposes, the branch or agency does not need to be reconstituted under the non-profit-organizations laws of the host Member State. Thus, the establishment of an agency or branch in another Member State is within the powers of the management of the foundation. If the home state of the foundation imposes restrictions on the right of a foundation to establish an agency or branch in another Member State, such restriction would hinder or make “less attractive” the foundation's freedom of establishment under Articles 43 and 48 of the EC Treaty and, therefore, would constitute a violation of Articles 43 and 48 of the EC Treaty unless it can be justified under the “four-factor test” that was first applied by the European Court of Justice in *Gebhard*²¹⁶ in the context of Article 43 of the EC Treaty and extended by the Court in *Centros*²¹⁷ to restrictions on companies' freedom of establishment guaranteed

²¹⁶ Case C-55/94, *Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* [1993] ECR I-4165 at para.37.

²¹⁷ Case C-212/97, *Centros Ltd. v Erhvers- og Selskabsstyrelsen*, [1999] ECR I-1459 at para. 34.

by Articles 43 and 48 of the EC Treaty and reconfirmed in *Inspire Art*²¹⁸. Hence, a categorical denial by a Member State of the right to set up agencies or branches in another Member State would deprive foundations within the ambit of Articles 43 and 48 of the EC Treaty (*see supra*) of their freedom of establishment. Similarly, attempts by the Member State in which the establishment is effected to impose its more restrictive law (*e.g.*, concerning the purpose of a foundation) on the agency or branch of a foreign (EU) foundation would constitute a violation of Articles 43 and 48 of the EC Treaty unless such violation could be justified in accordance with the jurisprudence of the European Court of Justice.

In light of the case law just mentioned, a Member State law that requires the branch of a foreign (EU) foundation, that was validly formed in accordance with the law of the foundation's home state, fully to comply with the foundation laws of the branch's host state would seem to be inconsistent with the mandates of Articles 43 and 48 of the EC Treaty unless it could be justified under the "four-factor test" established in *Gebhard*. Similarly, a law that imposes unnecessarily rigorous requirements on the establishment of an agency of a foreign (EU) foundation would also restrict the foundation's freedom of establishment and could be upheld only if it were justified in light of the *Gebhard* test. It appears that laws of this kind are presently in force in the *Czech Republic, Estonia, Italy, Spain, Poland and Bulgaria*.

In view of the four-factor test set forth in *Gebhard* and expressly reconfirmed in *Centros*, Member States may, however, impose upon out-of-state foundations certain notification or registration requirements (*see, e.g.*, the registration requirements under Czech law) as long as they are reasonable under the circumstances and not prohibitive. Thus, for example, a Member State may not charge foreign foundations prohibitively high fees or impose excessive waiting periods in connection with the registration.²¹⁹ A Member State may, however, require useful information, for example, about the nature of the activities of the foreign foundation, the capitalization, the management and the persons behind the organization as well as the tax status in the country of formation.²²⁰ The requirement of some member states (*e.g., Estonia, Italy and Spain*) that a foreign foundation follow certain recognition procedures or establish a representative office within the Member State in which it intends to carry on its activities (*e.g., Poland and Bulgaria*) constitute a highly questionable restriction that can hardly be justified in light of the four-factor test.

²¹⁸ Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] I-10155 at para. 133.

²¹⁹ *Cf.* Cases C-163-/94, C-165/94 and C-250/94, *Lucas Emilio Sanz de Lera and Others*, [1995] ECR I-4821 (holding that in cases involving the free movement of capital "[a] prior declaration, giving useful information as to the nature of the planned operation and the identity of the declarant, would enable the Member States to verify the actual use to which means of payment exported to non-member countries was put, without impeding liberalized capital movements, and thereby to ensure observance of any restrictions on capital movements authorized by Article 73c of the Treaty").

²²⁰ *Cf.* Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203 (para. 49) (holding that "[t]here is nothing to prevent the tax authorities concerned from requiring a charitable foundation claiming exemption from tax to provide relevant supporting evidence to enable those authorities to carry out the necessary checks. Further, national legislation which absolutely prevents the taxpayer from submitting such evidence cannot be justified in the name of effectiveness of fiscal supervision").

Similarly, the Court has held that a tax provision that has the effect that revenue from capital of non-Finnish origin receives less favourable tax treatment than dividends distributed by companies established in *Finland* constitutes an obstacle to the free movement of capital since shares of companies established in other Member States are less attractive to investors residing in Finland than shares in companies which have their seat in that Member State. Such a provision may also make a foundation's right of establishment less attractive and is therefore in conformity with the EC Treaty only if the restriction can be justified in accordance with the four-factor test of *Gebhard* and *Centros*.²²¹

cc) Transfer of the Real Seat

Articles 43 and 48 of the EC Treaty apply also to the transfer of the center of administration or real seat (*siège reel* or *effektiver Verwaltungssitz*) of non-profit foundations. According to the jurisprudence of the European Court of Justice, freedom of establishment includes the right of a company to transfer its center of administration or real seat (*siège reel* or *effektiver Verwaltungssitz*) to another Member State. The same principles apply to foundations within the ambit of Articles 43 and 48 of the EC Treaty (*see supra*).

Thus, a Member State's (State B) refusal to recognise the legal personality of a foundation that was validly formed under the laws of a Member State (State A) on the ground that the foundation had effectively transferred its real seat or center of administration to State B, constitutes a restriction on freedom of establishment which, in principle is incompatible with Articles 43 and 48 of the EC Treaty (*Überseering*). In light of the Court's holdings in *Centros*, a foundation that is validly formed in an EU Member State enjoys the freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty even if it never intended to engage in any activity in its home state, but was formed in one Member State only for the purpose of establishing itself in a second Member State where its main, or indeed entire, activity is to be conducted. The home state's requirement that the same foundation be reincorporated in the country of establishment is tantamount to outright negation of freedom of establishment which, unlike a restriction, cannot be justified in any case under the "four-factor test" of *Gehard* and *Inspire Art*. In light of *Centros* and *Inspire Art*, the reasons for which a foundation chooses to be formed in a particular Member State are irrelevant with regard to application of the rules on freedom of establishment. It should be noted, however, that, as was stated above, a foundation can only invoke freedom of establishment pursuant to Articles 43 and 48 of the EC Treaty if it operates a business or if it is „actively“ managing its assets or property or if, in the course of its not-for-profit activities, it offers goods or services in exchange for money or similar financial means. If it does not meet any of the aforementioned prerequisites, the foundation will not fall within the ambit of Articles 43 and 48 of the EC Treaty.

If it enjoys freedom of establishment under Articles 43 and 48 of the EC Treaty, the liability of its directors is subject to the law of the state of formation (State A) rather than the state of establishment (State B). This follows from the holdings of the European Court of Justice in *Inspire Art*. In light of the Court's jurisprudence it is also fair to conclude that the law of the state of formation, rather than the law of the state of

²²¹ Case C-319/02, *Petri Manninen*, [2004] ECR I-7477 (with further references to the Court's case law).

establishment, governs the internal affairs of the foundation such as the role and powers of the directors, the requirement of board of supervisors, and minimum capitalization requirements.

Measures and instruments of government supervision, by contrast, are not necessarily governed by the private law of foundations. However, even administrative and other public law affecting foreign foundations must be measured against freedom of establishment as Articles 43 and 48 of the EC Treaty mandate that a foundation's freedom of establishment must not be restricted regardless of whether the restriction is part of private and public law. Justifications, if any, need to meet the high standards developed by the European Court of Justice in *Gebhard*, *Centros*, *Überseering* and *Inspire Art* ("four-factor test").

As has been explained before, the principles established by the European Court of Justice regarding freedom of establishment in the "immigration" or "entry" cases are likely to be equally applicable to the "emigration" or "exit" cases (*Cartesio*). In light of the Court's jurisprudence, it is inconceivable that the Court would construe a foundation's freedom of establishment guaranteed by Articles 43 and 48 of the EC Treaty in the case of a cross-border transfer of the real seat, principal place of business or center of administration ("emigration" or "exit" cases) more restrictively than in an "immigration" or "entry" case such as *Überseering* or *Inspire Art*. This view is, as set forth above, shared by Avocate General *PoiARES Maduro* in his opinion of May 22, 2008 in *Cartesio*.

d) Cross-Border Mergers between, and Acquisitions of, Foundations

The European Court of Justice has never had an opportunity to rule on cross-border mergers between, and acquisitions or restructurings of, foundations. There is no pertinent secondary EU legislation either. Directive 2005/56/EC applies only to corporations but not to foundations.²²² At the national level, there is hardly any discussion of the relevant issues. In the United Kingdom and the Netherlands, the law does allow foundations to merge. German law permits a foundation to spin off economic activities. The foundation laws of several German provinces (*Länder*) provide that foundations may merge; provided, such a merger is expressly permitted in the foundation's articles of formation. Such a merger requires, however, approval by the competent government authorities.

In *Sevic Systems AG v. Amtsgericht Neuwied*,²²³ the European Court of Justice has made it clear that structural changes such as a cross-border merger (*in casu*: *Verschmelzung*) fall within the ambit of Articles 43 and 48 of the EC Treaty.. The Court noticed that the relevant German law provided rules for domestic *Verschmelzungen* but did not attempt to regulate similar cross-border transactions²²⁴. According to the Court, the different treatment of domestic and cross-border transactions could prevent companies from exercising their freedom of establishment and does therefore constitute a restriction of Articles 43 and 48 of the Treaty²²⁵. The Court pointed out that

²²² Directive 2005/56/EC on cross-border mergers of limited liability companies, OJ L 310/1 (25 Nov 2005).

²²³ Case C-411/03, *Sevic Systems AG v. Amtsgericht Neuwied*, [2005] ECR I-4321 at para. 21.

²²⁴ Case C-411/03 at para. 20.

²²⁵ para. 22 et seq.

imperative requirements in the public interest such as the protection of creditors, minority shareholders or employees as well as the interest in an efficient enforcement of tax laws may justify certain restrictions of freedom of establishment, but the Court held that the refusal of cross-border mergers is incompatible with Articles 43 and 48 of the EC Treaty.²²⁶ It is fair to conclude from the Court's holding that if a Member State allows domestic entities to merge or engage in similar restructuring transactions it must also allow these transactions across state borders. This would seem to apply equally to outbound (*Hinausverschmelzung*) and inbound transactions (*Hineinverschmelzung*).²²⁷ In order to make this kind of cross-border transaction viable, the two jurisdictions concerned would need to allow this kind of transaction, and the parties concerned would have to comply with the requirements of the laws of both jurisdictions, including any governmental approval requirements. In light of the fact Articles 43 and 48 of the EC Treaty apply only to foundations engaged in economic activities, cross-border *Verschmelzungen* of foundations and similar transactions would seem to be an extremely rare exception rather than a common transaction.

3. Conclusions

The preceding analysis illustrates the increasing significance of the right of establishment pursuant to Articles 43 and 48 of the EC Treaty, especially in the field of not-for-profit foundations. While the Court has not yet ruled on the issue, case law suggests that the provisions regarding freedom of establishment apply to a not-for-profit foundation if it engages in "economic activity", i.e., if it offers goods or services in a market in competition with offers made by persons who operate in that market for profit. In contrast, if the foundation does not carry on an "economic activity", it cannot invoke the right of establishment. Given the theoretically broad scope of the concept of "economic activity" it is fair to conclude that at least some not-for-profit foundations in the EU are subject to the right of establishment.

Where to draw the line between economic and non-economic activities is not entirely clear, however. While the Court's jurisprudence does provide some guidance, it does not offer clear, foreseeable, and reliable solutions for all possible cases. Thus, for example, it is subject to debate under what, if any, circumstance the management of a foundation's assets can be characterised as "active". Similarly, it is unclear whether the economic activity in question needs to be material and, if so, whether it needs to be quantitatively or qualitatively material or both. The absence of a clear distinction is particularly problematic because the applicability of Articles 43 and 48 of the EC Treaty depends upon the characterization of the activity of a foundation as an "economic" one. Only if the activity of a not-for-profit foundation can be characterised as an economic activity, may the foundation invoke the right of establishment which allows it, inter alia, to engage in cross-border activities. Under the provisions regarding the right of establishment, the not-for-profit foundation even enjoys the freedom to transfer its principal place of business or real seat (*siège social*) from its home Member State to another Member State. Specifically, the right of establishment allows a foundation both to emigrate and to immigrate. In contrast, at the current state of European law, the

²²⁶ Case 411/03 at para. 28 – 30.

²²⁷ Opinion of the Advocate General Tizzano in *Sevic*, [2005] ECR I-10805 at para 45.

transfer of the registered seat will be possible only if legal mechanisms are in place that ensure that the interests of all those affected by such a transfer are taken into account.

It is also clear from the ECJ's case law that if a foundation enjoys the right of establishment, a Member State may not, as a general rule, restrict this right or make its exercise less attractive, unless the restriction can be justified according to Article 46 of the EC Treaty or pursuant to the four-factor test set forth in *Gebhard* and reconfirmed by the ECJ in *Centros*. In light of case law, the real seat doctrine would not seem to be a justifiable restriction of a foundation's right of establishment in regard to both immigration and emigration cases. In contrast, Member States may impose registration requirements on foreign corporations; provided, these requirements are not contrary to the four-factor test. Thus, for example, under Articles 43 and 48 of the EC Treaty the registration authority of a Member State may not charge prohibitively high registration fees or impose unreasonably long waiting periods in connection with the registration. Special recognition requirements for foreign not-for-profit foundations are subject to the same limitations as registration requirements. The requirement imposed by some Member States (e.g., *Bulgaria* and *Poland*) that a foreign foundation establish a representative office in the state in which it wishes to operate would seem to be an unjustifiable restriction of the foundation's right of establishment.

While for some foundations (i.e., only those that are engaged in "active" economic activities) a cross-border transfer of the principal place of business, real seat or *siège réel* is possible under Articles 43 and 48 of the EC Treaty, numerous material problems continue to exist. These problems result primarily from the supervision and control mechanisms that Member State authorities may exercise over domestic (and sometimes also over foreign) foundations. The interaction between state supervision and freedom of establishment is still unsettled.

Most Member States have taken a rather narrow view with regard to mergers between domestic foundations. Cross-border mergers of foundations thus far appear to have been relatively seldom. For the time being, Articles 43 and 48 of the EC Treaty are not likely to open more opportunities for foundations engaged in economic activities.

II. Tax Law

1. Fundamental Freedoms: General Principles According to Case Law

In the field of tax law, the impact of the fundamental freedoms is equally relevant.²²⁸

In European case law one can find three cases which discuss the impact of the fundamental freedoms to tax law barriers.

a) *Stauffer: Discrimination of a Real Estate Investment of a Foreign-Based Foundation*

As far as the tax treatment of non-resident foundations is concerned, the ECJ has already made the first and most significant step by its decision of 14 September 2006 in the *Centro Musicologia di Walter Stauffer* case.²²⁹

²²⁸ Also, less obvious, the state aid rules (Art. 87 EC) are applicable.

²²⁹ Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203.

This inbound case concerned an Italy-based public benefit foundation which made a real property investment in Germany. While income from such investments is usually tax-exempt if derived by a public benefit institution resident in Germany, the clear wording of Germany's Corporate Income Tax Act makes clear that the exemption is not available for non-resident institutions like the *Stauffer Foundation*.

The case touches on several intricate questions of the fundamental freedoms, with some of them having been answered by the ECJ in its preliminary ruling:

- Are the fundamental freedoms applicable to real estate investments of a for-profit institution as well as to a non-profit institution? (if so, which fundamental freedoms in particular?)
- Is there any justification for the current restriction?
- If there is no justification, when is a foreign public benefit foundation comparable to a national one so that a restriction implies unjustified discrimination?

aa) Applicability of Fundamental Freedoms to Foreign Investments of Public Benefit Foundations

The first point concerns the applicability of the market freedoms to foreign income from the investments of a public benefit foundation. While business and entrepreneurial foundations (e.g., in the Netherlands) act on economic markets and, for this reason alone, do enjoy full protection of the fundamental freedoms like any other player on such economic markets, public benefit foundations might be regarded as non-market actors and, for this reason, be denied any protection accorded under the fundamental freedoms.

However, the mere fact alone that a foundation (like any other body, corporate or non-corporate) earns income functions as a strong indicator of economic activity. If, and to the extent that, income tax rules of the state of residence provide for taxation of non-profit activities where the foundation earns income (or derives capital gains) from sources abroad, it is exactly these rules which make perfectly clear that there obviously is a market activity of such corporation. Each single activity, and each item of income, might then be tested against the fundamental freedoms.

Thus, in the *Stauffer* decision the ECJ determined that the fundamental freedoms of the EC treaty are applicable. In the specific case, the freedom of establishment was denied, because the Italian foundation had not secured a permanent presence in Germany (the services ancillary to the letting of the property were provided by a German property management agent).²³⁰ However, according to the ECJ, the freedom of capital movement was applicable, because 'investments in real estate' were included in the nomenclatura of the (former) Council Directive 88/361/EEC of 24.6.1988, and because it is ECJ settled case law that the content of the nomenclatura can be used in order to define "capital movements".²³¹

bb) No Justification

The ECJ has clarified that restrictions of the fundamental freedoms cannot be justified in the field of the taxation of public benefit organizations in an easier way than

²³⁰ ECJ, C-386/04, [2006] ECR I-8203, para. 19-20.

²³¹ ECJ, C-386/04, [2006] ECR I-8203, para. 22.

elsewhere. The ECJ especially denied a justification of the total exclusion of any foreign public benefit foundation (1) because of the special provisions Art. 87(3)(d) and Art. 151 of the EC Treaty,²³² (2) because of the need of effective fiscal supervision (which only allows “measures enabling it to ascertain in a clear and precise manner whether the foundation meets the conditions imposed by national law”),²³³ (3) because of the need to ensure the cohesion of the national tax system,²³⁴ and (4) because of the need to protect the basis of tax revenue and to the fight crime.²³⁵

cc) Comparability of a Foreign Public Benefit Foundation with a National Public Benefit Foundation

The ECJ was not competent to decide whether the Italian foundation in this specific case was comparable to a tax-exempt German foundation, because the interpretation of national (tax) law is a task for the national courts.

However, the ECJ has provided hints concerning the criteria for the comparability test: According to the ECJ, the Italian foundation has to meet all requirements of German tax law, except the residence in Germany.²³⁶ For this test, it is not sufficient that the Italian foundation has the status of a tax-exempt foundation according to Italian tax law.²³⁷

After the decision of the ECJ, the German Federal Fiscal Court had still to decide whether the Italian foundation met the requirements of German tax law.²³⁸ This test was not easy, because German tax law provides for additional requirements in comparison to Italian tax law. Therefore, it was uncertain whether the Italian foundation met criteria like the “duty of timely disbursement”, which exist in German tax law, but not in Italian tax law.²³⁹ Because of that uncertainty, the Federal Fiscal Court referred the case back to the Federal Local Court in order to clarify the facts.

b) Currently Under Review: *Persche* and the Discrimination of Direct Cross-Border Donations

In the case *Persche* the ECJ will have to decide whether the fundamental freedoms of the EC treaty also prohibit discrimination in the case of a donation to a foreign-based foundation.

The German resident individual *Hein Persche* donated towels, walking frames and other medical devices to a social institution in Portugal in 2003. The tax authorities in Germany denied any deduction of donations on the grounds that the recipient institution was not resident in Germany.

Germany’s Federal Tax Court has left open the question whether requirements other than the recipient’s residence were met. The Court made clear, however, that at least for the sake of its own rulings, the compatibility of the residence criterion was decisive. For these reasons, it

²³² ECJ, C-386/04, [2006] ECR I-8203, para. 45.

²³³ ECJ, C-386/04, [2006] ECR I-8203, para. 47-50, especially para. 48.

²³⁴ ECJ, C-386/04, [2006] ECR I-8203, para. 52-59.

²³⁵ ECJ, C-386/04, [2006] ECR I-8203, para. 60-61.

²³⁶ ECJ, C-386/04, [2006] ECR I-8203, para. 40.

²³⁷ ECJ, C-386/04, [2006] ECR I-8203, para. 39, see also the Opinion of the Advocate General *Stix-Hackl* in Case C-386/04, para. 94.

²³⁸ See German Fiscal Court (Bundesfinanzhof), decision of 20.12.2006, Case I R 94/02, published in *Deutsches Steuerrecht (DStR)* 2007, 438 et seq.

²³⁹ See the legal comparative analysis, supra .

referred the case to the ECJ,²⁴⁰ where it is still pending.²⁴¹ On 14 October 2008 (CJ) Advocate General Mengozzi delivered an opinion on the *Persche* case. The ECJ ruling may not be expected before spring 2009.

In this case, it is necessary to look carefully at the following legal issues:

- Are the fundamental freedoms also applicable to donations to a public benefit institution? (aa)
- If the fundamental freedoms are applicable: Is there any justification for the current restriction? (bb)
- If there is no justification: Is a foreign public benefit foundation comparable to a national one, so that a restriction means an unjustified discrimination? (cc)

aa) Applicability of Fundamental Freedoms to Donations to Public Benefit Foundations?

It is evident that a donation (which lacks a consideration) does not fall into the ambit of the freedom of establishment (Art. 43, 48, EC Treaty).

However it is possible that a donation falls into the ambit of Art. 56 of the EC Treaty, read in connection with the nomenclatura in Annex I on the (former) Council Directive 88/361/EEC of 24 June 1988.²⁴² Indeed, according to chapter XII of that Directive (“Personal Capital Movements”) “gifts and endowments” as well as “inheritances and legacies” fall into the ambit of Art. 56 of the EC Treaty also. Although it may seem surprising that the “market freedoms” of the EC Treaty are also applicable in such “altruistic” cases, the wording of the nomenclatura is very clear. Consequently, the ECJ has already decided that even inheritance falls into the scope of Art. 56, read in connection with the nomenclatura in Annex I on the (former) Council Directive 88/361/EEC, Chapter XII.²⁴³ Thus, it would be very surprising if the ECJ did not decide that donations fall into the ambit of the freedom of capital movement. In addition, the opinion of the Advocate General points in this direction.

bb) No Justification?

The strict focus on the divergence in residence seems to make the *Persche* case similar, if not equivalent, to the *Stauffer* case. In *Stauffer*, too, the ECJ convincingly stated that the mere fact that a recipient foundation has its seat and actual place of management in a different EC Member State does not withstand a full comparability of the two situations.²⁴⁴ Thus, it is questionable whether the ECJ will now decide differently on *Persche*?

²⁴⁰ German Federal Fiscal Court (*Bundesfinanzhof*), decision of 9.5.2007, Case XI R 56/05, published in *Amtliche Sammlung der Entscheidungen des Bundesfinanzhofes* vol. 218, p. 125 et seq. = *Deutsches Steuerrecht (DStR)* 2007, 1295 et seq.

²⁴¹ ECJ, Case C-318/07 – *Hein Persche/Finanzamt Lüdenscheid*. The hearing took place before the Grand Chamber (13 judges) on 17.6.2008.

²⁴² In the *Persche* case it was argued that non-monetary gifts such as those donated to the Portuguese charity do not constitute movements of capital. However, this restriction does not seem to be convincing, see also the Opinion of Advocate General Mengozzi, para. 28 et seq.

²⁴³ ECJ, Case C-364/01, – *Heirs of Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerle*, ECR [2003], I-15013; Case C-513/03 – *Van Hilten-van der Heijden*, ECR [2006], I-1957. n

²⁴⁴ See supra C II 2 a bb.

According to some legal scholars, *Persche* is not comparable to *Stauffer*, because in *Stauffer* there was a “tax relation” between the source country and the charity by being taxable as a non-resident on the rental income of real estate in Germany. On the other hand, in *Persche* there was no such tax relation between the charity (in Portugal) and Germany, where the deduction would have to be granted. However, this argument is not very convincing, because in *Persche* there is indeed a “tax relation” between the donor (in Germany) who claims the deduction from his income tax and the source country (Germany).

Another main argument is that effective control by the tax authorities may not be guaranteed: there is continuous control and audit of domestic charities, whereas for foreign charities it would have to be on a case by case basis, which cannot be provided for in a view of the high numbers of donations. However, such problems also arise in a case like *Stauffer* as well as in many other transnational cases. In *Stauffer*, the ECJ rejected this argument,²⁴⁵ and it would not be consistent to decide on the two cases differently.²⁴⁶

cc) Comparability – a Question for the National Court

The question of comparability (would a donation to a resident foundation in such a case be accepted as a tax-exempt donation under German law²⁴⁷) will not be decided by the ECJ, since this is a question pertaining to German national tax law, which falls into the ambit of the German (tax) courts.

dd) Prospect

The ECJ will have to test whether the fundamental freedoms are also applicable to donations to a public benefit institution, and, if so, whether there is a justifying reason for the denial of tax benefits for the cross-border donation in the *Persche* case.

Here, the authors will not anticipate the ruling of the Grand Chamber. However, given that it is the mere fact of the recipient’s residence which is at issue here,²⁴⁸ we can hardly see a convincing justification why *Persche* should be decided differently from *Stauffer*.

After all, even if we are not fully confident what the outcome of the *Persche* case will be, it seems to us that the ECJ will likely rule in favour of a deduction of cross-border donations, as the Opinion of the Advocate General Mengozzi suggests.

c) Laboratoires Fournier (Territorial Restrictions for Tax Benefits)

Another question was to be decided by the ECJ in *Laboratoires Fournier*.²⁴⁹

According to French legislation, a tax credit for research was available for research activities solely carried out in France. Fournier, which manufactures and sells pharmaceuticals,

²⁴⁵ ECJ, C-386/04, [2006] ECR I-8203, para. 47-50.

²⁴⁶ See also the Opinion of Advocate General Mengozzi, para. 77 et seq.

²⁴⁷ The question whether the Portuguese institution in the concrete case promotes a “German public benefit purpose” may be doubtful. However, this point does not regard the European law (but the German national tax law) and will there not be reviewed further.

²⁴⁸ As already stated, the question whether the issue of the place where the public purpose might be performed.

²⁴⁹ ECJ, Case C-39/04 – *Laboratoires Fournier SA vs. Direction des vérifications nationales et internationales*, [2005] ECR I-2057.

subcontracted numerous research projects to research centres based in various Member States and took the resultant expenditure into account in calculating this tax credit for research for the years 1995 and 1996. In 1998 Fournier was audited for those years. Following that audit, tax adjustment notices were issued to Fournier, as the Direction des Vérifications had disallowed the aforementioned expenditure in the calculation of the tax credit for research as claimed by the company. The resultant additional tax assessments were levied on Fournier for the period at issue in the main proceedings.

aa) Applicability of Fundamental Freedoms to Research Activities

According to the ECJ, research activities fall into the ambit of the fundamental freedom of Art. 49 of the EC Treaty (freedom of services).

bb) No Justification

Restricting the benefit of a tax credit for research only to research carried out in the Member State in question was not justified. The ECJ denied a justification based on the need to ensure the cohesion of the national tax system.²⁵⁰

Moreover, the additional argument that the territorial restrictions would be justified by the objective of promoting research did not convince the ECJ. The promotion of research and development could not justify a national measure which refuses the benefit of a tax credit for any research not carried out in the Member State concerned. Such legislation would be directly contrary to the objective of Community policy on research and technological development which, according to Art. 163(1) of the EC Treaty, would be, inter alia, 'strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at an international level'. In addition, Art. 163(2) EC Treaty provides, in particular that, for this purpose, the Community is to 'support [undertakings'] efforts to cooperate with one another, aiming, notably, at enabling [them] to exploit the internal market potential to the full, in particular through ... the removal of legal and fiscal obstacles to that cooperation.'²⁵¹

Finally, the aim of the effectiveness of fiscal supervision would not justify that kind of restriction either. A Member State could apply measures which would make possible to ascertain the amount of costs deductible in that State as research expenditure clearly and precisely. However, national legislation that would absolutely prevent the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States could not be justified in the name of effectiveness of fiscal supervision. The possibility could not be excluded a priori that the taxpayer would be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.²⁵²

2. *Conclusion: Non-Discrimination Rule as Regards the Seat of a Foundation*

a) Taxation of a Foundation

aa) Inbound Constellation

²⁵⁰ ECJ, Case C-39/04, ECR I-2057, para. 20-21.

²⁵¹ ECJ, Case C-39/04, ECR I-2057, para. 23.

²⁵² ECJ, Case C-39/04, ECR I-2057, para. 24-25.

The analysis of the *Stauffer* decision confirms the existence of the non-discrimination rule concerning the income taxation of a non-resident foundation by the state of source.

bb) Outbound Constellation

In the outbound constellation (tax treatment of resident foundations acting out of area) the described non-discrimination rule is not applicable, because in this constellation there is no discrimination of a foreign-based foundation, but a general restriction of national tax law for all foundations irrespective of their residence.

According to *Stauffer*, such a general restriction does not generally infringe the fundamental freedoms of the EC Treaty: “Member States are entitled to require a sufficiently close link between foundations upon which they confer charitable status for the purposes of granting certain tax benefits and the activities pursued by those foundations.”²⁵³

However, as in *Laboratoires Fournier*, in certain cases a *territorial* restriction *can* nevertheless be regarded as an infringement of the fundamental freedoms of the EC treaty, e.g., if there is a contradiction to the aims of the EC Treaty.²⁵⁴ Thus, the *territorial restrictions* of some Member States can infringe the EC Treaty, if they are too strict.

b) Taxation of Donors

aa) Resident Donors of Non-Resident Foundations

According to the analysis of the *Persche* case, there are good reasons to believe that the non-discrimination rule is probably also relevant to the deductibility of donations by a resident donor to a non-resident foundation. Concerning inheritance taxation, the fundamental freedoms (most notably, Art. 56 (1) EC) apply. In this respect, its effect is similar, if not identical, to the income tax situations analysed in *Persche*.

With regard to donations made by a resident to a non-resident foundation, the fundamental freedoms might be applicable in their effect as rules prohibiting restrictions (including discrimination of outbound cases).

bb) Non-Resident Donors of Resident Foundations

In general, the fundamental freedoms do not preclude any agreement made between two or more Member States as to which of them has the primary responsibility to consider personal expenses of an individual taxpayer. In the absence of such an agreement, the ECJ has usually assigned the primary responsibility to the state of residence, considering that it is this state which has the best means to assess the taxpayer's worldwide income. This tendency dates back to the ECJ decision in *Schumacker*.²⁵⁵

If one stays with the *Schumacker* jurisprudence, the solution is rather clear. As a rule, it is the state where the taxpayer is resident which bears primary responsibility for the deduction of the donation. As indicated above, this is fully convincing even without

²⁵³ Case C-386/04, *Centro di Musicologia Walter Stauffer v. Finanzamt München für Körperschaften*, [2006] ECR I-8203, para. 37.

²⁵⁴ See supra C II 2 c.

²⁵⁵ ECJ ruling of 14 February 1995, C-279/93, 1995-I E.C.R. 225 - *Finanzamt Köln-Altstadt/Roland Schumacker*.

reasonable alternatives where the taxpayer does not earn income from sources in the country where the foundation resides. But even if the taxpayer does earn income there, the ECJ does not regard him as being in a position sufficiently similar to the one of resident individuals. The only constellation where the *Schumacker* doctrine does constitute an obligation of the Member State to allow deductions also to non-resident taxpayers is the constellation where the taxpayer earns no (or almost no) positive income in his or her state of residence. In this atypical constellation, there is a substituting responsibility of the so-called source state (here, the state where the foundation resides) to allow the deduction of the donation. But again, this only applies if the taxpayer derives a relatively high amount of income from sources in this state (usually, the threshold is considered to be 90 per cent of his world-wide income).

In the context of donations made by a non-resident taxpayer to a resident foundation, however, one may well argue against the application of the *Schumacker* doctrine. The reasoning could be that, at least from a tax policy viewpoint, it is the state where the foundation is resident which has in the end the primary (if not exclusive) responsibility to allow the donation for deduction simply because it is this state which has authority over, and might profit from the activities of, the corresponding recipient (the foundation). This concept of equivalence might indeed justify an abolition of *Schumacker* and constitute an extended, if not primary, obligation of the state where the foundation is resident to allow the donation for deduction. Still, this obligation is useless whenever the taxpayer does not derive taxable income from sources in this country.

After all, with or without the *Schumacker* doctrine, the case of non-resident taxpayers making a donation to a resident foundation is highly intricate. But the overwhelming number of sub-constellations can be solved on the basis of the fundamental freedoms in a satisfactory manner.

cc) Non-Resident Donors of Non-Resident Foundations

Lastly, where a Member State imposes income tax upon non-resident donors of non-resident foundations because the taxpayer earns income from sources within this State, the deductibility of the donation depends on *Schumacker* again. If he earns all or almost all of this world-wide income within this State, the State has to accept the same responsibility for the personal deductions of the taxpayer as his state of residence (which, in the absence of considerable amounts of income, is not in a position to grant effective deductions). EC law (Arts. 12, 18, 39, 43, 49 Art. 56 EC Treaty, as the case may be) prevents the taxpayer from paying higher taxes simply because of the fact that his income is being generated within more than one jurisdiction. Therefore, the “strong” source state might be obliged under EC law to allow donations made by a non-resident taxpayer for deductions.

It should be noted, however, that this obligation does not go beyond the treatment of resident taxpayers making the same donations to the same (non-resident) foundation.

c) Taxation of “Affiliated” Beneficiaries

As pointed out in the course of the analysis of tax-law barriers, there are some (rare) cases where a state may impose income taxes on the beneficiaries of a foundation. According to the basic distinction between non-affiliated beneficiaries (e.g., people in

need who receive aid by the foundation in course of its charitable activities) and affiliated beneficiaries (the donor and his family), the following rules apply:

For non-affiliated beneficiaries, EC law does not ban income taxation in general. It does grant non-discriminatory treatment in both inbound and outbound situations. There are no particularities, however, compared to standard cases of EC tax law.

The same holds true for affiliated beneficiaries. Here, however, the protection against discriminatory treatment (including discriminatory restrictions in outbound cases) gains particular relevance if the respective state (usually, but not necessarily, the state where the taxpayer is resident) applies the concept of transparency of the foundation to non-resident foundations only, whereas beneficiaries of resident foundations remain untaxed or are taxed on an accrual basis only. These cases are rare. It should be noted, though, that the fundamental freedoms (Art. 43 and/or Art. 56 (1) EC, as the case may be) grant a high level of protection. In this regard, the principles elaborated above will apply *mutatis mutandis*.

d) VAT

By contrast, the barriers which we have identified on the field of VAT may be best overcome by an EC law definition of the public purpose institutions. Currently, by making dynamic reference to domestic law, the VAT System Directive has assigned a considerable margin of discretion to the Member States.

In the absence of further harmonization, some minor distortions might be tackled by a proper application of the fundamental freedoms and/or state aid rules. However, from a methodological viewpoint, the ECJ is extremely reluctant in increasing the density of secondary Community law (here, the System Directive) through an active interpretation of primary law.

3. “Bureaucratic Barriers” in Order to Avoid Tax Discriminations

a) The Non-Discrimination Rule – A New Opportunity for Tax-Planning Structures

As a consequence of *Stauffer* and (probably) *Persche*, there seems to exist a general non-discriminatory rule in the inbound cases which are most important in practice in order to source funds (investment activities and probably donations).

If this is true, new opportunities for tax-planning structures emerge apart from the solution to create indirect cross-border transactions by using other public benefit institutions in various Member States:²⁵⁶ Direct cross-border transactions are also possible without negative tax consequences, if the foundation in the state of destination is regarded as tax-exempt in the state of source.

b) Compliance Costs

Such a solution avoids some of the compliance costs, which are necessary to use in the traditional tax-planning structure of a network of public benefit organizations,²⁵⁷ as there are no costs for reduplication and no costs for compliance with different law systems of two or more different institutions. However there are still costs for

²⁵⁶ Cf. B II 4 *supra*.

²⁵⁷ Cf. B II 4 *supra*.

compliance with different law systems of one institution which can even be higher, as described in more detail below.²⁵⁸

D. Economic Relevance of the Barriers according to the Field Study

In the field study we included questions about the relevance of barriers against international activities and the perception of barriers as well. It was our goal to establish firmer knowledge of the relevance of international activities to foundations in the Member States (1) and to test their perceptions concerning barriers to cross-border activities (2). In analysing these perceptions of barriers, we need to distinguish between the responses given by foundations which do have experience in such activities and those which do not, i.e., which only report their expectations without real experience in the cross-border arena.

Relevance of International Activities

Despite other data sources, our survey enables us to give at least an estimation of the scope of the international orientation of foundations. Through several questions we are in a position to provide for some informed indication, as to how often and to what extent (compared to their overall expenditure) foundations are active on the international level.

1. Number of Foundations Conducting International Activities

According to Table 13, the average share of foundations that are active on an international level is astonishingly high (65-67 % of the weighted data).²⁵⁹

Table 13: Rate of foundations, conducting international activities

| % of foundations conducting international activities | | | | | | | |
|---|--------------------|--------------------|-------|-----------------------|-------|---------------------|-------|
| Country | EFC ²⁶⁰ | Unweighted data | | Weighted expenditures | | Weighted for assets | |
| | | Yes ²⁶¹ | No | Yes | No | Yes | No |
| Belgium | 43 | 75.00 | 25.00 | 51.88 | 48.13 | 3.75 | 96.25 |
| Cyprus | | 100.00 | | 100.00 | | 100.00 | |
| Czech Republic | | 66.67 | 33.33 | 79.04 | 20.96 | 74.69 | 25.31 |
| Denmark | | 33.33 | 66.67 | 0.05 | 99.95 | 0.05 | 99.95 |
| Estonia | 30 | 66.67 | 33.33 | 66.67 | 33.33 | 52.05 | 47.95 |
| Finland | 6 | 66.67 | 33.33 | 50.14 | 49.86 | 99.77 | 0.23 |
| France | 22 | 92.86 | 7.14 | 92.40 | 7.60 | 91.77 | 8.23 |
| Germany | 18 | 100.00 | | 100.00 | | 100.00 | |
| Greece | | 75.00 | 25.00 | 96.93 | 3.07 | 96.93 | 3.07 |
| Hungary | | 60.00 | 40.00 | 50.04 | 49.96 | 50.04 | 49.96 |

²⁵⁸ See E I infra.

²⁵⁹ This figure includes cases that have stated that they are active internationally at least occasionally. 46% have stated that they conduct international activities “regularly”.

²⁶⁰ In the EFC data, the rate of foundations active internationally is included. Unfortunately, this figure is available only for very few cases as described in Table 13.

²⁶¹ The assessment that a foundation is conducting international activities is based on the answer to the question “Do you conduct international activities never, rarely, occasionally, or more or less regularly?”.

| % of foundations conducting international activities | | | | | | | |
|--|---|--------|--------|--------|--------|--------|--------|
| Ireland | | | 100.00 | | 100.00 | | 100.00 |
| Italy | 0 | 92.31 | 7.69 | 90.94 | 9.06 | 91.69 | 8.31 |
| Latvia | | 100.00 | | 100.00 | | 100.00 | |
| Lithuania | | | 100.00 | | 100.00 | | 100.00 |
| Malta | | 100.00 | | 100.00 | | 100.00 | |
| Netherlands | | 85.71 | 14.29 | 83.55 | 16.45 | 80.21 | 19.79 |
| Poland | | 100.00 | | 100.00 | | 100.00 | |
| Portugal | | 100.00 | | 100.00 | | 100.00 | |
| Romania | | 100.00 | | 100.00 | | 100.00 | |
| Slovakia | | 71.43 | 28.57 | 67.91 | 32.09 | 67.91 | 32.09 |
| Slovenia | | 100.00 | | 100.00 | | 100.00 | |
| Spain | | 100.00 | | 100.00 | | 100.00 | |
| Sweden | | 100.00 | | 100.00 | | 100.00 | |
| United Kingdom | | 75.00 | 25.00 | 71.48 | 28.52 | 75.00 | 25.00 |
| Total (average for countries) ²⁶² | | 71.72 | 28.28 | 66.75 | 33.25 | 65.32 | 34.68 |
| Total (all foundations) | | 81.8 | 18.2 | 66.3 | 33.7 | 67.8 | 32.2 |

There could be several reasons for this surprisingly high number.

First, larger foundations that are more likely to be active internationally could be overrepresented in the sample. This is surely true because (1) in the sample, larger foundations are represented by a higher number than in the ground population; (2) larger foundations are much more likely to answer a questionnaire concerning a potential European Foundation Statute; (3) larger foundations have much more often the resources to fill out an extensive questionnaire as used for the purpose of this study. We tried to diminish these factors by weighing the data and giving smaller foundations additional weight in doing so. With the implementation of our weighing factors, the share of foundations active internationally is reduced from 72 % in the raw data to 65 to 67 %. But this share still seems to be much too high for immediate understanding.

The second reason for the high rate of internationality could be a specific answering behaviour which could have also led to an overrepresentation of larger foundations. One could argue that especially foundations performing international operations would answer this specific question. But the rate of missing values is under 1 % of all cases for this question, so that this argument seems to be unsustainable. Nevertheless, we controlled for the classification of a foundation into “being active internationally” or not by comparing several answers and could validate the finding.

Third, it could be argued that the small number of cases per country distorted the results. If nearly all responding foundations in some countries are orientated towards international activities, the average between countries is biased in this direction. But a

²⁶² This average does not include those cases where (due to numbers too small in cases like in Cyprus) the share of one category adds up to 100%. This reduces the share of foundations active internationally somewhat but not significantly.

glance at the overall averages (not grouped for countries) shows that this is not the case. The rate of international active foundations stays the same or even rises.

A fourth reason for the high rate of foundations active internationally in the sample (and the weighted calculation) is that the questionnaire is answered only by foundations which exceed a certain level of economic size. The result would be that we were blind to some (possibly many) very small foundations which are not running international programmes and that would in turn give the calculations a bias towards larger foundations.

Fifth, it could be argued that there may be differences between Member States regarding the rate of foundations active internationally. However, the cases of *Cyprus, Germany, Latvia, Malta, Poland, Portugal, Romania, Slovenia, Spain* and *Sweden* illustrate why it is not advisable to calculate averages for single countries. The sample contains no foundations without international activities in these countries and therefore displays rates of 100 % of internationally active foundations. For the calculation of the overall average in Table 13, we used only countries where we have in fact observed cases without international activities. Nevertheless it seems useful to take a look at Table 13 to get an impression of the (data) situation, depicted above.

Sixth, what could increase the rate of internationally active foundations is the huge amount of very small-scale cross-border activities. This suggestion is substantiated by the finding that smaller shares of operating expenditures spent internationally (< 1m euros) constitute already 56 % of the overall cases of international activities (Table 14).

Table 14: Operating expenditures abroad (categories)

| Category | Frequency ²⁶³ | Share | Cumulated share |
|-------------------------|--------------------------|---------|-----------------|
| 0 - 500,000 | 6977 | 46.66% | 46.66% |
| 500,000 - 1,000,000 | 1447 | 9.68% | 56.33% |
| 1,000,000 - 2,000,000 | 2293 | 15.33% | 71.67% |
| 2,000.000 - 4.000.000 | 4184 | 27.98% | 99.65% |
| 4,000,000 - 10,000,000 | 27 | 0.18% | 99.83% |
| 10,000,000 - 14000.000 | 8 | 0.05% | 99.88% |
| 14,000,000 - 25.000.000 | 18 | 0.12% | 100.00% |
| | 14954 | 100.00% | |

The seventh line of thought could be that there are in fact more foundations active on the international level than we have thought so far.

The obvious uncertainty about the validity of the data leads to the question whether we can use the results at all and in which way.²⁶⁴ We decided not to step back from any further calculation, but to try to come to reasonable results and underline the preliminary character of the following figures. Thus, for the purpose of this study and on the basis of our findings, we assume that the number of foundations that perform international activities is significantly higher than other studies would suggest. There is

²⁶³ The number of foundations results from the weighting process.

²⁶⁴ Unfortunately, a comparison with the EFC data sheds no more light on this topic. The response rate here is even worse than to the European Foundation Statute survey, which is demonstrated in the first column of Table 13.

a certain probability that the numbers in Table 13 are too high, but the finding remains that internationality is very common among European foundations.

2. Further Results

Table 15 shows that a very large share of foundations operates at the EU or even global level. The orientation towards single countries or regions is less frequent. This could be seen as a result of a strategic orientation towards either a national topic (foundations active only on the regional or national level) or a more general and geographically less specific international scope. This finding corresponds to the general number of foundations active internationally. With respect to tendency, European foundations are significantly more outward looking and less limited by regional boundaries than assumed before.

Table 15: Scope of international activities

| | Domestic only ²⁶⁵ | Specific countries | European regions | EU wide | Other continents or world regions | World-wide |
|----------------------|------------------------------|--------------------|------------------|---------|-----------------------------------|------------|
| Unweighted | 31.8 | 5.6 | 10.3 | 15.6 | 5.6 | 30.8 |
| Expenditure weighted | 27.0 | 4.6 | 11.3 | 10.3 | 3.7 | 43.1 |
| Asset weighted | 32.9 | 4.5 | 16.2 | 12.4 | 5.7 | 28.7 |

If we look at the amount of expenditure differentiated between spent “domestically” and “internationally” (Table 16), European foundations spend an average of 5-6 % of their total operating expenditure for international activities. This adds up to € 73.9m.

Table 16: Share and average amount of international expenditure

| | | % of annual expenditure | Average amount in € | Sum for all foundations |
|--|------------|-------------------------|---------------------|-------------------------|
| Domestically | Unweighted | 89 | 15.6m | € 1.7bn |
| | Weighted | 93 | 5.9m | |
| Internationally | Unweighted | 6 | 4.1m | € 73.9m |
| | Weighted | 5 | 1.7m | |
| Total (all foundations) ²⁶⁶ | Unweighted | | | € 1.9bn |
| | Weighted | | | € 153bn |

²⁶⁵ Despite the fact that for the calculation only those cases are included that state they are active on the international level sometimes, there are many foundations that state that their scope of activity is “domestic only”. This could be caused by either the fact that they are active in one other country only or that they deal with international topics but organise them on the domestic level. These cases are ignored in our interpretation because we do not know exactly what caused this inconsistency.

²⁶⁶ Included in the ‘total’ row of Table 16 are foundations that answered the question about their operating expenditure by stating a figure for “domestically” too. That causes the lower numbers in this row, compared to the addition of the rows above.

Further to the mere status quo of internationality of European foundations, it is interesting to look at the potential growth of this domain of programme interests.

Table 17 shows clearly that a considerably large number of foundations that are already performing international activities are willing to increase these operations even further. About half of the foundations are planning to expand their international scope in one way or another. This depicts the huge potential of cross-border activities the foundation sector in Europe has in addition to the existing strong international orientation. In this view, foundations are no exception to the general trend of internationalisation which can be observed in the for-profit sector in particular. This is underscored by the fact that only about 5 % of the respondents say they plan to reduce international activities.

Table 17: Intention to expand international activities²⁶⁷

| Foundation is planning to expand international activities | | |
|--|-------|-------|
| | Yes | No |
| Unweighted | 55.88 | 44.12 |
| Expenditure weighted | 49.05 | 50.95 |
| Asset weighted | 46.34 | 53.66 |

II. Perception of Barriers

To analyse the barriers a foundation could face when conducting international activities we have to distinguish between barriers which are really experienced by a foundation and those which are only anticipated before taking up the program. The following paragraphs reflect this differentiation.

1. Experienced Barriers

For foundations experienced in conducting work on an international level, the working conditions in a foreign legal environment seem to be the largest problem. Between 15 and 20 % (depending on weighing factor) state that “Working in different jurisdictions complicates programme operations”. The uncertainty of working under legal conditions dissimilar to those in the home country obviously requires an intensified effort to come to the same results as when conducting a programme at the national level.

Second and third are the statements that grant-making is more complicated (12-15 %) and more costly (9-10 %).

It is also worth mentioning that a high number of respondents do not see significant barriers when conducting international activities. Unfortunately, the open question about what is meant by “other” barriers has been answered far too rarely to be processed with any validity.

Table 18: Significant barriers experienced

²⁶⁷ For this calculation only those foundations are included which conduct international activities at least occasionally.

| | Unweighted | Expenditure weighted | Asset weighted |
|--|------------|----------------------|----------------|
| Grant-making is more complicated. | 15.29 | 13.06 | 12.38 |
| Grant-making is more costly. | 10.19 | 7.48 | 9.23 |
| Working in different jurisdictions complicates programme operations. | 20.38 | 19.62 | 15.11 |
| Different tax laws make the differentiation of what is related and what is unrelated business income cumbersome. | 7.01 | 3.26 | 4.96 |
| Reporting requirements to different authorities is cumbersome and costly. | 10.19 | 4.19 | 7.48 |
| Asset management costs increase. | 3.82 | 1.94 | 0.05 |
| Fundraising costs increase. | 5.10 | 2.70 | 3.77 |
| Administrative costs are higher due to the need to establish affiliate organizations. | 8.92 | 3.95 | 4.75 |
| Other barriers | 3.18 | 6.93 | 7.24 |
| No barriers | 15.92 | 36.87 | 35.04 |

In a somewhat more detailed way we asked in what aspect of their work foundations experience most of the barriers. Depending on the weighting factor, the most frequently stated items were “Day-to-day operational activities” and “Reporting requirements to tax and other relevant authorities”. Second and third were “Programme planning” and “Fundraising” as shown in Table 19.

Table 19: Aspect of experienced barriers

| | Unweighted | Expenditure weighted | Asset weighted |
|--|------------|----------------------|----------------|
| Programme planning | 11.54 | 12.58 | 9.46 |
| Formation of new organisation/programme | 6.73 | 3.82 | 4.98 |
| Establishment and legal recognition | 9.62 | 3.47 | 5.84 |
| Reporting requirements to tax and other relevant authorities | 13.46 | 9.24 | 17.79 |
| Asset management | 3.85 | 2.58 | 0.22 |
| Fundraising | 11.54 | 11.04 | 12.30 |
| Day-to-day operational activities | 20.19 | 18.53 | 16.53 |
| Other | 6.73 | 10.58 | 6.40 |
| None | 16.35 | 28.17 | 26.47 |

2. Anticipated Barriers

For the calculation of anticipated barriers toward international activities we include only those foundations which responded that they were planning to increase their international activities. As Table 20 shows, the top 3 anticipated barriers stated differ slightly from the experienced barriers as described above. First mentioned is (as above) the work in different jurisdictions which complicates programme operations. Second, (14-15 % of responses) fundraising costs would increase, and the third place is shared by the items “Administrative costs are higher due to the need to establish affiliate organizations” and “Different tax laws make the differentiation of what is related and what is unrelated business income cumbersome”.

Dealing with an unfamiliar legal environment seems to be the most severe barrier for these foundations too. Those foundations looking into the future are more concerned with the costs of their activities than others.

Notable here are the relatively (compared to the shares in Table 18) low numbers of respondents expressing the opinion that there would be no barriers. In advance to the start of international activities, the responding foundations seem to be more convinced that they would experience difficulties than those who are already conducting those programmes.

Table 20: Significant barriers anticipated

| | Unweighted | Expenditure weighted | Asset weighted |
|--|------------|----------------------|----------------|
| Grant-making is more complicated. | 15.00 | 13.07 | 11.37 |
| Grant-making is more costly. | 10.83 | 12.52 | 7.54 |
| Working in different jurisdictions complicates programme operations. | 19.17 | 21.14 | 19.85 |
| Different tax laws make the differentiation of what is related and what is unrelated business income cumbersome. | 6.67 | 6.65 | 11.58 |
| Reporting requirements to different authorities are cumbersome and costly. | 11.67 | 4.41 | 3.67 |
| Asset management costs increase. | 1.67 | 0.02 | 3.98 |
| Fundraising costs increase. | 9.17 | 13.98 | 14.64 |
| Administrative costs are higher due to the need to establish affiliate organizations. | 10.83 | 13.37 | 9.81 |
| Other barriers | 4.17 | 3.51 | 3.06 |
| No barriers | 10.83 | 11.33 | 14.50 |

The top 3 detailed aspects of barriers differ in one way from Table 21. Second (with 16-17 % responses) comes the establishment and legal recognition. Foundations planning

to take up new international programmes are obviously more concerned about legal barriers. This agrees with the finding that experience leads to a diminished degree of seeing important barriers. Foundations already conducting at least some projects on the international level do not see the legal barriers towards the introduction of new organisational entities as a major problem. Foundations exploring the possibility to extend their scope do.

Table 21: Aspect of anticipated barriers

| | Unweighted | Expenditure weighted | Asset weighted |
|--|------------|----------------------|----------------|
| Programme planning | 17.86 | 12.03 | 9.14 |
| Formation of new organisation/programme | 9.52 | 6.57 | 6.42 |
| Establishment and legal recognition | 13.10 | 15.88 | 17.46 |
| Reporting requirements to tax and other relevant authorities | 16.67 | 10.62 | 10.20 |
| Asset management | 3.57 | 0.38 | 5.53 |
| Fundraising | 11.90 | 14.42 | 14.34 |
| Day-today operational activities | 17.86 | 23.31 | 20.49 |
| Other | 9.52 | 16.79 | 16.41 |

3. Other Reasons for not Expanding International Activities

In addition to the previous questions, we asked the respondents why they did not intend to take up or expand international activities. The possible answers are divided into absolute and relative barriers, to distinguish between hard and rather soft factors which hinder foundations from being active on the international level. In asking this question, we were primarily interested in identifying foundations which are not restricted by any forbidding factors and could therefore take up international programmes but are not doing so yet.

The most important reason preventing international activities is a restrictive charter with a purpose which is aimed explicitly at specific regions. Those foundations are most unlikely to ever start activities across national borders.

The second most important factor is size. "Being too small" could be a severely restricting factor. However, as shown above, the perception of barriers towards international activities decreases with experience and information. So there might be a chance that at least some of this 19-27 % of foundations that state that they are too small could alter their point of view if they were better informed or if there were clear, transparent and simple rules on how foundations can become active across borders.

Table 22: Absolute barriers

| | Unweighted | Expenditure weighted | Asset weighted |
|--|------------|----------------------|----------------|
|--|------------|----------------------|----------------|

| | | | |
|---|-------|-------|-------|
| Foundation is too small. | 26.83 | 18.63 | 21.99 |
| Purpose is geographically limited to specific region. | 41.46 | 53.61 | 52.77 |
| Donor wish (deed) | 12.20 | 9.61 | 10.31 |
| Legal recognition | 6.10 | 0.23 | 1.58 |
| Other | 13.41 | 17.92 | 13.35 |

As could be expected, next to mentioning unspecific “other” reasons for not becoming active internationally, the perceptions of barriers are the two most important reasons in the category of “relative barriers”. Table 23 depicts this result in detail. For the unweighted cases, costs that arise from the need to establish affiliate organizations are the most important argument (and still for 20-28 % of the weighed cases). As shown above, for foundations already active internationally, this is rather a less urgent problem. Even if we interpret the findings in Table 23 in the way that the need to establish new organisational entities is not in fact that difficult or even necessary, it is still important that many foundations refuse to become active internationally because they anticipate this problem.

Table 23: Relative barriers

| | Unweighted | Expenditure weighted | Asset weighted |
|---|------------|----------------------|----------------|
| Tax reasons | 9.76 | 5.88 | 2.26 |
| Administrative costs due to the need to establish affiliate organizations | 34.15 | 19.81 | 28.21 |
| Administration costs overall prohibitive | 7.32 | 1.12 | 1.92 |
| Overall cost-benefit ratio not favourable | 14.63 | 7.44 | 13.65 |
| Assessment of barriers resulted in negative board decision | 7.32 | 19.69 | 22.14 |
| Other | 26.83 | 46.05 | 31.81 |

4. Interpretation of the Results

The results of the survey support the findings of the legal analysis of the barriers.

First, they also show that there exist legal barriers to cross-border activities, but the barriers are not “absolute” in the sense that they would prohibit cross-border activities.

Secondly, most foundations report increasing costs in order to cope with the barriers. But there is an interesting difference between the foundations which have experienced barriers and foundations which anticipated barriers: In the first group the number of foundations which see no significant barriers when conducting international activities was remarkably higher than in the second group. At first sight, this difference could be interpreted as a sign that the significance of the barriers is overestimated. However, if we look more closely at the details, it seems that this difference underlines the finding

of the legal comparative analysis that there exists comparatively high legal uncertainty in civil law and tax law. This argument is strengthened by the finding that foundations which already have a larger scope of international activities (Europe-wide or global) express far more often the perception that there are no significant barriers than their counterparts that are active on a smaller scale only. It seems that the perception of barriers towards international activities underlies some sort of scaling-effect. The more such activities are performed by a single foundation, the easier it becomes because the legal uncertainty decreases the more the foundation's managers gain experience.

III. Excuse: Vignettes of Case Studies in European Cross-Border Public Benefit Activities

In addition to a systematic analysis of the barriers to cross-border activities of European foundations, or more generally activities for the European public benefit, the following sample of vignette descriptions serves the purpose of illustrating the kinds of activities which are relevant in the context of European cross-border activities. Each of the vignettes refers to a programme or an organisation which emerged in recent European philanthropic history and serves beneficiaries in several Union Member States, works with programmes, people and also resource development in several Member States.

1. *Rise Foundation*

By Conrado Pirzio-Biroli, CEO, RISE

The **RISE Foundation** (Rural Investment Support for Europe Foundation) is a new initiative. It is unique and independent. It covers all aspects of conservation and development of the rural world, promoting private investments, the advancement of private property and cooperation between land managers and rural communities. The RISE Foundation operates primarily across all 27 current EU Member States.

During the establishment of the foundation, there were many questions and hesitations as to the best way of inserting a trans-national instrument of philanthropy into a national system of law in the absence of a European framework facilitating the attainment of the foundation's statutory objectives. The RISE Foundation opted for a statute of a public utility foundation under Belgian law, making Belgium the base for its operations, but it included a stipulation in its statutes that it would adopt a European Statute for Foundations as soon as such an option became available.

The RISE Foundation faced and/or faces a number of challenges in dealing with different legal systems, in drafting its articles of incorporation, in fund-raising, and in supporting trans-national projects. It had to battle with Belgian notary habits, not to say idiosyncrasies, and adapt the language of its draft statute, which was based on the EFC-proposed draft statute. It actually complained with the European Commission that Belgian and many other EU Member States' laws were blatant cases of discrimination among EU citizen donors, in contradiction with the provisions of the Internal Market. Commission action with the European Court of Justice regarding several complaints since the creation of RISE was an encouragement for the Board of RISE to persevere in its endeavour.

As RISE is currently mainly involved in fund-raising, the main obstacles currently relate to taxation. The lack of tax rebates for cross-border donors across Europe is a

serious impediment to its future as it makes it more difficult to find donors. While it was possible to reduce this impediment by joining the Trans-national Giving Europe (TGE) Network of the KBF, TGE is currently limited to some ten countries, is not generally known, and involves a loss of donation value of up to 5 %. A further enlargement of the TGE Network would make it eventually possible to by-pass discriminatory fiscal fragmentation of donors in Europe. But this is inevitably a slow undertaking. So is the decision-making process of the EU via Commission, Council and Parliament. The EU judicial process is far quicker. There is little doubt that denouncing discriminatory treatment in contradiction with the Community treaties is the most rapid and effective way to hopefully end it. If ECJ rules soon, this will help other philanthropic initiatives in Europe with cross-border purposes.

While RISE seeks a European image, it still has too much of a national one. It is increasingly absurd in a Single Market, which includes the option of setting up Societates Europaeas, to ignore the need for a European Foundation Statute. The latter should not attempt to harmonise different tax-rebate/exemption provisions of Member States. Instead it should ban their unequal application across intra-EU borders. Applying national law on donations in a discriminatory fashion to the advantage of national donors supporting national beneficiaries, as against national donors supporting other European beneficiaries, is intolerable. Charity is the least appropriate subject for discrimination!

As RISE moves into operations - it has just started financing its first project (land reclamation, Spain) -, its Board continues to believe that a European Foundation would facilitate also supporting cross-border investments, including the financing of trans-national projects, devising cross-border financing instruments, and possibly also facilitating the application of different inheritance provisions and VAT systems to cross its cross-border activities.

2. EUSTORY: Europe's History - A Challenge for Foundations

By Wolf Schmidt, Board Member and CEO, EUSTORY

Unfortunately, the European Union has not yet managed to reconcile European economic integration with a European civil society. The citizens of Europe lack civil and tax law frameworks which would allow them to found associations or foundations across the EU. So far, civil society can only organise itself nationally.

At the same time there are increasing numbers of issues which require effective pan-European strategies. For example, every country sees its own history from a national perspective although it is really only comprehensible in a wider context. It will be difficult to forge a common future if we do not find the means to share details of our respective pasts. A project is devoted to the idea of correcting this shortcoming which, given the continued lack of a European foundation law, has had to act creatively to find a means of European funding: EUSTORY - The History Network for Young Europeans. The network is based on an established model of international cooperation.

The Association – the Network

'EUSTORY – The History Network for Young Europeans' is a common platform of non-governmental organizations from 19 European nations which is arranged in ways similar to an association. In accordance with the 'German Federal President's History

Competition', an approved model since 1973, students are asked to trace historical paths. Since 2001, over 90,000 teenagers have participated in EUSTORY competitions with 40,000 research projects extending from Wales to Vladivostok and from the North Cape to Sicily. Between 2001 and 2007, EUSTORY's supporters have donated some €11m (US\$17m). In addition, 2,500 volunteers also support EUSTORY. The starting point was a Polish initiative.

In 1996, the organization KARTA successfully conducted its first history competition in Poland following the German model. The Stefan Batory Foundation financed this national project and the Körber Foundation has become the most important partner of this international network. Experience shows that adolescents are interested in history. The lack of knowledge of each other and the level of prejudice against 'the others' are enormous. However, the willingness to encounter and learn is very encouraging. What EUSTORY requires is additional money to satisfy young people's interest in Europe's past stories. Here we are dealing with adolescents whose intelligence and commitment make them stand out, and who in future will be seen as part of Europe's elite.

EUSTORY enjoys an excellent reputation. It operates under the international auspices of Martti Ahtisaari, Władysław Bartoszewski and Jacques Delors, and the presidents of countries including Germany, Estonia and Latvia and the Swiss Foreign Minister are patrons of the national competitions. Last year, EUSTORY received the German National Foundation's National Award from Horst Köhler, the President of Germany.

European Fund-Raising as a problem

Until today, EUSTORY has not been registered as an association so as to avoid linking the highly symbolic common activities with a single national law. However, EUSTORY is, as a non-registered association, not contractually capable: it cannot win sponsors, or submit an application to the EU, and it does not even have its own bank account. So it seemed obvious that, in addition to the civic education operating network of competitions, there should be a separate fund-raising unit with special know-how.

In 2006 a tool for this was developed: an International Eustory Foundation, which could also act as an interim model for a European foundation. The Netherlands offers the best legal conditions for this and the aim to acquire 'European money' can be realised in cooperation with the European network 'Transnational Giving Europe'. In a complicated process this ensures for several European countries, including Germany that trans-national donations are tax-deductible.

Forming a pan-European foundation is an ambitious task, which only makes sense as a joint effort. The conditions for this, set by the Körber Foundation, were to win ten partners from ten European countries. Following 18 months of advertising, it has become clear how difficult this is due to the lack of a European foundation law and public benefit tax law. If the inclination to invest in a foundation's capital is less than the interest in investing in current activities, then the missing familiarity with foreign national foundation laws becomes a virtually insurmountable obstacle. There could not have been better evidence to prove the importance of an EU-wide foundation statute. From this, the EUSTORY-Network has concluded that it should postpone having an International EUSTORY Foundation and instead concentrate initially on financing innovative projects with European partners.

EUSTORY as an Alliance of Foundations

The idea of launching a European foundation has opened many doors. Up to that point, only the Compagnia di San Paolo and Norway's Fritt Ord were participants in the international field along with the Körber Foundation. In the past year, the King Baudouin Foundation (Belgium), Mercator Foundation (Switzerland) and the Open Estonia Foundation, have been recruited. In Germany, the Gerda Henkel Foundation is willing to cooperate, in Sweden, the Bank of Sweden Tercentenary Foundation, in Finland, the Swedish and Finnish Cultural Foundations, and in Austria, the ERSTE Foundation.

Thus, with EUSTORY a strong union of European foundations is emerging with the motto: "We promote our future by helping our youth to understand our past". After quite complicated work on statutes in line with the requirements of Belgian law, EUSTORY is going to register as an AISBL (Association Internationale Sans But Lucratif, or non-profit international association) this year. This way it will function on the same legal basis as the European Foundation Centre, but the work will be done in different countries including a team at the Körber Foundation.

3. Carpathian Foundation

Based on Internet research and a telephone interview with János Lukács, CEO, May 6th, 2008

The Carpathian Foundation is a cross-border network of regional foundations that focuses primarily on inter-regional and transfrontier activities, and economic and community development in the bordering regions of Hungary, Poland, Romania, Slovakia and Ukraine. It encourages the development of public/private NGO partnerships, including cross-border and inter-ethnic approaches to help prevent conflicts and to promote regional development. It implements development programs and provides financial and technical assistance to projects which will result in tangible benefits to the communities on both sides of national borders and which will improve the quality of life of the people in the disadvantaged small towns and villages of the Carpathian Mountains.

When the Carpathian Foundation was established in 1995, it was decided that it should be established as a network of foundations, with a separate legal entity in each country. The mission of the organisation is cross-border in nature, and the network solution was found in order to overcome the fact that foundations are not allowed to operate in their neighbouring countries. The Carpathian Foundation International is based in Hungary, with additional national organizations established in Hungary, Poland, Romania, Slovakia and Ukraine. Naturally there were considerable costs in having to establish separate offices in all the countries, including the administrative and office costs, and finding out about the legal environment of foundations in each country. There were additional costs arising from the fact that it was not possible to establish identical organisations in each country as the requirements for setting up foundations were different in all the different countries, for instance, in terms of governance and supervisory authorities. The network structure is currently working sufficiently well that there are no big problems in the foundation's everyday operations, but it would naturally be simpler and less costly to have been able to establish one organization on the European level.

Carpathian Foundation does most of its fundraising overseas and in some other EU countries. There have not been problems to raise funds from overseas and to channel them across the network. In the absence of a regime that allows tax-efficient donations from one EU Member State to another, the foundation resorts to using the Transnational Giving Europe (TGE) network to raise funds. Carpathian Foundation has now applied to be a member of the TGE network, which would enable tax-efficient donations from all the countries in the TGE network to all the countries where the Carpathian Foundation has offices.

Although the Carpathian Foundation has managed to find a practical solution to the barriers to cross-border work that it faces, its operations would be less cumbersome and costly if there was a European-level legal form for foundations. Currently, a lot of time is spent on keeping abreast of foundation law and foundation tax law developments in all the countries where it is necessary for the foundation to have separate legal entities in order to operate. This makes operations more costly and less transparent as Carpathian Foundation International is not able itself to track the legal developments in all the languages in the countries involved and it has to rely on second-hand local information.

The lack of a suitable environment for the cross-border activities of foundations also prevents the Carpathian Foundation from undertaking further cross-border activities. The foundation would be interested in expanding to other EU Member States, but the fact that it would need to go through the costly process of setting up another legal entity after familiarising itself with the national laws and regulations in the country in question is currently preventing it from going ahead. If there was a European Foundation Statute, the foundation would be able to direct more resources to its public benefit activities and expand to other EU Member States. The Statute would also resolve a lot of inconveniences that the foundation faces on a daily basis in its operations.

4. The European Climate Foundation

In 2007, considerations started to set up a European Climate Foundation, which would promote climate and energy policies that reduce Europe's greenhouse gas emissions and help Europe play an even stronger international leadership role in mitigating climate change.

Because of the lack of a European legal tool, the legal and tax situation of public benefit foundations in selected European countries was reviewed and checked against a set of criteria which were considered essential for the establishment and functioning of such a foundation. In terms of strategic assessment, a European legal instrument would have been the best option..

The European Climate Foundation was established in 2008 in The Hague (head office), the Netherlands. It also has a presence in Germany (Berlin) and Belgium (Brussels). The decision to establish the head office in the Netherlands was based on the fact that the Dutch foundation law provides a flexible environment and easy and quick establishment of foundations.

The European Climate Foundation currently has six funding partners:

- The Arcadia Trust www.arcadiatrust.org <<http://www.arcadiatrust.org>>
- The Children's Investment Fund Foundation www.ciff.org <<http://www.ciff.org>>
- The Ecofin Research Foundation
- The McCall MacBain Foundation
- The Oak Foundation www.oakfnd.org <<http://www.oakfnd.org>>
- The William and Flora Hewlett Foundation www.hewlett.org <<http://www.hewlett.org>>

For more information on the European Climate Foundation, please consult:

http://www.europeanclimate.org/index.php?option=com_content&task=view&id=42&Itemid=57

5. The Benefits of Becoming a European Foundation for the Stiftung Liebenau

Initial Position

Stiftung Liebenau (the Liebenau Foundation) is currently organised as a holding foundation which has operating subsidiaries (“mittelbare unternehmenstraegerstiftung”, with not-for-profit GmbHs as subsidiaries). The predominant portion of the operative activities is carried out by (mostly wholly owned) subsidiaries of the Foundation. A few of the direct activities having to do with the realisation of the Foundation's goals are carried out by the Foundation itself (e.g., WfbM in the grassland enterprises).

Stiftung Liebenau offers direction to the functionally active subsidiaries in and outside Germany, is in charge of central services (e.g., finances, construction) for the use by the subsidiaries, carries out research and development in the social services sector, and subsidises subsidiary activities. In addition, the Foundation provides and manages the properties used by the subsidiaries in the pursuit of its goals.

1) Benefits of a European Legal Structure

1. Administrative, Financial, Fiscal

Some administrative expenditures having to do with the recognition of the non-profit status and possibly (see below for further details) the need to found separate national operating companies for the activities of Stiftung Liebenau and its subsidiaries outside Germany would be eliminated. This would facilitate speedier and more cost-effective action abroad where applicable.

A fiscal, Europe-wide recognition of the non-profit activity within the relative country would be a great benefit since it would simplify considerably the schemes currently necessary and long administrative and organisational processes within each country.

2. Image/Marketing

A Stiftung Liebenau according to European law, analogous to a European Company (i.e., an SE), would highlight the supra-regional character and European orientation of Stiftung Liebenau, presenting its foreign activities as a matter of course. A European Foundation could also elicit a better image outside Germany because of its recognisable

international rather than national orientation. These aspects could be used as image and brand forming.

3. Organisation

Where applicable, national subsidiaries could eliminate the need for national foundations abroad. The corresponding founding and administrative efforts would save time and money and make entry into foreign markets easier.

A central issue for Stiftung Liebenau as an operating foundation having great entrepreneurial dynamism is its supervision. Those acting in this capacity must be able to meet their supervisory duties without hindering the Foundation in its pursuit of its operative responsibility or to deprive it of information. It is our view that a supervisory body for Europe-wide activities cannot perform its duties via an institution in Brussels or a regional institution (such as the Regional Commission responsible for the foundation office). What remains as a possibility is a decentralised approach to supervision by independent boards, such as a supervisory board which fulfils the criteria of an independent controlling body.

2) Disadvantages

1. National Orientation

According to the EU Treaty and the prospective EU Constitution, social services are subject to national regulation.

In our view, the usefulness of a European foundation can only develop fully when the EU as an economic and currency union also becomes a social union.

The nation-states will continue to attach value to shaping their social services themselves according to their cultures and abilities. As a recognisably foreign provider (because of the name or because of the developing European naming conventions), it is likely that one would experience more disadvantages than advantages.

2. Operating Company Partnerships

The experience of Stiftung Liebenau indicates that partnerships, when possible, with local companies that have their own operating experience are very helpful. Such partnerships facilitate the understanding of cultural, national, linguistic and other similar regional and national particularities. Institutional features are likewise easier to market when they appear in the national language. That would mean that a foreign operating company would carry a foreign name in any case and in many cases would found a company with domestic partners. In such a situation having the legal form of a European Company would not lead to direct benefits.

3. Image

In some European countries (e.g., Austria) a foundation is not a form of organisation that is necessarily widely recognised and associated with charitable and reputable activities. Similarly here the legal form 'foundation' would not necessarily be chosen for the operation of social institutions. In such a case, a European foundation would not offer any particular benefit either.

6. Summary

The common characteristic of all these cases (and a number of other ones which await vignette description) is the need to establish several legal entities in different Member States along with all the transaction costs involved in doing so in order to pursue a common public benefit purpose across Member State borders. This involves, in particular, setting up different legal entities serving the same purpose in different jurisdictions and investing a lot of time and resources into information gathering, professional advice and preparation work to design such a structure. The problems as described in the vignette cases do not refer to tax law issues only, but rather concentrate on civil law matters. The vignette descriptions confirm that even larger organizations have to go through substantial efforts to establish the knowledge required as to the situation in different jurisdictions of the European Union. In addition, the evidence shows that issues of common branding and common organisational cultures are as much at stake as are governance and proper organisational matters. The programme examples associated with the organizations in question also document that an increasing number of public benefit issues have a European dimension (like civic education, common history, democratic transition, environmental issues and the like) and therefore call for a supra-national legal form to be organised on the European Union level rather than on national levels. The vignette cases confirm that a feasible solution could be found in any of these cases, however, at substantial cost for information gathering and organisational provisions. The vignettes obviously do not allow us to make any judgement on those causes for which the solution has not been found yet. They will be addressed under E.3 below as incalculable costs.

A second level of concern to these organizations is naturally the tax deductibility of contributions which is, however, an issue of secondary concern here because both Transnational Giving Europe Structures as well as European Court of Justice rulings on non-discrimination seem to be providing the basis for the handling of tax law issues.

Transnational Giving Europe is a network of European foundations or charitable institutions which have mutually agreed to accept and pass through donations to network partners in other countries to the extent that their charters and national tax laws permit. The structure operates between eight European countries against a transaction fee of a maximum of 5 % and tests each individual case of a cross-border pass-through donation before accepting it. The purpose is to provide donors with an opportunity to deduct contributions to public benefit organizations in other countries by claiming deductibility for a gift to a national organization.²⁶⁸

E. Estimation of the Costs of the Barriers

In the following chapter we try to give an estimation of the barriers cost against international activities. Therefore, we first distinguish between different types of costs, then we explain our model used to calculate the costs for individual foundations, illustrate the potential dealing with difficulties for three cases, and finally calculate the overall costs that arise because of existing barriers. In a separate paragraph on incalculable costs we address the effects of philanthropic activities foregone because of the expected prohibitive barriers of excessive costs by the parties involved.

²⁶⁸ Transnational Giving Europe: www.givingineurope.org.

I. Kinds of Costs

As the analysis has shown, from a legal standpoint, most of the described barriers which can arise in cross-border transactions might be overcome by two main approaches: (1) by the traditional way of establishing a network structure,²⁶⁹ or (2) (as regards tax barriers) by using the non-discrimination rule, which was developed by the ECJ in *Stauffer* as regards investments and may be extended to donations in the pending case of *Persche*.²⁷⁰ However, both solutions will lead to significant compliance costs.

1. *Transfer of a Foundation's Seat*

As already shown the transfer of a foundation's seat will lead to barriers which can be so high that it seems hardly possible to overcome them.²⁷¹ Even if it were possible to overcome the barriers at least in some cases, it is reasonable to assume that the costs for the necessary steps would be very high. There would be at least extensive legal counselling required to gather all necessary information and to fulfil all requirements which the two governmental administrations involved might pose.

2. *Costs of the Network Solution*

a) Costs of Establishing Additional Institutions

The establishment of additional public benefit foundations or non-profit organisations in one or more foreign Member States will necessarily lead to some costs. Management has to comply with different formal and establishing procedural rules in *civil law*, depending on the legal form of the subsidiary entity (foundation law, association law, trust law, company law, etc.).

If a new foundation is to be established, a certain minimum endowment is necessary in several Member States.

A challenging task may be the coordination of the statutes of the main foundation with the statutes of the newly established institution(s) which has to achieve two different aims. On the one hand, every foundation/organisation has to meet the national requirements of civil law and tax law. On the other hand, both institutions should still support the same aim, as though they were a single institution. Thus, the statutes should be as similar as possible, which will make it necessary to find rules which avoid that the different institutions "drift apart".

In order to overcome the information gaps about other jurisdictions and to deal effectively with the inherent degree of legal uncertainty as described above for both the civil law and tax law of the Member States, using the help of legal experts seems unavoidable.

Costs of Maintenance of a Network Structure

As regards the costs of maintaining a network structure, some consist of a mere *reduplication* of the positions in the two institutions (e.g., board), as well as of a reduplication of identical or equivalent duties, e.g., establishing accounting systems,

²⁶⁹ See supra B II 4.

²⁷⁰ See supra C II 3.

²⁷¹ See supra B I 5.

filing annual tax returns, and reporting on the activities of the foundation in the local language and to local authorities.

On the other hand, the costs are caused by the fact that civil law and tax law regulations of the Member States is not identical. Thus, there may be different rules on reporting and accounting, and management may have to consider a more or less broad variety of differences with regard to the preconditions of civil law and tax law.

Differences also may exist in the case of fundamental decisions (e.g., important amendments of the statutes of the institution (which can be necessary for all institutions because of a tax law reform in one Member State). In such a case, it may be difficult to avoid that the different institutions “drift apart” or that their charters and bylaws become more inconsistent because of different requirements and procedural rules.

3. Cost of the Non-Discrimination Solution

If the non-discrimination solution is regarded as the most likely approach to overcome tax law barriers, there are no costs of establishment and reduplication.

However, the compliance costs of different tax law regimes remain and are even higher than in the traditional tax-planning model of an institutional network. In the case of an indirect transaction, generally, the public benefit institution in the state of destination does not need to meet all the requirements of the state of source. It is usually sufficient that only the public benefit institution in the state of source has to fulfil all requirements of tax law, while the public benefit institution in the state of destination usually only has to fulfil some basic/fundamental requirements of the state of source (e.g., a public benefit purpose of the state of source). In the case of direct transactions by using the non-discrimination rule of the ECJ, it is thus necessary to ensure that all the public benefit foundations fulfill *all* requirements of two or more tax law regimes.

Although the common features of the tax laws seem to be quite similar in the Member States, we still do not have legal comparative studies which include all elements of the tax laws of the Member States. As a result, the legal uncertainty is considerable and thus it is necessary for the individual foundation to seek legal advice, an effort which, due to complexity and legal uncertainty, may require some time and money to check all the aspects.

In addition, it will be necessary to establish an overview of the situation in the relevant Member States because tax law can change, be it due to amendments in the law or due to interpretation of the law by the courts or the competent authorities. In such a case, an amendment of the foundation’s statutes may be necessary, which itself will generate the requirement to verify that such an amendment is also accepted by the tax laws of the other relevant Member States.

4. Costs to Overcome Psychological Barriers

In certain cases there may be additional costs because of psychological barriers. Such barriers may be relevant, as for example is the case in the EUSTORY vignett:²⁷² In this case a supranational European Foundation would be regarded as a “neutral” institution and be more readily accepted by donors and academic partners in the Member States

²⁷² See supra D III 2.

than a national institution, which may be regarded as more “biased”. Of course, this neutrality can also be ensured by a network of foundations in close cooperation or by institutional provisions (e.g., pluralistic inclusion of board members) accompanied by a well-designed communication campaign which would lead, however, to other types of additional costs.

5. *Costs of Failure*

Finally, “costs of failure” can come into play if the barriers create prohibitive obstacles or at least expectations of such for *potential cross-border activities* in the Member States. In this case, possible contributions to the public good of the EU Member States as a whole are foregone altogether.

One could argue that in such a case the money could still be used for a national public benefit purpose, so that the “costs of failure” at a European level are compensated by benefits at a national level.

In some cases this may be true, in others it may run counter to donor intent and, therefore, the contribution may never materialise. It therefore seems doubtful whether such a “zero-sum game” is realistic in all cases, because the opportunity to serve a purpose using the means of a supranational legal form like a European Foundation may increase the willingness of some founders/donors to donate more money than under the status quo. An example of such a situation would be the entrepreneurial family which has family members in several Union Member States, owns corporate assets there, and shares a common vision of their philanthropic interests which can currently only be organised in a sub-optimal way using more than ten different legal entities. The family is listed among the wealthiest Europeans, but has declined to make itself available for a formal vignette case description.

Thus, the European Foundation may attract more private money. Unfortunately, due to a lack of comprehensive data, it is not possible to verify or reject this hypothesis. However, there are examples which may provide some evidence. In Germany, the number of foundations increased significantly after a tax law reform which increased the amount of income tax deductibility for gifts to a threshold of 1m euros for the establishment of new foundations, to be claimed in addition to a general deductibility for charitable contributions of up to 20 % of taxable income.

The reason for this phenomenon is probably the heterogeneity of donors. Some donors are irrational and will not take the legal situation into account. Other donors are rational and will, therefore, take into account the legal framework. It is plausible that a donor who wants to spend a relatively high amount of money will usually be a rational donor.

Concerning corporate contributions to philanthropy, we tried to test our hypotheses and assess the costs by conducting a survey among the corporate giving programmes and corporate foundations of the US with the help and support of the US Council on Foundations. The low response rate to our survey unfortunately does not permit us to give any quantitative results. The few respondents, however, seem to confirm the notion of relative barriers (no prohibitive situation, but costs to establish information).

II. Experienced and Anticipated Costs

The transaction cost argument concerning barriers to international activities needs to distinguish between a real cost and an anticipated cost approach. Basically, we are testing the following line of argument: The legal situation in Europe allows for cross-border activities and does not create prohibitive obstacles albeit at a certain level of transaction costs. This level is judged by the donors and foundation governors of Europe as being really high or as being significant in terms of the perceptions of the parties involved or both. We tested the argument in several steps by both asking for general perceptions concerning higher or lower costs of cross-border activities as well as trying to estimate the total level of costs which have to be seen as a loss to the public good.

To evaluate the perception of cost differences between activities on the national and on the international level, we asked which ones would be cheaper or if there were no significant differences. To double check, the issue was addressed in two different questions.

Table 25 shows that the overall assessment of responses corresponds to our expectations that costs for international activities are at least “somewhat higher” than those on the national level. However, we have to remark that the answers are not that explicit. There is a tendency towards a neutral evaluation of cost differences.²⁷³

A closer look reveals that the assessment of higher costs (just like the perception of barriers) is highly dependent on experience. Foundations that are only active internationally from time to time are much more likely to state that costs for international programmes are higher, while foundations with a larger scope of activities present a more differentiated view on this topic by stating that the cost differences are not that high or even not measurable. We must also consider that the perception of cost differences and also of barriers differs not only according to the size and experience of foundations. For smaller foundations the barriers and costs are (relative to their capital and staff) in fact more severe than for larger foundations. It is probably not only a difference in the view of possible difficulties but also a factual difference of the individual capability to master those barriers.

Table 24: Evaluation of cost differences

| | Incorrect | Partly incorrect | Neutral | Partly correct | Correct |
|--|-----------|------------------|---------|----------------|---------|
| In terms of operation costs: It is relatively cheaper to operate at the national level only. | 4.3 | 10.1 | 17.4 | 31.9 | 34.8 |
| In terms of operation costs: It is comparatively cheaper to operate | 50.8 | 21.3 | 18 | 8.2 | 0 |

²⁷³ The high numbers in the “neutral” category could, to a certain extend, be explained by the fact that respondents tend to choose the middle category when confronted with a five value Lickert scale.

| | Incorrect | Partly incorrect | Neutral | Partly correct | Correct |
|--|------------|------------------|----------------|------------------|-------------|
| at an international level only. | | | | | |
| In terms of operation costs: It is irrelevant whether we operate at a national or international level. | 32.8 | 16.4 | 23.9 | 9 | 16.4 |
| | Much lower | Somewh at lower | About the same | Somewh at higher | Much higher |
| Are the costs of 'doing business' abroad lower, the same, or higher than at the national level | 1.4 | 5.7 | 28.6 | 50 | 12.9 |

III. Modelling and Evaluation of Costs

1. Introduction: Calculable und Incalculable Costs

Unfortunately, only a comparably small part of the presented costs can be calculated, whereas other costs are incalculable, because nobody knows the number of cases or/and the amount of the costs. Table 25 below gives an overview of types of costs ensuing from dealing with several jurisdictions. The table does not include the many types of costs which originate from additional administrative structures which would not be required if one legal entity was sufficient to organise the transnational contributions for the public good.

In order to present a manageable model calculation, we focused on what is calculable - the cost of legal counselling, as we have some information about the number of cases and some information on the average costs of a legal counselling case. A very rough estimate can also be provided concerning the additional cost of establishing new institutions²⁷⁴ and meeting the minimum capital requirements, which vary, however, between the Member States. A conservative estimate can be regarded as most likely in this case because the affiliate institutions will most likely not receive endowments far beyond what is legally required. As for the other cases, we unfortunately do not have enough information about the number of cases or/and the amount of the costs.

2. Model of Cost Estimation for Legal Counselling (Calculable Costs)

As regards the costs for legal counselling, the cost model is a multiplication of the numbers of cases and the fees for the individual legal counselling. Here we can distinguish between the establishment of a new organization abroad (a), and the running of the affiliated organization in a foreign country (b).

Table 25, depicts the findings for this model calculation

²⁷⁴ For the sake of simplicity and to avoid an over-speculative approach, we assumed that foundations which see the need to create affiliate institutions to perform activities in other countries use the equivalent legal form of a foundation available in the countries in question.

Table 25: Model cost for internationally active foundations

| | Cost categories | | | | |
|--|--|---|---|---|---------------------------------------|
| | Minimum capital | Legal counselling costs for establishment (civil law) | Legal counselling for establishment (tax law) | Permanent legal counselling (civil law) | Permanent legal counselling (tax law) |
| Establishment of new organization | 0-1mil. Euros per foundation (Average: 64,150 Euros) | 10,000 – 16,000 euros ²⁷⁵ | | -- | |
| Frequency | once | once | | -- | |
| Running of affiliate organization in a foreign country | -- | -- | | 6,000 euros | |
| Frequency | -- | -- | | Every 2 years ²⁷⁶ | |
| One organization active in different countries | 0 | 0 | 0 | | 6,000 euros (every 2 years) |

a) Legal Counselling for the Establishment of New Organizations

For foundations that are planning to establish a new organization in another country, there are one-time expenses for legal and fiscal counselling (civil law and tax law). We assume the ideal case that a foundation both wants to establish a new organization and meet all the legal requirements necessary to be treated the same way as domestic foundations. This holds especially for the requirements to be tax exempt like a domestic organization.

The estimated cost for this legal counselling is 10,000 - 16,000 euros per case.²⁷⁷ This amount could also constitute a barrier that especially hinders small and less informed foundations to integrate international programs in their strategy.

Calculating the total costs that arise for foundations due to the need to establish new organizations in foreign countries is a most sensible task. It is essential to estimate the number of cases for which these costs apply. There are between 25,000 and 30,000 foundations²⁷⁸ which indicate that they plan to expand their international activities. Not all of them will necessarily establish affiliate organizations to do so. This means that we had to calculate the ratio of foundations which will chose the way of creating affiliate organisations to expand their activities. From the approximately 55,000 foundations

²⁷⁵ As described under Part 4 E II 2 a, these are only costs for legal counselling in the case of establishing of a new legal entity and only a minimal estimation due to the incalculable nature of other costs.

²⁷⁶ We assume that the expenses for this adjustment and the legal evaluation of national law are not due every year but rather in periods of 2 years.

²⁷⁷ 25 - 40 hours of work in a legal office of good reputation at 400 euros per hour.

²⁷⁸ The following figures are calculated based on our own survey data.

which carry out international activities, between 3 and 4 % report difficulties concerning the establishment of new legal entities, so that we can assume that they have indeed experience with the formation of affiliate organizations and have well-established intentions to use them.

If we apply this share of 3 to 4 % to the 25-30,000 foundations intending to expand their international activities, between 750 and 1,200²⁷⁹ of those foundations that expressed their intention to become active internationally would create new organizations in order to expand their scope of activity. These figures add up to respective costs of 7.5m to 19.2m euros.

It seems plausible to us to expect that these costs would occur each year. This is because the number of 750 to 1,200 cases takes into account only foundations that already exist and that have declared the wish to expand their geographical scope. Not included (because of the great difficulty to calculate) are those cases that result from a growing foundation sector. From the analysis of the dynamics of the sector, we learn that it is highly active and currently growing vigorously. With the concentration on existing cases only, our calculation stays on the more conservative side and stands back from any ungrounded assumptions.

b) Running Legal Counselling for the New Organization

For foundations that are already active in one or more countries there are running expenses for the adjustment of the organization to changes in national legislation (civil law and tax law). Again, in an idealised case, a foundation would regularly monitor these changes, having a legal office oversee the changes in law on the one hand, and execute the necessary changes at the organizational level on the other.

The estimate for legal counselling is 6,000 euros.²⁸⁰

There is a high probability that many foundations are not spending this amount every year for the supervision of their legal status. Therefore, we estimate that these costs are due only every second year in order to appropriately cover potential changes in the jurisdictions of the Member States (2 years).

On the other hand, the estimate of 3,000 euros in expenses for permanent legal counselling is very low. There are many large foundations that employ a legal department of their own and that spend significantly more on legal advice than the estimated amount. In the context of this study, however, the costs and resulting behaviour of average foundations are of special interest.

Table 26: Annual Costs of Barriers

| | | Costs per case | Annual Cases | Annual costs |
|-------------------------|--|----------------|--------------|--------------|
| Calculable Costs | | | | |

²⁷⁹ This rather cautious calculation of cases takes into account that many of the international projects might well be small and therefore not that expensive. Because we have no indication of the distribution of size among international activities this approach seems appropriate.

²⁸⁰ 15 hours of work in a legal office of good reputation at 400 Euros per hour. This figure is based on information gathered from some interviews with lawyers, specialized in international corporate law.

| | | | | |
|---|-----------------------|-----------------------|----------|---|
| Costs for the establishment of new organizations | Legal counselling | 10,000-16,000 euros | 750-1200 | 7.5m to 19.2m euros |
| Running expenses for international activities | Legal/tax counselling | 3000 euros | 27,500 | 82.5m euros |
| Total Calculable Costs | | | | 90m to 101.7m euros |
| Incalculable Costs | | | | |
| Estimation of minimum capital | | Average: 64,150 euros | 750-1200 | 48m to 77m euros |
| Further incalculable costs - Costs for establishment apart from legal counselling - Additional administration costs - Psychological costs - Costs of failure - Other | | ? | ? | ? |
| Grand Total | | | | 138m to 178.7m ± X²⁸¹ euros |

3. Assessment of Incalculable Costs

a) Transfer of a Foundation's Seat

As already stated,²⁸² a possible transfer a foundation's seat would probably cause a huge amount of costs for legal counselling to meet the requirements of the administrations involved.

We stand back from calculating those costs. This is due to several reasons. First, there is no precedent which would inform us about the real amount of costs. Second, the costs would be highly dependent on the constellation of the countries in question. The costs for the mandatory termination of a foundation would surely vary widely from Member State to Member State (if it is possible at all). Third, even if we could find one or several cases of foundations which have had their seat transferred to another Member State, the specifics of the constellation mentioned under the second point would forbid any generalization and calculation of an average. And fourth, it is hard to estimate how relevant such transfers would be, if there were less severe barriers.

b) Costs for the Establishment of New Organizations Apart from Legal Counselling

As a matter of fact, there are additional costs apart from legal counselling, if a new organization is established.

The costs for the establishment of a new organization would include a potentially required minimum amount of capital. This requirement varies between the Member States of the European Union and lies between zero (for most associations and foundations) and one million euros, as is the case for French traditional foundations.

²⁸¹ The X indicates further incalculable costs which we do not estimate.

²⁸² See supra B I 5 and E III 3.

If we calculated a simple average, these costs would be 64,150 euros, which would constitute a large barrier for smaller foundations looking at this option to go international. Because of the large range and the many cases where no minimum capital is required, we have not included these costs in the formal assessment of calculable costs. However, if that average cost level was applied, the endowment costs of new affiliates would be the single largest cost item, even though it only applies once in the lifetime of an organization. We therefore offer the figure in Table 26 as an additional indicator, while admitting that it is not really possible to provide for a balanced estimate of the endowments costs. On the other hand, the number of cases assumed is so conservative that the resulting figure can hardly overstate the case.

A second line of argument could also support this reasoning: If we did not consider the minimum capital requirement to be a legal issue but rather looked at it from a practical point of view, it would be realistic to assume that establishing a new organization in another country would require a minimum investment of the same dimension. It may therefore be justified to include the figure in the overall considerations, even though we may have to assume a large margin of error.

c) Additional Administration Costs

We refrain from calculating further costs that occur in this case (like administration costs, staff and so forth) because there is a vast variety of differences in the capability of foundations to deal with this. Furthermore, the more experienced a foundation is and the larger its already realised scope of activities, the lower the costs will probably be.. As in the perception of barriers, some learning effect might apply that especially reduces the staff costs over time. Furthermore, the level of information a foundation has gathered could be cost reducing. In general, foundations that are already active on the international stage have surely an advantage against those establishing their first international program.

d) Psychological Costs

As mentioned above, the costs originating from expectations may be higher than those actually needed to resolve the given problems and to establish solutions to real barriers. It is impossible to give an estimate of those costs which primarily refer to information asymmetries among the foundation population of Europe. Perceived barriers (even if not existing in reality) will either have prohibitive effects or create additional transaction costs from information gathering only to find out that the perceived barriers are either non-existent or not insurmountable. The empirical findings of our survey indicate that those “psychological” effects exist (foundations with real experience giving a more realistic picture of the barriers and their likely impact). However, decisions are not based on “the truth” but on the existing levels of information and expectations based on them. They may be more effective in preventing action than real barriers themselves.

e) Costs of Failure

The costs of failure, i.e., the contributions to the public good foregone because of both real and perceived barriers cannot be assessed. Anecdotal evidence seems to suggest, however, that this kind of costs is an additional element in the field which should not be ignored. With the methodological approaches feasible and chosen for the purpose of this

study (with the exception of the US corporate giving and corporate foundation survey which was intended to serve as a proxy for this question) we cannot estimate the level of philanthropic activity which does not get realised because donor intent and existing barriers as well as perceptions thereof cannot be reconciled. It should be noted, however, that an increasing number of globally active corporations include corporate social responsibility considerations in their strategies. In addition, the integrated European single market creates a growing number of wealthy families who have assets in different Member States. Both the globalisation and European integration of the economy, as well as the transfer of post world-war II wealth to the next generation, create a growing potential for this kind of donor intent with a European rather than national scope in mind.

f) Total Potential of Cross-Border Transactions with Barriers Removed

The calculation of the additional resources that would be spent internationally if there were no barriers for such activities is restricted by several factors:

- We assume that the overall sum of expenditure stays the same. There seems to be no way to estimate a possible growth of expenditure if there were no barriers towards international activities.
- For the variables used for the calculation, we have only very few responses. So the calculation of averages is not that reliable and a breakdown by country is nearly impossible.

In order to estimate the amount of money which is not spent internationally in Europe, we performed the following steps of calculation:

Step 1: Calculation of the average share of operating expenditure which is used for international activities by foundations that are active on an international level. For all responding foundations that are active internationally the average of expenditure spent internationally is 17.94 %.

Step 2: Calculation of the amount that equals this share for the operating expenditure of foundations which are not active internationally and not restricted to a regional topic. Here we include first and foremost those foundations that state that the reason for not conducting international activities is that the foundation is too small. As described above, this might be the main group that could become internationally active if they were sufficiently informed and if they saw the possibility to do so clearly. This group makes up 14 % of all respondents.

Step 3: Building the weighted total of this amount of euros. If we calculate this share of the expenditure of those foundations that are not yet active abroad, the sum total is about 3.8 billion euros per year. It is clear that this figure is more or less fictive. But we are convinced that a certain number of foundations would become internationally active if the costs they anticipate could be reduced and the level of transparency rose. Given the very high total levels of foundation expenditure in Europe, even a shift of a small share of the total would result in a substantial gain for international activities.

F. Main Findings of Part 4

I. Existing Legal Barriers to Cross-Border Activities

The overall assessment of barriers to international activities of foundations in the Member States indicates that legal barriers do exist both in civil law and in tax law.

As regards *civil law*, cross-border activities may be subject to various barriers of a different nature and magnitude.

If a foundation intends to carry out activities in another country without transferring its seat to that country, it very often faces national measures and prerequisites that go beyond the requirements imposed by its home country. Thus, it is not uncommon for Member States to impose national recognition procedures on out-of-state foundations.

If, however, a foundation decides to transfer, or has effectively transferred, its *siège réel* or *effektiven Verwaltungssitz* to another Member State, Member States applying the real seat doctrine (*Sitztheorie*) will require the foundation to dissolve itself and to reconstitute itself in the respective Member State; provided, of course, the dissolution is permitted in the first place or approved by the competent government authority. As the dissolution and liquidation of a foundation effectively terminates the will of the original benefactor or founder, the board's decision to dissolve and liquidate the foundation will, as a general rule, require government approval. Formation of a new foundation in another Member State, in turn, will be subject to a set of entirely new and different laws that may be based on a totally different perception and conception of non-profit organizations and foundations. The same is true with regard to the formation of a subsidiary organisation in another Member State if a foundation decides not to dissolve itself in its home state and reconstitute itself in another Member State but rather form a subsidiary organisation in the other Member State in which its wants to engage in activities.

As regards *tax law*, there are barriers for public benefit foundations receiving tax benefits. The vast majority of the Member States only grant tax benefits to resident foundations but not to non-resident foundations. This is also true for tax benefits to donations which exist in almost all Member States. As regards outbound constellations, however, more or less all Member States accept that a public benefit foundation can promote its public benefit purpose in another Member State. Only comparatively few Member States restrict such cross-border activities of a resident foundation to a certain point. In practice, the usual way to overcome the existing tax law barriers seems to be the establishment of one or more other foundations or non-profit organizations in compliance with the national laws of the states in which these other foundations or organizations are to engage in activities.

II. National Barriers and the Fundamental Freedoms of the EC Treaty

There is a debate currently whether some or all existing barriers infringe the fundamental freedoms of the EC Treaty, especially the freedom of establishment and the freedom of capital movement.

There is an increasing significance of the right of establishment pursuant to Articles 43 and 48 of the EC Treaty, especially in the field of public benefit foundations. While the ECJ has not yet ruled on the issue, case law suggests that the provisions regarding

freedom of establishment apply to a not-for-profit foundation if it engages in “economic activity”, i.e., if it offers goods or services in a market in competition with offers made by persons who operate in that market for profit. In contrast, if the foundation does not carry on an “economic activity”, it cannot invoke the right of establishment. Given the theoretically broad scope of the concept of “economic activity” it is fair to conclude that at least some not-for-profit foundations in the EU are subject to the right of establishment. Where one is to draw the line between economic and non-economic activities is not entirely clear, however.

But even if the freedom of establishment is not applicable, the freedom of capital movement may apply. The freedom of capital movement has a wide ambit which even seems to include donations.

It is clear from the ECJ’s case law that if a foundation enjoys the right of establishment or the right of capital movement, a Member State may not, as a general rule, restrict this right or make its exercise less attractive, unless the restriction can be justified according to Article 46 of the EC Treaty or pursuant to the four-factor test set forth in *Gebhard* and reconfirmed by the ECJ in *Centros*.

As regards the *civil law barriers* in the light of case law, the real seat doctrine would not seem to be a justifiable restriction of a foundation’s right of establishment in regard to both immigration and emigration cases. In contrast, Member States may impose registration requirements on foreign foundations provided these requirements are not contrary to the four-factor test.

As regards the *tax law barriers*, the analysis of the *Stauffer* decision confirms the existence of a non-discrimination rule concerning the income taxation of a non-resident foundation by the state of source. According to this non-discrimination rule, a non-resident foundation is entitled to receive similar tax benefits like a resident foundation, if the non-resident foundation meets all requirements of the tax law of the state of source. There are good arguments that such a non-discrimination rule is also applicable to tax benefits for donations; the ECJ will decide this question soon in the *Persche* case which is just under review. If such a non-discrimination rule were accepted by the ECJ, a new possibility to overcome existing tax barriers would be possible as any non-resident foundation could claim tax benefits under the condition that it can prove that it meets the requirements of the state of source (except its seat). However, such a “non-discrimination solution” is not easy to implement, because of several legal uncertainties regarding the requirements of the tax laws of the Member States.

Comparing the barriers for cross-border activities of foundations with the barriers for cross-border activities of companies in the light of the fundamental freedoms of the EC Treaty, it seems that the nature and magnitude of barriers are quite similar, but in the foundation sector there is still much more legal uncertainty (e.g., meaning of “economic activities, comparability of tax law requirements, etc.). Therefore, the transaction costs will be often higher, because more legal expertise is needed in order to cope with the legal uncertainty.

III. Economic Relevance of the Barriers

Our findings from an economic point of view indicate clearly that the foundation sector in Europe is to a very large extent experienced in conducting international activities.

There are far more foundations that have at least tried to perform cross-border activities than one would think.

From our study, we learn clearly that foundations experience and anticipate barriers in the context of international activities. There seem to be some scaling effects since larger and more experienced foundations find it easier to be active internationally than smaller and less experienced ones.

IV. Estimated Costs of the Barriers

The assessment of the costs for activities in a foreign country also indicates that there are economically relevant differences to the conduction of the same activity on the national level. In particular, working in a different legal environment is named as one of the major difficulties foundations have to deal with.

The overall assessment of barriers to international activities of foundations in European Union Member States indicates that barriers do exist, even though they cannot be described as insurmountable in nature. The main part of these barriers consists of uncertainties as to the provisions of other jurisdictions in both civil and tax law. Consequently, these uncertainties actually suggest that the level of perceived barriers is higher – especially for smaller foundations and those less experienced in international activities – than the level of actual barriers, even though all but the largest foundations report the latter. Even if barriers could be identified basically as surmountable and resolvable, this remains a costly endeavour which puts a high demand on the foundations' capacity to process complex information of Member State jurisdictions. This cost level is carefully assessed in differentiating calculable and in calculable costs. Among the least calculable are the psychological costs and the effects of philanthropic contributions foregone because of barriers or perceptions thereof.

Even the limited range of calculable costs (primarily of the nature of the legal cost of establishing affiliates and of legal counselling alone with international activities) results in substantial losses (two-digit million) to the public good per year. If endowment costs for affiliates, administrative costs of additional entities as well as failure cases were calculable, they would certainly add a substantial share to the very conservative cost estimate which we offer at a minimum of € 90m per year without and of € 138m per year with endowment costs included. If the high end of our range is considered, the respective costs vary between € 101.7m and € 178.7m. The growing potential for cross-border philanthropy in Europe suggests that these figures should be seen as a minimum level of costs when considering a dynamic perspective. The non-calculable costs will certainly add another substantial share to the total transaction costs incurred by cross-border activities of European foundations or by foregone activities of European donors. The potential for further growth in the philanthropic sector of Europe exists and therefore we can expect the growing relevance of these cost estimates.

Part 5: Overcoming National Legal Barriers

A. Models

Several alternative models are conceivable for overcoming, or at least easing, national legal barriers, and the costs involved for cross-border activities in the European Union. Specifically, we are going to address five different models.

- The status quo, possibly combined with instruments of soft law,
- Harmonization
- Multilateral or bilateral treaties
- Introduction of a European Foundation Statute
- Introduction of a European Foundation Statute with tax-exempt status in all Member States

I. Status Quo Model

1. Implications

a) No Direct Legal Implications

There would be no further direct legal implications

b) Other Implications

However, in this case the status quo does not necessarily mean total stagnation. The adjudication of the ECJ seems to develop certain borderlines for the current barriers. Apart from this, the Commission could consider an additional package of measures in order to facilitate the conquest of the existing barriers.

aa) Adjudication of the ECJ and Infringement Procedures

As already stated, the ECJ may declare in the *Persche* case a general non-discrimination rule. According to such a rule, *some* (but not *all*²⁸³) of the existing tax law barriers would be incompatible with the EC Treaty. The Commission may use infringement procedures to deal with national legislation and offer assisting programmes to overcome internal market difficulties (e.g., Solvit²⁸⁴).

bb) Information Campaign

Since the magnitude of most legal barriers identified is increased because of information inadequacies and can be overcome by incurring more or less substantial transaction costs, an information campaign could be considered a means of choice to remedy the situation. In this context, one could also imagine that the Commission could prepare an

²⁸³ The non-discrimination rule is only applicable to inbound constellations (a non-residential foundation wants tax benefits from the state of source), but not to outbound constellations (a residential foundation wants tax benefits although its activities are abroad). However, most Member States do not seem to have barriers for outbound constellations, and some of the current barriers may infringe the EC Treaty because of other reasons (cf. the case *Laboratoires Fournier* supra C II 2 c).

²⁸⁴ http://ec.europa.eu/internal_market/interactive_info/practical_info_en.htm

interpretative communication clarifying the legal issues (as highlighted in the terms of reference for the study).

It should be kept in mind, however, that we are speaking of a matter far from trivial. The complexity of information required on 27 Member States does not suggest that helping to facilitate the availability of the information needed could be organised easily. Such an information effort would require at least a highly competent unit of monitoring experts which would have to process the information with the lowest possible risk of errors and incorrectness. The results of any such information approach would either have to be in the form of a fairly comprehensive online information portal or a handbook-style publication, but certainly not a collection of information brochures. The very fact that 27 Member States are involved creates a substantial level of complexity by the number of possible combinations which cannot be reduced. Therefore, an information campaign approach would certainly cause substantial ongoing costs and the need for a decision on which party would have to cover them.

Assuming that this task could be performed by the trade associations of the foundation sector or by networking solutions of academic partners on a voluntary basis would certainly fall short of the quality levels adequate to really foster philanthropic activity in the EU. This would also mean that the compliance costs of the current situation of complexity of 27 jurisdictions would be allocated exclusively to the foundation sector itself, which does not seem to be a feasible option. In addition to these cost allocation considerations, foundations and donors interested would still have to resort to legal counsel in order to avoid liability consequences of inappropriate information and in order to base their operations on legally sound judgements. Such a campaigning approach, therefore, could only provide for limited effects in dealing with the barriers below the threshold of legal action and would only have limited effects of cost reduction.

cc) Code of Conduct and Accreditation System

Voluntary codes of conduct could also be encouraged and used as another means of soft law²⁸⁵. Such a code could be combined with a voluntary accreditation system which would be based on trustworthiness, to be implemented at a European rather than national level. The aim of an accreditation system is that the Member States may voluntarily support such an accredited “European Foundation” and that the “psychological barriers” perceived by founders, donors, beneficiaries and the public are reduced.

Clearly, central to the model is to find adequate rules to ensure that the accredited “European Foundation” will be seen as a trustworthy institution by the Member States, founders, donors, beneficiaries and the public. Specifically, there are two crucial institutional questions:

- Which body is to be entrusted to stipulate the requirements for the accreditation?
- Which body is to be responsible for the accreditation?

Trustworthiness requires that a reputable public body should be nominated to develop the system. It should be a European body in order to underline the European character

²⁸⁵ The Commission has already issued, in a different context, a code of conduct for not-for profit organisation, Communication COM(2005) 620.

of the accreditation system. Thus potential bodies would be the European Commission or the European Parliament.

The actual implementation and running of the accreditation procedure, too, rests on a trustworthy body, either public or private, with a good reputation. Another question is whether it should be one European body or several national bodies. The advantages of a European body would be increased consistency and a stronger emphasis on the European nature of the accreditation system. The advantage of a national body may be greater flexibility of regional conditions and circumstances, perhaps even greater acceptance in political terms. In either case, the accreditation procedure should not be very burdensome.

The requirements for the accreditation should promote the aim of trustworthiness. Governments and the public in every Member State should view any accredited “European Foundation” as a reputable and trustworthy institution.

However, this does not necessarily mean that the European Foundation has to copy the most restrictive national foundation law among the Member States or combine the most restrictive provisions from every Member State. We have to keep in mind that the proposed European Private Company is no less restrictive than the national company law of several Member States (e.g., as regards minimum capital requirements).

Ways of enhancing protection to the extent needed to prevent abuse of any such ‘seal of approval’ are to stipulate clear functions for the accreditation status of a ‘European Foundation’ as well as appropriate governance models, including publicity and due diligence requirements. The aim would be to prevent the accredited European Foundation from being misused as a “cheap” escape from more restrictive national foundation laws in some Members States (see further *infra* B).

2. Expected Cost Reduction

In the status quo scenario, the costs of barriers against international activities of foundations would, *ceteris paribus*, remain in the range of 138m to 178.7m euros per year, as calculated in Table 26, or slightly below that level.

There might be some cost reduction as a result of current or future ECJ decisions and continued and expanded information and knowledge management by umbrella groups such as the European Foundation Centre. Included in this information management approach might be improved efforts at systematic information which could reach as far as a formal campaign. In that case, remaining costs for legal counsel in order to deal with liability and reliability suggest that the reduction will be limited and, certainly, the larger part of costs will be sustained. It also needs to be kept in mind that a large part of the costs for legal counsel address ongoing issues of monitoring legal and tax law changes which would only be reduced by a small margin.

Alas, at least for the foreseeable future, substantial barriers against, and legal uncertainties about, actual and potential cross-border activities will remain.

Due to the rather soft and, in terms of its outcomes, somewhat unpredictable instrument of an accreditation system, the potential cost reduction is hard to estimate. At some level, it seems plausible that certain foundations in some Member States would start international activities, encouraged by the cost reductions and greater opportunities the seal of approval granted by accreditation brings. The overall result would be higher

amounts of cross-border flows of grants and operations. However, we need to keep in mind that accreditation as such does not automatically reduce costs and increase opportunities; at the very minimum its labelling effect offers comparative advantages to those foundation possessing the ‘seal’ over those that do not.

II. Harmonization Model

The other extreme to the implied ‘no direct legal action’ of the status quo model would be the harmonization of the various foundation laws and/or tax laws across Member States.

1. *Implications*

As regards *foundation law*, the harmonization model would be neither desirable nor feasible. Although common historical roots exist, foundation law has developed differently across Member States, and for different reasons and with different outcomes. For example, some Member States accept Family Foundations, while other Member States do not. In light of these fundamental, historically developed differences, it is obvious that harmonization of the national foundation laws is not a desirable solution. If considered in detail, any harmonization approach to European foundation law would by necessity impoverish the wealth of traditions existing in Europe. This wealth of traditions lends itself to a subsidiary approach in the development of any policy for European laws on foundations.²⁸⁶

As regards *tax law*, harmonization would theoretically seem to be easier, because the national tax regulations are not as different as the legal treatment of foundations. Politically, however it does not seem to be realistic that the Member States would be ready to harmonise their tax laws.

2. *Expected Cost Reduction*

In the case of total harmonization of foundation law in Europe, all costs for cross border activities would no longer apply. However, it is quite likely that some new short- and medium-term costs might arise that are associated with legal changes and with compliance to what could be significantly new bodies of law, rules and regulations. However, the assumption would be that such costs remain transitory and, in the long run, the costs of a harmonised system would be substantially reduced and significantly lower than the status quo.

III. Bilateral or Multilateral Treaties (Treaty Model)

Another option for overcoming the national legal barriers is the use of bilateral or multilateral treaties, which are possible in both civil law and tax law.

²⁸⁶ Thus, it is not surprising that no legal scholar has argued for such a harmonization of foundation law and that the vast majority of the consulted foundations were against such a harmonization.

1. Implications

Under a *civil law treaty* each Member State would mutually recognise the legal personality of foreign foundations. Under a *tax law treaty* each Member State would mutually accord tax-exempt foundation status to foreign foundations, with the consequence that such foreign foundations would receive the same tax benefits as a national tax-exempt foundation. Thus, in theory, it is possible to overcome national legal barriers by the use of multilateral or bilateral treaties both in civil law (recognition) and in tax law (tax-exempt status).

However, there are still almost no multilateral or bilateral treaties between the Member States: the Hague Convention on the Law Applicable to Trusts and on their Recognition from 1985 was only ratified by a few Member States (*Italy, Luxembourg, Malta, the Netherlands and the UK*). Tax treaties are even more of a rarity. One reason for this lack of treaties may be that it is not always easy to equate a foreign legal form with a national one, e.g., if a public benefit purpose is a requirement in national civil law and/or national tax law, the term could have another meaning in other Member States. Another factor is that some Member States do not regard a foreign foundation as a resident of the other contracting state for the purposes of an income tax treaty where the foundation has no liability or only a partial liability to income tax in that other state. In view of these experiences, it seems unrealistic to expect the Member States to ratify unilateral or bilateral treaties in the course of the next few years.

What is more, bilateral tax treaty policy within the EU is dominated by the influence of the OECD model's tax conventions and commentaries. The recently published 2008 update of the OECD model income tax treaty affirms the OECD position that the non-discrimination article in the model treaty is not intended to preclude discrimination based on residence.²⁸⁷ Hence, the bilateral option could potentially reduce the policy influence of the European Union in strengthening Europe's foundation sector.

2. Expected Cost Reduction

The potential to reduce the costs of barriers by multilateral or bilateral treaties is hard to estimate, as it largely depends on the countries and barriers involved. If the scale and scope of such treaties is large, i.e., involving many Member States and addressing most barriers, the costs of barriers would be reduced significantly; in case only a few Member States engage in such treaties, overall costs would not be too different from the status quo option.

IV. European Foundation Statute (European Foundation Model)

An important alternative in overcoming the national barriers is the introduction of a European Foundation Statute.

The European Foundation would be an additional and optional instrument like the European Economic Interest Grouping (EEIG),²⁸⁸ the European Company (*Societas Europaea*,

²⁸⁷ http://www.oecd.org/document/28/0,3343,en_2649_33747_41231132_1_1_1_1,00.html

²⁸⁸ Council Regulation (EC) no. [2137/85](#) of 25 July 1985 on the European Economic Interest Grouping (EEIG), Official Journal C 285.

SE),²⁸⁹ the European Cooperative Society (Societas Cooperativa Europaea, SCE),²⁹⁰ and the proposed European Private Company (Societas Privatae Europaea, SPE).

1. Implementation Questions

a) Potential Legal Basis: Art. 308, EC Treaty

As all other European enactments, a Statute or Regulation for a European Foundation requires a legal basis within the EC Treaty. The other European legal forms (EEIG, SE, SCE, as well as the proposed SPE) are based on the “catch-all” rule of Art. 308 of the EC Treaty. The European Foundation, too, could be based on Art. 308.²⁹¹

b) Applicability of the EC Treaty to the Establishment of European Non-Profit Legal Entities?

Another question is whether Art. 308 of the EC Treaty would also allow for the introduction of a European Foundation. It could be argued that a fundamental difference from other European legal forms exists in this case.

Indeed, the EEIG, SE, SCE and SPE are “economic” European legal forms, which can lay claim to the freedom of establishment (Art. 48, EC Treaty), whereas a Foundation is typically a “not-for-profit” entity. The wording of Art. 48, paragraph 2, EC Treaty explicitly excludes “non-profit-making” organisations.²⁹² However, as already stated, there are strong arguments that this provision means each entity is regarded as a “for-profit” organisation if it carries on economic activities, regardless of whether this organisation has a non-distribution constraint or is tax-exempt.²⁹³ As a consequence of this test, all foundations carrying on economic activities would be protected by the right of freedom of establishment.²⁹⁴ Nevertheless, it should not be forgotten that it is not economic activity that is typical of a foundation, but grant-making activity. Thus it seems odd that only European Foundations which are not purely grant-making should be allowed.

However, even if the freedom of establishment only protects “economic” foundations, there are other good reasons to regard foundations which are purely grant-making as also protected by the freedom of capital movement (Art. 56, EC Treaty). As already stated, there are good arguments that the ECJ will decide in *Persche* that donations are covered by the freedom of capital movement.²⁹⁵

²⁸⁹ Council Regulation (EC) no. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), Official Journal L 294.

²⁹⁰ Council Regulation (EC) no. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Official Journal L 207.

²⁹¹ See also ECJ, Case C 436/03, which clarifies that Art. 308 and not Art. 95 of the EC Treaty is the appropriate legal basis for the SCE.

²⁹² According to Art. 48, EC Treaty, “companies or firms” means those constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

²⁹³ See also Part 4, C I 3 supra.

²⁹⁴ In some cases the freedom of services may be applicable too.

²⁹⁵ See Part 4, C 2 1 b aa supra.

Thus, a European Foundation with economic activities could be based on the freedom of establishment, whereas a European Foundation with grant-making activities on the freedom of capital movement.

c) Methodology

The usual method would be to implement the European Foundation in the same way as all other European legal forms, i.e., by means of a statute which provides the legal framework. A further question is whether the statute should be comprehensive (like the draft statute for the SPE) or whether it should only contain rules or a set of questions and should be supplemented by the law of the home country (like the SE) (see *infra* B II).

d) Transformation of National Foundations into a European Foundation

In company law, a decision by a (qualified) majority of the shareholders usually allows the transition of the company into another (European) legal form.

As regards the question of transformation from a national Foundation into a European Foundation, the situation is different. As the legal comparative analysis shows, all Member States have procedures for fundamental decisions (e.g., an amendment of the foundation's statutes), but the most common procedure for such a decision is (1) that the relevant majority of board members (the majority that is required by law and/or by the statutes of the foundation) agree, and (2) that the state supervisory authority finds that the transformation is in line with donor intent.²⁹⁶

It could seem to be quite a difficult task to decide whether the founder of an existing national foundation would have preferred the European Foundation as an organizational form, which did not exist when he made his endowment. In a few cases, the future possibility of a transition to European Foundation may actually have been mentioned in the foundation deed. Further indication of donor intent may be that the purposes of the foundation are purely "European" and/or that a comparatively high level of cross-border activities is necessary in order to pursue that purpose. However, there may be cases where it is questionable whether the transformation would meet the more or less fictive will of the donor.

Thus, it may be reasonable that the national legislator establish additional procedural rules for the existing foundations. Such procedural rules could give the board of the foundation an option whether it wants to transform its legal form from a national foundation to a European Foundation. One requirement of such a transformation may be that the statutes of the national foundation can remain much the same. That means that the freedom of scope of the European Foundation Statute has to allow the current version of the statutes of the national foundation being transformed. If it were necessary to amend the statutes of the national foundation, the national rules for such amendments might be applicable. Under such a condition, it seems possible also to allow national foundations a transformation to a European Foundation as the transformation would have no direct impact on the statutes of the individual foundation.

²⁹⁶ In some Member States the requirements are less strict, see Part 3 D II 1.

2. General Guidelines for the Content of a European Foundation Statute

The aim of this feasibility study is to test the potential of a European Foundation Statute for overcoming barriers to cross-border activities. It is not our goal to develop a detailed draft of such a European Foundation Statute. However, in order to show the potential of a European Foundation Statute, it is necessary to provide an overview of what the fundamental guidelines and options of a European Foundation Statute could be.

a) Primary Aim: Overcoming National Barriers

As already stated, the primary aim of a Statute for European Foundations is to overcome the existing barriers to cross-border activities. This involves two essential aspects:

- To overcome civil law barriers, the European Foundation will have to be a legal personality recognised in all Member States. In addition, the European Foundation shall be entitled to conduct activities of any kind in order to promote its purpose.
- To overcome tax law barriers, the European Foundation will be entitled to receive the same tax benefits as a domestic tax-exempt public benefit foundation.

The introduction of a European Foundation Statute will directly overcome the civil law barriers only. None of the other European legal forms affect the different tax law systems of individual Member States.

Another option would be to combine the European Foundation Statute with the added status of a tax-exempt organization in every Member State. This option will be discussed as a follow-on option.

b) Second Aim: Trustworthiness

The second aim is to find adequate rules to ensure that the European Foundation will be seen as a trustworthy institution. The Member States will probably not agree to the introduction of a European Foundation Statute if they have concerns that this European legal form might not be trustworthy, e.g., because it could be misused for the circumvention of their national foundation law, tax law or trade law.

Again (as in the case of accreditation), this does not necessarily mean that the European Foundation has to copy the most restrictive national foundation law from among the Member States or combine the most restrictive provisions of every Member State.

Ways of enhancing protection to the extent needed to prevent abuse are to stipulate clear functions or purposes for the European Foundation, and also appropriate governance models, publicity requirements and due diligence rules. The aim would be to prevent the European Foundation from being misused as a “cheaper” and “easier” version relative to national ones.

3. Expected Cost Reduction

The introduction of a European Foundation Statute would probably have multiple effects on the costs of barriers.

First the costs for the establishment of new organizations would no longer apply, because a European Foundation created in one Member State would automatically be

accepted in other Member States without the need to obtain legal (civil law) information which would otherwise be required to create an affiliate foundation (moreover, the most current expenditures for legal counsel would no longer be needed). Some reduction of tax counselling costs might also occur in conjunction with a non-discrimination approach combined with the EFS. However, some costs here may remain because the tax treatment of EFs will still vary from Member State to Member State. Using the calculation model described above (Part 4 E), the minimum cost reduction would be the calculable costs to the amount of at least between 48.5m – 60.2m euros annually.²⁹⁷ If we included in this figure the very rough estimate of the minimum capital endowment or other start-up investment costs (described above as incalculable costs) of affiliate organizations, the savings could amount to as much as 96.5 - 137.2m euros. As for the other types of incalculable costs, we can expect a remarkable impact, in particular, on the psychological costs and the costs of failure. With a European vehicle at the disposal of European subjects and European as well as other international corporations, we can expect a growth trend for European investments in philanthropy even though we cannot identify the size of this trend. Depending on how widespread knowledge of the vehicle of a European Foundation will be, these effects will most likely grow over time and help to stimulate growing dynamics in European philanthropy. The full cost effects of the European Foundation will depend on the approach to transforming existing foundations into the new legal form. If the legal provisions only allow doing so ex nunc, the effects will be more limited because all existing foundations will not have the opportunity to transform. They will, however, still have the opportunity to create one new affiliate instead of the several or many previously required. If the legal provisions create generous opportunities for transformation and manage to deal with an assessment of potential donor intent on the levels of national legislation, the cost effects will be comprehensive because all institutions wishing to transform will actually be able to do so.

In addition, there would be large gains in transparency as well as visibility for European foundations. The possibility of taking up international programmes would become both much more feasible and more visible. The empirical results given above show that the assessment of costs for international activities decreases with knowledge and experience. This could have an effect on the range of foundations that would find it attractive (and feasible!) to be active on a European level, thereby strengthening the European dimension of foundations in the EU.

A full assessment of the cost effects of the European Foundation Statute will also have to take into account any counteracting tendencies of remaining or new transaction costs due to the new legal framework. There will most likely be costs associated with cross-border activities even if conducted by a European Foundation. These costs cannot be easily investigated. For example, if current costs originate from the fact that foundation law is, to a high extent, unwritten law in the Member States, expert legal help will

²⁹⁷ The savings are calculated according to Table 26: The figure is explained by avoiding the costs for legal counsel when establishing affiliate foundations (7.5m-19.2m) as well as by avoiding the running costs for legal counsel in those cases because a EFS would make affiliate foundations redundant (we assume that these cost savings amount to 41m which equals around half of the total running expenses for international activities). The span is explained by the between 750 and 1.250 cases assumed.

continue to be required, and this problem will not cease to exist with a European Foundation Statute, since many rules in the European Foundation Statute would probably have to refer back to the rules applicable in the Member States.

In conclusion, our final estimate of the cost reductions associated with a European Foundation Statute will be slightly below the figures given above. We may overestimate the number of cases to fully benefit from a European Foundation Statute, and underestimate the costs of conducting cross-border activities as a European Foundation. If our considerations do not only focus on the cost reduction potential of a European Foundation Statute among existing foundations and their interest to become active internationally but also addresses the cases of foundations currently failing to come into existence with a European agenda at all, the overall effect of a European Foundation Statute would be more positive on the whole.

4. Further Possible Effects of a European Foundation Statute

According to the terms of reference, this feasibility study also assesses the possible effects of a European Foundation Statute on: (a) the activities and governance of foundations and trusts (especially a preliminary assessment on the possible type/group of foundations which are more likely than others to use such a statute); (b) the attitude of donors towards giving; (c) the corporate sector; and (d) on the national and European economy (notably in the fields of research innovation, technical development, competitiveness and growth). The goal of this point of the terms of reference is to identify possible benefits and drawbacks arising from the introduction of a European Foundation Statute.

As the empirical analysis shows, it is not possible to provide a quantitative assessment on these issues in light of the evidence collected in the survey. However, we can give a qualitative assessment on the four points.

a) Possible Effects on the Activities and Governance of Foundations and Trusts

A European Foundation Statute would at the same have effects of a model law on national jurisdictions. Assuming that the legal form of the European Foundation would be created with strict governance, accountability and publicity requirements enacted because of the wide scope of privileges granted to such an institution in the whole EU, the European Foundation Statute could set standards concerning these issues in Europe.

We expect that primarily large and medium-sized foundations which operate above the threshold of small, volunteer-run organizations will find the European Foundation of interest. In particular, this could apply to operating foundations serving purposes in regulated quasi-markets like social welfare or education. A number of these foundations are currently beginning to develop a European scope of interests (for instance by serving constituencies of European citizens who migrate between Member States and who are being served by foundations from their home country when they move to other countries, e.g., for their retirement or for professional reasons).

A European Foundation Statute would also offer an opportunity for more institutions in the sector which address efficiently a European agenda in the first place (e.g., European citizenship, civic education, migration and labour market issues, environmental purposes, or purposes of European cultural or scientific interest).

b) Possible Effects on the Anticipated Attitude of Donors towards Giving

This report clearly concludes that the legal status quo fails to mobilise a certain (though not quantifiable) level of donations by European citizens and by corporate players from both within and outside the EU. The vignette cases and the evidence from certain donor families like the one briefly mentioned under the paragraph on incalculable costs suggest that the current barriers, and even more so the perceived costs of barriers, result in reduced levels of contributions to philanthropy, i.e., have prohibitive effects. In addition, the growing trends of globalization and internationalization of the economies and the current transfer of wealth to the next generation provide qualitative criteria which support an argument of further sustained growth of philanthropy and therefore of a growing potential for the use of a European Foundation. This implies that even if the full potential brought about by reducing the costs for transnational programmes was only relevant to new foundations, this would still have positive effects on the overall levels of foundation activities in Europe. We need to state again that even with a restrictive approach to the transformation of existing legal forms, the existing institutions would have the opportunity to resolve the issue by only creating one affiliate institution instead of several.

c) Possible Effects on the Corporate Sector

Empirical results provided for the Member States where an empirical assessment of the relationship between foundations and corporations was feasible show that only in certain Member States (e.g. Denmark, Germany, Austria, with a predominance of private purpose foundation the latter country, and the Netherlands) do foundations own stock or even majorities of stock in corporations. Compared to both the number of foundations in Europe as well as the capitalization of corporations in the EU, the cases in question represent a marginal share, even though some very prominent cases are involved. It therefore does not seem to merit special attention to restrict the asset management of foundations in order to prevent abuse, as long as the European Foundation Statute foresees the European Foundation as a public benefit institution only. In terms of market efficiency, the research by Thomsen shows that foundation-controlled corporations do not generate lower returns than public companies which is an argument against inefficiencies as a consequence of these asset holdings.²⁹⁸

With a growing interest of corporations in corporate social responsibility activities, a European Foundation Statute will most likely have positive effects among those corporations which are European or global players, putting an efficient vehicle at their disposal to conduct their activities using a single legal instrument. This opportunity could also create an incentive for international corporations, especially those from the US which are already interested in CSR activities, to increase the level of their involvement.

²⁹⁸ Thomsen, Steen Corporate Ownership by Industrial Foundations. *The European Journal of Law and Economics* 7(2), 1999.

d) Possible Effects on the National and European Economy

Regarding the possible effects on the national and European economies (notably in the fields of research, innovation, technical development, competitiveness and growth), we must first refer to the findings on the economic importance of the foundation sector.

Not only is foundation work in the field of research and development (R&D) a good example of the international activities of foundations, it also constitutes an important field for the strategic development of the European Union, not the least in light of the Lisbon Strategy.²⁹⁹

The report “Giving More for Research in Europe”³⁰⁰ underlines the importance of foundations in the European Research Area. Foundations do not only fund important research through grants to institutions but also conduct valuable research themselves. Foundations are seen to be in a unique position to boost research with their ability to fund research programs which other institutions would rather neglect (basic research) and to support the researchers with their own competencies.

Despite the fact that the financial contribution to R&D spending from foundations is small at first sight,³⁰¹ given the specific qualities of foundations, they contribute in more than just financial ways to the European Research Area. The report which was completed by an expert group for the Commission sees foundations as one important pillar in the overall architecture of the European research landscape which merits efforts to expand it.

Little is known about the total scale of research foundations in Europe, with OECD and Eurostat statistics shedding little light on the field of foundations’ activities. Hopefully the FOREMAP project currently conducted at the European Foundation Centre will bring some new insights here and possibly develop a methodology to evaluate the sector more precisely.

One reason for the lesser extent to which foundations in Europe contribute to the field of research could be the difference between an international research field which is increasingly organised across borders and the foundation sector which is very heterogeneous and largely organised within national borders. The argument is that the level of international research funded or conducted by foundations is too low, and that it is in the best interests the European Union to raise it to a higher level. Here again, the differences between the jurisdictions are seen as the major obstacle to trans-European giving, funding and programme operations. Like the more general findings in this feasibility report, legal uncertainty seems to be the major problem in the development of a transnational and European culture of research funding by foundations. There seem to be some severe problems in organising international collaboration, raising funds internationally and funding international programs or projects.

²⁹⁹ This could be deduced also from the strong interest of the European Commission and umbrella organisations like the EFC that recently conducted a research project dealing with research foundations in Europe (FOREMAP).

³⁰⁰ http://ec.europa.eu/invest-in-research/pdf/download_en/rec_5_7800_giving_4_051018_bat.pdf

³⁰¹ The average share of “other national sources” (i.e., others than governmental or industrial and covers not only foundations but the non-profit sector as a whole) on R&D spending was 2.3% in 2003 for the EU 27. In comparison, the same figure for the United States was 4.8%. See: OECD Main Science and Technology Indicators Volume 2007/2 - Table 15.

To overcome these obstacles and to expand the contribution made by foundations to research in the European Union, the Report “Giving More for Research in Europe” provides clear suggestions we cannot but underline. The report, which was completed by an expert group for the Commission, makes the following recommendations to strengthen the framework for private and corporate giving in the field of research:

- Improve visibility and information about research foundations
- Create a more beneficial fiscal and regulatory environment for foundations
- Improve mechanisms for leveraging funds for research
- Promote more effective funding arrangements and mechanisms
- Foster a more conducive EU-wide environment for foundations

Under letter e) the explicit recommendation is to consider the implementation of a European Foundation Statute in order to facilitate international activities of research foundations.

With a common legal form research foundations could cope with the needs of the international research community in a much better way. The European Foundation could also serve as an important cornerstone in the strategy for European Research Infrastructures as proposed by the Commission for a council regulation on the Community legal framework for a European Research Infrastructure (ERI).³⁰² In addition, [REGULATION \(EC\) No 294/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 2008 establishing the European Institute of Innovation and Technology \(EIT\)](#) mentions that “[the] EIT shall have power to establish a Foundation with the specific objective of promoting and supporting the activities of the EIT.” Because of the absence of the European legal form, this foundation would need to be set up according to one national foundation law.

Furthermore, the European Foundation could boost the designated features of a European Research Area (ERA), as proposed in the Green Paper “The European Research Area: New Perspectives” as follows:³⁰³

An adequate flow of competent researchers with high levels of mobility between institutions, disciplines, sectors and countries;

World-class research infrastructures, integrated, networked and accessible to research teams from across Europe and the world, notably thanks to new generations of electronic communication infrastructures;

Excellent research institutions engaged in effective public-private cooperation and partnerships, forming the core of research and innovation 'clusters', including 'virtual research communities', mostly specialised in interdisciplinary areas and attracting a critical mass of human and financial resources;

Effective knowledge-sharing notably between public research and industry, as well as with the public at large;

Well-coordinated research programmes and priorities, including a significant volume of jointly-programmed public research investment at the European level involving common priorities, coordinated implementation and joint evaluation; and

³⁰² COM (2008) 467 final.

³⁰³ COM (2007) 161 final.

A wide opening of the European Research Area to the world with special emphasis on neighbouring countries³⁰⁴

In this context, the European Foundation could become a common tool to meet the goals of the proposals and to further develop the set of European Research Infrastructures (besides the pure academic networks and commercial institutions active in the field of research).

We expect that the introduction of a European Foundation Statute would have positive effects concerning all of the above points. It would increase the visibility of the foundation sector in public, diminish transaction costs for international activities in R&D (as in many other fields), and facilitate the organisation of international programmes and operations. By means of easier access to information, an additional effect could be that more foundations will be willing to set up international research programmes, raise funds in different countries and offer their grants Europe-wide.

V. European Foundation Statute with Additional Tax-Exemption (Tax-Exempt European Foundation Model)

Another option would be a European Foundation with a tax-exempt status in all Member States.

1. Scope of Tax-Exemption

Theoretically there are three main sub-options regarding the scope of tax-exemption (tax benefits):

a) Harmonization

Under the tax harmonization model (see A I supra) the European Foundation and the national foundations receive identical tax benefits in all Member States under identical conditions. Such a solution, however, is not realistic.

b) Specific Tax Regime for European Foundations

There could be a specific tax regime for the European Foundation: This means that a European Foundation receives the same tax benefits in all Member States, regardless of the tax benefits of the Member States for their national foundations (which can be more or less generous).

Example 1: Donations to a European Foundation are tax-exempt up to 10 % of the income of the donor in any Member State. This is also true in Member State A, where such donations to a national tax-exempt foundation are tax-exempt up to 20 % of the income of the donor, and in Member State B, where a donation to a national tax-exempt foundation is only tax-exempt up to 5 % of the income of the donor.

Such a solution seems to be problematic because it may lead to severe frictions between the tax regime for national public benefit foundations and the tax regime for the European Foundation: There would be discrimination, if one of the two regimes (e.g., tax benefits for the European Foundation) offers wider tax benefits than the other (e.g.,

³⁰⁴ COM (2007) 161 final, pp 2

tax benefits for a national foundation in Member State X) and the foundation of the discriminated tax regime fulfils all requirements of the other tax regime.

In *Example 1* as regards the tax benefits for donors, in Member State B a donor to a national tax-exempt foundation is discriminated in comparison to a donor to the European Foundation, and in Member State A a donor to a European Foundation is discriminated in comparison to a donor to a national tax-exempt foundation.

Such discriminations are politically not desirable and may be regarded as an infringement of national constitutional law and/or European law.

c) Non-Discrimination Solution

A third solution would be that a European Foundation receives the same tax benefits in each Member State as accorded to national tax-exempt foundations (non-discrimination).

Example 2: In Member State A, donations to a European Foundation are tax-exempt up to 20 % of the income of the donor (because donations to a national tax-exempt foundation are also tax-exempt up to 20 %). In Member State B, donations to a European Foundation are only tax-exempt up to 5 % of the income of the donor, because the national tax-exempt foundation is only tax-exempt up to 5 % of the income of the donor.

Such a solution avoids friction between the national tax regime and the tax regime for the European Foundation. Thus, the non-discrimination solution is the only solution which is both realistic and reasonable.

2. Implications

Consequently, we will review only the possibilities of implementing a non-discrimination solution. There are three possible ways of implementing such a solution.

a) Implementation by the European Foundation Statute Itself

It is questionable whether a legal basis exists for implementing a non-discrimination rule in the European Foundation Statute itself. Even if it were legally possible, one has to bear in mind that first drafts of other European legal forms also included a part on taxation but those rules were removed later because no agreement among Member States could be reached. Thus, such an implementation does not seem to be realistic.

b) Implementation by a Multilateral Treaty

A European Foundation with additional tax-exemption could be implemented by a European Foundation Statute which is accompanied by a multilateral treaty of all Member States accepting the status of the European Foundation as a tax-exempt organization. However, such an implementation seems somewhat unrealistic. As already stated, the experiences to date have shown that there is no real prospect of the unanimous approval of the Member States that would be necessary for such an undertaking. Unfortunately, the prospect of a move by national governments to harmonise their foundation tax law, to conclude a special multilateral treaty, or to make use of double taxation treaties, is not much better.

c) “Automatic” Implementation in the Form of the Lowest Common Denominator of the National Tax Laws

Apart from these two more traditional ways there is a new way to introduce a European Foundation accepted in all Member States as a tax-exempt organization, and that is simply by means of a European Foundation Statute without an additional multilateral treaty: According to the new adjudication by the European Court of Justice in the “Stauffer” case, it is unlawful to deny tax-exempt status to a foreign foundation if this foundation meets all the State’s other requirements of a national tax-exempt foundation.³⁰⁵

Thus, theoretically the European Foundation would be automatically tax-exempt in all Member States, if the European Foundation Statute were to combine all requirements of the tax law of the Member States (de facto lowest common denominator), i.e., by allowing only such public benefit purposes as are allowed in all Member States, by prohibiting remuneration for the board of directors (as under *Spanish* tax law³⁰⁶), by requiring a duty of timely disbursement and several formal statements in the foundation’s statute (as under *German* tax law³⁰⁷), by allowing only such purposes which are regarded as “public benefit” in every Member State,³⁰⁸ etc.

The requirements of tax law could be mandatory for all European Foundations or be part of a “model statute”, leaving it open to the founder whether she/he wants the additional advantage of the status of a tax benefit foundation in all Member States.

At first sight, such a tax-exempt European Foundation may seem unrealistic, because it would be over-regulated and too ‘bureaucratic’. However, according to the results of the comparative legal studies of the tax law of foundations, the similarities in tax law seem to be much greater than in foundation law³⁰⁹. Thus, it is imaginable that such a European Foundation could be a viable proposition and the price may be worth considering tax-exemption in all Member States.

3. General Guidelines for the Content of a Tax-Exempt European Foundation Statute

The primary aim of a tax-exempt European Foundation Statute is obvious: tax-exemption in all Member States. As a matter of fact, a tax-exempt European Foundation Statute has to find the lowest common denominator of the tax law of the Member States in order to reach this aim. As the task is complex, ways would have to be found to make the European Foundation as simple as possible from an administrative and tax point of view.

4. Expected Cost Reduction

The introduction of a European Foundation Statute with competencies in tax law would decrease the costs of barriers further in addition to the gain of the European Foundation Model without tax-exempt status. Total annual transaction costs amounting to 90m and

³⁰⁵ See Part 4

³⁰⁶ See Part 3

³⁰⁷ See Part 3

³⁰⁸ See Part 3

³⁰⁹ See Part 3

101.7m euros could be saved, not including incalculable costs such as minimum capital and the consequences of barriers perceived as prohibitive. Most of the counselling costs would be obsolete and the neutrality of treatment for international active foundations would be maximised.

5. Further Possible Effects

In addition to the positive effects of the European Foundation Statute without tax-exempt status, the comprehensive approach, including automatic tax exemption according to the non-discrimination approach, would create a high degree of standardization and further reduce national discretion as to the tax treatment of the European Foundation. The approach would create the most far-reaching incentive for funding trans-national European causes and would have the greatest potential to foster science and research funding as well as other causes of European interest. It would lead towards a shared concept of a European public good, even though such a concept may not be feasible except for a limited list of purposes mentioned in European Treaties such as the goal to promote R&D and the competitiveness associated therewith.

B. Options for the Content of a European Foundation Statute or Code of Conduct

Both the European Foundation Statute and a Code of Conduct (as an alternative means of soft law) have the aim of fostering trustworthiness. Because of similarities, it seems reasonable to discuss several options both for the European Foundation Statute and the Code of Conduct for a “European Foundation” together. Since the aim of the tax-exempt foundation statute is different (lowest common denominator of the national tax laws), the options for such a statute will be discussed later (see C *infra*).

I. Fundamental Characteristics of a European Foundation

The European Foundation should have the following five main characteristics:

- Legal personality
- Promotion of a public benefit purpose
- No membership
- State supervision
- Establishment by registration

1. Legal Personality

The European Foundation should have legal personality (with full capacity and limited liability) which is acquired upon registration. A comparative legal analysis shows that this is the rule in almost all Member States.³¹⁰

2. Public Benefit Purpose

The European Foundation should promote public benefit purposes only.

³¹⁰ See Part 3

The comparative legal analysis shows that public benefit foundations are accepted in all Member States, whereas other types of foundation are usually only accepted in some Member States.³¹¹

A limitation to exclusively public benefit purposes has two advantages:

- The function of the European Foundation is clearer, which may strengthen the case for a European Foundation Statute.
- The countries requiring a national foundation to pursue only public benefit purposes would probably not support a European Foundation allowed to promote any lawful purpose.

3. No “Formal” Membership

As the comparative legal analysis shows, in all Member States a foundation normally has no “formal” membership.³¹² It seems reasonable, therefore, that the same would apply to the European Foundation.

4. State Supervision

According to the comparative legal analysis, in every Member State a foundation is supervised by the state supervisory authority.³¹³ Thus, a European Foundation should also be supervised by such an authority.³¹⁴

5. Establishment by Registration

In order to provide the necessary legal certainty, a European Foundation should be established not only by the private act of the founder but also with the participation of a public authority. The aim of legal certainty means that the act should be non-discretionary registration by the registration authority.

This is also the rule of the national foundation laws of almost all Member States.³¹⁵ Establishment normally needs the participation of a public authority which has no discretion if the requirements for establishment are fulfilled. Registration is common to many Member States, and this seems to be an adequate model for a European Foundation, providing legal certainty as to whether the European Foundation has been established in law or not.

Apart from these five fundamental criteria, there are a number of questions for which certain alternative solutions are possible.

II. Options for the Combination of the European Statute and National Law of the Member States

One important question is how detailed a Statute on the European Foundation should be.

³¹¹ See Part 3, B IV supra.

³¹² See Part 3, C I 10 supra.

³¹³ See Part 3, C III 1 supra.

³¹⁴ See also B VI infra, which discusses further details.

³¹⁵ See Part 3, D I 4 and 5.

Generally two models are possible:

- In the case of the draft of the SPE, the statute is comprehensive as regards company law. The national law of Member States is applicable as regards other legal fields (e.g., tax law, insolvency law).
- In the case of the SE, the statute gives only rudimentary rules for the SE, which are supplemented by the national rules of every Member State not only in other legal fields but also in company law. Thus, the SE is not a mere “European” legal form. In practice there exist 27 SEs, combining national company law of the Member States and the statute for the SE (e.g., the “French SE”, the “German SE” and the “Italian SE”).

Both models have their advantages and disadvantages:

The model of the SE gives the Member States more opportunities to avoid friction between the European Statute and their own national company law and thus may be easier for Member States to accept. However, such a model is complex and lacks transparency, because of the national differences to which the SE model is subject (de facto 27 different SEs).

Consequently, it is quite understandable that the newer draft of the SPE tries to avoid this complexity and lack of transparency. Since our main argument in favour of a European Foundation Statute is based on the current transaction costs, any solution still requiring the help of legal counsel to shed light into the complex situation would reduce the cost advantages of a European Foundation Statute.

III. Options for the Definition of Public Benefit Purpose

As already stated, the purpose of a European Foundation should be restricted to a “public benefit purpose”. Consequently, it is necessary to decide whether the comparatively vague term “public benefit purpose” should be defined more exactly.

As the legal comparative view shows, three kinds of definition are possible:

- Definition by a closed list
- Definition by an open list
- No definition at all

The advantage of a comprehensive definition is the increase of legal certainty; the disadvantage is that such a definition could be too inflexible to be able to react to new developments in philanthropy.

The danger of inflexibility is probably the reason why only a few Member States which stipulate a public benefit purpose in foundation law or tax law define the term “public benefit purpose” by means of a closed list.

As regards the European Foundation, it is reasonable to minimise legal uncertainties as much as possible. Therefore, there should be a description of public benefit purposes, which includes the public benefit purposes which are accepted by all Member States. According to the legal comparative analysis, at least the following purposes seem to be accepted in all Member States as public benefit purposes both in civil law and in tax law.³¹⁶

³¹⁶ See Part 3, B IV 2 c aa supra

1. health preservation, disease prevention, therapeutic and medical rehabilitation activities,
2. social activities, family counselling, care for the elderly,
3. scientific activities, research,
4. school instruction and education, personal ability development, dissemination of knowledge,
5. cultural activities,
6. preservation of cultural heritage,
7. preservation of historical monuments,
8. nature preservation, animal protection,
9. environmental protection,
10. children and juvenile protection, children and juvenile advocate services,
11. promoting of equal opportunity within society for underprivileged groups.

The description could comprise a closed list or an open list. The advantage of a closed list is that the legal certainty is higher; however, the danger of such a closed list is that it is too inflexible.

The vast majority of the Member States define what is meant by a public benefit purpose by means of an open list. An open list could also be chosen for the European Foundation. In that case, the next question would be which institution is to be competent to decide whether a non-defined purpose is a public benefit one. In the national law of Member States these questions are usually decided by the competent governmental authorities, but at the end of the day the courts are entitled to review the decision if the foundation lodges a claim against it. Thus, in case of a European Foundation Statute, defining what is meant by a public benefit purpose by means of an open list, would make the review of such decisions the task of the European Court of Justice.

The alternative would be a closed list. We can find such closed lists in only a few Member States: in Hungarian non-profit law as well as in German tax law (after a recent reform). However, in both countries the lists are extensive. Furthermore, in Germany a “procedural opening clause” has been introduced: It is possible to extend the list by agreement between the tax authorities of the German *Länder*, so any reform of the law by Parliament is unnecessary.

IV. Options for the Establishment of a European Foundation

As already stated, a European Foundation should be established by registration and the two requirements for registration should be that it promotes a public benefit purpose and that it has no “formal” membership (see B I 2 and 3 supra). As regards the governance of the foundation, there may be additional mandatory rules which are discussed in B V below.

1. *Foundation Deed*

Apart from this, an additional requirement for the registration should be that the foundation deed contains the necessary information about the foundation’s purpose, assets and organization. It is reasonable to require a certain form for the foundation deed (e.g. notarization).

2. An Obligatory “European” Dimension?

It is an open question whether an obligatory “European” dimension of the mission should be required in order to establish a European Foundation.

Such a European dimension could be required in one of two different ways (alternative or cumulative).³¹⁷

- as a requirement for the *purpose*, stating that a European Foundation must promote a “European” public benefit purpose,
- as a requirement for the *activities*, stating that a European Foundation must conduct activities in at least two Member States.

The necessity for such a requirement could be justified by two arguments:

- (i) The other European legal forms traditionally have the requirement of a European dimension.
- (ii) A foundation with only domestic purposes and funding sources will not need to carry out cross-border activities and thus does not need a European legal form, which aims to overcome barriers of cross-border activities.

However, in each case there are strong counter-arguments:

- (i) The requirement of a European dimension is more a politically motivated restriction, a point which is also debatable for the other European legal forms. Interestingly, the draft for a new European Private Company deliberately does not require any European dimension.
- (ii) The test of whether a purpose or an activity is a “European” one can become very complex, because the requirement should not exclude the overcoming of legal barriers to cross-border activities.

In the case of the *purpose*, some public benefit purposes are usually international by their nature (e.g., science, international understanding). Even if the purpose of a European foundation was restricted to the territory of one Member State, it is not easy to decide whether such a purpose is not “European”. For example, a foundation for the preservation of an object of great cultural value (e.g., a church or a museum of international reputation) should be accepted as a European foundation regardless of the controversial and artificial question of whether such a purpose should qualify as a national or a European one (because of the cultural impact of the object) and also regardless of the question of whether the foundation is active in other Member States. It is unconvincing that in the example the Foundation should be able to qualify in another way if it also preserves another church in another Member State.

The question of what kind of *activity* can qualify as a sufficiently “European” activity may also lead to doubtful and undesirable results. One example is the question as to the nature of the conditions that have to be met when fundraising in another Member State in order to be regarded as “activities” there. Another example is the question of whether a European

³¹⁷ A third possible alternative would be the requirement to have *founders* from different Member States. However, such a requirement would not make much sense, for the nationality of the founder is not relevant for the overcoming of existing national barriers.

Foundation which has immovable property in another Member State should lose its status as a European Foundation if it decided to sell this property and acquire immovable property in its home state. If this were to be applied, a European Foundation could be forced to continue holding property in another Member State even if this were to become economically unreasonable. In addition, the possibility of receiving or making cross-border donations is inherent to practically all European Foundations.

In order to avoid complicated questions of definition and to avoid undesirable results, there are good reasons to follow the approach of the draft for the European Private Company and require no European dimension. An alternative would be the necessity of a European dimension, which is defined in very generous terms.

3. Obligation of an Initial Minimum Endowment?

It is debatable whether apart from a “European” dimension there should be any additional requirement in order to establish a European Foundation.

As the comparative legal view shows, the Member States have rather different solutions with respect to this point. Some Member States do not stipulate any initial endowment, while other Member States do (up to a million euros in France).

One argument for the requirement of a certain minimum amount of capital is that it may be seen as a sign of the seriousness of the purpose of the European Foundation, and that a European Foundation thus capitalised may be regarded as more trustworthy than a European Foundation without any initial assets of substance.

In addition, those Member States which do require a certain minimum amount of capital could have concerns that the European Foundation might be used as a tool to circumvent the requirements of their national foundation law.

However there are also good counter-arguments:

The draft for the new European Private Company only requires a symbolic minimum capital of 1 euro. This is justified by the argument that getting established as a European Private Company should also be open to smaller companies. In the case of the European Foundation it is reasonable to allow the establishment of small European Foundations as well. In those Member States which stipulate a minimum level of initial assets, it is not unusual for a foundation to start with a comparatively small endowment which will then be increased by later donations (e.g., community foundations). Some types of foundation (e.g., alumni, friends of a museum) do not even need a substantial endowment to embark on their mission.³¹⁸

As regards the danger of circumvention, it should be kept in mind that the draft for the new European Private Company does not require any minimum capital, while many Member States do have such a requirement in their national company law. Thus, not every difference between a European legal form and a national legal form can be regarded as “circumvention”.

³¹⁸ Of course, even the lack of such a minimum endowment requirement does not mean that a foundation could exist without any assets at all. There could be a provision which clarifies that a European Foundation must be liquidated when, for lack of adequate assets, the duties of the foundation can no longer be fulfilled. Additionally, (national) insolvency laws are applicable in the event of insolvency.

It is therefore recommended either not to require a minimum capital or to keep it rather modest (e.g., € 25,000 or 50,000) in order to allow smaller initiatives to use this legal form as well.

V. Options for the Governance of the Foundation

According to the suggestions above, a European Foundation should have no “formal” membership, and there should be mandatory State supervision.³¹⁹ All Member States require these two fundamental criteria as a rule. There are only two additional mandatory rules for the governance of a foundation which are accepted in *all* Member States: (1) that the foundation has at least a board of directors as its executive organ, and (2) that in case of any amendment of the foundation’s statutes, a certain formal procedure is necessary (usually requiring participation by a State supervisory authority).

Apart from this, many Member States leave considerable latitude to the founder to determine the foundation’s governance in its statutes. The lack of more detailed mandatory rules for internal governance in the foundation’s governing legislation may also be explained by the convention that the State supervisory authorities call on the foundation to account and ensure proper management by its executive organs.

If we look at the strictness of the regulation of internal governance compared with the strictness of State supervision in the Member States, we can distinguish four basic models:

1. *Intensity of Regulation and Supervision*

- the “*liberal model*” which requires only very rudimentary rules for governance and private supervisory mechanisms and has a comparatively low level of State supervision (e.g., the Netherlands),
- the “*private supervision model*” which combines several mandatory private supervisory mechanisms (e.g., accounting and auditing) with a comparatively low level of State supervision (e.g., the *Austrian* “private foundation”),
- the “*state supervision model*” which has a comparatively high level of State supervision but only rudimentary requirements as regards governance and other private supervisory mechanisms (e.g., the *Austrian* “public foundation”),
- the “*strict model*” which combines a comparatively high level of State supervision with detailed requirements for internal governance and private supervisory mechanisms (e.g., *France*).

The “liberal model” is cheap and leaves it open to the founder to stipulate the level of private supervision she/he regards as adequate. However, there is a danger that the lack of control can lead to abuse and that public trust in the institutional form of the foundation could be lost as a consequence of such abuses.

The “strict model” provides mandatory protection against abuses, which should increase public trust in the integrity of the foundation as an institutional form, but there is the danger of too much bureaucracy, especially if the foundation is comparatively small. In order to find a compromise, some Member States distinguish between “small”

³¹⁹ See B I 3 and 4 supra.

foundations, which are less strictly regulated, and “large” foundations, which are more strictly regulated.

In the case of the European Foundation, there may be good arguments for choosing a “private supervision model”, which combines private supervisory mechanisms (for most issues and requirements) with state supervisory mechanisms (for a small list of key issues like fundamental changes):

- Adequate private supervisory instruments support the trustworthiness of the European Foundation.
- State supervision is naturally more complex, if a foundation is active in different Member States.
- The tendency of modern legislation in the Member States is to introduce a “private supervision model” which sometimes replaces or complements the traditional “State supervision model”. Examples are the newer private foundation in *Austria* and the new foundation laws of most *East European Member States*.

2. *Private Supervisory Mechanisms*

We distinguish between several basic forms of private supervisory mechanisms which can be identified in the Member States (sometimes alternative, sometimes cumulative):

- Mandatory rules for a foundation’s organs (board of directors and its members, supervisory board and/or other organs),
- Procedural rules for specified kinds of decisions (e.g., appointment of board members, amendment of the foundation’s statutes),
- Information and enforcement rights for persons with a legitimate interest (e.g., the founder, subsequent donors, beneficiaries, creditors, etc.),
- Requirements for an auditor,
- Mandatory rules for the content and quality of annual reports and annual accounts,
- Requirements for transparency/disclosure (which may include the foundation’s statutes, annual reports, annual accounts and/or audit reports).

For the European Foundation, some of these requirements could be introduced

- as mandatory requirements for all or for “large” foundations,
- as voluntary recommendations in a kind of “Foundation Governance Code” as a means of self-regulation.

a) Foundation’s Organs

One possible requirement for the internal organization is that there should be *at least three directors*. Such a requirement can establish a system of mutual checks and counterbalances within the board. This system is a convenient way to compensate for the lack of control resulting from the fact that a foundation has no shareholders and thus no proprietors like a commercial company.

As regards the *personal requirements* for a board member, it could be required that the board member should be a *natural person* (in order to support transparency and

certainty), “*personally independent*” from other board members (in order to avoid the danger of being influenced by side-interests of a private nature).

The establishment of a *supervisory board* is most uncommon in the Member States. As there is already an internal control mechanism within the board, an additional supervisory board should only be required for the largest foundations (if there should be a mandatory rule at all).

b) Procedural Rules for Fundamental Decisions

Fundamental decisions like the amendment of a foundation’s statutes should require the consent of the State supervisory authority. The State supervisory authority should (only) be entitled to reject a change to the statutes if this is deemed necessary in order to prevent the original intentions of the founder, or the reasonable expectations of the foundation’s beneficiaries, or the legal rights of other persons affected, from being compromised.

c) Rights for Persons with a Legitimate Interest

Most Member States do not give any mandatory rights to the founder, beneficiaries or other third persons (e.g., other donors, creditors) with a legitimate interest. Nevertheless, in order to achieve an adequate system of private supervisory control, it seems reasonable to give such persons at least a “limited” enforcement right, namely that they may submit a report to the State supervisory authority, complaining that the foundation’s organs are not fulfilling their legal responsibility. The State supervisory authority should then be obliged to issue an adequate statement to the person within due time.

d) Auditor

At least the largest European Foundations should have their annual accounts audited by an eligible independent auditor who is subject to professional regulation.

e) Content and Quality of Annual Reports and Accounts

At least for the largest European Foundations, there should be some mandatory requirement for the content and quality of annual reports and accounts in order to increase transparency and to ensure that a true and fair view is shown by the accounts. Examples of such requirements can be found in England and Wales and also in Scotland.

f) Disclosure

The registration of a European Foundation, its annual reports and accounts (and, where applicable, audit reports) should be a matter of public record. Disclosure in the public domain is required to achieve the *transparency* necessary for the maintenance of public confidence in the proper administration of the foundation.

3. *Directors’ Duties*

Most Member States do not have explicit rules about the directors’ duties. In the case of the European Foundation it may be helpful to clarify that both a general duty of care and a general duty of loyalty exist.

Additionally, some specific duties may be stipulated. One example for a specific duty of loyalty could be the regulation of self-dealing transactions. Such transactions may be allowed on condition that they are fair, and that the annual report and accounts contain adequate information about the self-dealing transactions.

VI. Options for State Supervision

1. State Supervisory Authority

In the case of the European Foundation there are two potential models:

- Supervision by a central European State supervisory authority
- Supervision by the relevant national State supervisory authority or authorities

Both models have their pros and cons.

A central European State supervisory authority may have the advantage of a good reputation and can develop a uniform standard in its supervisory policy and practice. In the case of enforcement measures, the European State supervisory authority may need the cooperation of national governmental authorities. Disadvantages of a central State supervisory authority are a certain amount of bureaucracy as well as the challenge of having to cope with the different languages in the Member States, and the costs of funding the authority.

Decentralised State supervision by national State supervisory authorities has advantages in being able to avoid some of the bureaucracy and translation problems.

If the second model is chosen, the following question arises as to which national State supervisory authority should be competent:

- the State supervisory authority of the Member State where the European Foundation has its statutory main office (registered office/home office), or
- the State supervisory authority of the Member State where the European Foundation has its actual administrative main office (operational headquarters/house office).

If the second model is chosen, the usual and more convincing solution seems to be the first option (registered office), since otherwise there could be legal uncertainty regarding cross-border activities. Whatever the case, a certain amount of cooperation between the different national State supervisory authorities will be necessary.

2. Competences of the State Supervisory Authority

The State supervisory authority should have the following tasks and powers:

- Registration,
- Consent to fundamental decisions,
- Information rights,
- Intervention rights in the event of any significant breach of the law or the statutes.

The State supervisory authority should not have the right to review the discretionary decisions of a board of directors for any other reason. The measures of the State

supervisory authorities should be proportionate and all their decisions should be appealable in the courts.

VII. Options for the Regulation of Economic Activities

1. *Economic Activities of the European Foundation*

As regards economic activities by the foundation itself, two main options are possible, which can be found in several Member States:

- Generally no restriction; national rules of commercial law or co-determination may be applicable (e.g., *the Netherlands*).
- Economic activities must be subordinated to the foundation's public benefit purpose (e.g., *Spain*).³²⁰

An argument for the first solution (no restriction) is that the European Foundation should overcome barriers for all cross-border activities, which also includes economic cross-border activities. Additionally, as the comparative legal view shows, strict prohibition is very uncommon because it ignores the consideration that it can be very helpful for a foundation to increase its assets not only by the raising of funds and the administration of investment assets, but also by carrying out economic activities.

The main argument for a restriction of economic activities within the national law of the Member States seems to be that foundation law does not normally include rules to protect creditors, e.g., like those applicable to a company trading for profit. Thus, the foundation could be used as a vehicle to circumvent these mandatory rules (e.g., capital requirements, publicity, accounting standards).

However, it can be debated whether this argument is convincing in the case of the European Foundation.

- According to the recent rulings of the European Court of Justice in the cases of *Centros*, *Überseering* and *Inspire Art*, there are good reasons for believing that foundations of one Member State which carry out economic activities must be recognised in another Member State even if they do not have the same rules to protect creditors.
- The European Foundation may have a comparatively high standard in matters of governance, transparency and accountability (as recommended), and there could be specific requirements for European Foundations which carry out economic activities.

2. *Subsidiary Trading Company*

As the comparative legal analysis shows, almost all Member States allow a foundation to have a subsidiary trading company.

If the risks of direct trading by the European Foundation were regarded as too high because of the lack of national creditor protection rules, an alternative could be to allow

³²⁰ A general prohibition of economic activities of the foundation itself and a prohibition to implement a subsidiary company only exist for *Czech* foundations, but *Czech* public benefit institutions (which are comparable to a foundation) are allowed to perform subordinated economic activities.

a European Foundation to establish a subsidiary trading company (which may be a national company of one Member State or a European Private Company).

C. Options for the Content of a Statute for a Tax-Exempt European Foundation

The aims for a Statute for a Tax-Exempt European Foundation are (1) to find the lowest common denominator of the national tax laws of the member states, and (2) to put it into a statute in the least complex way possible.

I. Research Task

As regards the first aim, unfortunately, until now nobody has collated all the requirements of the tax laws of all 27 Member States. Thus, it would be necessary to start further comparative legal studies in order to develop a detailed statute with the lowest common denominator of all Member States. The task is challenging, because it will be necessary to find general rules, instead of cumulating rules, which seem to be different but are only sub-types of a general principle. However, as there has been a remarkable increase in comparative legal work in the field recently, there are good chances that such an approach will be successful.

II. Need for Flexible Amendment Rules

There should be amendment procedures which are flexible enough to react to further reforms of the national tax laws by one or several Member States – experience shows that tax law is changing fast.

III. Options to Decrease Complexity

There are several options to decrease complexity.

First, instead of the “big” solution – the lowest common denominator of the tax laws of all 27 Member States – a “small” solution could be introduced: the lowest common denominator of a smaller number of Member States. The smaller the number is, the lower is the complexity, but also the advantage of the tax-exempt status. Such a “small” solution could be helpful in an introductory stage.

Second, the Member States could decide to accept a “Tax-Exempt European Foundation Statute”, even if this statute does not fulfil any of the very specific requirements of the national tax law, but includes the fundamental rules. Of course, it is up to the national legislator whether a European Foundation which does not fulfil all but most tax law requirements should be accepted as a tax-exempt organization.

However, some Member States already know such a distinction between “fundamental” tax law rules and “less important” tax law rules. For example, under German tax law a national tax-exempt organization may have the statutory purpose to make grants out of its assets to a foreign organization on condition that the foreign organization promotes a public benefit purpose which is also accepted under German tax law. The further requirements of German tax law are not necessary in such a case. Only in the case of a foreign organization that has no national tax-exempt organization status are the rules of the “Stauffer” decision applicable, requiring that the foreign organization meets all further requirements of German tax law. Other Member States also have comparable rules if there is a national representative office or a national “sponsoring” organization.

Thus, it seems that the purpose is a more important requirement than the other requirements of tax law. Consequently, a European Foundation which has an accepted public benefit purpose and meets additional fundamental tax law requirements should have the chance of being accepted even if its registered office is not in the Member State in question.

D. Main Findings of Part 5

I. Models to Overcome the Existing Legal Barriers

We have debated the feasibility and desirability of five models to overcome the existing legal barriers: (1) Maintaining the status quo; (2) harmonization; (3) multilateral or bilateral treaties; and the European Foundation Statute (4) without tax-exempt status or (5) with tax-exempt status in all Member States (non-discrimination rule). It should be noted that each option has its own sub-options influencing the possibilities to overcome the barriers and to reduce the current costs.

1. *Status Quo Model*

The status quo-model does not necessarily mean total stagnation. The adjudication of the ECJ seems to establish general a non-discrimination rule in tax law which would overcome some of the existing barriers in tax law.³²¹ The status quo model would imply that on the legal side nothing substantial would be changed. Additionally, attempts could be made to reduce the current legal uncertainties through information campaigns or soft law (code of conduct, accreditation procedure). Such means cannot facilitate the barriers, but try to reduce the costs to overcome those barriers. Unfortunately, it seems unlikely that such measures can reduce the current costs significantly. The remaining costs (as far as they are calculable from our point of view) add up to at least 90m to 101.7m euros per year.

2. *Harmonization Model and Treaty Model*

The other extreme to the implied 'no direct legal action' of the status quo model would be the harmonization of the various foundation laws and/or tax laws across the Member States.

Although this would reduce the costs for cross-border activities substantially because foundations would find the same legal environment in all Member States, it seems completely unrealistic that such model could be implemented.³²²

³²¹ The non-discrimination rule is only applicable for inbound constellations (a non-residential foundation wants tax benefits from the State of source), but not for outbound constellations (a residential foundation wants tax benefits although its activities are abroad). However, most Member States does not seem to have barriers for outbound constellations and some of the current barriers may infringe the EC Treaty because of other reasons (cf. the case *Laboratoires Fournier* supra C II 2 c).

³²² As regards the harmonization of foundation law, it would not be desirable to force the Member States to unify their different foundation types.

3. *Treaties Model*

In the Treaties Model there are basically two kinds of treaties possible. Under a *civil law treaty* each Member State would mutually recognise the legal personality of foreign foundations. Under a *tax law treaty* each Member State would mutually accord tax-exempt foundation status to foreign foundations, with the consequence that such foreign foundations would receive the same tax benefits as a national tax-exempt foundation. The costs effects of this model are very hard to evaluate because there are many different constellations of treaties possible between Member States. If there were treaties between all Member States the effect would be comparable to the Harmonization Model. Unfortunately, experience (almost no treaties between the Member States) shows that it seems to be unrealistic that the Member States will establish such treaties.

4. *European Foundation Model*

The European Foundation Model constitutes a somewhat different approach, since it is an additional legal form which would overcome civil law barriers completely.

As regards the *implementation* of such a European Foundation Statute, the legal basis would be Art. 308 of the EC Treaty, combined with the fundamental freedoms (i.e., freedom of establishment and freedom of capital movement) which are applicable to cross-border activities of foundations: (1) purpose-related and non-purpose related economic activities of foundations seem to be protected by the freedom of establishment or by the freedom of services; (2) investment of assets is protected either by the freedom of establishment or by the freedom of capital movement; (3) donations seem to be protected by the freedom of capital movement. Existing national foundations will be entitled to take the form of a European Foundation, if such a transformation is in the line with the will of the founder as laid down in the foundation's statutes. In many cases it may be quite a difficult task to decide whether the founder of an already existing national foundation would have preferred the European Foundation as an organizational form, as it did not exist when he made his endowment. One solution could be a specific procedure allowing a transformation under the condition that the foundation's statutes can remain similar after the transformation.

The *cost effects* are dependent on the scope of the European Foundation Statute. As regards civil law barriers, we estimate that a European Foundation Statute could lead to a cost reduction of 90m to 101.7m euros (138m to 178.7m euros if we also take minimum capital into account). Apart from this, there would also occur a cost reduction of incalculable costs (costs of transfer of the foundations' seat, costs of reduplication, psychological costs, costs of failure).

Apart from the cost effects, the European Foundation may have the following *further effects*: it may encourage foundations to become internationally active; it could be seen as a good example of governance, could encourage a larger amount of private giving in Europe through much better visibility of the legal form, could be an incentive for more corporate giving and corporate social responsibility, could attract more international (and extra-European) giving to foundations in the EU, and it could serve as an adequate vehicle to foster the special needs of the growing European Research Area.

5. *European Foundation Model with Additional Tax Exemption*

A European Foundation with a tax-exempt status in all Member States would need an additional implementation of tax law rules.

As regards the scope of such tax benefits, there are various options. Instead of a harmonization, it seems to us that only a non-discriminatory solution is both realistic and reasonable. Thus, a European Foundation would receive the same tax benefit as a tax-exempt foundation in the *same* Member State.

As regards implementation, there could be an implementation by the European Foundation Statute itself, by an additional treaty, or (automatically) by collecting the lowest common denominator of the national tax laws of the Member States.

While the two first options do not seem very realistic, the third option may be considered: According to the adjudication by the European Court of Justice in the “Stauffer” case, it is unlawful to deny tax-exempt status to a foreign foundation if this foundation meets all the State’s other requirements of a national tax-exempt foundation. Thus, theoretically, the European Foundation would automatically be tax-exempt in all Member States, if the European Foundation Statute were to combine all requirements of the tax laws of the Member States (de facto lowest common denominator). Consequently for a European Foundation there would be allowed only such public benefit purposes as are allowed in all Member States. Additionally there would be a prohibition of remuneration for the board of directors (as under *Spanish* tax law), a duty of timely disbursement and several formal statements in the foundation’s statute (as in *German* tax law), allowing only such purposes which are regarded as “public benefit” in every Member State, etc. The requirements of tax law could be mandatory for all European Foundations or be part of a “model statute”, leaving it open to the founder whether she/he wants the additional advantage of the status of a tax benefit foundation in all Member States.

Such a European Foundation would mean the most expectable cost reduction effects (from the feasible models). The potential cost reduction could add up to 90m to 101.7m euros (138m to 178.7m euros, minimum capital included). The approach would create the most far-reaching incentive for funding trans-national European causes, and it would have the greatest potential to foster science and research funding as well as other causes of European interest. It would lead towards a shared concept of a European public good, even though such a concept may only be feasible for a limited list of purposes mentioned in European Treaties such as the goal to promote R&D and the competitiveness associated therewith.

Table 27: Cost reduction by policy options

| Model | Effectuated cost categories | Cost reduction |
|------------|--|--|
| Status quo | Generally none In case of information | Generally none In case of information |

| | | |
|-----------------------|---|--|
| | policy and/or means of soft law: incalculable costs | policy and means of soft law: up to 18m to 20m euros ³²³ and incalculable costs |
| Harmonization | Depending on the scope | up to 138m-178.7m ³²⁴ |
| Treaties | Depending on the scope | up to 138m-178.7m ³²⁵ |
| EUF | Establishment running? (Minimum capital) | 7.5m-19.2m 82m (48m-77m) |
| | | 91m – 101.7 (138m - 178.7m) |
| EUF and tax exemption | Establishment running? Minimum capital | 7.5m-19.2m 82.5m 48m-77m |
| | | 91m – 101.7 (138m - 178.7m) |

II. Options for the Content of a European Foundation Statute

If the European Foundation model was chosen, the next question would relate to the content of a European Foundation Statute.

1. General Framework

In order to develop such a Statute, the similarities and differences of the foundation laws of the Member State should be taken into account. In light of the legal comparative analysis, it seems feasible that a European Foundation should have the following five main characteristics: (1) a legal personality (with full capacity and limited liability), (2) promotion of a public benefit purpose, (3) no formal membership, (4) State supervision, and (5) establishment by registration (without discretion of the registrar).

One important question is how detailed a Statute on the European Foundation should be. Generally, two models are possible: a comprehensive statute (like the draft of the SPE) where national law of Member States is applicable as regards other legal fields (e.g., tax law, insolvency law), or a statute with rudimentary rules (like the SE), which are supplemented by the national rules of every Member State in other legal fields as well as in company law. A comprehensive statute is preferable, because such a statute is less complex and more transparent and thus can better reduce the transaction costs.

An important aim is to find adequate rules to ensure that the European Foundation will be seen as a trustworthy institution. The Member States will probably not agree to the

³²³ This figure is estimated under the assumption that the costs for legal counselling would be reduced by 20% compared to the current situation.

³²⁴ Total harmonization of foundation law and tax law.

³²⁵ Treaties between all Member States both in civil law and tax law.

introduction of a European Foundation Statute if they have concerns that this European legal form might not be trustworthy. This could be, for example, because this form could be misused to circumvent Member State national foundation law, tax law or trade law. However, this does not necessarily mean that the European Foundation has to copy the most restrictive national foundation law among the Member States or combine the most restrictive provisions from every Member State.

2. Details

There are several possibilities in trying to define *public benefit purpose* (closed list, open list).

It is questionable whether a European Foundation should have an obligatory “*European*” dimension. In order to avoid complicated questions of definition and to undesirable results, there are good reasons to follow the approach of the draft for the European Private Company and to require no European dimension. An alternative would be the necessity of a European dimension, which is defined in very generous terms.

It is arguable whether a certain minimum amount of *founding assets* should be necessary, with the Member States having rather different solutions to this question. As there are examples where such an initial minimum endowment does not seem to be necessary for the public benefit function of the foundation, it is recommended either not to require a minimum capital, or to keep it rather modest (e.g., € 25,000 or 50,000) in order to allow smaller initiatives to use this legal form as well.

As regards *governance*, there may be good arguments for choosing a “private supervision model”, which combines private supervisory mechanisms (e.g., rudimentary mandatory rules for the foundation’s organs, auditing, mandatory rules for the content and quality of annual reports and annual accounts, and requirements for transparency/disclosure) with state supervisory mechanisms (for a small list of key issues like fundamental changes). All or some of the private supervisory mechanisms could be introduced as mandatory requirements for all or for only “large” foundations, or they could be introduced as voluntary recommendations in a kind of “Foundation Governance Code” as a means of self-regulation.

With respect to *State supervision*, there are two potential models: supervision by a central European State supervisory authority or supervision by the relevant national State supervisory authority or authorities. Both models have their pros and cons. A central European State supervisory authority may have the advantage of a better reputation and can develop a uniform standard in its supervisory policy and practice. Decentralised State supervision by national State supervisory authorities draws advantages from being able to avoid some of the bureaucracy and translation problems. If the second model is chosen, the following question arises as to which national State supervisory authority should be competent: the State supervisory authority of the Member State where the European Foundation has its statutory main office (registered office/home office), or the State supervisory authority of the Member State where the European Foundation has its actual administrative main office (operational headquarters/house office). The usual and more convincing solution seems to be the first option (registered office), since there could otherwise be legal uncertainty for cross-border activities. Whatever the case, a certain amount of cooperation between the

different national State supervisory authorities will be necessary. The State supervisory authority should have the following tasks and powers: (1) registration, (2) consent to fundamental decisions, (3) information rights, and (4) intervention rights in the event of any significant breach of the law or the statutes. The State supervisory authority should not have the right to review the discretionary decisions of the board of directors for any other reason. The measures of the State supervisory authorities should be proportionate and all their decisions should be appealable in the courts.

As regards *economic activities* by the foundation itself, there are two main options in the Member States: (1) generally no restriction; national rules of commercial law or co-determination may be applicable, or (2) economic activities must be subordinated to the foundation's public benefit purpose. If the risks of direct trading by the European Foundation were regarded as too high because of the lack of national creditor protection rules, a further alternative could be to allow a European Foundation to establish a subsidiary trading company³²⁶ (which may be a national company of one Member State or a European Private Company).

If the European Foundation should have an additional *tax-exempt status*, the first task will be to find the lowest common denominator of the national tax laws of the Member States. Until now nobody has collated all the requirements of the 27 Member States' national tax laws, but there are good chances that such an approach will be successful due to the progress of comparative research in this field. The second task would be to enter the lowest common denominator into a statute in the least complex way possible. There should be amendment procedures which are flexible enough to react to further reforms of the national tax law of one or several Member States – experience shows that tax law changes fast. Several possibilities exist to decrease complexity (e.g., the “small” solution: the lowest common denominator of a smaller number of Member States, support by the Member States to exempt a Tax-Exempt European Foundation, if the fundamental requirements of the national tax law are fulfilled).

³²⁶ Almost all Member States allow a foundation to be the major or only shareholder of a company.