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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Proposal for a Council Regulation on the Statute for a European Foundation (FE)

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1. PROBLEM DEFINITION

Public benefit purpose foundations — which this impact assessment specifically focuses on — are significant actors in the EU and its economy. Through their activities in key areas, such as education and research, social and health services, the arts and culture or environmental protection, they make a major contribution to the achievement of a number of the EU's objectives. There are approximately 110 000 public benefit purpose foundations in the EU. Their assets amount to about €350 billion and their expenditures to €83 billion (both lower-end estimates)¹. The role of foundations in performing public benefit purpose activities has always been important, but it has gained even greater significance in the aftermath of the recent economic and financial crisis due to the growing expectations of citizens. Yet, support from the private sector to public benefit causes is not fully exploited across the EU.

One of the main reasons appears to be that foundations cannot channel funds efficiently on a cross-border basis in the EU. When they decide to operate across borders, foundations have to spend part of the resources they collect on legal advice or fulfilling legal and administrative requirements laid down by the different national laws. This means that less funding is available for public benefit purpose activities. This was confirmed by the public consultation carried out by the Commission in 2009², in which respondents underlined that part of the funds of foundations active abroad is used to cover the costs of operations instead of being channelled for public benefit purposes.

In addition, these legal and administrative requirements have a strong deterrent effect on foundations initiating or developing operations across borders, with the result that the scope of their activity is narrower than could be expected from their potential and their expansion ambitions.

More specifically, foundations often face uncertainty about recognition as a public benefit purpose foundation in other Member States (which leads to uncertainty also with respect to the applicable tax treatment); they have to bear unnecessary costs for channelling funds on a cross-border basis due to civil and tax law barriers; and the cross-border donations they receive are often limited due to donors' lack of trust in and knowledge of foreign foundations, and the fact that donors are not sure whether they are entitled to tax benefits with respect to donations made across borders.

2. ANALYSIS OF SUBSIDIARITY

EU action is needed to remove existing barriers and restrictions to foundations' cross-border operations across the EU. The current situation demonstrates that the problem is not properly addressed at national level and that its cross-border character requires a common solution to

¹ Data stem from the 2008 feasibility study. The figures given above are intended to provide an impression — rather than a complete picture — of the foundation sector and should be seen as indicative due to the difficulty of obtaining data about European foundations. See http://ec.europa.eu/internal_market/company/docs/eufoundation/feasibilitystudy_en.pdf.

² See http://ec.europa.eu/internal_market/consultations/docs/2009/foundation/summary_report_en.pdf.

enhance foundations' mobility. The objectives of the proposed action could be better achieved at EU level, which would ensure clear and coherent rules across the EU. The preferred option of the Statute for a European Foundation, with non-discriminatory tax treatment applied automatically to European Foundations (FE), is an optional tool and would not replace national legislation. It would not go beyond what is necessary to satisfactorily achieve the objectives, and it therefore complies with the principle of proportionality.

3. OBJECTIVES

The main objective is to allow foundations to more efficiently channel private funds to public benefit purposes on a cross-border basis in the EU, which should – for instance, due to lower costs for foundations – increase the amount of funding available for public benefit purpose activities, and in turn benefit European citizens and the EU economy. It translates into several specific objectives, including reducing costs and uncertainty for foundations, and increasing cross-border donations.

4. POLICY OPTIONS

The following options are considered in the impact assessment: (1) the baseline scenario; (2) an information campaign and a voluntary quality charter; (3) a Statute for a European Foundation (with or without addressing tax issues); and (4) limited harmonisation of laws on foundations. Sub-options for the Statute are considered in detail in an Annex.

The *baseline scenario* includes ongoing initiatives, which would continue to have impacts on foundations' cross-border activities: inter alia infringement cases and work in the tax area, ensuring completeness of the implementation of the Services Directive, and non-legislative initiatives in the area of research and to support cross-border giving.

An *information campaign* would seek to improve foundations' knowledge of their rights and obligations under national laws when operating across borders. The campaign could be conducted through a Europe-wide website or specific publications; it could be run and financed by the Commission, by the foundation sector, or by the latter with the Commission's support. In addition, foundations could be encouraged to sign up to a *quality charter*, on a voluntary basis, to ensure the quality and trustworthiness of their activities. Such a charter, to be drawn up by the foundation sector with the support of the Commission, would establish a set of common rules and criteria to be complied with (e.g. on reporting, transparency and disclosure). Compliance with the charter could be subject to independent, objective scrutiny by a third party. Moreover, the sector could be encouraged to broaden the scope of the charter by agreeing on a common definition of a public benefit purpose foundation. In order to improve public awareness of the charter and the visibility of the foundations complying with it, these foundations could be awarded a 'European quality label'.

A *Statute for a European Foundation without addressing tax issues* would be an alternative legal form for foundations; it would not call for any changes to the existing national forms of foundations and its use would be voluntary. The Statute would lay down the main requirements for the European Foundation, which would have legal personality across the EU.

For the sake of trustworthiness and accountability, the FE would have to have founding assets equivalent to at least €25 000. Its assets would be dedicated to a public benefit purpose, as defined in the Statute through an exhaustive list of commonly accepted purposes in most

Member States. Each foundation wanting to use the Statute would need to prove its cross-border dimension in terms of activities or intentions thereof in at least two Member States. The FE would be free to pursue its purposes in any lawful manner allowed in its statutes, consistent with its public benefit purpose and in line with the Regulation on the Statute. It would have the capacity to carry out activities within any Member State and outside the EU. It would be free to engage in economic activities, provided that any profit was exclusively used in pursuance of its public benefit purposes. However, economic activities unrelated to the FE's public benefit purpose would only be permitted up to a threshold, which would be determined in the Statute. To ensure high standards of transparency and accountability, the FE's annual accounts would need to be audited and disclosed to the public. Finally, supervision would be carried out by designated national supervisory authorities, for which the Statute would stipulate proportionate but robust powers.

Under the *Statute for a European Foundation addressing tax issues* European Foundations would, in addition, be automatically granted the same tax benefits as are provided for domestic public benefit purpose foundations, without any need to check whether they were 'comparable' to domestic ones. The same solution would apply with respect to donors to and beneficiaries of the European Foundation.

Limited harmonisation of laws on foundations would mean harmonising those requirements that foundations need to meet to be able to register and operate abroad, i.e. the acceptable purposes of a public benefit purpose foundation, minimum assets, registration requirements and some aspects of internal governance. Member States would have to allow foundations fulfilling harmonised criteria to operate in their country without imposing any additional requirements. The options of more extensive harmonisation of national laws on foundations, and harmonisation of the tax treatment of foundations and their donors were also considered.

5. ASSESSMENT OF IMPACTS AND COMPARISON OF OPTIONS

The policy options considered are expected to have the following impacts:

The baseline scenario would have a positive but limited impact on foundations and cross-border donations to the extent that the current infringement proceedings would remove tax discrimination against foreign public benefit purpose foundations and their donors. However, infringement proceedings may not resolve discrimination problems quickly. Moreover, the simple application of the non-discrimination principle would not sufficiently facilitate the activities of foundations or encourage cross-border donations because there would still be a degree of uncertainty about whether a foreign public benefit purpose foundation would be recognised as comparable to a domestic one by tax authorities. Moreover, implementation of the Services Directive is having a positive impact on reducing obstacles and costs for the establishment of, and the cross-border provision of services by, foundations engaging in economic activities but would not bring changes for those carrying out non-economic activities (e.g. grant-making foundations). Therefore, the uncertainty concerning the public benefit status of a foreign foundation would hardly be reduced. For those reasons, this option would not achieve the chosen policy objectives.

The effectiveness of an *information campaign* and a *voluntary quality charter* would be marginal. An information campaign would facilitate to some extent cross-border donations and foundations' activities by providing more information on Member States' rules and procedures. However, it would require a comprehensive information-gathering effort and

therefore generate costs, and would not replace specific legal advice. The quality charter, through voluntary common rules across the EU and granting a European label, could increase donors' willingness to give to foundations that have signed up to the charter, as well as national authorities' trust in them. It would nonetheless, as a soft law instrument, have a limited impact as it would not address the national civil and tax law barriers in place and as authorities would be free to decide whether or not to recognise the label.

These two options would not lead to additional administrative burdens for the national authorities, and might enjoy a high level of political acceptability. As the barriers and costs would remain largely unchanged for foundations, they might not be willing to develop many new cross-border projects and, consequently, to employ additional employees or volunteers. This could, in turn, deprive direct beneficiaries and EU citizens as a whole of some social, environmental or economic benefits.

A Statute for a European Foundation without addressing tax issues would offer more uniform conditions regarding recognition as a public benefit purpose foundation, thereby reducing legal uncertainty across the Member States. It would also cut costs currently due to obstacles created by national civil laws. Cross-border donations would be substantially encouraged by the European label and the Statute's European image could also encourage more foundations' activities on EU-wide issues such as research or the environment. However, this policy option would not address the tax treatment of foreign foundations and donors, and its related costs, and in particular the uncertainty of being recognised as a public benefit purpose foundation for tax purposes abroad. It might have some indirect positive effect if tax authorities were less strict in performing the 'comparability test' due to higher trustworthiness of the European legal form.

A Statute for a European Foundation with automatically applied non-discriminatory tax treatment appears to be the most appropriate policy option as it would achieve all of the objectives by removing to a large extent both the civil and tax law-related barriers and costs. It would provide the same benefits as mentioned above for the Statute without addressing tax issues. In addition, by introducing non-discriminatory tax treatment without 'comparability test', it would further reduce compliance and legal advice costs and further diminish legal uncertainty — in particular of being recognised as a public benefit purpose foundation across Member States for tax purposes.

Overall, the Statute addressing tax issues could be expected to result in a reduction of most of the legal counselling costs, which are currently (for civil and tax law) estimated at between €90 and €102 million a year. As it should offer the best conditions, as compared to the other options, for foundations to develop their cross-border activities in areas which are important for society (e.g. research and education, social and health services, the arts, culture or the environment) and should best incentivise donations, its impacts on direct beneficiaries and EU citizens in terms of social, economic or environmental benefits should also be higher than for the other policy options.

The Statute's impact would depend on the number of foundations that decided to use it and the number of resulting donations. Provided that the rules governing the FE are precise and uniform, it could be assumed that a number of foundations which are keen to expand their existing EU-wide activities (between 25 000 and 30 000³) may be interested in doing so

³ Data from the feasibility study.

through this legal form. In addition, foundations currently only active in one national market or those yet to be established might also be interested in the Statute. As regards the impact on cross-border donations, figures for gifts channelled through the ‘Transnational Giving Europe’ mechanism, which in 2010 grew by 25% and exceeded €4.2 million, indicate that there is growing potential for cross-border giving that could be tapped by the Statute.

Member States would need to adapt their national systems and train staff in the relevant national registration, supervisory and tax authorities to be able to deal with the new legal form of the FE but this should not impose major administrative burdens. Most countries already have a registry for foundations and there is also a state supervisory authority for foundations in all Member States, so the Statute would not lead to significant costs associated with the creation of new authorities. Given that the Statute would not lead to any changes in national laws, it should also be more politically acceptable than the harmonisation option.

Limited harmonisation of laws on foundations would offer a higher degree of uniformity among national legislations on this topic. As it would harmonise the most relevant rules for foundations’ cross-border operations, and in particular the definition of a public benefit purpose, it could facilitate their activities, reduce their costs and provide them with more legal certainty of being recognised as a public benefit purpose foundation for civil law purposes abroad. However, it would be challenging to reach a compromise on harmonised definitions among all Member States due to the diversity of national laws.

Limited harmonisation would not bring any direct benefit with regard to tax restrictions either, although it could be argued that it might bring indirect benefits and a less strict approach by tax administrations in performing the ‘comparability test’. Therefore, this option would lead to cost reductions and impacts on donations potentially comparable to those under the Statute without tax issues, although in contrast to the latter, it would not offer foundations a recognisable European label. Updating national laws on foundations due to harmonisation would lead to some administrative and compliance costs for national authorities and stakeholders.

The options of extensive harmonisation of national laws on foundations and the introduction of a uniform set of tax laws for foundations and their donors were discarded. Although they could lead to substantial benefits by effectively removing all the relevant differences between national laws and by ensuring the same tax treatment across the EU, these options would be technically challenging and politically unacceptable to Member States, not least due to the political sensitivity of tax issues.

6. MONITORING AND EVALUATION

The Commission will monitor implementation of the chosen policy option and assess the progress achieved according to the objectives set. The necessary data will be gathered in collaboration with national authorities, the foundation sector and any other relevant stakeholders. If the Statute is chosen, in its monitoring the Commission could focus on issues such as the number of European Foundations established, the variation in their cross-border activities and trends in cross-border donations. If limited harmonisation is preferred, the Commission would initially focus on implementation of the proposal, and only then on gathering data. As regards evaluation, an evaluation report would be undertaken seven years after the entry into force of the chosen proposal to assess progress and check whether the objectives have been achieved.