

Consultation on a possible statute for a European foundation

Questionnaire, Part I

Information about the respondent

A. Name of the foundation/company/organisation/person and your function

The Danish Commerce and Companies Agency (DCCA)
Søren Clausen, Special advisor

B. Address and register ID number of registered organisations

Kampmannsgade 1
1780 Copenhagen V
Denmark

CVR: 10150817

C. The legal form, field of activity and country of origin of your organisation

Public authority, Denmark

The DCCA is registration authority for all commercial foundations covered by the law on commercial foundations. Besides this the DCCA is supervisory authority for the main part of these commercial foundations.

Question 1: Barriers to the cross-border activities/establishment of foundations

Q 1.1 The study identifies four categories of civil law barriers/difficulties for the crossborder activities of foundations in Europe (pp. 105-111):

- 1) Recognition of foreign foundations (pp. 105-107),
- 2) Recognition of trusts (p. 107),
- 3) Cross-border transfer of the Real Seat (pp. 107-110),
- 4) Cross-border transfer of the Registered Seat (pp. 110-111).

Do you agree with these findings?

Yes, but the DCCA is of the opinion that the barriers do not impose the amount of burdens/problems that the study concludes.

The problems in the study regarding trusts don't seem to be solved by a European foundation. The difference between trusts and foundations are of fundamental character. The problem with recognition of trusts in civil law Member states therefore seem to be a problem related to the trust form it self.

A part of the cost savings in the study are based on the assumption that all current foundations that experience problems with cross-border operations can transform into a European foundation. The DCCA finds that this is a rather optimistic assumption.

In order for an existing national foundation to transform into a European foundation (or set up a new European foundation) at least some Member states (or maybe most of them) will require

that the purpose of the European foundation or the new foundation is within the purpose of the existing foundation. This is to prevent that the setting up of a European foundation or the new foundation is not a way to circumvent the rules presently applying to the existing foundation. It is unlikely that the national supervisory authority will allow the proposed solution in all cases and therefore the savings related to this solution in the study has to be reduced.

The study identifies a barrier related to setting up a branch in another Member state when operating regularly in this country and the costs related to this barrier should be reduced by the European foundation. The DCCA is not sure about this conclusion as some countries might still put forth a demand for registration at a national register. This is because the registration is often performed for tax or VAT purposes and is a matter of national regulation.

Q 1.2 Do you see any further civil law barriers/difficulties? Please specify.

Q 1.3 Please rank the civil law barriers in order, starting with the one you find the most important.

It is not possible for the DCCA to list the barriers in order.

Q 1.4 If you are answering for a foundation, please give concrete examples of the civil law barriers and/or difficulties you have encountered. How do you deal with these barriers/difficulties? Have they influenced your plans to conduct cross-border activities?

Q 1.5 If you are answering for a foundation and have tried to transfer your real or registered seat cross-border, have you experienced any problems? Please specify your reasons for wanting to transfer the seat and the problems experienced, if any.

Q 1.6 The study identifies eight categories of tax law barriers/difficulties for the crossborder activities of foundations in Europe (pp. 111-122):

- 1) Income taxation of foreign foundations (pp. 112-114),
- 2) Income taxation of domestic foundations operating abroad (pp. 114-115),
- 3) Income taxation of domestic donors of foreign foundations (p. 116),
- 4) Income taxation of foreign donors of domestic foundations (p. 117),
- 5) Income taxation of foreign donors of foreign foundations (pp. 117-118),
- 6) Income taxation of affiliated beneficiaries (p. 118),
- 7) Inheritance taxation (pp. 118-120),
- 8) Further taxes (pp. 120-121).

Do you agree with these findings? If not, please explain why.

The DCCA can't answer questions related to tax law.

Q 1.7 Do you see any further tax law barriers/difficulties? Please specify.

The DCCA can't answer questions related to tax law.

Q 1.8 Please rank the tax law barriers in order, starting with the one you find the most important.

The DCCA can't answer questions related to tax law.

Q 1.9 If you are answering for a foundation, please give concrete examples of the tax law barriers and/or difficulties you have encountered. How do you deal with these barriers/difficulties? Have they influenced your plans to conduct cross-border activities?

Q 1.10 Do you consider the civil law barriers or the tax law barriers more important?

The DCCA can't answer questions related to tax law.

Q 1.11 Why do foundations set up additional organisations/structures in other Member States in your view?

The DCCA doesn't have specific knowledge of Danish foundations setting up additional organisations/structures in other member states.

Q 1.12 The study seems to identify tax barriers as the main reason for foundations setting up additional organisations/structures in other Member States (p. 122).

Do you agree with this finding? If not, what do you think is the main reason for foundations setting up additional structures/organisations in other Member States?

The DCCA can't answer questions related to tax law. On the other hand the DCCA doesn't know of foundations setting up additional organisations/structures besides holding companies.

Question 2 – What solutions would be most appropriate

Q 2.1 The study assesses five different options to deal with the barriers/difficulties identified. The options assessed are (p. 178-194):

- 1) Status quo combined with soft law instruments
- 2) Harmonization
- 3) Bilateral or multilateral treaties
- 4) A European Foundation Statute without tax elements, and
- 5) A European Foundation Statute with tax elements

What other options for solving the problems do you see if any?

Some of the problems identified in the study relates to specific Member states violating EC law. As this is considered a problem in the study one solution could be infringement procedures towards these identified countries.

Q 2.2 The study suggests that of the above options, the European Foundation Statute seems to be the preferable policy option (p. 1). Do you agree? Why/why not?

The DCCA doesn't agree with this solution.

The DCCA is of the opinion that the problem doesn't call for EU regulation. One of the reasons is that according to Danish law foundations have the possibility to own one or more companies. Through a company the foundation can perform the cross border activities and therefore the need for the European foundation isn't that big.

Also when comparing this initiative to the regulations regarding the European company (SE) or the European cooperative society (SCE), the DCCA expect a very low number of foundations, if any, willing to use the new organisational structure.

See also the answer to question 1.1 above

Q 2.3 If you do not agree, what do you consider as the preferable policy option? Why?

The preferable solution is status quo because the DCCA is of the opinion that the need for a European foundation isn't as big as indicated by the study.

Q 2.4 Would you consider a European Foundation Statute which does not include tax elements (for instance a tax-exempt status in all EU Member States, p.191) as a useful/attractive instrument? Why/why not?

No, if a European foundation is to be considered, the question of tax elements most likely has to be addressed.

Q 2.5 Do you believe that an accreditation system (pp. 179-180) could be a proportionate solution to the problems for cross-border activities that foundations face today? Why/why not?

No.

A system of accreditation would bring about unnecessary administrative burdens.

Q 2.6 What added value do you think a "European label" (obtained for instance through a European legal form like the European Foundation) would bring for the foundations?

Q 2.7 In your view, the benefits attached to a "European label" for foundations:

- can only be achieved through a specific European legal form (European Foundation Statute)
- can be achieved through an accreditation system
- can already be achieved through national foundations (e.g. through their names, statutes, marketing)
- can be achieved through other means, which ones?

Question 3: Content and form of a possible statute for a European Foundation

Q 3.1 According to the study the European Foundation should have the following five main characteristics (p.194):

- 1) Legal personality
- 2) Promotion of a public benefit purpose
- 3) No membership
- 4) State supervision, and
- 5) Establishment by registration

Do you agree that a European Foundation should have these five characteristics? If not, please explain why.

Beside these characteristics it is also important that the management of the foundation is independent in relation to the founder, contributors and beneficiaries. There should also be a minimum capital requirement.

Q 3.2 How detailed should the European Foundation Statute be? Should it be as comprehensive as possible (as is the case for the Commission proposal for a European Private Company Statute) or should it only contain basic rules and refer to national laws on other issues (as is the case for the European Company Statute) (pp. 195-196)?

Q 3.3 Should an initial endowment be required (p. 199)? If yes, how large an endowment should be required?

Yes

The amount of initial endowment is not that important, but it should under no circumstances be allowed or possible to set up a foundation without capital.

Q 3.4 What should be the rule on economic activities by the European Foundation itself (p. 204)?

The DCCA thinks that it will be difficult to only regulate the public benefit purpose foundations. In Member states where foundations are allowed to have “any lawful purpose” it is often the case that the foundations have mixed purposes. This means that they pursue both public benefit purposes and other types of purposes.

Q 3.5 How should the supervision of a European Foundation be arranged (pp. 200-203)?

It should be performed by a national, public, registration and supervisory authority.

Q 3.6 On what conditions should an existing foundation be able to transform itself into a European Foundation (p 184)?

That should not be possible.

If the setting up of a European foundation is made possible it should only be possible to choose this legal form/organisational structure at the initial founding.

Q 3.7 If you think that the European Foundation should have other characteristics, please specify which ones.

See the answer to question 3.1.

Question 4: Potential transformation of existing foundations into a European Foundation

If a European Foundation Statute were introduced, the possibility of transforming existing foundations into a European Foundation would seem to depend on several factors e.g. the statutes of the foundation ("will of the founder"), the agreement of the board of the foundation, the approval of the supervisory authority, the scope of crossborder activities and existing barriers, as well as on the content of a possible European Foundation Statute (p.184).

Q 4.1 If you are answering for a foundation, would you consider transforming your foundation into a European Foundation if possible?

Q 4.2 On what criteria would the decision of the board depend?

Q 4.3 What do you think the benefits and drawbacks of a transformation in the case of your foundation would be?

Q 4.4 Would the possibility to transform itself into a European Foundation be decisive in order for your foundation to expand its activities to other Member States? Why/why not?

Q 4.5 In case your foundation already operates cross-border, would this possibility lead to a substantial increase of cross-border activities?

Question 5: Any other comments

General remarks about the possible statute on a European foundation:

The DCCA finds that it is a problem with the proposed regulation of foundations, that there is no common European definition of a foundation. The member states therefore have different views as regards what constitutes a foundation and what activities it can undertake.

Beside this there is no harmonisation regarding foundations, in contradiction to company law. It will therefore be a much more difficult and demanding task to reach a compromise and produce a directive or regulation concerning a European foundation.