ICSA Response

To European Commission Consultation:

Consultation on a Possible Statute for a European Foundation

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INSTITUTE OF CHARTERED SECRETARIES AND ADMINISTRATORS

Response to Consultation on a Possible Statute for a European Foundation

The Institute of Chartered Secretaries and Administrators (ICSA) is the professional body qualifying and supporting company secretaries and corporate administrators in all sectors of the economy. Members are educated in a range of topics including finance, HR, company law, administration and governance, which enable them to add value to any organisation. The Institute has some 10% of UK members directly employed in the not for profit sector, with many more involved on a voluntary basis in capacities such as trustees and school governors.

Responses to Specific Questions
Information about the respondent

A. Name of the foundation/company/organisation/person and your function
This response is being submitted on behalf of the Institute of Chartered Secretaries and Administrators (ICSA) by Louise Thomson, Head of Policy (Not-for-Profit).

B. Address and register ID number of registered organisations
ICSA’s offices are at 16 Park Crescent, London, W1B 1AH.

C. The legal form, field of activity and country of origin of your organisation
ICSA is a non-profit making professional body established by Royal Charter. We are the professional body qualifying and supporting Chartered Secretaries in over 70 countries.

D. If you are answering for a foundation
ICSA is not responding on behalf of a foundation. By responding to this consultation we are representing the views of our members, students and the wider profession of Chartered Secretaries operating in the not-for-profit sector and who have considerable experience of best practice in corporate governance, compliance and administration within the sector.

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 cross border 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?
The document provides an insightful guide to the theoretical barriers that trusts and foundations may face should they wish to work across the European community or transfer their office of direction to another country. The document, however, fails to provide sufficient information to support the argument that these barriers actually do present difficulties for those foundations and trusts working in more than one European country. The admission in the paper that there has been little obvious public reaction to
the challenges highlighted would suggest that the matters addressed are only of relevance to a minority of entities at the present time.

For those foundations and trusts that do wish to operate across many borders, however, and have experienced difficulties in doing so the introduction of a new European Foundation may provide a solution. In this scenario we can appreciate the additional flexibility available within the European Foundation format for those entities that wish to adopt it of their own volition.

**Q 1.2 Do you see any further civil law barriers/difficulties? Please specify.**
The paper seems fairly comprehensive in providing an overview of the matters in question.

**Q 1.3 Please rank the civil law barriers in order, starting with the one you find the most important.**
As we have expressed earlier, the theoretical barriers are not overwhelmingly supported by evidence of those challenges in practice. It is the Institute’s view that the psychological, language barriers and lack of understanding of each jurisdiction’s legal framework for trusts and foundations are likely to have a more realistic impact on their cross border activities.

**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?**
ICSAs is not responding to this consultation on behalf of a foundation, this question is therefore, not applicable.

**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.**
As mentioned previously, this question is not relevant in the ICSA’s case.

**Q 1.6 The study identifies eight categories of tax law barriers/difficulties for the cross border 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 study provides an interesting précis of the differing tax treatments to trusts and foundations and their donors across Europe. It is noted, however, that recent and ongoing developments are likely to impact on the current tax framework in some European countries.
Q 1.7 Do you see any further tax law barriers/difficulties? Please specify.
The document appears to provide a sound overview of the situation.

Q 1.8 Please rank the tax law barriers in order, starting with the one you find the most important.
Given the recent and ongoing developments in the tax framework for trusts, foundations and charitable entities, it would be preferable to assess the potential and real problems in the light of the reactions of those governments affected by recent decisions.

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?
ICSA is not representing any foundations; this question is therefore not relevant.

Q 1.10 Do you consider the civil law barriers or the tax law barriers more important?
On balance, given the available evidence presented in the feasibility study, it is to be assumed that the tax law barriers present a more real challenge than those highlighted under the civil law framework.

Q 1.11 Why do foundations set up additional organisations/structures in other Member States in your view?
Please see response below.

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?
This appears to be a significant factor; however, there is some weight to the arguments of establishing branches and other subsidiary entities to ensure that there is a degree of local accountability and representation for the trust or foundation’s activities.

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?
The five options appear to be the most obvious at the present time.
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? Further to previous responses, ICSA is not sufficiently convinced by the evidence presented that there is significant need and support for the introduction of a new type of incorporated entity that is applicable across Europe. For a minority of existing and proposed trusts and foundations, however, that currently does or intends to work across many borders and find the European Foundation model attractive, the flexibility of having a specific format may be of benefit to them.

Q 2.3 If you do not agree, what do you consider as the preferable policy option? Why?
Without further evidence that strongly favours the need for major changes, ICSA would back the option of maintaining the status quo backed up with codes of conduct, governance standards and other measures that are proportionate to the size and activities of trusts and foundations. Such mechanisms should take account of existing supervisory and regulatory in each country and should, where possible, complement those standards.

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?
Further to previous comments on the limited demand for a European Foundation and the observation that tax matters are a key driver for their introduction, the option of a European Foundation format that does not include tax benefits would seem to further limit the demand and potential take-up for the new vehicle.

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?
In theory, it is certainly possible that a proportionate accreditation system could be introduced in order to resolve the issues of cross border activities of trusts and foundations.

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?
Without further detailed research and evidence as to the need for a European Foundation entity, it is difficult to assess what value could be added.

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?
Please see answer above.
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.
If the European Foundation is to take the narrow view of philanthropic and public benefit activities it may undertake to those similar to grant-making trusts, the five characteristics appear appropriate. A considerable drawback of the attractiveness of such a corporate framework for the charity sector within England, Wales, Scotland and Northern Ireland is the potential restriction on the activities that a European Foundation could undertake and the limitation on members, which could provide an extra layer of legitimacy and accountability to the actions of the foundation.

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)?
There should be sufficient guidance to enable the European Foundation to be widely recognised across European participants, with due reference to those national laws that are appropriate and proportionate to the size and activities of the foundation. Flexibility and proportionality should be the key watchwords.

Q 3.3 Should an initial endowment be required (p. 199)? If yes, how large an endowment should be required?
While an initial minimum endowment may have some arguments in its support, it is not the Institute’s opinion that such an endowment becomes a condition of its creation or registration.

Q 3.4 What should be the rule on economic activities by the European Foundation itself (p. 204)?
Economic activities of the European Foundation should be restricted to supporting the public benefit aims of the foundation and should not be permitted to override the principal goals of the foundation. A threshold should be levied on the income that can be generated in a given year. Due consideration should also be given to ensuring that any proposed activities that present a risk to the foundation and its assets should be ring-fenced in an appropriate manner to mitigate those risks.
Q 3.5 How should the supervision of a European Foundation be arranged (pp. 200-203)?
ICSIA is in favour of maintaining the status quo with soft support provisions, but where the European Foundation is introduced any supervision should be by an external entity with a range of powers at its disposal. Any kind of supervision or regulation, however, should be proportionate to the size, assets and activities of the foundation. This will require various thresholds for different areas of oversight. European Foundations should also enjoy the freedom to insert additional clauses within their governing document to strengthen their levels of accountability and transparency.

Q 3.6 On what conditions should an existing foundation be able to transform itself into a European Foundation (p. 184)?
Conditions should be based on the similar conditions available in respective European countries for the transfer and incorporation of public benefit assets to a new or existing entity with similar overarching principles.

Q 3.7 If you think that the European Foundation should have other characteristics, please specify which ones.
No other characteristics have been identified.

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 cross border 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?
The ICSA is not responding on behalf of a foundation. Answers to this and the following questions are, therefore, not relevant.

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
ICSIA has no other comments to make.