

RECOMMENDATION ON **FOUNDATION GOVERNANCE**

*COMMITTEE ON FOUNDATION GOVERNANCE
DECEMBER 2014*

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INTRODUCTION

The purpose of a commercial foundation is usually laid down by the founder. The board of directors is responsible for ensuring that the management of the foundation safeguard the purpose and interests of the foundation and that the foundation is administered in accordance therewith.

The fundamental difference between commercial foundations and enterprises is that commercial foundations do not have owners. Commercial foundations do not hold general meetings at which the owners decide whom the board of directors should consist of, and who controls that the board of directors is performing its duties adequately and in accordance with the wishes of the owners.

The overall purpose of foundation governance is to support the management of commercial foundations safeguard the purpose and interests of the foundation and administer the foundation in accordance with best practice.

Safeguarding the interests of the foundation involves a duty for the board of directors to ensure that the activity and distribution objectives are promoted in the best possible way, and that an executive board (if relevant) and other employees involved in daily operations work solely in the interests of the foundation. The board of directors should also safeguard the interests of the foundation in relation to any subsidiaries among other things by exercising active ownership.

Management of commercial foundations should be competent and professional in accordance with the intentions of the founder, the articles of association and current legislation. Only this will secure confidence in the commercial foundations from relevant stakeholders.

The Recommendations should assist in securing a solid basis for good governance of commercial foundations, transparency and openness regarding the work of the board of directors, and contribute to improving the governance of commercial foundations.

The Recommendations are a supplement to the legislation on commercial foundations, including the Commercial Foundations Act (abbreviated hereafter to LEF) and the Financial Statements Act (abbreviated to ÅRL), which set the framework for the needs of the outside world for transparency with regard to the governance of commercial foundations as well as foundation distributions and activities.

The Recommendations are not an exhaustive list for good governance of commercial foundations. The challenges and circumstances for the foundations and their boards of directors are far too diverse for this.

Recommendations are the best type of regulation of good governance of commercial foundations. However, this requires that the society, the foundations, and the foundations' various stakeholders have a positive attitude to governance of commercial foundations, that they follow developments in the area, engage in the debate on these, and that they are fundamentally positive about the Recommendations.

A. Soft law and its implications

The Recommendations are "soft law" and thus more flexible than legislation ("hard law"). Whereas regulation by law typically provides a minimum standard, soft law reflects a higher standard than legislation by describing best practice. Furthermore, soft law is characterised by a high degree of voluntarism, which provides the Recommendations with the flexibility necessary for commercial foundations to adjust the principles on good governance to the circumstances of the individual foundation.

Soft law is easier to adapt and more dynamic than legislation, and this makes it possible to keep the Recommendations continuously up-to-date.

There are significant differences between the individual commercial foundations, their purposes, activities, sizes, etc. and therefore also what is good governance for the individual commercial foundation.

The flexibility of the Recommendations is essential as there is no one-size-fits-all solution for good governance of all commercial foundations.

Therefore, the Recommendations enable the individual foundation to organise itself appropriately for its own specific situation.

B. The comply or explain approach

Reports on the Recommendations must apply the comply or explain principle.

This means that the board of directors of the individual commercial foundation itself decides the extent to which it wants to comply with the Recommendations.

The comply or explain principle is a key element in the Recommendations and is cemented in section 60 of LEF. Any explanations should relate to the individual Recommendation and should enable the reader to understand the type of management of the foundation.

If a commercial foundation fails to meet a Recommendation the board of directors must explain,

- why it has chosen differently, and
- what it has chosen to do instead.

Failure to comply with a Recommendation is **not** considered as a breach of rules but merely implies that the board of directors has chosen a different approach .

According to section 60(2) of LEF, the foundation authority can order the board of directors to account for its response to the Recommendations, when the foundation

- fails to address one or more Recommendations,
- fails to explain and justify a deviation, or
- provides a reason for a deviation from the Recommendations which is apparently unjustified or without meaning.

C. Reporting

Section 60 of LEF stipulates that the board of directors of a commercial foundation must take a position on the Recommendations on Foundation Governance.

In this context the board of directors must account for whether the foundation is complying with a given Recommendation; if not the board must explain the background for the non-compliance and what the foundation has chosen to do instead. According to section 77a of ÅRL, reporting must take place

- in the management commentary or notes in the annual report, or
- on the foundation's website with a precise reference to the website in the management commentary or in the notes.

The information must be presented clearly and easy to read. If a commercial foundation does not comply with a Recommendation, the explanation for the non-compliance must relate to the specific Recommendation, and it must enable the reader to understand the choice of the board of directors and the reasons therefor.

Reporting must cover the same period as the accounting period of the annual report.

These Recommendations only apply for commercial foundations.

If a commercial foundation has listed subsidiaries and/or group companies, these companies will be subject to the Recommendations on Corporate Governance. The governance of these companies shall not be contained in the report of the foundation.

The Committee on Foundation Governance has drawn up a form which commercial foundations can use for their reporting. The form is available on www.godfondsledelse.dk. By using the same reporting structure from year to year, stakeholders can more easily find, process and compare information.

RECOMMENDATIONS ON FOUNDATION GOVERNANCE

1. Transparency and communication


To different degrees, recipients of grants and parties entitled to support from the commercial foundation as well as other stakeholders (subsidiaries, associated companies, employees, trading partners and others) require information and knowledge about the foundation. How well they understand the foundation depends on the quality, scope and frequency of the information published by the foundation.

Transparency and openness are vital in order to be able to assess and take a position on the foundation.

Guidelines for communication help the foundation to provide reliable and accurate high-quality information on time and to ensure that the foundation at all times meets its purpose, including distribution purpose.

Essential information including statements from the board of directors on how and to what extent the foundation has complied with the Recommendations for Foundation Governance must be available on the foundation's website or in the management commentary or notes in the foundation's annual report.

1.1 IT IS RECOMMENDED that the board of directors adopt guidelines for external communication, including who can make public statements on behalf of the foundation and on what matters. The guidelines should address the need for transparency and stakeholders' needs and possibilities to obtain relevant up-to-date information about the circumstances of the foundation.

 **COMMENTS:** The rules of procedure of the board of directors could contain an overall description of the guidelines for external communication.

2. Tasks and responsibilities of the board of directors

The board of directors is responsible for the overall and strategic management of the foundation and safeguard the interests of the foundation in accordance with the purpose of the foundation. Members of the board of directors must act independently of individual interests.

The board of directors must lay down the strategic goals of the foundation and ensure that the prerequisites necessary to achieve such goals in the form of financial resources and competences are in place. The board of directors must also ensure an appropriate organisation of the foundation and its activities.

If the board of directors decides to employ an executive board, the board of directors must ensure that a competent executive board is employed and it must stipulate the tasks of the executive board as well as its conditions of employment and the allocation of responsibilities between the board of directors and the executive board. The board of directors is responsible for exercising control of the executive board and for setting guidelines on how this control is to be exercised.

If the board of directors decides to have an administrator, the board of directors must stipulate the tasks of the administrator and reporting to the board of directors. The board of directors may not allocate the administrator managerial positions which usually falls within the tasks of an executive manager for example daily management.

If the foundation does not have an executive manager, the board of directors is responsible for conducting the daily management.

The board of directors must secure regular dialogue and exchange of information between the board of directors and the auditor.

2.1. Overall tasks and responsibilities

2.1.1 IT IS RECOMMENDED that, in order to secure the activities of the commercial foundation in accordance with the purposes and interests of the foundation, at least once a year the board of directors take a position on the overall strategy and distribution policy of the foundation on the basis of the articles of association.

COMMENT: Strategy discussions can form the basis for discussions on whether the foundation's strategy adequately addresses the foundation's short-term and long-term opportunities and challenges.

2.2. Chairman and vice-chairman of the board of directors

The most important tasks of the chairman of the board of directors are to ensure that the board of directors performs its strategic, management and control duties.

The chairman should ensure that specialist knowledge and competences of individual board members are

utilised in the best possible manner and to the benefit of the foundation.

It is also the responsibility of the chairman to ensure effective board work, including good communication with good and constructive relationships within the board and with an executive board, if relevant.

2.2.1 IT IS RECOMMENDED that the chairman of the board of directors organise, convene and chair meetings of the board of directors in order to ensure effective board work and to establish the best conditions for the work of the board members individually and collectively.

COMMENT: The rules of procedure for the board of directors can include provisions that a yearly plan for meetings should be adopted annually.

2.2.2 IT IS RECOMMENDED that if, in addition to the position as chairman, in exceptional circumstances, the chairman of the board of directors is requested to perform specific operating functions for the commercial foundation, a board resolution be passed which ensures that the board of directors retains its independent, overall management and control function. Appropriate allocation of responsibilities should be ensured between the chairman, the vice-chairman, the other members of the board of directors and the executive board, if any.

COMMENT: It is advisable that the rules of procedure of the board of directors contain an overall description of the tasks, duties and responsibilities of the chairman and vice-chairman.

A board resolution that the chairman may accept single tasks in addition to the tasks pursuant to legislation and the rules of procedure should contain provisions on the specific precautions which have also been adopted to secure segregation of roles and responsibilities within the board of directors and between the board of directors and the executive board, if the foundation has one.

2.3. Composition and organization of the board of directors

Good governance of commercial foundations requires that the board of directors is composed appropriately in relation to its tasks and responsibilities.

The board of directors should be composed in a way that its tasks can be executed effectively in a constructive and qualified dialogue with a possible executive board.

If the articles of association do not contain provisions in this respect the board of directors should define the competences required by the foundation and it should regularly assess whether the composition of the board of directors and the competences of its members individually and collectively reflect the requirements imposed by the situation and circumstances of the foundation.

Self-supplementary appointment of members of the board of directors can entail a risk of exclusion and lack of new talent, diversity, competences, etc.

Appointments to the board of directors by external stakeholders can entail a risk that the member in question is perceived as a representative of external interests.

Irrespective of how the board of directors is appointed the board of directors should make sure that it is able to comply with legislation and the articles of association, including the purpose and interests of the

foundation, and thereby comply with the responsibilities incumbent upon the board of directors.

Diversity in relation to business and grants experience, age and gender etc. can improve the quality of the work of the board of directors.

When composing the board of directors it is important to secure a good balance between continuity and new talent among the members of the board of directors.


At suitable intervals, normally every year, the board of directors should consider whether the composition of the board and the competences of its members individually and collectively reflect the requirements imposed by the purpose of the foundation, including commercial and distribution purposes, its strategy, financial position and other circumstances.

If the board of directors ascertains that there are material weaknesses in the composition of the board of directors it is incumbent upon the board of directors at its own initiative to change the composition if necessary in dialogue with the foundation authority.

A member of the board of directors may resign from the board at any time during the appointment period. It is only the foundation authority who can dismiss a member of the board of directors during an appointment period.

2.3.1 IT IS RECOMMENDED that the board of directors regularly assess and stipulate the competences that the board of directors is to possess in order to perform the tasks incumbent upon the board of directors as well as possible.

2.3.2 IT IS RECOMMENDED that, with due respect of any right in the articles of association to make appointments, the board of directors ensures a structured, thorough and transparent process for selection and nomination of candidates for the board of directors.

 **COMMENT:** The preparatory process for selection and nomination of candidates should be approved by the board of directors and should ensure that the purpose of the foundation is carried out.

In order to ensure that the board of directors possess the correct competences it may, for boards with many members and where new appointments are self-supplementary, be appropriate to set up a nomination committee to propose candidates on the basis of a structured process.

Before making appointments to the board of directors, it may be appropriate to have a dialogue with an entity entitled to make appointments on the board's assessment and identification of the competences the board should possess in order to best perform the tasks incumbent upon it as well as the board's expectations to its competences and qualities.

2.3.3 IT IS RECOMMENDED that members of the board of directors are appointed on the basis of their personal qualities and competences taking into account the collective competences of the board and when composing and nominating new members of the board the need for introducing new talent is weighed against the need for continuity and the need for diversity is considered in relation to commercial and grants experience, age and gender.

2.3.4 IT IS RECOMMENDED that in the management commentary in the annual report and on the commercial foundation's website, there is an account of the composition of the board of directors, including its diversity, and that the following information is provided on each board member:

- the name and position of the member,
- the age and gender of the member,
- date of original appointment to the board whether the member has been re-elected, and expiry of the current election period,
- any special competences possessed by the member,
- other managerial positions held by the member, including positions on executive boards, boards of directors and supervisory boards and board committees in Danish and foreign foundations, enterprises and institutions, as well as other demanding organisation tasks,
- whether the member has been appointed by authorities/providers of grants etc., and
- whether the member is considered independent.

2.3.5 IT IS RECOMMENDED that the majority of the members of the board of directors of the commercial foundation are not also members of the board of directors or executive board of the foundation's subsidiary(ies), unless it is a fully owned actual holding company.

COMMENT: The most important aspect is that there is some distance to the board of directors of the subsidiaries performing the commercial activities. This is the only way to establish the required segregation of persons to ensure that the foundation can safeguard its ownership interests, and the control of the subsidiary and its management.

A fully owned actual holding company typically does not have independent operating activities other than pure holding activities. In such special situations it does not involve the same risk that there is complete conformity between the board of the foundation and its fully owned holding company. In these situations, Recommendation 2.3.5 applies between the commercial foundation and the operating enterprise.

2.4. Independence


An appropriate proportion of the members of the board of directors should be independent. The board of directors will decide which members are to be considered as independent in accordance with the Recommendation.

2.4.1 IT IS RECOMMENDED that an appropriate proportion of the board of directors be independent.

If the board of directors (excluding employee representatives) is composed of up to four members, at least one member should be independent. If the board of directors is composed of between five and eight members, at least two members should be independent. If the board of directors is composed of nine to eleven members, at least three members should be independent, and so on.

To be considered independent, this person may not:

- be or within the past three years have been member of the executive board, or senior employee in the foundation, or a subsidiary or associated company to the foundation,
- within the past five years have received larger emoluments, including distributions or other benefits from the foundation/group or a subsidiary or associated company to the foundation in other capacity than as member of the board of directors or executive board of the foundation,
- within the past year have had a significant business relationship (e.g. personal or indirectly as partner or employee, shareholder, customer, supplier or member of the executive management of companies with corresponding connection) with the foundation/group or a subsidiary or associated company of the foundation,
- be or within the past three years have been employed or partner at the external auditor,
- have been a member of the board of directors or executive board of the foundation for more than 12 years,
- have close relatives with persons who are not considered as independent,
- is the founder or a significant donor if the purpose of the foundation is to grant support to this person's family or others who are especially close to this person, or
- a member of the management of an organisation, another foundation or similar, which receives or repeatedly within the past five years have received significant donations from the foundation.

 **COMMENT:** The criteria mentioned above cannot be considered as exhaustive.

It is the responsibility of the board of directors to assess the actual independence of its members. When applying the criteria for independence, the board of directors should focus on the substance of the situation rather than the form.

The independence of a board of directors should be assessed on the basis of its ability and willingness to conduct the purpose of the foundation objectively and impartially.

The board of directors should not be influenced by interests other than conducting the purpose of the foundation as intended by the founder and as stated in the articles of association.

The above criteria do not apply with regard to the assessment of the independence criteria in section 1(2) of LEF which state that the commercial foundation must have an *independent management in relation to the founder*.

2.5. Appointment period

At suitable intervals the board of directors should consider the provisions in the articles of association on the appointment period for members of the board of directors. Depending on the size, activity and purpose of the foundation an appointment period of two years may be too little time for a new member of the board of directors to familiarize with all aspects of the foundation and it can therefore be inappropriate. In contrast an appointment period which is too long could obstruct the necessary dynamics and introduction of new talent to the board of directors.

2.5.1 IT IS RECOMMENDED that members of the board of directors be appointed for a minimum period of two years and a maximum period of four years.

COMMENT: A not too long appointment period sharpens the awareness of the board of directors of the issue of the composition of the board of directors and of the possible need for new talent. Members may be re-appointed.

2.5.2 IT IS RECOMMENDED that an age limit for members of the board of directors be set, which is published in the management commentary or on the foundation's website.

COMMENT: Members of the founder's family may be exempted from such an age limit.

2.6. Evaluation of the performance of the board of directors and the executive board

The evaluation is to form the basis for continuous improvements in board work and to ensure that the board of directors continues to have the right composition and regularly introduces new talent.

2.6.1 IT IS RECOMMENDED that the board of directors establish an evaluation procedure in which the board of directors, the chairman and the contributions and performance of individual members are evaluated annually and the result is discussed by the board of directors.

2.6.2 IT IS RECOMMENDED that once a year the board of directors evaluate the work and performance of the executive board and/or the administrator (where relevant) in accordance with predefined clear criteria.

COMMENT: At suitable intervals, the board of directors should assess its own efforts: Has the board of directors achieved its goals? How well does the collaboration and communication function between (if relevant) the board of directors and the executive board and/or administrator? The board of directors and a possible executive board should agree in advance how the evaluation is to proceed. The nature and scope of the evaluation procedure depends on the situation of the foundation.

According to the Danish Commercial Foundations Act the board of directors must have written rules of procedure as the foundation of its work. It is advisable that the board of directors' rules of procedure include an overall description of how the evaluation of the work of the board of directors is to be conducted.

Members of the executive board or an administrator who are members of the board of director, should not take part in the boards evaluation of the executive board and/or the administrator, respectively, as they are disqualified in this context.

3. Remuneration of management

Especially in commercial foundations who do not have owners and therefore no general meetings to exercise control, transparency and openness on all important aspects of the principles for and amount of the remuneration of the board of directors and executive board (if relevant) are important.

3.1 IT IS RECOMMENDED that the members of the board of directors of commercial foundations be remunerated with a fixed remuneration and that members of a possible executive board be remunerated with a fixed remuneration, possibly combined with a bonus which should not be dependent upon accounting results. The remuneration should reflect the work and responsibilities consequential to the position.

COMMENT: The principles for remunerating members of the board of directors and members of the executive board (if relevant) must support appropriate long-term development of the foundation in accordance with the purpose of the foundation.

Remuneration of members of the board of directors may be merely a symbolic amount.

If a member of the board of directors is employed in, or is a member of the executive board of a subsidiary of the foundation, there is nothing to prevent the person in question from receiving incentive pay from the subsidiary as part of the conditions of employment.

It does not conflict with these Recommendations to pay part of the remuneration of members of the board of directors of a foundation in the form of shares in any listed subsidiaries.

The board of directors is responsible for ensuring that remunerations, including bonuses, for members of a possible executive board are appropriate in relation to the work and responsibilities of the executive board as well as the financial situation of the foundation.

3.2 IT IS RECOMMENDED that the annual financial statements provide information about the full remuneration received by each member of the board of directors and executive board (if relevant) from the commercial foundation and from other enterprises in the group. Furthermore there should be information on any other remuneration which members of the board of directors, except for employee representatives, have received for performing tasks for the foundation, subsidiaries of the foundation or enterprises in the same group as the foundation.

COMMENT: There is nothing to prevent the board of directors from establishing pension agreements for the executive board of the commercial foundation. However, pensions may not be allocated to members of the board of directors, as there is no employment relationship remunerated by a salary on which a pension is earned.

If a pension and/or severance scheme is agreed, this will be considered as covered by the information on remuneration. Severance schemes cover a wide area, including period of notice and qualification for this, termination payment, change-of-control agreements, insurance and pension schemes, payment of pension contributions after retirement, etc.