



RECOMMENDATIONS ON **FOUNDATION GOVERNANCE**

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Preface

A. Introduction

The commercial foundations are of great importance to Danish society. Through their ownership of the companies they control and the other investments and asset management they undertake, the foundations impact the Danish business community and the development of both large and small Danish companies.

The foundations help to maintain production and thus jobs as well as export and tax revenues in Denmark. Through their distribution purpose, the foundations also contribute to the development of society in a large number of areas, including research, culture, education, the environment, social work, etc. The commercial foundations are thus of great socio-economic importance to Danish society.

A commercial foundation has one or more purposes, which are usually laid down by the founder in the foundation's articles of association. The board of directors is responsible for ensuring that the management of the foundation safeguards the purpose and interests of the

foundation and that the foundation is administered in accordance therewith.

The fundamental difference between commercial foundations and other enterprises is that commercial foundations do not have owners. Commercial foundations do not hold general meetings where the owners decide who should sit on the board of directors and which control that the board of directors is performing its duties adequately and in accordance with the wishes of the owners.

The overall purpose of the Recommendations for Foundation Governance is thus to support that the management of commercial foundations solely safeguards the purpose and interests of the foundation and administers the foundation in accordance with best practice.

It is essential for the foundation's work and reputation that the general public has confidence in that the foundations are run with professionalism and respect for the surrounding community. Recommendations for Foundation Governance shall contribute to this, inter alia through

recommendations on transparency and openness about the work of the board of directors.

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 any) and other employees work solely in the interests of the foundation. The board of directors should also safeguard the interests of the foundation in relation to the foundation's enterprises and any subsidiaries, inter alia by exercising shareholder engagement¹.

Shareholder engagement means that a foundation which owns one or more subsidiaries contributes to the management of the companies by appointing members of the board of directors in these companies and by acting as the stable foundation for their long-term development. The board of directors must continuously monitor the development of the subsidiaries.

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 are a supplement to the legislation on commercial

foundations, including the Commercial Foundations Act² and the Financial Statements Act³, which set the frameworks for the needs of the outside world for transparency with regard to the governance of commercial foundations and, inter alia, financial reporting, statutory statements and information on distributions and activities. The Recommendations are intended to demonstrate best practice for the work of the board of directors in commercial foundations.

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

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 are positive about the Recommendations, have a positive attitude towards improving the governance of commercial foundations, follow developments in the area and engage in the debate on these matters.

B. 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,

¹ In the Danish version the term "engageret ejerskab" is used.

² In Danish Lov om erhvervsdrivende fonde, LBK nr. 984 af 20. september 2019.

³ In Danish Årsregnskabsloven LBK nr. 838 af 8. august 2019 with later amendments.

soft law reflects a higher standard than legislation by describing best practice. Furthermore, soft law is characterised by a high degree of voluntarism, which grants the Recommendations the flexibility necessary for commercial foundations to adjust the principles on good governance of commercial foundations to the circumstances of the individual foundation.

The Recommendations therefore make it possible for the individual foundation to organise itself as it deems most appropriate.

The flexibility of the Recommendations is essential since good foundation governance does not necessarily mean one right solution for all commercial foundations.

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

C. The comply or explain approach

The report on foundation governance must be prepared using the comply or explain principle, with respect to each recommendation.

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

The principle means that it is the board of directors of the individual commercial foundation that decides to what extent the board of directors wants to comply with the Recommendations.

If a commercial foundation fails to meet a recommendation, the board of directors must explain the following for each recommendation:

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

Failure to comply with a recommendation is not considered a breach of rules but merely implies that the board of directors has specifically and for reasons it has explained chosen a different approach.

According to section 60(2) of the Commercial Foundations Act, 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 a deviation,
- provides an explanation for a deviation that is apparently unjustified or without meaning, or
- explains a deviation but does not explain what they decided to do instead.

D. Reporting

The board of directors of a commercial foundation must prepare a report on foundation governance, in which the board of directors addresses each recommendation in the Recommendations for Foundation Governance.

For each recommendation, the board of directors must, cf. section 60 of the Commercial Foundations Act, account for whether the foundation is in compliance with the recommendation or explain:

- *why* the foundation does not comply with the specific recommendation and
- *what* the foundation has done instead.

According to Section 77a of the Financial Statements Act, the report must be included:

- 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.

In its report, cf. Section 60 of the Commercial Foundations Act, the board of directors must only address the recommendations. The comments on the recommendations are solely for inspiration

for the work of the board of directors with the recommendations.

The information in the report of the board of directors should be presented in a clear and easy to read way. If a commercial foundation does not comply with an individual recommendation, the explanation for the non-compliance must relate to the specific recommendation, and it must be clear and comprehensive thus enabling the reader to understand the choice of the board of directors and the reasons therefore.

The report must cover the same period as the accounting period of the annual report and shall be published concurrently with the annual report.

The Committee on Foundation Governance has drawn up a form which commercial foundations can use for preparing their report. The form is available at www.godfondsledelse.dk. By using the same structure from year to year, stakeholders can more easily find, process and compare information. A number of questions and answers can also be found on the committee's website, which serve as a guide both generally and for the specific recommendations.

The Recommendations only apply to the commercial foundations, but they can certainly serve as inspiration for non-commercial foundations, other self-governing institutions, foundation-like associations, etc.

Recommendations on Foundation Governance

1. Transparency and communication

To different degrees, recipients of grants, 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. Their insight into and relation to 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.

Principles on communication help the foundation to provide relevant, reliable and precise information of high quality in a timely manner.

Essential information, including the board of directors' statutory report in relation to the Recommendations on Foundation Governance must be included in the management commentary or notes in the annual report or on the foundation's website, with a specific reference to the management commentary or notes.

1.1. It is recommended that the board of directors adopt principles for external communication that address the need for transparency and stakeholders' needs and possibilities to obtain relevant up-to-date information about the circumstances of the foundation.



Comment: The rules of procedure of the board of directors could contain an overall description of the principles for external communication. The principles should establish who speaks to the public on behalf of the commercial foundation and on which matters.

It may be relevant to publish the overall positions, procedures and values upon which the foundation's communication is based.

Publication of the foundation's contact person(s) in the foundation's annual report and/or on the foundation's website supports that it is simple and transparent for the public to get in touch with the foundation.

ment of the companies, best supports the foundation's purpose and the development of the companies.

The strategy should also include the position of the board of directors on the distribution activities, including how the board of directors implements the purpose of the foundation. The board of directors should consider the purpose of the distributions as well as what value the foundation wants the distributions to add to the recipients and to society in general. In that connection, the board of directors should consider how the foundation communicates to its stakeholders about the purpose of the foundation's distributions.

2.1.2 It is **recommended** that the board of directors regularly address whether the foundation's asset management is in line with the purpose of the foundation and its long- and short-term needs.

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Comment: The board of directors should define and continuously address the general principles according to which the board of directors manages the foundations capital. The general principles should, inter alia, concern the expected return, distributions, liquidity requirement in general, as well as the timing thereof, inter alia in relation to the foundation's commercial activity, distribution policy, investments and costs. The board of

director should address the objectives of the foundation's investments, permitted asset types, risk profile, risk diversification and capital resources in relation to the foundation's activities, as well as monitoring and reporting.

In general, the foundation's asset management should ensure the long-term viability of the foundation and the opportunity for it to continue to fulfil its purpose and to support ownership of subsidiaries, if applicable.

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 management, strategic and control duties.

The chairman should ensure effective board work, including good communication with good and constructive relationships within the board and with an executive board, if relevant.

The chairman should also ensure that the individual member's special knowledge and competences are used in the best possible manner and for the benefit of the foundation.

2.2.1 It is **recommended** that the chairman of the board of directors organize, 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, every year, an annual wheel or similar is adopted, which contains a plan for the year's meetings and for which topics are to be addressed at the individual meetings.

2.2.2 It is **recommended** that if the board of directors, in exceptional cases, asks the chairman of the board of directors to perform special activities for the commercial foundation which extend beyond the duties of chairman, a board resolution to that effect be passed to ensure that the board of directors maintains its independent, general 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 of the chairman pursuant to legislation and the rules of procedure should contain provisions on the spe-

cific 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 organisation of the board of directors

Good governance of commercial foundations requires the composition of the board of directors to be appropriate 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 the executive board, if any. It is essential that members of the board of directors only safeguard the interests of the foundation and that each member always acts independently of special interests. This also applies to members appointed by external entities that are entitled to make appointments.

The board of directors defines the competences required by the foundation, supplementing any provisions in this regard in the articles of association. The board of directors regularly assesses whether the composition of the board of directors and the competences of its members individually and collectively reflect the requirements and challenges imposed by the situation and circumstances of the foundation.

Appointment of members of the board of directors through co-opting can entail a risk of

exclusion and lack of new talent, diversity, competences, etc.

Irrespective of how the board of directors is appointed, it should make sure that it is able to comply with legislation and the articles of association of the foundation, 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, gender, etc. can improve the quality of the work of the board of directors.

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

At suitable intervals, 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, strategy, financial position and other circumstances. The consideration should also include the ability and willingness of the members of the board of directors to impartially carry out the purpose of the foundation.

Regular replacement contributes to new talent, including a renewed perspective on the foundation and its management.

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 that 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, and at least every second year, assess and stipulate the competences that the board of directors needs to possess in order to best perform the tasks incumbent upon the board of directors.

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 approves a structured, thorough and transparent process for selection and nomination of candidates for the board of directors.

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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 possesses the correct competences it may, for boards with many members or where new appointments are co-opted, be appro-

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 conduct a dialogue with an entity entitled to make appointments about the board's assessment of the competences and attributes that the board should possess, individually and collectively, in order to best perform the tasks incumbent upon it. The dialogue should also include the expectations concerning other significant factors, such as time spent.

The board of directors should also ensure good on-boarding of new board members (and, if relevant, an executive board). Inter alia, the board of directors should ensure that new board members receive relevant information, including about any major projects, challenges, risks, etc. in the foundation and any of its subsidiaries.

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 that when composing and nominating new members to the board, the need for introducing new talent is weighed against the need for continuity and the need for diversity in relation to, inter alia, commercial and grants experience, age and gender.



Comment: It may be appropriate for the board of directors to regularly address succession in the board of directors and the executive board, if any.

2.3.4 It is **recommended** that in the management commentary in the annual report and on the commercial foundation's website, if any, 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 owns shares, options, warrants and similar in the foundation's subsidiaries and/or associated companies,

- 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.

There is no one governance model that is necessarily the right one, as it depends on the specific circumstances of the foundation and the company(ies) owned by the foundation. There are advantages and disadvantages regardless of what one chooses. The board of directors should therefore continuously assess the chosen governance model.

A fully-owned actual holding company typically does not have independent operating activities other

than the ownership of the underlying companies. When there are no independent operating activities, the risk of complete conformity between the board of the foundation and the board of directors in its fully-owned holding company is not the same.

In these special situations, Recommendation 2.3.5 only applies between the commercial foundation and its operating enterprise(s).

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.

The independence of a board of directors must be assessed on the basis of its ability and willingness to independently and impartially carry out the purpose of the foundation.

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,
- between five and eight members, at least two members should be independent, or
- nine to eleven members, at least

three members should be independent, and so on.

To be considered independent, this person may not, for example:

- be or within the past three years have been member of the executive board or a senior employee in the foundation or an essential 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,
- be a close relative or in another way be very close to persons who are not considered as independent,

- be 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
- be 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.

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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.

A commercial foundation is characterised by being self-governing and having no general meeting, and hence there is an absence of direct control over the board of directors. It is therefore critical that there is mutual independence among the members of the board of directors, so that the board of directors as a whole can carry out the necessary self-control and perform an impartial evaluation of current and previous decisions.

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 the Commercial Foundations Act, 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 familiarise themselves with all aspects of the foundation, and it may therefore be inappropriate. By 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.

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Comment: An appointment period which is not excessively long sharpens the awareness of the board of directors of the issue of the composition of the board of directors and new

talent.

An appropriate appointment period thus aims, inter alia, to ensure that the board of directors is composed in such a way that it always best matches the foundation's purpose, opportunities and challenges. An appropriate term also helps ensure independence. There should be a sensible balance between replacement and continuity in the board of directors.

Appointment of board members can take place by co-opting or by a third party (an entity entitled to make appointments) outside the board appointing one or more board members. Any re-election **should** take place actively. For co-opting, this should take place by vote in the board of directors and, as a general rule, at the board of directors' meeting on the adoption of the annual report.

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.

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Comment: An age limit supports the introduction of new talent to the board of directors as well as the board of directors' decision on its composition and competencies.

Members of a founder's family may be exempted from such an age limit.

An age limit is not in conflict with the rules on non-discrimination, as a board position is not an employment relationship.

2.6. Evaluation of the performance of the board of directors and 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. Involving external assistance in the evaluation process may be considered, possibly periodically.

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.

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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 the board of directors and the executive board and/or administrator, if any? The board of directors and any 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 administrators who are members of the board of director, should not take part in the board's 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 that do not have owners and therefore no general

meetings to exercise control, it is essential to be transparent and open about all important aspects of the principles for and amount of the remuneration of the board of directors and the executive board, if any.

3.1.1 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 potential 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 remuneration of the board of directors includes all services and is provided for the responsibility and work effort associated with performing the duties of board member. Remuneration thus includes salary, bonus or similar schemes, as well as any contributions to pension, but also other benefits such as free car, housing, telephone, internet or similar.

The position as board member of a foundation entails a special obligation to ensure that the board of directors' decisions on remuneration are made solely for the fulfilment of the foundations purpose and interests and thus solely correspond to the responsibilities and work effort associated with the board position.

It is also the responsibility of the board of directors that remuneration, including bonuses, to members of an executive board, if any, is appropriate in relation to the executive board's work and responsibilities as well as the foundation's financial position.

The principles for remunerating members of the board of directors and members of the executive board, if any, 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, and similarly, the board position may be unpaid.

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 foundation's subsidiary(ies) as part of the conditions of employment similar to others at a comparable level.

The board of directors of the foundation should, as part of the Foundation's shareholder engagement with its subsidiary(ies), address the principles of the subsidiary(ies) for remuneration of its board of directors and executive board.

3.1.2 It is **recommended** that the financial statements provide information about the full remuneration received by each member of the board of directors and any executive board from the commercial foundation and from the foundation's subsidiaries and associated companies. Furthermore there should be information on any other remuneration which members of the board of directors and an executive board, if any, have received for performing other work or tasks for the foundation, the foundation's subsidiaries or associated companies, except for the remuneration of employee representatives as employees.



Comment: Since commercial funds do not have owners, it is important that there is transparency concerning the total remuneration of the board of directors and an executive board, if any.

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, cf. the preparatory work for Section 49 of the Commercial Foundations Act since 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.

The foundation is also in compliance with the recommendations if the information is instead provided in a separate remuneration report which is published on the foundation's website and to which reference is made in the annual report.



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