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European Enterprise Foundation Model Law

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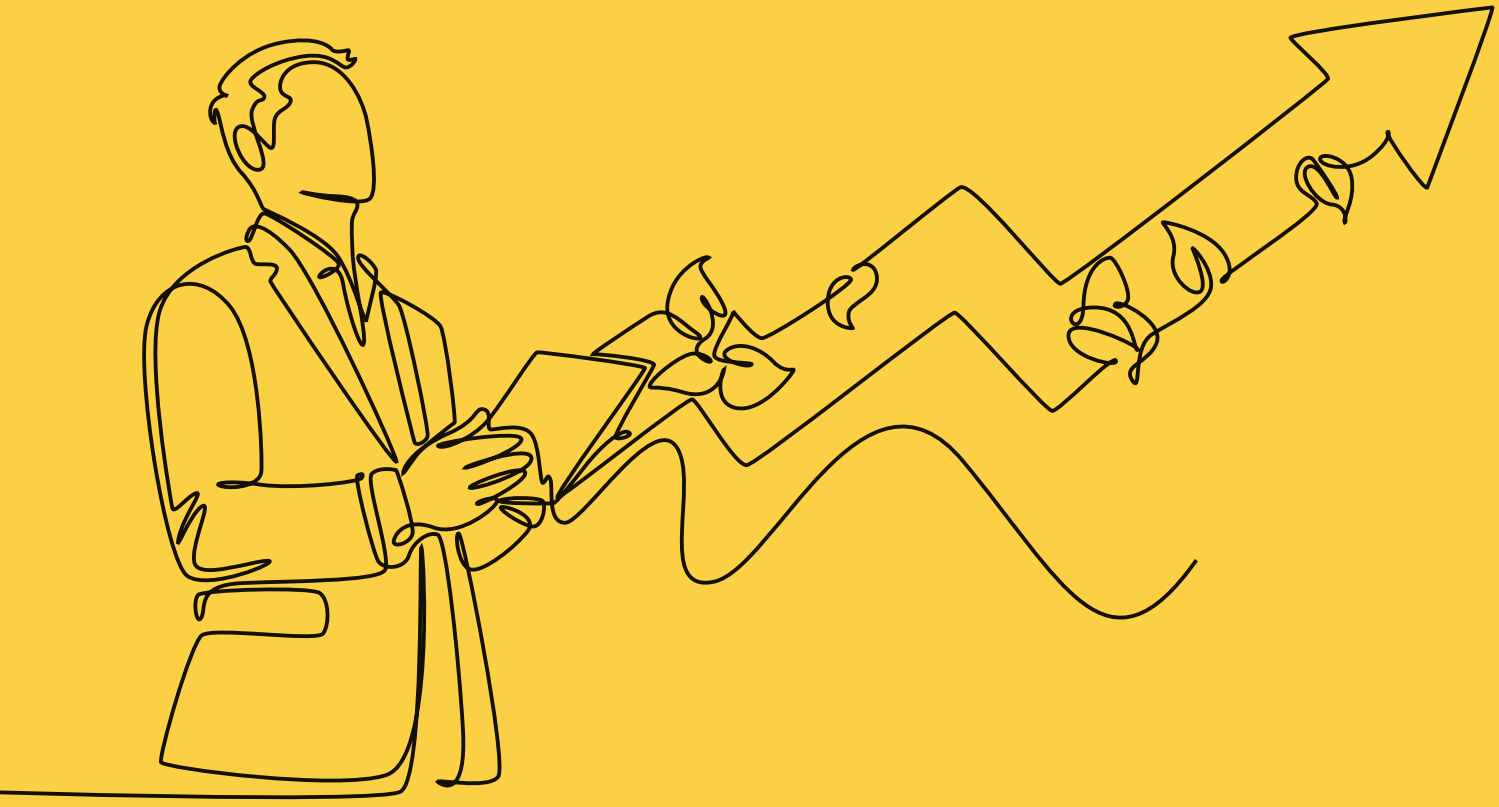

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Approved by the ELI Council on 22 September 2025
Final draft published on 9 December 2025

ISBN: 978-3-9505990-0-8

This publication was co-funded by the European Union's Justice Programme. Acknowledgement is also due to the University of Vienna, which has generously hosted the ELI Secretariat under successive Framework Cooperation Agreements since 2011. Furthermore, the publication was financially supported by the Novo Nordisk Foundation and Copenhagen Business School (grant number NNFSA170030394) as well as the research project on long-term ownership and value creation in enterprise foundations [grant number 300912, 2020) sponsored by the Augustinus Foundation, the Carlsberg Foundation, the COWI Foundation, the Interogo Foundation, the Lauritzen Foundation, Leo Holding, the Lundbeck Foundation, the Ramboll Foundation, and the William Demant Foundation.

This project is co-funded by the European Union

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Part A. Introduction

I. Executive Summary

Enterprise foundations (EFs) are – in brief – foundations which own companies.[1] They play an important role as owners of successful European companies like Robert Bosch, InterIKEA, Novo Nordisk, Rolex, and La Caixa, while making substantial philanthropic donations to the public good. And yet, despite their contribution to European society, European enterprise foundations have a shadowy legal existence, which prevents them from reaching their full potential. Although enterprise foundations are permitted in most European countries, they are usually regulated by foundation law that tries to enforce a strict separation between for-profit and non-profit entities and does not recognise the benefits that foundation ownership of business companies entails. Very few European countries have a codified enterprise foundation law that explicitly addresses business ownership. In many European countries, not only foundation law, but also company and trust law are used to create functional equivalents giving rise to structures of baffling diversity. Moreover, the idiosyncrasies of national foundation law – tax law not less than civil law – imply significant barriers to cross-border integration at a point in time when solutions to European and global problems are of paramount importance.

The primary purpose of this project is to present **an enterprise foundation model law** that facilitates the creation and governance of enterprise foundations. The model law is thus intended to stimulate the creation of more well-governed enterprise foundations that will contribute to responsible ownership and competitiveness of businesses in Europe and around the world. This aim is to enable policy makers at national and European levels to make informed choices as regards the legal options at their disposal.

The enterprise foundation model law includes, inter alia, rules on:

1) definitions;

2) formation and permissible purposes;

3) registration procedure;

4) amendment of foundation purpose;

5) governance of the enterprise foundation;

6) audit and transparency requirements, and

7) supervision by a competent authority, either a public agency or court.

The Proposal also contains best practice recommendations (guidelines) on foundation governance and principles for the taxation of enterprise foundations.

Policy makers may decide to adopt the model law as a whole or specific provisions from it, allowing for differences in national implementation. From a practical perspective, full harmonisation may have certain advantages. However, based on significant national differences in foundation law as well as consultations with legal experts, the model law is instead drafted with a considerable degree of **optionality** in mind. Optionality is viewed as the most appropriate tool to bridge the significant differences in European foundation law and to make the model law relevant to as many European jurisdictions as possible. For example, the model law makes it optional whether courts or government

[1] For elaboration and variations of this short-hand definition, see Part A.III.

agencies should supervise enterprise foundations. Alternatively, legislators may opt for a low degree of public supervision (for example, for private foundations) and rely primarily on internal governance systems, such as supervisory boards. Thus, the model law can be seen as providing building blocks for national legislators, helping them to improve their legal frameworks for enterprise foundations.

The model law is written as an inspiration for national and European legislators with such optionality in mind. Rather than stating broad and unavoidably ambiguous rules, it lays out specific provisions which legislators can agree with (and use), disagree with and modify or discard altogether while addressing possible inconsistencies which may arise from this procedure. Legislators can find ideas for still other legal approaches in the explanatory remarks. Thus, we have exemplified legal principles by specific provisions to improve readability and comprehension rather than seek to impose a specific blueprint on national law that is considered to function well enough as it is. To be sure, countries that wish to enable the creation and governance of enterprise foundations are unlikely to achieve this goal if they fail to adopt key provisions in the law. However, particularly with regard to supervision and the regulation of enterprise foundations, there are different national traditions which shape the way countries address legal problems.

Given the different legal traditions in the area, we see no scope for a uniform European enterprise foundation law that would replace existing national laws. However, in the spirit of optionality, the European legislator may introduce the model law on an opt-in basis, possibly within a 28th regime.

The intended optionality of the model law allows for a multiplicity of purposes in enterprise foundations. Some may have a public (i.e. philanthropic) purpose, financed by earnings of the enterprise. Some may serve a private purpose, such as support of founding family members. Some may regard the growth and development of a company as a purpose in itself. Moreover, still other enterprise foundations may combine different purposes. Again, national legislators may select these options in light of their legal traditions and culture, albeit possibly with the result that fewer enterprise foundations will be created.

Despite all these differences, the common denominator is ownership control of one or more business companies. The model law applies both to foundations engaged directly in businesses' activity and to foundations holding shares in business companies. However, since the latter are so much more important in practice, the draft focusses on them.

This enterprise foundation model law's goal is to propose special provisions absent in standard foundation law addressing the specific challenges and opportunities of EF business ownership. Among the most significant of such provisions, we emphasise the following:

1. A functional enterprise foundation definition: A foundation that holds a controlling interest in a business company (regardless of purpose).

2. Responsible ownership of a business company as a legitimate EF purpose.

3. An obligation of the EF to be a responsible owner, taking into account the interests of the company and its stakeholders.

4. EF directors' duty is not necessarily to avoid risk, but to take calculated risks in the best interests of the EF's purpose.

5. EF directors' duty is not just to monitor EFs but also foundation-owned companies.

6. A business judgement rule is applied to business decisions.

7. EF boards must, to some extent, be independent of the companies owned by the EF.

8. Related party transactions between EF directors and corporate subsidiaries must be disclosed, take place at fair value and be approved by a majority of disinterested EF governing board members.

9. EF directors that serve on subsidiary company boards are to be remunerated through a fixed fee.

10. Minimum disclosure of business ownership and key accounting figures.

11. Foundation authorities (government agencies, courts) that supervise EFs must have business competence.

12. The national competent authority should facilitate a set of best practice recommendations for EFs on a comply and explain basis.

13. Best practice recommendations to improve governance.

14. Tax principles stressing tax neutrality to prevent the establishment of EFs for tax avoidance.

Part A of the model law presents the main legal concepts and the background for the draft model law text, which itself is subsequently presented in **Part B**. Part B is followed by explanatory remarks to the model law in **Part C**. Explanatory remarks accompany all sections of the model law and its optional variations. The remarks typically explain the background to the proposed articles of the model law and the different options that lawmakers can choose from. The remarks also include examples and explanations of the intended application and interpretation of the rules. **Part D** presents draft tax principles that we believe are necessary to ensure tax neutrality of enterprise foundations relative to companies and other legal entities that engage in business activity. The model law does not aim at a harmonisation of tax law but recognises the importance of tax law for the discussion. The tax principles thus serve as a contribution to the international discussion of non-profit taxation that is already under consideration by the Organisation for Economic Co-operation and Development (OECD) and the EU.[2] **Part E** provides an example of best practice recommendations for good governance of enterprise foundations and explanatory remarks.

The model law is based on extensive discussions with stakeholders which were held between 2023-2025. ELI advisory committee members and other ELI experts contributed significantly to the project. These contributions have been instrumental in comparing, understanding, and discussing regulatory law, foundation law and tax law in more than twenty jurisdictions – including common law and civil law jurisdictions. Different solutions from European countries have been considered as elements ('building bricks') of the model law. Although the model law is not based on one, idealised model of enterprise foundation law from one European jurisdiction, it is in many ways inspired by the insights from the 2012-2015 discussions on the EU proposal on a statute on foundations, and the feasibility study prepared by Klaus Hopt et al (2009).[3]

The main difference from previous foundation law proposals is this model law's focus on *enterprise* foundations. Foundations that own businesses have characteristics other than those of traditional grant-making foundations with a diversified investment portfolio (and thus no formal control of enterprise). In particular, responsible ownership of a business company can be a goal in itself in enterprise foundations, since they may create value for society by engaging in active ownership of for-profit companies making use of their controlling influence.[4] Moreover, to engage successfully in business activities, enterprise foundations must necessarily take more risk than conventional foundations.[5]

As an introduction to the model law, it is helpful to address their impact and wider social and economic benefits (Part A.II), the definition of enterprise foundations (Part A.III), the policy case for enterprise foundations (Part A.IV), the main parts of the model law (Part A.V), and the main sources, inspirations and comparative perspectives (Part A.VI).

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[2] The 2022 OECD Model Law (Pillar II) and the 2022 EU directive on a minimum tax include thorough deliberations on taxation of nonprofits. Obviously, questions of taxation are often crucial to avoid cross-border barriers for enterprise foundation philanthropy. But considering the ongoing work in OECD and EU, as well as the project framework adopted by the ELI Council, the model law has drafted tax principles instead of tax rules.

[3] See EU Commission proposal for a regulation on a statute for a European Foundation (2012); Hopt (2009). See also Part B.VI.

[4] On active ownership, see Thomsen (2017) 25–38 and 151–166.

[5] Financially, enterprise foundations take more risk because they concentrate their investments more, in particular by having controlling influence (i.e. a large share position) in a particular company or in the case of an operating enterprise foundation by engaging fully in a particular company. The risk pertains both to risks of bankruptcy as well as risks of earnings shortfalls or deficits. In contrast, conventional foundations – i.e. those who are not enterprise foundations - can diversify their financial portfolio and most do so (if they can). Admittedly some conventional foundations may invest in a single asset, but financially it is advisable for them to diversify their portfolio. Taking risks is necessary to engage in business activity, where conventional foundations can invest in government bonds or put their money in a bank account which carry very little risk. Most of them appear to do so.

II. Impact and Wider Social and Economic Benefits

Enterprise foundations are not only responsible, long-term owners of business companies that helped foster the growth of European multinationals like Novo Nordisk, InterIKEA or Robert Bosch. Through their donations and operating philanthropy, they contribute significantly to the public good, promoting research and education, equality, social progress, protection of the natural environment, and scientific and technological advances. Altogether, they make a significant contribution to achieving goals of sustainable and inclusive growth in Europe, facilitating a more active involvement of citizens and civil society. Since the foundations are non-profit entities, they constitute an alternative to conventional capitalist business ownership.[6]

Enterprise foundations may have different purposes in their charters. Some purposes concern philanthropy; others focus on family or specific businesses. However, most enterprise foundations throughout Europe seem to have some public good purposes; that is, purposes which are beneficial to the general public. Because the foundations own assets that would otherwise be owned by private individuals, and because of their public good purposes, public good foundations counteract a concentration of private wealth. An endowment to a public good foundation is a contribution, not an investment.[7] Thus, because ownership of companies is transferred from private interests to non-profit organisations, the non-profit nature of public good enterprise foundations enhances equality among European citizens. Figuratively speaking, the purpose comes to 'own' the company, when a wealthy individual gives away a company to an enterprise foundation.

At the same time, enterprise foundations contribute to the competitiveness of the European economy. The Draghi report[8] has highlighted the importance of European competitiveness and the growth of large companies as a key strategic issue[9]. As responsible long-term owners, enterprise foundations have an important role to play in this respect as evidenced by the high frequency of foundation-owned companies among Europe's largest and most successful businesses.

Various EU organs have stressed the beneficial impact of foundations. On 15 November 2012, the European Economic and Social Committee (under the European Parliament) stated that a better legal framework for foundation law would, in turn, have a positive impact on European citizens' public good and the EU economy as a whole. It could play a key role in helping to achieve smart, sustainable, and inclusive growth in the EU, facilitating the pooling and scaling up of expertise and resources. On 19 January 2013, the Committee of the Regions (under the European Parliament) stated that it was aware of the economic importance of foundations throughout Europe in all areas of public interest, particularly those within the ambit of local and regional authorities, such as social and health services, social security, arts and culture, education and training, science, research and innovation, and the environment. It highlighted, in particular, the role that foundations can play through the harnessing of their resources and creativity in a period of major political, financial and social crisis in Europe, in which it is vital to explore all possibilities for strengthening the EU and guaranteeing its citizens a future and prospects for growth.

The project team's consultations with stakeholders reconfirmed the views expressed by EU institutions. Legal and social barriers currently inhibit the formation of not only foundations, but also enterprise foundations in Europe and around the world. Moreover, founders face strong incentives

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[6] See Hansmann and Thomsen (2021), Thomsen, (2017), Thomsen (2023), and Ørberg (2024),765–807.

[7] See Part A.III on the defining features of enterprise foundations, inter alia, the irrevocability requirement.

[8] European Commission (2024). The future of European competitiveness. Part A | A competitiveness strategy for Europe. <https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en> (last accessed April 4 2025).

[9] See also the Letta report on the need to strengthen the internal market to promote sustainable prosperity in Europe: Letta, Enrico (2024): The report argues for greater self-determination and that large companies are better able to take advantage of the internal market.
Published: April 2024 (Last update: 21/10/2024) Publisher: European Union

not to establish enterprise foundations because they must relinquish private wealth to do so – not only for themselves but also for their descendants. From an economic viewpoint, this is a market failure that limits the creation of enterprise foundations to the extent that they will generally be underrepresented regardless of their merits. This means that the case for enterprise foundations is not realistically concerned with a general conversion to foundation ownership but whether it makes sense to enable founders to establish them when they think it makes sense.

In the view of the project team, there is a need for better facilitation of cross-border philanthropic activities, and there would be positive effects of a European Enterprise Foundation as a legal figure.[10] The need for a model law and the policy case for enterprise foundations is developed further in Part A.IV, but first it is necessary to understand the concept of enterprise foundations.

III. Defining Enterprise Foundations

An 'enterprise foundation' definition must explain both the 'enterprise' element and the 'foundation' element. Based on extensive research and discussions with the many experts involved in the project, within the model law, an 'enterprise foundation' is defined as a foundation that holds a controlling interest in a business.[11] In the model law, the question of controlling interest is based on an overall assessment. A controlling interest can be assumed if the enterprise foundation holds a majority of votes in the company (holding enterprise foundation) or if the foundation conducts business itself (operating enterprise foundation). If a foundation does not hold a majority of votes in a business, a shareholder agreement or an otherwise dispersed shareholder structure may still suffice for the foundation to exercise effective control and classification as an enterprise foundation.[12] However, an enterprise foundation under this model law is not a foundation established and operated by a company for Corporate Social Responsibility (CSR) purposes, but a foundation controlling a business.[13]

Moreover, it is required that the entity is a foundation. While under civil law understanding, a foundation is characterised as a legal entity that receives an endowment, the common law understanding of a foundation is based on the transfer of property from a donor to a person to be held on trust or independent institution (eg a charitable company) for a charitable purpose.[14] Both viewpoints involve a transfer of property to be used for a certain purpose. In this way, the 'foundation' can be seen as a concept rather than a legal term. The foundation as a concept has a long history, going back to antiquity. This foundation concept is interpreted and implemented differently today in various jurisdictions using national terms like *Stiftungen*, *stiftelser*, *fondations*, *fondationes*, *fonde*, and trusts.

Within the model law, a foundation is defined as an entity:

(a) with legal personality;

(b) with assets irrevocably separated from its founder(s);

(c) without owners, members or shareholders;

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[10] See also EU Commission proposal for a regulation on a statute for a European Foundation (2012); Schlüter, Then and Walkenhorst (2001); Hopt et al. (2009); and Hopt et al. (2006), 45–52.

[11] Sanders and Thomsen (2023), 221–245.

[12] The voting rights threshold could be framed in many ways, and there are also inherently difficult questions about informal influence. One option could have been to focus on formal control of at least 50,1 % of the voting rights. On the considerations of a clearer rule, see the explanatory remarks.

[13] A clear distinction between such foundations and the enterprise foundations discussed in this model law is particularly important in France, where a *fondation d' entreprise* is indeed a foundation set up by a company. See <https://www.service-public.fr/particuliers/vosdroits/F31016> (last visited Mar. 16, 2025).

[14] In the common law world, the term 'foundation' as a term for charitable organisations apparently first emerged in the UK in the early 15th century (See Online Etymology Dictionary. (n.d.). Foundation (2025). It was later widely used in the UK and the US to denote a type of charitable non-profit organisation such as the Rockefeller Foundation which were set up as charitable trusts. See Encyclopedia of Social Work. (n.d.). Philanthropic Foundations (2013) see for the work of Anne Turgot in 18th century France: Clarke (1964).

(d) founded for one or more purposes determined by the founder (s); and

(e) with a governing board acting in the interest of the foundation and its purpose.

This definition is mainly based on the civil law understanding of foundations in Continental Europe, where the foundation has no shareholders or members and has legal personality. At least in most civil law systems, a foundation is understood as:

(1) A private entity with **legal personality without members or shareholders**. The foundation may choose to donate, but (in principle) nobody has a claim to a dividend or donations. The foundation may receive income but cannot distribute that income to the foundation's board members, directors, officers, or other persons who exercise control over the foundation.[15] The prohibition on private self-dealing is typically viewed as important because of the non-profit nature of foundations.

(2) A foundation is **independent of its founder(s)** and requires an (in principle) **irrevocable transfer of property**. For tax reasons and due to creditor protection as well as to ensure the integrity of the foundation, an irrevocable transfer is required in most European jurisdictions.

(3) This initial wealth or endowment is provided by the founder in order to pursue one or more (in principle) unchangeable **purpose(s) established by the founder at the founding.** The will of the founder – and particularly the purpose – is considered crucial in most European countries.

(4) A foundation is **administered and represented by its governing board** who are expected to pursue the purpose set by the founder. The governing board is, in virtually all countries, the supreme body of the foundation.[16]

(5) Foundations are usually under some form of **public supervision, for example by courts, a governmental office, a charity commission or a tax office**.[17]

(6) Like the founding of other corporate entities, setting up a foundation requires some form of **registration**, even if the special approval formerly required is no longer technically necessary in most countries.

(7) The purpose, organisation and administration of a foundation are written down in the **foundation's charter,** which may be included in a will.

In Ireland and the UK, there is no 'foundation' in the Continental European sense,[18] because there are no legal entities without members or shareholders. Yet, functional equivalents exist eg in Ireland and the UK, in trusts and companies limited by guarantee[19] that are faced with many of the same challenges as enterprise foundations. In fact, the word 'foundation' is used in both the US and the UK to describe these entities. Both foundations and the functional equivalents in common law countries can be described as non-profit entities in the sense of Henry Hansmann. While the entity itself may generate profits, it may not distribute them to members or shareholders.[20] Moreover, in many civil law jurisdictions, functional equivalents, such as companies with specially designed charters, exist alongside foundations.[21]

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[15] See Sanders and Thomsen (2023). On the non-distribution constraint, see Hansmann (1980); Powell (1987).
[16] See Ørberg (2024) with references.
[17] This is because foundations and their director's pursuit of the founder's purpose are not monitored by shareholders or members. See on this fundamental point, Hopt 'The board of non-profit organizations: some corporate governance thoughts form Europe' in Hopt and von Hippel (eds (2010) 536; see also Jakob (2006); Thomsen and Kavadis (2022) 227, 308 et seq.
[18] See eg Eldar (2023) 203.
[19] Mullen and Lewison (4th ed 2014).
[20] Hansmann (1980).
[21] See eg Sanders (2023) para 1.33.

While mindful of such variations, including enterprise foundations that engage directly in business activities, the model law is focused on the Continental enterprise foundation that controls business through business ownership,[22] It seems necessary to apply a clear definition that does not require a deep understanding of organisational law, foundation law, charity law, corporate law, or trust law.[23] The model law does not provide specific rules on functional equivalents which would make it immensely complex, considering the many functional equivalents across Europe and in the rest of the world.[24] However, national legislators can take the provisions expressed in this model law – especially in the governance section – into account when regulating functional equivalents.

For an elaboration of specifics of the model law definition, see the explanatory remarks to Article 1-2.

IV. The Policy Case for Enterprise Foundations

Enterprise foundations constitute a hybrid between the non-profit world of philanthropy (the foundation) and the for-profit world of business (the company) markets. It is the view of the project team that enterprise foundations contribute greatly to European society in terms of economic value creation, employment, research and development, sustainability, equality and social harmony.[25]

The proposition is not that all companies should convert to foundation ownership but rather that enterprise foundations have a useful role to play in the economic (and social) system along with other ownership forms like family businesses, investor ownership, State-owned enterprises or cooperatives. However, legal and social barriers currently inhibit the formation of enterprise foundations in Europe and around the world.[26]

A growing volume of empirical research demonstrates the distinctive characteristics of enterprise foundations and how foundation ownership influences the behaviour and performance of businesses.[27] It is helpful to briefly *summarise* key arguments in this research:

A. The Arguments for Enterprise Foundations

1. **Purpose**. A growing number of voices call for the reinvention of capitalism through a corporate purpose which describes how the company is useful for society in addition to creating value for shareholders.[28] Foundation ownership is a robust empirical realisation of corporate purpose since foundations are uniquely purposeful institutions which influence the business company that they own. Enabling enterprise foundations in Europe would, therefore, help meet the contemporary calls for a more responsible type of capitalism.

2. **Long-term ownership**. Foundations are, in principle, perpetuities with an indefinite time horizon. Thus, they are less subject to the short-term urgency of private business owners and financial markets which has been highlighted in recent EU policy discussions.[29] The empirical research indicates that foundation-owned companies are in fact managed for the longer term compared to conventional business

[22] Operating foundations run businesses in their own name, while holding foundations control a business company.
[23] There are many cross-country variations and differences not only in terms of formal rules, but also in terms of the application of rules. The mere translation and understanding of rules often required lengthy explanations during seminars and conferences. These impressions reinforced the perception of the difficult nature of enterprise foundation law in a comparative context.
[24] Indeed, many European countries appear non-receptive towards trust-like structures. See eg Hansmann and Mattei (1998).
[25] See references to EU institutions in part A.II.
[26] See the references in Part A.II.
[27] For an overview of the literature, see Thomsen and Kavadis (2022).
[28] See eg See also Mayer (2021a) and Mayer (2021b).
[29] The EU policy initiative on sustainable corporate governance to counter short-termism (<https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en>) was regarded as controversial and subsequently abolished. However, the perceived need for a long-term view on competitiveness remains widespread (<https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1668>)

companies.[30] Long-term ownership allows companies to make decisions that favour their long-term interests and to pay greater attention to their stakeholders. Europe needs more long-term business ownership to foster companies that are competitive at the global level.

3. **Employee welfare**. Presumably because they are less subject to short-term profit pressure, foundation-owned companies tend to treat their employees better. The employees are better paid and stay longer.[31]

4. **Sustainability.**[32] Foundation-owned companies tend to do better in terms of environmental and social sustainability, which may, in part, be attributable to responsible long-term ownership.[33]

5. **Economic equality**. Foundation shareholdings in large companies would most likely alternatively be owned by private individuals (the top 1%). Thus, foundation ownership tends to reduce wealth inequality.[34] Moreover, dividends distributed by companies to philanthropic foundations do not fund consumption by wealthy individuals but charitable purposes, and this reduces income and wealth inequality. Under foundation ownership, the economic pie is more evenly split between labour and capital.

5. **Philanthropy.** Public enterprise foundations donate substantial amounts to research, education, culture, social projects and other socially useful purposes. Enterprise foundations are particularly large donors because of the revenue streams from their companies. They thus contribute to a better, more harmonious society. Enterprise foundations can add business experience to their charitable activities thus potentially making them more effective philanthropists. In emergencies like COVID, they can access the resources of their companies, and they can use their business competence in investment and governance. Compared to notoriously cash-starved NGOs. they generate a healthy financial surplus, which means that they can have greater impact.

B. The Arguments against Enterprise Foundations

1. **Rarity**. Enterprise foundations and foundation-owned companies constitute only a small fraction of global economic activity. It is easy to understand why, since establishing a significant enterprise foundation requires a correspondingly large donation from the founder's personal assets, and not everyone is so inclined. This means that enterprise foundations will realistically be in short supply for the foreseeable future and be unable to address truly global challenges. This is true, but it does not mean that they cannot contribute and all the more so if the legal framework is supportive. In countries and areas where they are plentiful, they can, in fact, make a significant difference.[35]

2. **Incentives.** Enterprise foundations do not have the strong personal incentives of personal owners which, in theory, could make them less motivated to maximise profits. This is true but the counterargument offered by Professor Henry Hansmann, Yale Law School, is that a limited profit motive may also, under some circumstances, be a competitive advantage, for example, customers may, in some circumstances, prefer dealing with foundation-owned companies which have less of a profit motive to abuse them.[36] The same argument can give foundation-owned

[30] Thomsen, Børsting, Poulsen and Kuhn (2018).
[31] Børsting and Thomsen (2017).
[32] The need for a more sustainable internal market is stressed by the Letta report (Letta 2024).
[33] Schröder and Thomsen (2025).
[34] See Thomsen, Levorsen and Nilausen (2022).
[35] See Thomsen (2023).
[36] See Hansmann (1980) The Role of Non-Profit Enterprise.

companies a comparative advantage if they are more trustworthy in business relationships with other stakeholders, such as employees or suppliers.[37]

3. **Inflexibility**. It has been claimed that foundations are bound by their charters and hence not sufficiently flexible to compete successfully with 'normal' business companies.[38] However, the purposes and governance clauses of most foundations are sufficiently broad to allow them to adapt to new circumstances. Moreover, it has been shown that foundation-owned companies are competitive in terms of profitability and other performance indicators.[39] Note also that the immutability of the foundation purpose does not generally apply to foundation-owned companies, which can, in fact, change their purpose and governance provided that the changes are not inconsistent with the foundation charter.

4. **Accountability**. In most cases, foundation boards are self-elected, which raises concerns about their accountability,[40] since they do not face the scrutiny and control of shareholders. While it is important to note that there may also be advantages to not being governed by outside stakeholders, for example the risk of capture by such stakeholders and compromise of the foundation purpose, accountability is an important issue, which call for remedies in particular with regard to foundation governance and regulation, which we discuss below.

5. **Taxation**. It is often claimed that enterprise foundations are granted special tax privileges, but this is an overstatement.[41] It is true that foundations typically do not pay much tax, but neither do family offices or other holding companies. In both cases, the combined entities pay taxes typically in the operating company. Taxation in family businesses takes places when dividends are paid out as income to shareholders. The same is the case for foundations whose donations are taxed when they are paid out as income or when the recipient institutions like universities or hospitals pay salaries. Private individuals are taxed on capital gains when they sell shares or on inheritance. Foundations typically hold on to their shares, and even when they do not, any capital gains are either reinvested or used for philanthropy, in which case taxes are generated. Foundations do not die as humans do, and hence their wealth is not inherited, but for very good reason. Again, any tax saving on inheritance taxes is either reinvested or paid out as donations.[42]

C. Remedies

As was already demonstrated, powerful counterarguments can be brought forward to the arguments presented against enterprise foundation. There are potential remedies to the remaining issues raised above. Two kinds of remedies are considered here: foundation governance and regulation by enterprise foundation law. Both can be considered as examples of enterprise foundation governance in a broad sense.

1. *Foundation Governance*

By foundation governance we mean the direction and control of foundations, mainly by foundations boards. Foundation boards can greatly facilitate accountability, employing a structured and rational approach to the selection of new board members, the objective of which is to ensure a suitable board composition including relevant board competencies

[37] See Thomsen and Kavadis (2022) 34.
[38] See eg Ørberg (2024).
[39] See Thomsen and Kavadis (2022) ch 6.
[40] This is a common criticism of foundation governance. See eg Bulmer (1995).
[41] See Thomsen and Kavadis (2022) ch 5.
[42] Hence artificial inheritance taxes on family enterprise foundations – as known from German Erbersatzsteuer – are ultimately a tax on donations or consolidation of the foundation-owned business, see Sanders (2023).

in the best interests of the foundation. The process can be based on board evaluations, including rigorous evaluation of individual board members and foundation executives. Disclosure of annual reports and donations as well as decision criteria, including ownership policies, can contribute further to addressing the accountability issues. A third approach is to ensure an appropriate distance between the foundation and the operating company,[43] for example limited overlap between the foundation and the company board, public listing of subsidiaries, ownership of multiple companies and establishing an intermediary holding company to handle the foundation's finances. In general, delegation to the company board is a way to enable checks and balances.

Private external governance – such as by additional supervisory boards or granting information rights to important stakeholders – may introduce additional checks and balances, where these are appropriate. It should be clear, however, that assigning control rights to interested parties outside the enterprise foundation confers not only benefits but also governance risks of their own, including capture by such stakeholders that compromises the foundation purpose.

2. *Regulation*

Policy makers can promote the establishment of enterprise foundations by increasing legal certainty about their creation and operations. A separate enterprise foundation law may be helpful in this respect. In addition, policy makers can help ensure the good governance of foundations, including accountability, by legislating governance rules and associated rules on transparency, such as mandatory financial reports and disclosure of related party transactions. Legal rules on board composition (such as independence) are another way to ensure good governance. A governance code for enterprise foundations based on comply-and-explain can be used to the same effect.

While economic incentives are inconsistent with the non-profit nature of foundations, they may be used in foundation-owned companies. Moreover, rigorous evaluation of foundation officers and directors can help enforce foundation purposes more effectively.

Flexibility with regard to purpose and governance may be created by a specialised regulatory agency that can handle such issues and conduct administrative supervision of the foundations (i.e., to ensure legality and governance in accordance with the foundation charter).

It should be clear, however, that there are costs as well as benefits to regulation. Assigning excessive powers to a foundation authority can make enterprise foundations vulnerable to political capture and expropriation. Moreover, bureaucratic procrastination can be especially costly for enterprise foundations, which occasionally need to react fast to changing business circumstances. Hence it is clearly preferable to address governance issues by enterprise foundation governance rather than government regulation, which should be limited to legality supervision, i.e. to ensure that enterprise foundations act in accordance with the law and their charters.

V. Overview of the Main Parts of the Model Law

Now that the need for effective regulation has been explained, this section turns to the main parts of the model law. The model law is deliberately kept short but with comprehensive explanatory remarks.[44] Naturally, the explanatory remarks (under C) contain material important for the application and interpretation of the model law. The model law text should not be read

[43] See Hansmann and Thomsen (2021), 172–30.

[44] There may be different drafting styles, such as EU legislation with its directives and regulations and a focus on the text of the law text itself. However, the project team decided to follow the previous work on European foundations, see eg Hopt et al. (2006). The approach with explanatory remarks appears more user friendly because of the combination of legal text structured in sections and the explanations with examples in non-legalistic language. This drafting approach has also been successful in some of the most successful model laws, see eg the OECD Model law on a global minimum tax (Pillar II).

without consulting the accompanying explanatory remarks.

The model law draft rules are divided into five main parts: Chapter 1 on establishment; Chapter 2 on foundation property and changes in status; Chapter 3 on amendments and mergers; Chapter 4 on governance; Chapter 5 on the competent authority exercising legality supervision; and Chapter 6 on dissolution.

The model law **Chapter 1** is entitled **establishment** and deals with definitions, formation, rules on permissible purposes, rules on foundation charter content, and rules on registration procedure. The rules on permissible purposes are to a large extent optional, so it will be up to legislators to decide whether eg family purposes should be accepted in their jurisdiction. The focus in Chapter 1 is on the fundamental rules regarding the foundation's existence and on the written charter that binds the governing board of the foundation. The founders have wide discretion in choosing the purpose and the 'constitution' of the foundation, but, after the formation phase, the founders relinquish their property rights, and the assets belong to the foundation.[45]

Chapter 2 on foundation property and change in status includes rules on the use of the foundation property and the non-distribution constraint, which is typical for non-profit companies in general and foundations in particular. In particular, there is no general rule to preserve the foundation's original property (*Grundkapital*) unless the charter states so. In this way, the governing board is free to restructure, invest and sell property. In the process, taking calculated risks is permissible.

Chapter 3 on amendments and mergers of foundations deals with questions of purpose amendments. Whereas the first chapter deals primarily with the fundamental rules in the formation phase, the second chapter regulates the existence phase after the foundation has been established. Amending the purpose, or merging with another foundation, may involve a departure from the will of the founder at the time of the establishment of the foundation. Amendments to the purpose are, therefore, typically only allowed where the amendment is necessary and in the interest of the foundation, while charter rules on organisation and governance with their declaratory nature are often easier to amend.[46] The balance between the respect for the founder's will, on the one hand, and, on the other hand, the need for adaption to changed circumstances is particularly difficult in the case of enterprise foundations, but the model law and explanatory remarks provide a framework for this assessment. Importantly, purpose amendments should be considered in light of relevant tax law classifications, eg tax benefits for public good purposes, to avoid the risk of tax evasion.

The governing board of the foundation must stay within the organisational limits stipulated in the foundation charter. While adhering to purpose and governance rules in the charter is clearly important, there is a need for default rules on governance and certain restrictions. **Chapter 4 on governance** includes both. The chapter adopts a broad understanding of 'foundation governance'. Thus, the chapter regulates the governing board's rights and duties, including duties of good faith and loyalty, and also the duty to distribute to any donation purposes expressed in the charter as well as the duty to engage actively with controlled subsidiaries. The chapter includes rules on board members' rights, appointment, representation, board independence, remuneration of the board, transparency, accountability, reporting, disclosure, audit requirements and asset management. Although bearing in mind the desire for privacy, the draft governance rules are designed in light of the fact that the EU anti-money laundering legislation – including the new regulations on authorities, supervision and traceability – effectively subjects all foundations to

[45] See Part A.III on the definition of an enterprise foundation.
[46] See Part A.III.

a certain level of public scrutiny. More generally, accountability and transparency are regarded as essential to the legitimacy and social acceptance of the enterprise foundation model and, therefore, for its potential economic and social contribution. Hence accountability and transparency are believed to be in the best interests of enterprise foundations in general.

Chapter 5 on the competent authority responsible for legality supervision over foundations is closely related to the governance chapter. Internal governance instruments within the foundation are, in most legal systems, supplemented by external supervision by a court, as in the Netherlands, or vested in an administrative agency, as in Denmark, Germany, Norway and Sweden. It is, however, also possible that private parties with the right to sue or self-regulatory approaches can play a role in the oversight of foundations. While the model law suggests including supervision by a competent authority (i.e. public body or court), the project team is aware that there are other options. In line with the optionality approach governing this draft, national legislators may choose other options that they believe fit their legal systems better. Such approaches will be discussed more thoroughly in Chapter 5.

According to the model law, legality supervision may be exercised by either an administrative agency or a court which exercises legality control of the governing board. That supervision is supplemented by a review performed by an independent auditor. In the absence of members and shareholders, the competent authority ensures that the governing board acts in accordance with the charter of the enterprise foundation and the national law implementing this model law. The essential parts of this supervision model are found in the vast majority of European states.[47]

A particularly delicate question is the sweep and force of the competent authority powers. The model law states that one or more competent authorities are to have the powers necessary to ensure legality, meaning that enterprise foundations are governed in accordance with their charters and the law. However, the competent authority should not, and cannot, interfere with the management of enterprise foundations. While the choice of court or agency is optional, the model law recommends appropriate powers for the competent authority. Effective supervision is necessary to maintain public trust and confidence in enterprise foundations. To achieve this purpose, the establishment of such an authority is not sufficient. The authority must also be effective, competent and work with a service attitude, focused on assisting foundations. This requires that competent authorities have appropriate resources, and that their decisions are open to legal and public scrutiny.

Legal supervision by efficient authorities that respect the principles of subsidiarity and proportionality can be helpful for all kinds of enterprise foundations. However, national legal systems are not easily changed, and national legislators may understandably be hesitant to introduce new public agencies to supervise enterprise foundations. In some cases, a national legislator may also wish to distinguish between enterprise foundations with public and private purposes and, for example, mandate public supervision of foundations with a public purpose while relying on internal governance and legal enforcement through private claims by beneficiaries and founders for private foundations, especially family foundations. This differentiation between charitable and private purposes in relation to supervision is known in eg Switzerland, Austria, Germany, Ireland and the Netherlands.[48]

Chapter 6 provides draft rules on the dissolution and winding up of enterprise foundations.

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[47] See part A.VI.B; van Veen (Schlüter et al. eds., 2001); Sanders and Thomsen (2023) 233–234 and the upcoming 2nd edition; van der Ploeg et al. (2017).
[48] Sanders and Thomsen (2023), 233–234 and the upcoming 2nd edition with country reports by Breen (2025 forthcoming) on Ireland and Stokkermans and van Uchelen (forthcoming 2025) on the Netherlands.

VI. Sources, Inspirations and Comparative Perspectives

A. Main Sources and Inspirations

As mentioned, the model law is based on extensive discussions with stakeholders which took place between 2023-2025. Together with project experts, the project team compared and discussed in depth regulatory law, foundation law and tax law in more than twenty jurisdictions. This was possible due to the considerable comparative work performed by scholars prior to, and after, the start of the project.[49]

The main inspiration for the model law has been the previous work on European foundation law. Highlights are the 2001 book on 'Foundations in Europe',[50] the 2006 book 'The European Foundation – A new legal approach',[51] the 2009 Feasibility study on a European foundation statute,[52] the 2012 EU Commission proposal for a regulation on a statute for a European Foundation and literature related to the proposal, the 2014 book 'Foundation law in Europe', the 2020/2024 legal mapping of philanthropy by Philea,[53] and the 2023 book 'Enterprise foundation law in a comparative view'[54] with contributions from a number of European jurisdictions.

The project team also considered the very different rules in the US. In 1969, the US opted for a tax penalty regime instead of regulatory regimes as in Europe.[55] While the US created recent (narrow) exceptions to allow for functional equivalents to enterprise foundations, such as Patagonia and Newman's Own,[56] the rules on excess business holdings continue to display a hostility towards foundation ownership of business companies.[57]

The charity law regimes in Ireland, England and Wales have a different foundation concept than that on the European Continent,[58] but the supervision of charitable foundations in these States has many similarities to the supervision of foundations in Continental Europe.[59] The powers of regulators resemble the powers typically found in Continental jurisdictions.[60] These legal regimes were taken into account in the drafting process of the model law even though the model law mainly builds on a civil law perspective on foundation law.

Another source of inspiration is European company law[61] and corporate governance, for example corporate governance codes.[62] In some respects, enterprise foundations are hybrids between foundations and companies. This is particularly the case insofar as they engage in active ownership, risk taking or other business activities. Corporate governance concepts like independence, transparency, accountability, and board committees are, therefore, reflected in the current model law proposal.

The project team studied a vast amount of research articles and books, and during ELI seminars and workshops, there were presentations and discussions covering most of Europe. For an overview of the literature, see the bibliography.

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[49] See part VI.B on comparative perspectives.
[50] Schlüter et al (2001).
[51] Hopt et al. (2006).
[52] Hopt et al. (2009).
[53] Philea (2020).
[54] Sanders and Thomsen (2023).
[55] Eldar (2023).
[56] Eldar (2023).
[57] See Eldar (2023) 212 with an explanation of the 200% tax penalty on business holdings on more than 20%.
[58] See Part A.III.
[59] Breen (2018); Breen (2024).
[60] Schlüter et al. (2001).
[61] See for example, Dorresteijn, Olaerts, Kemp, Meyer and Arons (2022). De Luca, N (2022). European Company Law. Cambridge University Press; Fleckner and Hopt (2013).
[62] See, for example, Du Plessis and Low (2017).

The project team is indebted to the ELI Advisory Committee, the Consultative Committee, and other stakeholders (regulators, practitioners, ELI experts, etc.), in particular the European Network of Enterprise Foundations (ENEF) that participated in the many workshops and conferences and generously provided high-level comments on previous drafts of the model law.

We are particularly grateful for helpful comments from the following:

Emeritus Professor Klaus J Hopt, Max Planck Institute of Comparative and International Private Law, Hamburg, Germany

Emeritus Professor Colin Mayer, University of Oxford, United Kingdom

Professor Hanna Almlöf, Linköping University, Sweden

Professor Eugenio Barcellona, University of Eastern Piedmont, Italy

Policy Officer for Social Economy Marie Boscher, DG GROW, European Commission

Professor Oonagh B Breen, University College Dublin, Ireland

Professor Carolina Cunha, University of Coimbra, Portugal

Dr. Sabrina Dupoy, University of Aix-Marseille, France

Professor Ofer Eldar, University of Berkely, USA

Professor Miguel Gimeno-Ribes, University of Valencia, Spain

Professor Dominique Jakob, University of Zurich, Switzerland

Professor Susanne Kalss, Vienna University of Economics and Business, Austria

Professor Konrad Osajda, University of Warsaw, Poland

Marianne Philip, Partner at Kromann Reumert and adjunct professor at Copenhagen Business School, Denmark

Professor Katerina Ronovská, University of Masarykova, The Czech Republic

Professor István Sándor, ELTE faculty of law, Budapest, Hungary

Professor Christiaan Stokkermans, Erasmus School of Law, The Netherlands

Professor Ivan Tot, University of Zagreb, Croatia

Professor Wino van Veen, Vrije Universiteit Amsterdam, The Netherlands

Professor Hans de Wulf, University of Gent, Belgium

Professor Anne-Marie Weber, University of Warsaw, Poland

Comparative Perspectives

The project team, especially project assistant Mark Ørberg, reviewed sources on comparative enterprise foundation law including the following Austria,[63]

[63] Schauer and Nueber (2024); Kalss (2023) 61; Kalss (2024); Zollner (2014) in Prele eds. Olbrich 2020), 512–518.

Belgium,[64] the Czech Republic,[65] Denmark,[66] England and Wales,[67] France,[68] Finland,[69] Germany,[70] Hungary,[71] Ireland,[72] Italy,[73] Liechtenstein,[74] the Netherlands,[75] Norway,[76] Poland,[77] Portugal,[78] Slovakia,[79] Spain,[80] Sweden,[81] Switzerland[82] and the USA.[83]

The review of comparative material has led to the following provisional observations.

1. *Most States Allow for Enterprise Foundations*

From our survey among ELI advisory boards experts,[84] it appears that at least 15 of the 23 jurisdictions involved in the project allow for the 'enterprise foundation holding model' with a foundation controlling a business enterprise,[85] but with different restrictions, eg in terms of how active ownership by the foundation may be exercised.[86] At least 20 European jurisdictions appear to allow for enterprise foundations in the broad sense, including foundations that own or run businesses and functional equivalents.[87] In some jurisdictions, the business activities of the foundation may only be ancillary to the distribution purpose (eg, Croatia and the Czech Republic). Importantly, though, all European countries allow foundations to benefit from economic activities, eg 'unrelated activities' in a subsidiary,[88] and almost all Member States allow a foundation to establish a subsidiary commercial company.[89]

The enterprise foundations we observe in Europe can be divided into three main models[90] based on their ownership structure, activities and purposes:

Model A. Operating foundations – eg foundations with hospital activities, museums activities or university activities – are common in Europe and in the US. Such entities are typically considered non-profit despite their commercial activities.

Model B. Grant-making enterprise foundations – that

[64] Forrest and Houben (2024) Denef, Verschaeve, van der Ploeg, van Veen, Versteegh (2017), 327–343.
[65] Ronovská(2014), 35–49; Ronovská and Lavický (2016), 641–646; Ronovská and Lavický (2015), 639–644; Ronovská and Pihera (2019), 662–667.
[66] Feldthusen (2016); Feldthusen (2024). Koele and Feldthusen (2020); Feldthusen (2023); Thomsen, (2017); Ørberg and Blichfeldt (2023). Ørberg (2024). Ørberg and Troels (2024).
[67] Charity Commission for England and Wales, Charity Commission Guidance, <https://www.gov.uk/guidance/charity-commission-guidance>; Bater (2020); Fries (2010) 896. Breen (2015); Breen Ford and Morgan (2008) 5; Dunn (2014).
[68] Combes (2014), 71–85.
[69] Löfman (2024).
[70] Richter and Gollan (2024), 323–327; Sanders (2023) 45; Weitemeyer (2023); Thöm (2024).
[71] Sándor (2023); Sándor, (2021).
[72] Breen (2024). Breen (2014).
[73] Barcellona (2014), 155–174.
[74] Schurr (2014) 175–192; Meinecke (2023); Jandrasits (2024).
[75] van Veen and Hjalmar (2016); Van Veen (2000); Overes, Helen and van der Ploeg (2014); Koele (2016); Koele (2014).
[76] Woxholth (2001).
[77] Krzywański and Gajdziński (2024); Moszyńska (2024).
[78] Rui Hermenegildo (2014); Barnabé, Assis, and de Oliveira (2024).
[79] Csach and Bohumil (2024).
[80] Penalosa-Esteban (2014.); Alli Turrillas (2015).
[81] Olsson (2023), 103; Einarsson and Fagerberg (2024); Engwall (2021).
[82] Jakob (2023) 83; Jakob et al (2020); Jakob and Brugger (2022); Jakob and Goran (2014), 283–310. Weiss, Kinga, and Weber (2024).
[83] Eldar (2023), Lyubomir, Noked and Desrosiers. (2024). Hansmann and Thomsen (2021).
[84] ELI advisory board members responded to a survey in 2023. The survey asked about eg the permissibility of majority ownership by foundations and 'ownership clauses' in national foundation law.
[85] See Thomsen (2023) 11.
[86] Austria, Belgium, Croatia, the Czech Republic, Denmark, Germany, Hungary, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, Poland, and Portugal. Lichtenstein and Luxembourg also seem to allow for such enterprise foundations.
[87] Austria, Belgium, Croatia, the Czech Republic, Denmark, France, Germany, Hungary, Italy, Ireland, Lichtenstein, Luxembourg, the Netherlands, Norway, Spain, Sweden, Switzerland, Poland, Portugal, and the UK.
[88] See Hopt et al (2006) 222.
[89] See Hopt et al (2009) 47 and 90 ('Much more frequent and accepted by almost all Member States are public benefit foundations which are owners or majority shareholders of an enterprise.').
[90] Based on the literature in Europe, the three models highlighted here appear to be the most common. There are of course other models of enterprise foundations, such as institutions with no distribution purpose, but these appears to be less common. See Sanders (2023), 40 (describing the German Wala Stiftung, which is a foundation with no distribution purpose).

is, foundations that are equipped with a distribution purpose and no business purpose – may control a business enterprise, thus separating them from typical grant-making foundations with a diversified portfolio. If these foundations decide to divest their stake in companies they control, this is not seen as an amendment of purpose.

Model C. Pure enterprise foundations – that is foundations with a business objective explicitly mandated by the foundation charter – typically have public good distribution purposes or private purposes.[91] However, unlike model B, these holding enterprise foundations are characterised by the fact that they must control specific business enterprises and *hold* that control, unless compelling reasons establish that the asset can be sold.[92]

Very frequently, these models are mixed so that enterprise foundations have both public and private distribution purposes in combination with a business purpose, and some business activity is conducted at the foundation level, while other business activities are carried out by corporate subsidiaries.

Another approach is to classify foundations by the functions of the companies they own. For example, some scholars propose a distinction between enterprise foundations that own income-generating for-profits companies and enterprise foundations that own socially oriented for-profits companies. The *income-generating for-profit* is controlled by a non-profit to generate funding for its charitable mission, ensuring steady long-term cash flows and mitigating systemic risk. The *socially oriented for-profit* is controlled to ensure the operating business adheres to the non-profit's mission, eg OpenAI and Lloyd's Register.[93] Socially oriented for-profits often also function as income-generating for-profits, as the categories are not mutually exclusive.

2. *Permissible Purposes*

A survey among ELI advisory board experts found that most European jurisdictions allow for public good purposes in foundations,[94] while some allow for private purposes,[95] and business objectives,[96] or a combination of the three types of purposes, albeit sometimes with certain restrictions in terms of, eg, the number of years or the number of generations of family members allowed to be benefitted (eg, Germany, Switzerland, Austria, Liechtenstein, Denmark, Sweden, and Norway). A few jurisdictions seem to allow for the foundation with only a business purpose – by some referred to as the pure business self-purpose foundation (*Unternehmensselbstzweckstiftung*)[97] – where selling goods or services is itself enough to be accepted as a valid foundation (eg Sweden).[98]

Some countries have a legal tradition with a focus on public good foundation purposes. For example, Portugal, Spain, and France do not allow private purposes in foundation charters. This means that neither a business nor a family member can be stated as a part of the purpose clause of the foundation charter. However, in these countries, so-called 'ownership clauses' – which mandate ownership of a particular

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[91] For a compilation of enterprise foundation structures, see Eldar and Ørberg (2025).
[92] See Ørberg (2024).
[93] See Eldar and Ørberg (2025).
[94] There is no general definition for these public good – or public benefit – purposes, but it seems that most European countries have a more or less similar definition, possibly influenced by tax law.
[95] Private purposes in some states are specific individuals such as family members; see for a comparative perspective, Schöning (2004).
[96] There is not a general definition of business objectives, but the term is used here to describe charter clauses on ownership and/or running a business (preserving and maintaining an enterprise). In some countries, such clauses are seen as purposes, in others they are seen as objectives along with the distribution purposes.
[97] The discussion on pure self-purpose foundations is not always directly comparable in the different states. In the Feasibility Study on a European Foundation Statute – final report (2009), 60–61, Hopt et al stated that: '*The German view is, in the main, that such 'trade protection' foundations ('Unternehmensselbstzweckstiftungen') are not allowed, because the assets of a foundation should be subordinate to its purpose […]. The same view also holds sway in Austria.*'
[98] See Olsson (2023) and Olsson (1996).

business[99] – appear to be permissible. Functionally equivalent to purpose clauses, these clauses require the foundation to keep control of the subsidiary, but they are not classified *as such* as a part of the purpose.[100] Tax reasons and cultural reasons appear to be the most likely explanations for the restrictive approach to private purposes in these countries.[101]

Therefore, in terms of foundation purposes, there appear to be two main approaches in European legal regimes. The prevalent approach accepts private purposes. Some states – such as France, Spain, and Portugal – do not accept family purposes or other non-charitable purposes, but they nevertheless appear to accept ownership clauses.

3. *Formation and Registration Rules in Europe are rather similar*

Overall, the rules on establishment and registration of foundations are rather similar in the European states.[102] Some states require a minimum capital, and some have a requirement of proportionality between founding assets and purpose. Almost all states require foundations to be registered.[103] There are some differences between civil law and common law countries in terms of specific requirements to be fulfilled at the stage of formation, and common law countries typically focus on the 'charitable' character of the organisation as opposed to a focus on conceptual criteria in the civil law countries described in Part III of the explanatory remarks.[104] For example, the formation and registration procedures in Germany, Austria, Switzerland, Denmark and Sweden all appear similar.[105]

4. *All States Require a Written Governing Document*

Despite huge variation in terminology, all States require a form of written governing document, typically a charter. The charter may be identical with the original deed (a document expressing the founder's intention to establish the foundation which may be set up while the founder is alive or as part of a will) or a separate document.[106] Besides articulating the will of the founder, a written document is usually necessary to obtain tax exemptions. This 'governing document' must typically include rules on governance, assets, pursuance of a specific purpose, etc.[107]

5. *It Seems that all States Distinguish between the Formation Phase and Existence Phase*

The freedom of the founder appears to be fundamental in all European countries, which means that the founder, at least as a starting point, is free to choose the foundation's purpose, the first board and some or all of the governance rules, but from the moment the foundation is established, the existence of the foundation's legal personality means that the founder only has limited influence.[108] From that moment, the founder must respect the interests and purpose of the foundation.[109] However, there is great variation in terms of permissible founder influence,[110] and foundation governing boards must fulfil the will of the founder as expressed in the charter and founding documents.

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[99] The ownership clause makes it difficult to sell certain core assets owned by the foundation, and in some states, the sale of such assets requires permission from authorities or courts.
[100] See eg Cunha and Oliveira Martins (2025 forthcoming) section 3.2.2. (discussing ownership clauses).
[101] See eg Archambault (2022) (explaining that in France, foundations are subject to unfavourable legislation and that non-profit associations are therefore typically preferred). As pointed out by Prof. Dr. Birgit Weitemeyer in private correspondence, the unfavourable legislation probably reflects reluctance towards feudalistic structures.
[102] See eg Philea (2024) with country reports from most European countries.
[103] See Hopt et al (2009), 77–82 on formation and formation procedures.
[104] Hopt et al (2006), 63–77. For an example of common law rules, see eg Fries (2005).
[105] See the contributions in Sanders and Thomsen (2023).
[106] See eg Hopt et al (2009) 77, and Hopt et al (2006), 122–126.
[107] See the contributions in Sanders and Thomsen (2023), and Hopt et al (2006), 63–77.
[108] See eg Hopt et al (2009) 70 and 100 (highlighting the broad discretion of founders).
[109] Sanders and Thomsen (2023), and Ørberg (2024).
[110] See eg Kalss (2023) for a description of revocability rights for founders in Austrian law. Moreover, almost all countries allow for the founder to be a board member, and founders are typically given discretion to form their appointment rules, see Hopt et al (2006) 162 and 170.

6. *Approaches to Revocability and Influence of the Founder*

Separation from the founder is fundamental in most states, and many require irrevocable separation. There are notable exceptions, though. Austria allows the founder to revoke the establishment of the foundation at will, if this is an explicit condition at the formation. Also, Austria allows the founders to change the purpose after the establishment, if they explicitly reserved that right.[111] This provides immense flexibility from the perspective of the donor, but tax law may, in practice, limit the flexibility so that a public good purpose is not changed into, for example, a family purpose.

A more restrictive approach is found in the majority of European states. States like Denmark and Norway do not accept founder reservations on the charter.[112] Such a power for the founder would, according to one view, give them leverage to unduly influence the foundation. Moreover, the main principle of the supremacy of the governing board – and the principles of separation, independence and irrevocability – are perceived to be in conflict with a founder's right to revoke the foundation or amend the charter. If the founder could amend the charter, the assets and the directors of the foundation would be under such influence by the founder that they would not be regarded as having irrevocably given up their rights to the foundation.[113]

Another important question regarding permissible founder influence is the extent to which the founder may appoint directors of the foundation governing board. In Germany, the founder may, for example, retain the right to appoint the entire governing board. Such influence would be impossible under Danish and Swedish law. In these countries, statutory law is rather concerned with the risk of undue influence by founders.[114] The fear is that the foundation could effectively function as a tool for creditor evasion and tax abuse if the founder could appoint a majority of the board. However, in other countries, this risk is primarily mitigated by other means, eg private external governance mechanisms.

Although many central European countries developed their foundation laws with inspiration from German scholarly writings in the 19th century,[115] the concepts of independence and separation evolved differently across Europe. Setups with revocation rights – that from a Danish, German, Swedish, or Swiss perspective would violate fundamental foundation law principles – are entirely possible in Austria. Likewise, strong regulatory powers providing external governance and enforcement that are seen as necessary in England, Sweden and Norway could, in other countries, be seen as undue public intervention in the private matters of private foundations.

7. *The Protection of Purpose is a Core Part of the Existence Phase*

In most countries, approval of a competent authority (either agency or court) is necessary to amend the purpose chosen by the founder at the time of establishment.[116] This protection of the founder's original intentions appears to be fundamental in most states,[117] and most states allow for purpose amendments if the competent authority has decided that the changes are in line with the foundation's purpose that expresses the founder's will.[118] As mentioned, Austria, Liechtenstein and the Netherlands accept founder reservations, which means that no state approval is required for a change of the charter, including its purpose, while competent authority approval is always required for a change of purpose in Denmark, England, Finland, France,

[111] See Kalss (2023).
[112] See Feldthusen (2023).
[113] On independence in Danish enterprise foundations, see Feldthusen (2023).
[114] However, see the criticism in Eldar and Ørberg (2025).
[115] See Tamm (1982) 9–26 and Olsson (1996).
[116] See eg Sanders and Thomsen (2023), Hopt et al (2009), 82–84.
[117] See Sanders and Thomsen (2023), Hopt et al (2006), 258–266, and Ørberg (2024).
[118] See Hopt et al (2009) 102. The protection of purpose in European countries is described in the Philea (2020) country reports and in Sanders and Thomsen (2023).

Germany, Greece, Italy, Norway Spain, Slovenia, and Sweden.[119]

Foundations may need to adapt to changed circumstances. For example, occasionally, operational activities in enterprise foundations and their subsidiaries prove less profitable than expected. A commercially unsuccessful foundation activity yielding very little or no profit, or even a loss, is typically not itself considered problematic, because the foundation needs to be able to take calculated risks with its investments, and boards enjoy considerable discretion in their business judgements. At some point, though, the governing board must examine if the activities prescribed in the purpose should be revisited. With the foundation's perpetual fulfilment of purpose, the governing board of the foundation must ensure that the foundation asset base is not undermined and that the foundation – including its purpose – adapts to changing financial conditions or other unforeseen circumstances. This approach seems to be accepted in all states to avoid frustration of purpose.[120]

In most countries, the amendment of purpose is seen as an intervention in the core will of the founder, and such amendment to the founder's will is only acceptable when there are qualified circumstances.[121] The board should, according to this approach to foundation law, not be able to change the purposes without some control from courts or regulators. If the governing board itself could change the purpose at will and without due external governance mechanisms, the purpose could ultimately become the governing board's purpose instead of the founder's purpose.[122]

While the criterion 'qualified circumstances' is formulated differently in the various states, most states seem to require that amending the founder's purpose is only acceptable when necessary due to compelling reasons. Qualifying the exact compelling reasons, however, is inherently difficult and practices vary across Europe. In particular, the amendment of business purposes or ownership clauses (that are functionally equivalent) is difficult, as there may be a conflict between the founder's original wish and the current business needs of the foundation and the foundation-owned firm. In some countries, regulators have been criticised for being too inflexible in terms of amendments of business objectives, but, in other cases, scholars have criticised regulators for being too permissive.[123]

8. *Many Countries Require at least Three Members in the Governing Board*

There seems to be a tendency in foundation legislation to require at least three members in the governing board.[124] Those that do not would typically have very strong public or private-supervisory mechanisms in place.[125] Almost all allow for the founder to be a board member.[126]

9. *There are various Commonalities in the Duties of the Governing Board*

In all countries, the foundation board has a duty of care and a duty of loyalty with respect to the foundation.[127] These duties of care and loyalty mean that the governing board must faithfully pursue and fulfil the foundation purpose.[128] It seems that all countries also have rules on self-dealing and administration costs.[129] It is typically the duty of the board to determine who is to receive distributions from the foundation. A distribution to parties outside of the purpose would not be permissible. Rather

[119] See eg Hopt et al (2006), 262–264.
[120] See Sanders and Thomsen (2023) and Philea country reports.
[121] See Sanders and Thomsen (2023) and Philea country reports.
[122] On Danish law, see Ørberg (2024).
[123] See Olsson (1996).
[124] See eg Hopt et al (2006) 158, and Philea (2020) country reports.
[125] See eg Hopt et al (2009) 101.
[126] See eg Hopt et al (2006) 162, and Philea (2020) country reports.
[127] See eg Hopt et al (2006), 143–158.
[128] See the contributions in Sanders and Thomsen (2023), Hopt et al (2006) 72, Thomsen (2017) and Ørberg (2024).
[129] See eg Hopt et al (2009), 65–68, and Philea (2020) country reports.

than a question of foundation law, the question of adequate distribution for public benefit activities is often considered as a matter of tax law, but in some countries, foundation laws also require adequate distribution from the foundation.[130] Some states require enterprise foundations to engage in active ownership of subsidiaries, eg to ensure a sufficient flow of cash to the foundation.[131] However, the boards in most countries enjoy huge discretion in terms of asset management, and if states prescribe investment rules, they are typically very general and flexible.[132] For example, in Germany, Sweden, Finland and Denmark, there is a requirement of a sufficiently secure and profitable investment of the foundation's assets.[133]

10. *Remuneration Rules are very similar*

In foundations with public good purposes, the remuneration of board members must typically be 'reasonable.'[134]

11. *Transparency, Disclosure, and Accountability Requirements are very diverse*

Almost all countries require annual reports on the activities of the foundation, and frequently laws refer to the general accounting acts.[135] Many require disclosure to the general public of the annual report,[136] and many require an auditing of the report.[137] External auditing is necessary in eg Austria, Denmark, England, Finland, France, and Norway while external auditing is only necessary in certain cases in other countries.[138] It seems that most, if not all, states require audited financial reports for tax-exempt foundations.[139]

England and Ireland have public registries for charities, and Denmark has a registry for all enterprise foundations and general law, especially national company law.[140]

Moreover, in some countries, even communication between foundations and regulators are publicly accessible upon request, unless the information concerns sensitive information, such as trade secrets.[141] Transparency in terms of annual reports and distributions enables private parties to identify potential abuse in foundations, so that they can report problems to regulators or courts. But subjecting foundations to a high level of transparency does not appear common in Europe. Instead, many countries today primarily rely on auditors and other third-party mechanisms, and particularly in foundations with private purposes, transparency is more limited.[142]

12. *The Nature and Powers of Foundation Authorities Differ substantially*

The competence and powers of foundation authorities differ quite substantially in the European states, but all countries have rules to ensure that the foundation will indeed be able to further its purposes.[143] Some states have state supervision in the form of an

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[130] See Hopt et al (2009) 84, and Feldthusen (2023) for a description of Danish law.
[131] See eg Thomsen (2017) for a description of the Danish enterprise foundation act.
[132] See eg Hopt et al (2009) 86, and the contributions to the Philea 2020 mapping publications. See also Richter (2024) with a description on the German business judgement rule's application for foundations, stressing that it applies only if actions are within the foundation charter.
[133] See the contributions in Sanders and Thomsen (2023), and Hopt et al (2009) 86.
[134] See Philea (2020) country reports, Hopt et al (2009) 101, and Hopt et al (2006) 146.
[135] See eg Hopt et al (2006) 197.
[136] See eg Hopt et al (2006), 134–135 and 202, and Philea (2020) country reports. In Netherlands, annual reports are not required to be published, see Stokkermans & Uchelen-Schipper (2025 forthcoming).
[137] See eg Hopt et al (2009) 101, and Philea (2020) country reports.
[138] See eg Hopt et al (2006), 206–208.
[139] See Philea (2020) country reports.
[140] See Fries (2010), Breen (2025 forthcoming), and Feldthusen (2023).
[141] This is the case in Denmark, where communication between enterprise foundation and regulators is available upon request, although private information about individuals or sensitive company information may not be disclosed, according to the Danish Access to Public Administration Files Act, para 7 and 30.
[142] See eg Stokkermans and Uchelen-Schipper (2025 forthcoming) (describing how disclosure rules were proposed in the Netherlands in 2020, but widely criticised, and subsequently the proposal was changed so that access to financial information was limited to specific government agencies and service providers).
[143] See eg Hopt et al (2009),103–104 and 73.

agency or a court, some states combine courts and agencies, eg the Netherlands.[144] In some countries, private mechanisms of supervision are particularly widespread.[145] In Denmark, the enterprise competent authority has particularly extensive powers, but exerts them sparingly.[146] In Austria and many German states, private foundations are subject to very limited supervision by public authorities.[147] However, almost all states have a supervisory authority of some kind. Administrative bodies are found in, eg Austria (public foundations), England, Scotland, France, Germany, Greece, Italy, Slovenia, Spain, Finland, Norway, Denmark and Sweden.[148] In some states, economic decisions of a fundamental nature – eg decisions that would endanger the foundation's existence – must be approved by the competent authority, and in many states, the sale of certain assets must be approved by the competent authority.[149] Many states enable the competent authority to initiate some form of special inquiry in the foundation management, but foundation authorities cannot take over the management. Some states give wide powers to the competent authority, some states require a court order as the basis for agency intervention.[150] It seems that a few countries require courts to intervene for removal or appointment of foundation board members, while most countries give the competent authority removal or suspension powers.[151] Many countries allow foundation authorities to amend the purpose without consent from the governing board if there is a fundamental cause for doing so.[152] Unlike governing board's business decisions that are subject to a business judgement rule, eg asset administration, foundation authorities typically perform a full review of whether distributions are in fact in accordance with the foundation purpose.[153] This is in line with the notion that the business judgement rule does not apply in cases where the board acted in clear violation of the law, because such violation does not fulfil the good faith requirement that is a part of the loyalty duty. The review by non-tax regulators is sometimes supplemented by a tax authority review to ensure that public good purposes are in fact pursued.

To sum up, the foundation authorities in Europe typically have the right to intervene in the case of breaches of foundation law or the foundation charter, but they have no right to review business decisions of the board, even if the board appears inefficient. Inquiry powers, removal powers, ratification powers, cancellation, intervention powers and enforcement powers are common. Supervision by tax authorities typically complements the supervision by foundation authorities. However, the specific powers of foundation authorities are very diverse.

13. *Judicial Review of Competent Authority Decisions is common*

Because of the vast powers given to foundation authorities in many countries, appeal to courts is usually possible. Judicial review means that administrative decisions can be reviewed by the courts,[154] and it appears that, because of constitutional principles of separation of powers, most foundations in Europe enjoy judicial protection from administrative encroachment on the foundation.

14. *Taxation Varies and typically Rewards Public Good Distributions*

Since national customs vary greatly, taxation is

[144] See Stokkermans and Uchelen-Schipper (2025 forthcoming) (describing how the public prosecutor has information rights, but that eg removal of foundation board members requires court intervention).
[145] See, for the Netherlands and Austria, Stokkermans and Uchelen-Schipper (2025 forthcoming); Kalss (2023).
[146] See Feldthusen (2023).
[147] Sanders (2023) 48; Kalss (2023) 70.
[148] See eg Hopt et al (2006),245–248.
[149] See eg Hopt et al (2006),251–252.
[150] See eg Hopt et al (2006), 253–254, and Philea (2020) country reports.
[151] See eg Hopt et al (2006),254–255, and the country descriptions in Sanders and Thomsen (2023).
[152] See eg Hopt et al (2006), 265.
[153] See eg Jakob (2023) for Swiss law, Olsson (1996) for Swedish law, Ørberg (2024) for Danish law, Woxholth (2001) for Norwegian law, and Richter (2024) with a description on the German business judgement rule's application for foundations, stressing that it applies only if actions are within the foundation charter.
[154] The need for judicial review was also suggested by Hopt et al (2006), 245.

the area with the highest level of diversity. Both Klaus Hopt et al (2006) and Klaus Hopt et al (2009) thoroughly studied these differences in design. All states appear to provide tax benefits in some way for foundations that have public good purposes, in common law terminology, charitable purposes. In all countries, foundations may be tax-exempt if they meet the requirements of tax law. The non-distribution constraint is an important element for tax-exempt foundations and seems to be accepted generally.[155] The most common approaches in comparative tax law are explained by Paul Bater[156], and the country report contributions in the Philea (2020) publication on foundation law provide windows into the various states' tax laws on foundations. Moreover, the Philea (2020) country reports reconfirm the substantial differences among various states.

Importantly, most – if not all – states appear to have rules that ensure that taxes are not levied fully on the three levels of taxation: the subsidiary level, the foundation level, and the beneficiary level. As the feasibility report by Hopt et al explains:[157]

> *This means that most states, in one way or another, aim at mitigating the double burden which would arise in case of a full imposition of tax both on the level of the corporation (foundation, company) and on the level of its beneficiaries (founders, shareholders, etc.). The different EU Member States use highly different mechanisms in this respect, including – the exemption of corporate profits, combined with exclusive (but full) taxation of the shareholders on distribution (eg Estonia), – a moderate taxation of corporate profits, combined with a moderate taxation of the shareholders upon distribution (eg Germany, Ireland), – a full taxation on both levels, combined with a pro-rata credit of corporate income tax against the individual income tax of the respective shareholder.'*

If a foundation receives or received tax benefits, no states seem to allow such foundation to fall outside public external supervision performed by regulators or tax authorities. However, some states have rather limited public external oversight of foundations that have only private purposes and which receive no tax benefits.[158]

15. *Approaches to Private Governance Mechanisms*

Private governance mechanisms concern supervision by private parties that are not a part of the foundation's governing board, eg auditors, supervisory boards, and entities with the right to file supervisory complaints or lawsuits.[159]

The most common private external governance mechanism is the auditor's review of the foundation's finances and compliance with substantive law and the foundation charter. An example is Austria.[160] Even in countries with strong public authority powers, for example Denmark, the auditor's review of the foundation is typically the primary external governance mechanism.[161] Auditors fulfil an important role as they monitor the governing board and can report abuses to public bodies, such as regulators, courts, and tax authorities, which can then initiate investigations. Further, unintentional failures to comply with laws and regulations may be pointed out by the auditor and corrected, minimising the need to involve public authorities.[162]

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[155] Hopt et al (2006),295–296.
[156] Hopt et al (2006), 301–320.
[157] Hopt et al (2009), 97.
[158] See eg Stokkermans and Uchelen-Schipper (2025 forthcoming) (describing that private foundations are subject to some oversight by the prosecution service and courts, while public benefit foundations are subject to tax authority supervision).
[159] See eg Comstocková and Ronovska (2025 forthcoming) (describing the Czech approach to auditor review, supervision by a supervisory board, and regulatory review of tax-exempt foundations), or Osajda and Weber (describing auditing requirements and supervision in charitable and private foundations in Poland).
[160] See Kalss (2023), 78–81.
[161] See Ørberg (2024)
[162] For certain serious abuses, auditors would have to file a report for regulators, see eg Ørberg (2024) (describing the role of the auditor in Danish foundation law).

Most countries require an audit by an independent (external) auditor, although smaller foundations in some countries are not required to have such an external audit. Some form of auditing is usually seen as a necessity.[163]

Other common private governance mechanisms are supervisory boards and supervisory complaints from private parties. A supervisory board monitors the governing board of the foundation and may initiate either legal proceedings against the governing board or notify the relevant foundation authority.[164]

The supervisory bodies can take many forms and have different powers across Europe, but they generally serve as important control mechanisms, and in countries with limited public external governance, the private governance mechanisms tend to be stronger than in countries with strong public enforcement powers. Strong private governance mechanisms are seen in, for example, Austria and the Netherlands[165], and also in Germany if the founder designed the foundation to include strong private governance mechanisms.

In these jurisdictions with a special emphasis on private governance, illegalities are typically identified by minority board members from the foundation governing board, auditors, or third parties with standing, or supervisory boards, whereas other jurisdictions allow a risk-based public sector review – a review of foundation affairs without any specific suspension of illegalities – to complement the private oversight mechanisms.[166]

16. *Approaches to Public external Governance of Foundations with Public Good Purposes*

As stated above under point 12, the powers of foundation authorities differ quite substantially in the European states. Across Europe, two typical approaches to 'public external governance'[167] dominate. The majority of states appear to require public external governance mechanisms for all foundations with public good purposes, while some states opt for a limited approach to public external governance, mainly adopting court measures as opposed to regulatory measures.

Denmark, Sweden, England, Ireland, Norway, Germany, and Austria are all characterised by the statutory powers afforded to regulators that supervise foundations with public good purposes.[168] Although enforcement and intervention powers are not necessarily used particularly often in most of these states, regulators have a statutory authority to remove members of the governing board who (grossly) fail to fulfil their duties as faithful agents of the foundation.

The approach to public external supervision is different in some states where key enforcement measures are characterised by being subject to court authority. For example, to have members of the governing board removed upon application from the public prosecutor or an interested party, a court decision is required in the Netherlands.[169] This approach is typically based on notions of foundations as private law entities, even if they have public good purposes, and public intervention is seen as potentially problematic.[170]

In comparison to the court-focused approach, the approach in countries with strong regulators (government agencies, etc.) is typically based on the idea that the public has an inherent interest in the foundation, even if it is a private institution. However, private interests and public interests

[163] See Hopt (2006)137.
[164] On supervisory boards in Netherlands and Austria, see Stokkermans and Uchelen-Schipper (2025 forthcoming) and Kalss (2023).
[165] See Stokkermans and Uchelen-Schipper (2025 forthcoming) and Susanne Kalss (2023).
[166] Risk-based oversight is a part of the Danish regulatory oversight, see Ørberg (2024).
[167] External governance concerns entities outside the foundation's sphere, and public external governance refers to public bodies – such as regulators, agencies, tax authorities, courts, etc.
[168] See Feldthusen (2023), Olsson (2023), Fries (2010), Breen (2025 forthcoming), Woxholth (2001), Sanders (2023), and Kalss (2023).
[169] See Stokkermans and Uchelen-Schipper (2025 forthcoming).
[170] See ibid (describing criticisms of a proposal that would have provided more transparency in foundations).

must be balanced, limiting regulatory oversight to legality supervision.[171] The principle of the governing board's supremacy in business matters appears fundamental in all countries,[172] and legal supervision means that the foundation regulators must only use their powers if the law or the charter has been violated.

B. Steward Ownership

Steward ownership, a concept of business ownership, has lately gained traction in the international discussion. Steward ownership[173] is often defined by two major characteristics: First, there is the goal of ensuring the self-determination of the business. Steward-owned enterprises remain independent and the 'steering wheel' of the enterprise shall be always in the hands of people who are connected with it and work in it, not investors – so called 'absentee owners'. Second, profit is not perceived as an end in itself, but a means to an end – the business's purpose. Entrepreneurs adhering to this concept see themselves as trustees, as stewards of their voting rights for the next generation. Profits, which shareholders or members usually receive through dividends or upon liquidation, remain in the business to be reinvested or donated. In this way, profits serve the goals of long-term oriented entrepreneurship and the business's purpose. Shareholders or members may be paid for their work in the business though, thereby ensuring that they stay connected to the business rather than becoming 'absentee owners'.[174]

The concept challenges traditional thinking of business ownership. Rather than combining the pursuit of a prescribed beneficial purpose with profits for shareholders as dual-purpose companies like the *benefit corporation*, steward owners lead and develop a business without having a right to its profits. While decision makers do not have profit rights, it is possible to implement the concept by dividing profit rights and decision rights in different classes of shares of the business company in different entities, such as in the double-foundation structures of Bosch or Patagonia. Usually, double-foundation-structures are set up for tax purposes, as for example in Switzerland or Germany.[175] In steward ownership structures, however, their predominant goal is to distinguish between profit rights and voting rights.[176]

Steward ownership builds on the traditions of family businesses, where shareholders see themselves as trustees for the next generation, and enterprise foundations, which do not have dividend-oriented shareholders. In fact, enterprise foundations can be described as one possible legal tool to implement steward ownership.[177] However, steward ownership is a concept that can also be realised using other legal tools, for example associations, trusts, cooperatives or companies, as in the Bosch or Patagonia structures, which may be described as functional equivalents in the context of enterprise foundations. The concept may be found in the decision of Patagonia's founder to transfer all shares to a trust and a collective, making 'earth the only shareholder'.

While enterprise foundations are often established to continue mature companies, the steward ownership movement also aims at value- and long-term oriented start-ups whose founders do not want to work for a planned exit.

The steward ownership movement (with the Purpose Foundation) is spreading around the globe, with organisations already established eg in Germany, the Netherlands, Greece, Spain, the US, Latin America and Japan.[178]

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[171] See eg Ørberg (2024).
[172] Regarding the business judgement rule, see Sanders and Thomsen (2023).
[173] Sanders (2022); Sanders (2024) 45; Reiff (2023).
[174] Purpose Economy (2021), 9.
[175] On Switzerland Bottge (2022), Neri-Castracane and Bottge (2024), Jakob (2023); on Germany: Sanders (2023).
[176] Sanders (2022), 636–638.
[177] See Feldthusen, Kalss and Teichmann (2024).
[178] <https://purpose-economy.org/en/who-we-are/> (last accessed 31.10.2025).

In Germany and the Netherlands, enacting special legal corporate forms for steward-owned businesses are on the political agenda. The former project was part of the coalition agreement of the German government from 2021-2024 but could not be finalised. Under discussion was an implementation as a sub-form of the *Gesellschaft mit beschränkter Haftung* (GmbH), the German limited company, or as a new legal entity that took inspiration from the cooperative form and the limited company.[179] After the 2025 election, the implementation as a distinct legal form was included in the coalition agreement of the 2025 coalition supporting the government.[180] A draft law for such a legal form was prepared already in 2024 by an academic working group invited by three members of the German parliament.[181] In the Netherlands, a parliamentary resolution of 16 April 2024 recommends that a legal form for steward ownership is to be developed.[182]

While this model law proposes a legal framework for enterprise foundations, it may also be used to implement the concept of steward ownership.

C. Enterprise foundation ownership models

Enterprise foundation ownership may be structured in a number of different ways and use different legal structures that are functionally similar to the types of foundation ownership outlined in this model law.[183] The legal status of these different ownership models will depend on their specific characteristics. The model law may nevertheless be applicable to them although adjustments may be required to fit their particular circumstances.

Holding companies. It is very common for enterprise foundations to establish holding companies as intermediaries between EFs and their operating companies. Holding companies may, for example, undertake tasks such as portfolio management, legal services and alternative investments while the EF retains ultimate ownership of the business and remains in charge of philanthropy.

Dual class shares. Many foundation-owned companies issue dual class shares (or even multiple class shares) which enable the foundation to retain voting control through shares with higher voting rights, while shares with lower voting rights are issued to the public and listed on a stock exchange. Dual class shares are crucial for the business success of foundation-owned companies because they combine the advantages of purpose and long-term ownership with the advantages of public listing, such as access to equity finance and monitoring by minority investors.

Foundation co-ownership. In some cases, a number of related foundations – that are, for example, established by members of the same founding family and have a shared administration – jointly own a company. This allows the individual foundations to specialise in different public, private or business purposes. When combined with dual class shares, some foundations that hold low voting shares or have a limited share position may be mainly, or entirely, philanthropic, while other foundations that own shares with high voting rights exercise business ownership. Specialisation may be advantageous since the different purposes and functions may call for various competences of the governing board or among managing directors. It may also confer advantages in terms of regulation and taxation, for example if it allows philanthropic foundations to benefit from tax exemption. Nevertheless, in their entirety, such foundation co-ownership structures may be regarded as functional approximations of the simpler structures discussed in this model law. The relationship between the different forms of foundations may be regulated by their charters, shareholder agreements or depend on loyalty between family members.

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[179] Sanders et all (2024); See for a discussion in English of the German draft law and the first Dutch ideas for the new legal form: Sanders and Neitzel (2025). See also with references to the critical discussion of the concept and the first draft with further references: Sanders (2022).
[180] CDU/CSU/SPD (2025) line 2815–2819.
[181] Sanders et all (2024), for a discussion in English, see Sanders and Neitzel (2025).
[182] 29023-509 Motie d.d. 16 April 2024 – JC Sneller, Tweede Kamerlid Gewijzigde motie van de leden Sneller en Zeedijk over met universiteiten en bedrijfsleven een voorstel uitwerken voor een rentmeestervennootschapsbedrijfsmodel (t.v.v. 29023-4/2).
[183] Thomsen and Kavadis (2022).

Private co-ownership. Enterprise foundations may also co-own companies with private individuals, for example descendants of the founder who established the foundation. When combined with dual shares, enterprise foundations with voting control may, for example, play a special role as guardians of the business purpose and its continuity of the family business, while founding family descendants benefit from the dividends of low voting shares.

Functional equivalents. EF-like structures may be created using different organisational forms, for example, trusts, companies limited by guarantee or associations, which may be structured in ways that make them functionally equivalent to enterprise foundations as defined in this model law. For example, charitable trusts may own shares in companies that are irrevocably donated to the trust, and the board of trustees may have essentially the same duties as the governing board in enterprise foundations although trusts are not regarded as legal persons. As another example, public benefit associations that own companies may have a limited number of members that are also members of the association board, while an asset lock and a public purpose may prevent the members from expropriating their assets.

It is beyond the scope of this model law to flesh out the complexities and legal implications of all different enterprise foundation structures including those structures using functional equivalents, but the model law and its provisions will hopefully serve as a source of inspiration for future legislation related to them.

Part B. Model Law Draft Rules

Recitals

(1) This model law proposes rules to inspire and facilitate the establishment and activity of enterprise foundations in the interest of responsible long-term business ownership in Europe and abroad.

(2) Enterprise foundations may control businesses directly or as shareholders. Since they control the business rather than vice versa, they must be distinguished from corporate foundations established by companies to pursue Corporate Social Responsibility (CSR).

(3) Enterprise foundations can bring benefit to society in Europe and elsewhere not only through philanthropy but as engaged, responsible long-term business owners. The model law establishes that enterprise foundations are to act as such responsible owners regardless of their purpose.

(4) This model law can be implemented as a whole, but its rules may also be used as building blocks (constituent elements in other bodies of law) to inspire and complement national legal systems where necessary while respecting and adjusting for national traditions, needs and path dependencies (optionality).

(5) Given the wide disparity of foundation law in Europe, any enactment of the model law at the European level should not replace existing foundation law but take place on an opt-in basis so that potential founders have the option to establish a European enterprise foundation, possibly as part of a 28th regime, but may also choose to do so in a national legal system.

(6) Enterprise foundations are defined by their controlling interest in a business. This model law focusses on the challenges and opportunities of business ownership by foundations. Where business problems faced by foundations and companies raise similar challenges, comparable governance rules as known in corporate governance, corporate law and the law of groups can help address them (corporate parallelism).

(7) This model law takes the civil law understanding of the foundation as a legal entity with legal personality, established to pursue a purpose set by its founder as a starting point. However, functional equivalents may be found in common law countries, and this model law will hopefully also be of interest to them.

(8) Since enterprise foundations do not have members or shareholders, effective governance is required to establish accountability and to ensure that enterprise foundations act effectively in accordance with the law and their charters.

(9) In order to encourage founders to establish enterprise foundations, the model law leaves great freedom to founders to design enterprise foundations according to their ideas and provides rules to ensure that the will of founders is respected.

(10) European states have diverse foundation laws. In particular they take different approaches to family foundations, the economic activities of foundations, governance and supervision. The model law suggests a broad approach that includes public benefit foundations, family foundations and pure enterprise foundations with a business purpose. However, given the principle of optionality governing this model law, any legislator may adopt a narrower approach – for example, only allowing enterprise foundations that pursue a public benefit purpose.

(11) European states also take diverse approaches towards public supervisory authorities. The model law proposes legal supervision by a public body or court with business competence and adequate resources as a last resort when internal governance fails to ensure that foundations act in accordance with the law and their charters. However, given the principle of optionality governing this model law, national legislators may adopt other models, such as private supervision by a supervisory board.

(12) Transparency is particularly important for all entities engaged in business activities including enterprise foundations. The model law therefore includes rules on registration for enterprise foundations, reporting and external audits.

I. Definitions and Establishment

Recitals

(1) An enterprise foundation is a foundation that controls a business either as a shareholder or alternatively by engaging in business directly through the foundation.

(2) The model law accepts enterprise foundations with a public good purpose, a private purpose or a business purpose.

(3) Irrespective of their purpose, enterprise foundations have an obligation to be responsible business owners.

(4) Because transparency is important for economic efficiency as well as trust in enterprise foundations, the model law requires that they are publicly registered. Important information in the register shall be accessible to the general public while respecting rights to privacy.

(5) Founders have great freedom to design the charter according to their wishes, in particular by granting individual rights to beneficiaries and creating additional governance bodies.

(6) Establishing an enterprise foundation requires a charter, a declaration of the founder, an audited financial statement of donated assets and public registration.

1

Article 1 Enterprise Foundations

1. [1]Within this model law, an enterprise foundation (EF) is a foundation that controls a business. [2]The EF may control a company by share ownership (a holding enterprise foundation) or conduct a business by itself (an operating enterprise foundation). [3]A controlling interest according to sentence 1 shall be ascertained on the basis of the effective control of the foundation over the business in the individual case. [4]A foundation is not an EF if its business activities are limited to, or only constitute an insignificant part of, its assets.

2. [1]Within this model law, a foundation is defined as an entity

   a. with legal personality and full legal capacity;

   b. with assets irrevocably separated from its founder or founders;

   c. without members or shareholders;

   d. founded for one or more legal purposes set by its founders; and

   e. governed by a board of directors (a governing board) acting in the interests of the foundation and its purpose.

3. [1]Within this model law, the founder is defined as the person or persons setting up the foundation. [2]Founders must be a legal or natural persons with full legal capacity at the time of creating the foundation act. [3]If an EF has more than one founder, the rights to which the founders are entitled or which they have reserved, may only be exercised jointly by all founders, unless the charter of the EF provides otherwise. [4]The rights of the founders cannot be transferred *inter vivos* or inherited.

4. Within this model law, beneficiaries are the persons who benefit directly by the distributions of the foundation according to its purpose.

2

Article 2 Purpose

1. [1]An EF must pursue one or more lawful public benefit, private or business purposes as set out in its charter according to Article 4. [2]An EF may pursue both public benefit-, private – and business purposes at the same time. [3]The priority of different purposes of the EF may be determined by the charter. [4]Absent such regulation in the charter, the balancing of different purposes shall be the responsibility of the governing board to be exercised in the best interest of the EF.

2. Regardless of its purpose, an EF must exercise its ownership of business companies in a responsible way, bearing in mind the long-term interest of the foundation, the company and their stakeholders.

3. [1]A public benefit purpose aims at benefitting society or the environment at large by directly or indirectly supporting goals such as advancing social welfare and the relief of poverty, education, healthcare, arts and culture, research, religion, protection of the environment, protection and support of minorities, advancement of justice and international understanding.

4. [1]An EF may pursue private purposes, in particular benefitting the founder's family (family enterprise foundation, FEF) in accordance with the rules of this model law, and general law, especially national tax law. [2]An EF may not pursue the benefit of its founder or the founder's household as its main purpose.

5. [1]Responsible business ownership according to Article 2 (2) may be the only purpose of an EF (a pure enterprise foundation, PEF) or one among several other purposes. [2]In pure enterprise foundations, the charter must explain the businesses' mission and contribution to society as envisaged by the founder. [3]Divestment of a business company owned by a pure enterprise foundation as a charter obligation is only permissible if it can be shown with a high degree of certainty that such a divestment is in the best interest of the company and its stakeholders. [4]Divestment in such cases requires the approval of the competent authority.

3

Article 3 Establishment

1. The establishment of an EF requires:

   a. a declaration of the founder or founders in accordance with subsection 2;

   b. a foundation charter in writing that meets the requirements of Article 4;

   c. a valuation report drafted by an official auditor if the initial assets of the foundation do not only include cash; and

   d. registration in the commercial register or other register as prescribed by national law on the basis of 1 a) and c).

2. The declaration of the founder according to subsection 1 a):

   a. must be in writing;

   b. must name initial assets of the foundation worth at least € 50,000;

   c. must state the binding intention of the founder to donate the initial assets to the foundation; and

   d. may be included in a will that fulfils the legal requirements of the respective national law.

4

Article 4 Charter

1. The charter must include:

   a. the foundation's name;

   b. the names and addresses of the founders, or if one of the founders is a legal person, its registration number and address of its administrative headquarters;

   c. the foundation's purpose or purposes;

   d. the number of members of the governing board and the rules of their appointment;

   e. the time of dissolution if the EF is to be set up for a limited time, in particular when the founder wishes the EF to be dissolved upon the sale, dissolution or insolvency of the business;

   f. any rights which the founder wishes to grant to third parties outside the foundation, especially in respect of the appointment of members of the foundation board; and

   g. the distribution of net assets after winding up.

2. [1]The charter may also include:

   a. additional rules and procedures regarding the work of the governing board, in particular the dismissal of its members;

   b. bodies other than the governing board including committees, supervisory boards and advisory boards and their functions including rights of instruction, rights of appointing and dismissing other board members, rights to veto certain decisions by the board and right to information;

   c. the right of the governing board to set up and/or remove bodies according to (2) b);

   d. if the foundation purpose benefits a specific group of beneficiaries, their rights to benefits as well as rights to participate in meetings of the governing board or other bodies, and to receive information about the working of the foundation and distribution of benefits:

   e. the foundation's activities, in particular the business activities to be pursued;

   f. requirements and procedures for the amendment of the charter; and

g. other additional rules and procedures that supplement the rules in this model law.

[2]The charter may be supplemented by organisational documents and rules of procedure which are set up and to be changed by the governing board.

5

Article 5 Registration

1. An EF must be registered as an EF either for establishment or if the foundation has been established according to general foundation law and acquires control in a business.

2. Applications for registration as an EF shall be accompanied by the following documents and particulars in the language required by the applicable national law:

   a. the name of the EF, its address and website;

   b. a declaration of the founder including the list of assets according to Article 3 (2) b), in particular the name and registration number of companies the EF controls;

   c. the declaration foundation's charter;

   d. the names and addresses of the members of the governing board and any other person who may represent the EF on a regular basis;

   e. Whether the persons named under d) may represent the EF individually or jointly; and

   f. a declaration of the members of the board that they comply with the requirements of being a board member according to Article 13 (2).

3. [1]The registry shall register the EF if all relevant documents and required information have been submitted according to the rules of this model law provided its compliance with European company law and national law, in particular national registration law. The registry shall notify the foundation and the responsible competent authority of the registration.

4. [1]Everyone has the right to access the register and the information in (2) a), d), e) and the name and registration number of any companies the EF controls. [2]Anyone with a substantial interest has the right to access all information submitted to the register under (2).

6

Article 6 Name

[1]The EF shall add the term 'Enterprise Foundation' or the abbreviation (EF) in a language specified by national law to its name in correspondence and transactions. [2]The foundation must use the full name according to sentence 1 and its register and registration number on its website, letterheads and other means of written communication.

II. Foundation Property and Changes in Status

Recitals

(1) The assets of an EF may only be used for its purpose, but the governing board is not required to retain the initially donated assets.

(2) Since an EF is defined by the business it controls, status as an EF may be gained or lost with control over a business. The register needs to reflect these changes.

7

Article 7 Distribution and Foundation Property

1. Within this model law, an EF may not distribute any of its assets or profits it makes or receives, either directly or indirectly, except to the extent that such a distribution is part of the pursuit of the foundation's purpose.

2. [1]Unless the charter provides otherwise, the EF is free to administer, sell, reinvest and restructure its assets in the best interests of the EF's purpose, irrespective of whether the assets were donated by its founders or received later through donations or in another way. [2]In the course of the careful pursuit of the purposes and the interests of the foundation, the governing board may take reasonable risks in line with Article 14 (2) d).

8

Article 8 Changes in EF Status

1. A foundation that establishes a controlling interest over a business according to Article 1 (1) after its establishment, and has thus become an EF, must respect the rules in this model law, apply for registration as an enterprise foundation according to Article 5 and adopt a name according to Article 6 within six months after fulfilling the preconditions under Article 1 (1).

2. [1]A foundation that no longer fulfils the preconditions under Article 1 (1) must notify the register and competent authority within one year. [2]If national law provides, the foundation will be regulated by general foundation law. [3]The duties under (2) sentence 1 apply irrespective of whether the foundation is bound by its charter to control a business.

III. Amendment, Merger and Split

Recitals

(1) Charter amendments are particularly important for EFs in order to allow adjustment to changed circumstances in the best interest of the foundation and its purpose. The model law allows for such changes.

(2) Changes require the approval of the competent authority, which must be given if all legal requirements are met.

(3) The model law wishes to promote the establishment of EFs and encourage founders. Therefore, it allows founders to reserve a limited right to change the charter and veto changes.

(4) In order to allow flexibility, foundations may merge, split, and establish new foundations by means of a spin-off in the best interest of the foundation and its purpose as well as the interests of stakeholders such as employees and creditors.

9

Article 9 Amendment of the Charter

1. [1]The charter can be changed by the governing board with the approval of the competent authority if the changes can be expected to support the foundation's pursuit of its purposes, in particular supporting the EF as an engaged, responsible business owner. [2]Fundamental changes to the charter, including changes of the purpose(s) of the foundation, are only permissible if such changes are necessary to adjust to significantly changed circumstances or if the current purpose(s) have clearly ceased to provide a suitable and effective use of the EF's assets. [4]This may be the case if the foundation purpose is rendered obsolete or impossible to attain with the means available to the EF. [5]A change must not contradict the will of the founder at the time of the drafting of the foundation documents.

2. [1]In the charter, one or all founders can reserve the right to change the charter within twenty years after establishing the EF. [2]The foundation's purpose may not be changed according to sentence 1. [3]A change according to sentence 1 requires notification of the foundation board and the competent authority. [4]One or all founders can reserve in the charter the right to veto changes to the charter within twenty years after the establishment of the foundation. [5]Article 1 (3) sentences 3 and 4 apply in relation to the rights in sentence 1 and sentence 4.

3. [1]The founder may provide regulations about charter amendments in the original charter, but such amendments must still be approved by the competent authority.

4. [1]The foundation board shall apply for the approval of the competent authority for proposed changes to the charter as required under (1) sentence 1 in writing. [2]The application shall set out the reasons for the changes to the charter including the expected effects of the changes on the work of the foundation. [3]The competent authority must approve the changes if the requirements in

subparagraph (1) to (3) are met.

5. In extraordinary cases, where it is manifestly evident that purpose amendment is necessary, the competent authority may amend the purpose without application from the governing board.

10

Article 10 Merger

1. [1]EFs shall be allowed to merge upon application with the approval of the competent authority with other EFs or other foundations. [2]The competent authority must approve the merger provided that the merger can be expected to enhance the ability of the merging foundations to achieve their purpose(s) and not have negative effects on the rights of creditors or other stakeholders. [3]If the merger affects the purpose of one or all of the EFs concerned, the approval of the merger must meet the criteria for purpose amendment under Article 9.

2. [1]In case of merger by the formation of a new EF, all assets and liabilities of all foundations shall be transferred to the new EF, and the merging entities shall cease to exist. [2]In case of merger by absorption, all assets and liabilities of the foundations being absorbed shall be transferred to the absorbing EF the entity being absorbed shall cease to exist and the absorbing EF shall remain in existence.

3. [1]The governing boards of the foundations willing to merge must seek the approval of the competent authority required under (1) in writing and explain:

   a. the future activities of the merged foundation;

   a. in case of a formation of a new foundation, its charter;

   b. the effects of the merger for all foundations concerned and their ability to pursue their purposes; and

   c. the effects of the merger on the foundations' creditors, employees and other stakeholders including measures taken to secure their interests. If different competent authorities are responsible for the foundations willing to merge, the approval of all of them is necessary.

11

Article 11 Split and Spin-off

1. [1]An EF shall be allowed to split into two or more foundations or create new foundations by way of a spin-off upon application and with the approval of the competent authority. [2]The competent authority must approve of the split provided that the split can be expected to enhance the ability of the new and old foundations to achieve their purpose(s) and not have negative effects on the rights of creditors and other stakeholders. [3]If the split or spin-off affects the

purpose of one or all of the foundations concerned, the approval of the merger must meet the criteria for purpose amendment under Article 9.

2. [1]In case of a split, all assets and liabilities of the EF shall be transferred to the new foundations according to a splitting plan that must have been approved by the competent authority; the EF being split shall cease to exist. [2]In case of a spin-off, assets and liabilities of the EF shall be transferred to the new foundations according to the spin-off plan that must have been approved by the competent authority.

3. [1]The governing boards of the EF willing to split or create a new foundation by way of a spin-off must seek the approval of the competent authority required under (1) in writing and explain:

   b. the future activities of the foundations after the split or spin-off;

   c. the effects of the split or spin-off on all foundations concerned and their ability to pursue their purposes;

   d. the documents necessary to establish a foundation under Article 3 for all foundations to be newly created, including a charter;

   e. a detailed plan on the distribution of liabilities and assets between all foundations concerned (splitting plan, spin-off plan); and

   f. the effects of the split or spin-off on the foundations' creditors, employees and other stakeholders including measures taken to secure their interests.

IV. Governance of Enterprise Foundations

Recitals

(1) EF governance can be defined as the direction and control of the EF to ensure that it furthers its purpose to the greatest degree possible and acts in accordance with the law and its charter.

(2) Since EFs are self-owned, EF governance is exercised mainly by the governing board. The charter may also establish other boards, such as a supervisory board, to improve foundation governance.

(3) Unless the foundation charter specifies otherwise, the governing board must exercise functions reserved for shareholders in company law, such as the appointment of new board members, approving the annual financial report or appointing an auditor.

(4) In the absence of shareholder monitoring, the EF governing board members must exercise self-governance and mutual monitoring to ensure that the governing board acts in the best interest of the EF and its purpose.

(5) The governing board must therefore be organised to ensure that these tasks are carried out in the best possible way under these circumstances.

(6) The governing board must consist of at least three persons in order to allow for mutual monitoring.

(7) The governing board must appoint board members by co-optation unless the charter specifies otherwise.

(8) The governing board and, failing that, the competent authority must replace board members if necessary.

(9) The duties of the governing board reflect its overall responsibility for the governance of the EF.

(10) The governing board may delegate tasks to a managing director, an administrator or individual board members in order to effectuate its decisions. If the governing board does delegate tasks in this way, effective supervision of the managing director or other delegates is an important duty of the managing board.

(11) The governing board must be sufficiently independent to act in the best interest of the foundation rather than the interests of specific stakeholders.

(12) Remuneration of the governing board must reflect the non-profit status of the EF.

(13) The EF must be sufficiently transparent to demonstrate observance of its purpose and to facilitate a productive and harmonious relationship with its stakeholders and society in general.

(14) The governance of EFs can be facilitated by observing best practices in other EFs.

12

Article 12 Governing Board

1. The EF shall be governed by a board of directors (the governing board) composed of at least three members.

2. The EF is represented by the governing board as a whole, but the governing board may, on occasion or in accordance with it rules of procedure, delegate power of representation to two or more board members and/or to managing directors.

13

Article 13 Appointment and Membership of the Governing Board

1. On establishment of the EF, the first governing board members shall be nominated by the founder subject to the rules in this model law and relevant provisions in the charter.

2. [1]The subsequent appointment of governing board members shall be decided by majority vote by the incumbent governing board or according to procedures stated by the founder in the charter provided that they are consistent with the model law provisions. [2]Unless the charter specifies otherwise; members of the governing board are elected for a term of five years; re-appointment is possible. [3]Members of the governing board shall be natural persons that are

not disqualified by law from serving as a board member.

4. [1]Members of the governing board may resign at any time but are required to explain their reasons for doing so. [2]Both the resignation and the reasons must be communicated to the competent authority. [3]The resignation must be communicated to the responsible register.

5. A member of the governing board shall resign if:

   a. the member is legally disqualified from serving as a board member (cf Article 13 (2) sentence 3;

   b. the member does not meet the admission requirements set out in the founding documents or the charter of the EF;

   c. the member is found guilty by a court of financial impropriety;

   d. the member has been proven, by the member's acts or omissions, to be clearly unfit to fulfil the duties of a governing board member; or

   e. the member wilfully fails to comply with the foundation charter and rules of procedure.

6. Where the charter of the EF so provides, and if the governing board member does not resign on their own accord, the governing board must dismiss the member for the reasons set out in paragraph 5.

7. If the governing board does not remove a member of the governing board that has to be dismissed according to Article 13 (2) sentence 3, the competent authority shall dismiss that member or, where provided for in the applicable national law, propose the dismissal to a competent court.

8. Where national law warrants employee-elected members on EF boards, employee-elected directors shall be appointed to the EF board.

9. Neither EF managing directors, nor the board of directors or executive management of subsidiary companies may appoint members to the governing board.

14

Article 14 Duties of the Governing Board and its Members

1. [1]Members of the governing board shall act in the best interest of the EF and its purpose considering the foundation's responsibilities as a responsible owner while observing a duty of loyalty, care and obedience to the law in the exercise of their responsibilities. [2]In particular, board members must ensure that the funds of the enterprise foundation are only used in accordance with its purpose.

2. The governing board shall especially have the following duties:

a. governance of the EF in accordance with its purpose;

b. overall strategic management of the EF;

c. appointment and dismissal of EF managers;

d. monitoring the activities of the EF, particularly financial management and risk management. Risk management should not aim to avoid risk as such, which is inappropriate for enterprise foundations, but to take calculated risks as far as possible;

e. proper administration, management and conduct of the EF's activities, including bookkeeping and auditing;

f. compliance with the charter of the EF, this regulation and applicable laws;

g. responsible ownership of foundation-owned businesses according to Article 2 (1) sentence 3 including:

i. in the case of an operating EF, managing the business of the foundation including its operations, finances and risks;

ii. in the case of a holding EF, monitoring the operations of the subsidiary company and – if applicable – its subsidiaries (the whole group) including finances and risks, election of the companies' boards of directors and taking other appropriate steps in compliance with company law.

h. setting targets for the percentage of the under-represented gender in the governing board and developing a policy to increase the percentage of the under-represented gender on the governing board and its executive management.

3. [1]Board members who breach their duties and thereby cause a loss are liable to the EF. [2]They shall not be liable for losses if they acted carefully and in good faith in a decision not prescribed by law based on appropriate information (business judgement rule).

4. [1]The governing board must establish and annually revisit rules of procedure, which describe its internal governance (beyond those given by the charter and EF law) and which the governing board and managerial directors must comply with. [2]The rules must include any provisions on the composition of the governing board and nomination of board members, the division of responsibilities between the governing board and its managerial directors, establishment of committees, in particular an audit committee, rules for power of representation, supervision of the managerial directors, bookkeeping, minutes and other matters deemed important by the governing board. [3]The rules of procedure must be submitted to the relevant competent authority annually with the annual report.

5. [1]The governing board may employ an administrator for certain specific operational functions. [2]However, unless a managerial director is employed,

the EF governing board is responsible for the day-to-day operations of the EF, irrespective of whether or not there is an agreement with an administrator.

6. [1]Governing boards of large EFs with assets greater than €250 million must appoint an audit committee to monitor the financial accounting and risk management of the EF as well as related tasks decided by the EF governing board. [2]The audit committee shall not make decisions but make recommendations to the governing board on auditing and financial issues. [3]Audit committee members must have sufficient financial expertise to fulfil their functions adequately. [4]The committee shall be composed of three governing board members, a majority of which must be independent of founders, EF managing directors, board members as well as executives in subsidiary companies and other interested parties. [5]The audit committee shall meet at least twice a year without the presence of EF governing board members or EF managing directors.

7. [1]If an additional supervisory board is set up by the founder or the governing board, supervisory board members shall have the right and the duty to monitor the activities of the EF and its subsidiary companies (the whole group) in accordance with company law as well as to undertake other tasks specified by the EF charter or the rules of procedure. [2]However, the governing board retains overall responsibility for governing the EF. [3]Supervisory board members must fulfil their functions in the best interests of the EF and its purpose.

15

Article 15 Board Meetings

1. [1]The EF governing board annually elects a chairperson responsible for calling and directing board meetings. [2]In exceptional circumstances, such as a perceived threat to the survival of the EF, the EF's business or gross breach of law, two or more governing board members may require the chairperson to call an extraordinary board meeting, and if the chairperson fails to do so, any governing board member is entitled to call a meeting.

2. All EF governing board members must be invited to board meetings with due notice of a minimum of one week unless otherwise decided by the rules of procedure.

3. The EF governing board must meet at least twice a year.

4. The EF governing board has a quorum when a majority of its members are present unless a qualified majority is prescribed in the rules of procedure or the charter.

5. [1]Each member of the EF governing board shall have one vote. [2]Resolutions of the EF governing board are passed by majority vote. [3]In the case of a split vote, the chairperson shall have two votes, unless otherwise decided in the charter or rules of procedure.

6. Board meetings are confidential in the sense that board discussions and board decisions may only be communicated to the outside world upon authorisation by the board as whole.

16

Article 16 Managing Directors

1. [1]The governing board may nominate one or more managing directors to be responsible for the day-to-day management of the EF, subject to the directions of the governing board. [2]Managing directors in the EF or foundation-owned companies may not be members of the governing board. [3]Day-to-day management does not include transactions of an unusual nature or of major importance to the foundation. [4]Such transactions may only be made by managing directors if specifically authorised by the governing board.

2. Managing directors may be dismissed by the governing board.

3. Managing directors shall act in the best interests of the EF and its purpose and observe a duty of loyalty, care and obedience to the law in the exercise of their responsibilities. Article 14 (3) applies to managing directors accordingly.

4. Managing directors must ensure that the foundation, the foundation's bookkeeping and financial accounting compl with statutory regulations, and that its assets are properly managed.

5. Managing directors must ensure that the foundation's capital resources and liquidity are adequate at all times.

6. [1]Managing directors have a right to attend and speak at meetings of the governing board, unless otherwise decided by the governing board. [2]However, unless the governing board decides otherwise, governing board meetings shall include a closed session, in which managing directors shall not participate.

7. Managing directors are responsible for managing the foundation and at the same time share responsibility with the governing board for exercising ownership of subsidiary companies. If the foundation is an active shareholder, the responsibilities of managing directors may, in agreement with the governing board, extend, insofar as this is possible under company law, to facilitating such active ownership through monitoring and interaction with subsidiary company officers and directors.

17

Article 17 Board Independence

1. [1]Unless otherwise specified in the EF charter, neither founders, members of the founding family, managers in the foundation or its subsidiaries, nor board members in foundation-owned companies or other board members who have a business, family or other relationship with the founder or with each other may constitute a majority of the governing board. [2]At least two governing board members, or, in small governing boards of three members, at least one board member, shall be independent of the founders, the founding family, foundation managers or board members and managers in subsidiary companies.

2. [1]All transactions conducted by the EF must be in the best interests of the

foundation and its purpose and conducted with loyalty to the foundation and its purpose in mind. [2]Transactions between the EF or its subsidiaries and related parties – such as foundation board members, managerial directors, founders or parties related to them as family members – must be approved by a majority of disinterested governing board members, take place at fair value, be assessed by an independent auditor and be disclosed in the annual report of the foundation.

3. [1]EF board members and managerial directors may not participate in decisions in which they have a personal economic interest and must ask to be excused from discussions pertaining to such decisions. [2]However, they may communicate their opinions to the board in writing.

18

Article 18 Remuneration

1. [1]Members of the EF governing board shall be remunerated by a fixed fee proportionate to the workload and responsibility involved. [2]Alternatively, the charter or governing board may decide not to remunerate its members. Board members should be reimbursed for expenses incurred in fulfilling their duties, unless the governing board decides otherwise.

2. Governing board remuneration or other payments received by governing board members shall not exceed what is customary for similar positions in enterprise foundations or – where business competences in the EF governing board are called for – in business companies.

3. Governing board members shall not receive variable remuneration such as bonus or performance-related pay from the EF or its subsidiaries but may on occasion receive additional fixed payments for specific tasks as agreed in advance by the other members of the EF governing board.

4. The competent authority and the EF shall have the right to demand that excessive governing board remuneration (exceeding what is customary in enterprise foundations or business companies of a similar size) is paid back to the EF.

5. No benefit, direct or indirect, may be distributed to any founder, governing board member, managing director or auditor, nor extended to any person having a business or close family relationship with them, unless it is for the performance of their duties within the EF or expressed in the foundation charter and approved by the competent authority.

19

Article 19 Transparency and Accountability

1. The EF shall keep full and accurate internal records of all financial transactions.

2. [1]The EF shall draw up and forward to the competent national authority an audited financial report within six months from the end of the financial year. [2]The first reporting period shall be from the date on which the EF is established to the last day of the financial year as laid down in the charter of the EF.

3. The annual report shall contain at least the following:

   a. information on the activities of the EF;

   b. description of the way EF purposes have been promoted during the given financial year;

   c. a list of the grants distributed, taking into account the right of privacy of the beneficiaries;

   d. the foundation's updated rules of procedure;

   e. a statement of compliance with relevant best practices recommendations;

   f. a list of transactions with related parties during the year.

4. The EF shall prepare an annual summary financial statement including an overview of grants by type that is audited by one or more persons approved to carry out statutory audits in accordance with national rules.

5. The summary shall, at a minimum, contain the following consolidated accounting figures: total sales, total profits, total assets, total debt, total equity, total donations by type (family, philanthropy).

6. The summary financial statement, duly approved by the governing board, together with the opinion submitted by the auditor, shall be submitted to the competent authority and publicly disclosed, for example in the relevant national register or alternatively published on the EF's home page.

20

Article 20 Best Practice Recommendations on the Governance of Enterprise Foundations

1. The relevant competent authority or responsible ministry shall authorise a committee of experienced EF governing board members to propose a set of best practice recommendations for EF governance.

2. [1]EF governing boards are required to explain publicly, for example in their annual reports, whether and how they comply with each of these recommendations. [2]In case of non-compliance, EF governing boards must explain their reasons for non-compliance as well as whether and how they

have addressed the issues pertaining to the recommendation in question by other means.

V. Competent Authority

Recitals

(1) Member States/legislators shall take adequate steps to ensure that EFs respect the law and their charters in the interest of the purposes they pursue and the businesses they own. Ensuring this is the duty of the foundation's board and possibly other bodies within the foundation. The governance rules in Part IV of this model law aim at ensuring that this can be achieved in an efficient way (internal governance).

(2) If internal governance fails, a court, public prosecutor or other public body with business understanding may step in as a competent authority to enforce the law and charter in accordance with the principles of subsidiarity and proportionality (external governance).

(3) National legal systems already take different approaches to the supervision of foundations. Some consider supervision by a public office, tax authority or court only necessary for charitable entities and thus foundations pursing public benefit purposes, while it is regarded as unsuitable for private foundations or as suitable only to a very limited extent. According to the principle of optionality in this model law, such legal systems may reassess their approach to supervision in light of the model law but are not obligated to change a system considered appropriate and fitting for the legal system in place.

(4) Legal systems that decide against supervision of private foundations through public bodies or courts should strengthen internal EF governance systems by requesting the establishment of supervisory boards, the rights of beneficiaries and founders to sue the governing board for breaches of its duties, transparency and external audits. In such cases, it should be possible for a founder to submit the private EF to supervision by a public authority.

21

Article 21 Competent Authorities

1. Member States/legislators may designate one or more public authorities and/or a national court as the competent authorities for the legal supervision of EFs.

2. The competent authorities shall have powers to effectively ensure that EFs comply with the foundation charter and EF law.

3. The competent authority must have the legal competences, business understanding and resources needed to fulfil its duties in a timely and competent way.

4. [1]The competent authority shall only exercise legal supervision. [2]Legal supervision is limited to ensuring that EFs comply with their charters and the law, particularly EF law. [3]On request by EFs, the competent authority shall also seek to provide provisional and confidential guidance on the interpretation of EF law and the charter.

5. [1]Supervision and enforcement of the law and charter by the competent authority shall be exercised through specific, proportionate measures (principle of proportionality). [2]Measures by the competent authority are only required if the governing board and other responsible bodies of the respective foundation have failed to address the issue (principle of subsidiarity).

6. [1]Decisions by the competent authority shall be made in a timely fashion. [2]If the competent authority does not act in a timely fashion, access to remedies shall be available.

7. Decisions by the competent authority shall be reasoned and subject to appeal and judicial review by national courts.

8. Member States/legislators may impose a small fee on enterprise foundations to finance the competent authority.

22

Article 22 Right to Information

Where the competent authority has reasonable grounds to believe that the governing board of the EF does not act in accordance with the law or the charter, the competent authority is entitled to inquire into the affairs of that EF, and may require the directors and employees of the EF as well as its auditor(s) to make available all necessary information and evidence for a full assessment.

23

Article 23 Legality Supervision

1. [1]Where the foundation charter or national foundation law is violated, the competent authority may order the governing board to ensure that these violations are brought into conformity with the law. [2]Acting in accordance with the principles of subsidiarity and proportionality set out in Article 21 (5), the competent authority may, if the EF does not remedy the situation upon notification by the competent authority:

   a. issue recommendations and warnings;

   b. sue members of the governing board on behalf of the foundation;

   c. issue administrative penalties where governing board members fail to meet their obligations in a timely manner;

   d. suggest that relevant prosecution service authorities initiate criminal proceedings against board members;

   e. appoint an independent expert to inquire into the affairs of the enterprise foundation at the expense of the enterprise foundation;

   f. initiate random or risk-based control of enterprise foundations; and

g. decide that decisions of the governing board that violate the foundation charter or foundation law are invalid and must not be executed or – if already executed – must be revoked (cancellation powers). Business judgements regarding the administration of the enterprise foundation are not to be reviewed by the competent authority, unless they are based on clearly insufficient information or influenced by improper considerations.

2. In the case of severe misconduct, when other measures have failed, the competent authority shall have the power to remove members of the governing board or members thereof (removal powers).

24

Article 24 Approval of Amendments, Mergers and Dissolution

1. The competent authority shall have the power to approve amendments to the charter including the purpose suggested by the governing board as stipulated in Article 9 (power to amend purpose).

2. The competent authority must approve mergers, splits and spin-offs of enterprise foundations as stipulated in Articles 10 and 11 (ratification powers).

3. The competent authority shall have the power to decide to initiate the dissolution of the foundation in accordance with Article 26 (3).

25

Article 25 Supervisory Complaint

Anyone with a legitimate interest, in particular the foundation's founder and beneficiaries, can request that the competent authority investigates alleged breaches of foundation law and take appropriate action.

VI. Dissolution

Recitals

(1) EFs are wound up upon decision of the board with the approval of the competent authority, or in cases of serious violations of the law or charter by the competent authority itself.

(2) The process of liquidation of an EF must be undertaken by liquidators in the interest of creditors and those who receive the remaining assets according to the charter.

26

Article 26 Decision to wind up

1. The governing board of the EF may decide to wind up the EF in the following cases:

   a. the purpose of the EF has been achieved or cannot be achieved;

   b. it has lost all its assets, in particular when the company owned by the EF has filed for bankruptcy; and

   c. the EF has insufficient means to pursue its purpose after paying administration costs.

2. The governing board shall submit its decision to wind up to the competent authority for approval.

3. The competent authority may, after having heard the governing board of the EF, decide to wind up the EF or, where provided for in the applicable national law, to propose its winding up to a competent court in one of the following situations:

   a. where the governing board has not acted in the cases referred to in paragraph 1;

   b. where the EF continuous to violates its charter or the applicable national law, and other measures have failed.

27

Article 27 Winding up

1. Where the competent authority has approved the decision of the governing board pursuant to Article 26 (2), the members of the governing board shall act as the liquidators of the EF. Where the competent authority or, where applicable, a court has decided to wind up the EF, the competent authority or court shall appoint the liquidators.

2. Liquidators must act in the interests of the EF's creditors and those who will receive the remaining assents according to (3) below.

3. Once the creditors of the EF have been paid in full, any remaining assets of the EF shall be distributed according to the charter (Article 4 (1) g). If the charter does not provide such regulation or if the purpose stipulated therein can no longer be pursued, the remaining assets shall be transferred to another foundation with a similar purpose or purposes. In the case of a family foundation, the remaining assets may be paid out to the founder's family.

4. Final accounts until the date when the winding up takes effect shall be sent to the competent authority or court by the liquidator responsible for the winding up together with a report including information on the distribution of the remaining assets. These documents shall be disclosed upon application to anyone with a legitimate interest.

Part C. Explanatory Remarks

Recitals

The Recitals stated at the beginning of the model law and each of its main sections summarise the most important reasoning behind them. The Recitals explain the goal of the model law, which is to facilitate the creation and governance of enterprise foundations in Europe and abroad in order to promote sustainable and competitive business ownership. They also explain how the model law can be used. The Recitals stress the optionality of the model law, which does not have to be implemented as a whole but may be adopted piecewise and be regarded as a set of building blocks (legal elements) for improving national legal systems in line with their established foundation, company and charities law. The Recitals also state that if implemented by the EU, the model law should be offered only as an additional option, for example in a regime similar to the 28th regime[184] that is currently being discussed, but not as a replacement of national law.

I. Establishment

Article 1 Definition

Article 1 (1) sentence 1 Controlling a Business

Article 1 (1) sentence 1 includes a general definition of an Enterprise Foundation (EF), which will be explained further in the following subparagraphs and Articles. Defining enterprise foundations is not an easy task, and the definition was discussed at length in the working group meetings. Article 1 (1) sentence 1 defines an enterprise according to the control of a business for holding foundations further defined in sentence 3.

The approach taken here is broad in the sense that it defines enterprise foundations in relation to the business they control, not in relation to their purpose. This model law embraces EFs with different purposes, such as public benefit purposes, private purposes and business purposes as specified in Article 2.

An EF is, as the Recitals also point out, a foundation controlling a business, not, as, eg the French 'fondation d'entreprise'[185] a foundation established by a company for public good purposes.

The general term 'business' was chosen deliberately in order to include different models including holding foundations and other structures.

This model law does not specifically regulate functional equivalents like double foundations, i.e. structures in which two foundations hold the shares to a business. Such structures are well known eg in Germany and Switzerland.[186] Within such structures, voting rights are usually concentrated in one foundation, which would be described as an enterprise foundation. However, many provisions in the model law remain relevant to these structures.

Article 1 (1) sentence 2 Holding and Operating Enterprise Foundations

(1) sentence 2 distinguishes holding/indirect enterprise foundations and operating/direct enterprise foundations. The model law applies to both. Usually, the rules can be interpreted to fit both kinds of enterprise foundations. Slightly different regulation is provided in Article 14 (2) g), to take account of the fact that operating/direct enterprise foundations manage the

[184] <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339> (last accessed March 22, 2025).
[185] See Article 19 de la loi n° 87-571 du 23 juillet 1987 sur le développement du mécénat relatives aux fondations modifiée par la loi n° 90-559 du 4 juillet 1990 créant les fondations d'entreprise.
[186] Jakob (2023) Sanders (2023).

business directly through its board, rather than appointing boards in subsidiary companies as a major shareholder as holding/indirect enterprise foundations do.

Holding/indirect enterprise foundations are the most important types of EF, especially for larger businesses. Famous Danish enterprise foundations such as Novo Nordisk are holding foundations, holding a controlling share, while minority shares are listed on the stock exchange. Due to the economic importance of holding foundations, this model law and the explanatory remarks focus on them. In a holding foundation, the business can be administered by the flexible company while the legally more stable enterprise foundation functions as an anchor shareholder. According to this model law (Article 2 (2), enterprise foundations act as responsible owners of their businesses.

Holding/indirect EFs need to hold a controlling interest in a business company. The project team is aware of the fact that there are many foundations that hold shares and many of them hold a significant interest in companies but do not fall under this definition. This does not imply that such foundations do not make important contributions to society or that they are to be considered less valuable. However, this model law addresses foundations that engage in business activities, meaning a foundation that holds the controlling interest in a business company or engages in business activities on its own accord, business activity meaning eg buying and selling goods or services to make a profit and possibly at the same time to fulfil a purpose. Such an enterprise foundation does not just hold a diverse portfolio of different investments, although it may do so as well, but has a controlling interest in one or more businesses for which it bears responsibility. The skill and diligence with which this ownership position is used influences the performance of the business. Moreover, ownership control implies a certain concentration risk.[187] These attributes set enterprise foundations apart from normal (general) foundations which require special rules with respect to transparency, governance, supervision and other matters. For example, to engage in a business activity, enterprise foundations must be able to exercise active ownership (in the case of a holding foundations within the rules of company law) and take business risks if their businesses are to succeed.

Foundation-owned companies may raise capital for reinvestment by issuing shares to minority investors. This allows companies to finance investment, research and international expansion, which makes them more competitive. Businesses controlled by European EFs are often listed. However, it should also be underlined that effective control is necessary to ensure that the EF can act as a responsible owner of the business as a whole, especially when the foundation aims at pursuing its purpose through the business activities of the foundation.[188]

Legislators have the option of expanding the rules in this model law to a foundation holding a 'significant interest' in a company. This may be interesting for countries that do not have a long tradition of enterprise foundations and wish to acknowledge them.

Article 1 (1) sentence 3 'Controlling Interest'

(1) sentence 3 suggests a definition of 'controlling interest' referred to in Article 1 (1) sentence 2. According to general principles of company and competition law, a controlling interest is clearly established if the EF either conducts the business itself or holds a majority of shares with voting rights in the company.[189] However, a definition demanding such a majority without exception would not be flexible enough with respect to the individual case. In practice, a foundation may exercise effective control of a business company if it is the largest owner, even if it holds a voting share of 30% or less. Therefore, Article 1 (1) sentence 3 requires that a controlling interest must be ascertained by

[187] See above 8, fn 5.
[188] See for a discussion of this issue, Eldar and Øberg (2025).
[189] See European Model Company Act (2017) chap15.04.

considering the circumstances of the individual case, including, for example, ownership structure among minority shareholders, shareholder agreements and multiple voting rights.[190] Various classes of shares with different voting powers make it possible for an enterprise foundation to exercise control over a company without a majority of the share capital.

The project team is aware that this definition brings some uncertainty but flexibility was also needed. A controlling interest might be denied, for example, if the EF holds a majority of voting rights but is prevented by a shareholder agreement from exercising these votes freely. Moreover, the definition is also broad enough to include cases where the EF holds less than 51% of voting rights, but ownership of shares is otherwise dispersed, and attendance rates at shareholder meeting are generally low. Finally, a case where an enterprise foundation controls the company only because of shares with multiple voting rights is also covered.[191]

Danish law only demands that an EF has effective control of a business company which may be the case if it is the largest shareholder and holds less than 50% of the voting rights in a business company. Such a foundation is still able to influence, and probably even dominate, the decision making of the company, which would be sufficient to classify it as an enterprise foundation under Article 1 (1) sentence 3. A national legislator may, of course, adopt another definition.

In the Netherlands and Belgium, shares are often held by a foundation for beneficial owners who receive dividends while the voting rights lie with the foundation (DRS, stak-foundation).[192] This construction is popular in the Netherlands and Belgium to ensure that voting rights are exercised competently and responsibly while financial advantages can remain with the family. Such foundations fall under the definition proposed here if the foundation (and not the beneficial owners) controls the business and if the shares are irrevocably transferred to the foundation.

Article 1 (1) sentence 4 Significant Business Interest

(1) sentence 4 was drafted according to Part 1 2 (2) of the Danish Law on Enterprise foundations and its aim is to prevent foundations which engage in insignificant business activity from having to register and comply with the rules of this model law. For example, a foundation that administers a museum does not need to be considered an EF just because it sells a few books and postcards in a museum shop. As a rule of thumb, the business volume by sales could, for example, be required to exceed 10% of the foundation's earnings or € 100,000 for a foundation to be considered an enterprise foundation. A national law could include a more detailed rule.

Article 1 (2) Defining the Foundation

Article 1 (2) sentence 1 provides a definition of a foundation intended to highlight the understanding on which the draft is based. It names: a) legal personality and legal capacity rather than only legal capacity[193], which shows that the foundation is an entity independent in its existence from the founder and other entities; b) requires that the foundation holds assets irrevocably transferred from its founder(s) to the foundation; c) shows that the foundation may not have owners, members or shareholders that can receive profit distributions. This is a fundamental characteristic of a foundation under the civil law understanding that it has neither members nor shareholders. The term 'member' refers to members in associations or cooperatives who decide the direction of their corporate body based on their own will and not as appointed officers realising the purpose set by the founder. The definition could be broadened to include members who cannot receive profit distributions in charitable common law trusts and companies limited by guarantee as enterprise foundations under this model law. The exclusion of profit distributions implies

[190] See Hopt and Kalss (2024); see about control in group law: ECLE (2017) 9-14; European Model Company Act (2017) chap15.04.
[191] See Hopt and Kalss (2024),84.
[192] See Stokkermans and van Uchelen (forthcoming 2025); de Wulf (forthcoming 2025).
[193] See Articles 9 and 10 of the European Commission for the European Foundation.

that an enterprise foundation is a non-profit entity.[194]

The definition also entails one or more purposes defined by the founder (d) and the existence of a governing board acting in the interests of the foundation and its purpose (e). The governing board must be legally independent of the founders and their families although founders or founding family members may be members of the governing board as long as some board members are independent (see Article 17 on board independence).

Article 1 (3) and (4)

Article 1 (3) sentence 1, 2 define the founder as one or more legal or natural persons. Article 1 (3) sentence 3 regulates the relationship between multiple founders concerning their rights, especially in relation to the amendments according to Article 9.

The foundation's beneficiaries are defined in Article 1 (4). The suggested definition does not include everybody who might potentially benefit from the foundation. In a family foundation, the beneficiaries are members of the founder's family. They may, however, not only receive donations from the foundation but may also have a role in the business and in ensuring the foundation continues the spirit of a family business.

Article 2 Purpose

The purpose of a foundation is its heart and soul.[195] In many legal systems, what purposes a foundation may legitimately pursue and what role its business activity may play in this regard are highly debated.[196] This issue is also of crucial importance for the regulation of enterprise foundations in this model law.

According to Article 2 (1) sentence 1, an enterprise foundation may pursue one or more public benefit purposes, private purposes and also a business purpose. A foundation may also combine public benefit, private and business purposes in one charter, as Article 2 (1) sentence 2 makes clear. The relative priority attached to these purposes may be decided by the founder in the charter, as Article 2 (1) sentence 3 clarifies. If an interpretation of the charter does not shed light on the issue, the governing board has to balance the purposes, Article 1 (1) sentence 4. Pursuant to the principle of optionality, a legislator is, of course, free to choose a different path, for example by not accepting family foundations.

Responsible Business Ownership, Article 2 (2)

In Article 2 (2), the model law establishes an obligation for foundations to act as responsible owners bearing in mind the long-term interests of foundation-owned companies and their stakeholders. Stakeholders include not only the foundation's beneficiaries, but also its customers, employees, upstream suppliers, downstream buyers and minority shareholders of foundation-owned companies. Moreover, they include the interests of communities benefitting from the foundation and/or the business. The interest of the natural environment including climate change may also be included. If a legislator wishes to do so, concepts such as planetary boundaries and conducting business without causing harm may be explicitly emphasised.

It is a central element of this model law that enterprise foundations may make a beneficial contribution to a resilient and diverse European economy. This will obviously be the case in pure EFs with a company or business purpose. It will also be in the long-term interest of foundations with a public and a business purpose, since a successful company will be able to pay higher dividends to fund distributions by the foundation. For foundations without a business purpose, there is no obligation to maintain ownership of particular companies or even to continue as enterprise foundations. However, as long as a foundation owns a business, it is expected to act as a

[194] Hansmann (1980).
[195] See only Schwarz (2002) 1722; Schwake (2021) § 79 para 27.
[196] See the discussion in the comparative part and Sanders and Thomsen (forthcoming 2025).

responsible owner. Moreover, this rule also affects the duties of foundation board members and is therefore mentioned in Article 14 (2) g).

Imposing certain duties on the owner of business companies just because of their controlling interest is well known from other areas of law, in particular group law (*Konzernrecht*)[197]. While enterprise foundations are not necessarily part of groups under group law, the law of enterprise foundations may take inspiration from this area of law. If the EF owns one or several holding companies and therefore controls a group of companies, the duties to act as a responsible business owner cover the whole group while respecting the legal independence of the subsidiaries according to law.

Public Benefit Purpose Article 2 (3)

A public benefit purpose is the type of purpose usually associated with a foundation.[198] The draft of the European Commission for the European Foundation only deals with this type of foundation. Many enterprise foundations pursue a public benefit purpose. Other terms might have been 'charitable' or 'philanthropic purpose'.

The project team of the model law is aware of the fact that public benefit purposes are often closely linked to tax law. Article 2 is not intended to propose any recommendations concerning tax law but merely provides a definition of the purposes that may be relevant here.

The definition and the short list of public benefit purposes in Article 2 (3) took account of the draft Article 5 (2) of the European Commission for the European Foundation. However, while the list in the proposal of the European Commission is much longer, more detailed and exclusive, the phrasing in Article 2 (3) indicates that the short list provided here merely provides examples. Moreover, different from the European Commission draft, this short list includes the advancement of religion as one traditional common law charitable purposes.[199] A national legislator may, of course, use different terms, especially in connection with national tax law.

A public benefit test usually addresses two aspects: first, whether the goal pursued is provided ('is it beneficial?') and secondly, whether the goal benefits the public ('for whom is it good?').[200] The latter question addresses the issue of how those benefitting need to be defined. Under the model law, a purpose benefitting a group of people defined by a relationship to a certain person (eg the founder) or company rather than a need is understood as a private, not public benefit purpose.

Private Purpose, Article 2 (4)

Private purposes are mentioned in Article 2 (4) sentence 1. A private purpose is any lawful purpose that does not benefit the public in the same way as a public benefit purpose. It can benefit a group of people defined by a personal relationship with a company or person, such as being a family member or employee.

The most common private foundations are family foundations established to benefit the founder's family. Such benefits may be limited to times of need, supporting the education of young family members' education or even providing considerable financial benefits to the family. In addition, a family foundation may pursue certain secondary public benefit purposes important to the family. The model law does not provide a definition of family foundations in the text of the model law because the model law does not provide special rules for them. Mentioning family foundations in this Article merely reflects the fact that they are deemed permissible under the model law.

In several European countries, for example Germany, Austria, the Czech Republic and Poland,[201] family

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[197] See for example on German and European group law: Sørensen (2016); ECLE (2017); Emmerich and Habersack (2022), European Model Company Act (2017) Chapter 17; Conac (2016); for a discussion of the development of German and European Group Law, see Fleischer (2024).

[198] See with further references: Sanders and Thomsen (2023), 229–230.

[199] See already the Charitable Uses Act 1601; today eg UK Charities Act 2011, ch 1, s3 (c).

[200] See Sanders (2007), 33; Sanders (2009).

[201] See Kalss (2023), Sanders (2023), Comstocková and Ronovska (forthcoming 2025); Osjada and Weber (forthcoming 2025); Berisha (2025).

foundations are subject to public supervision only to a very limited extent, a point to be discussed more fully in the part on the competent authority (B V.) While this model law only proposes rules on governance and public supervision that apply to family foundations as well, national legislators are free to adopt another approach with special legislation for family foundations that requires less public supervision and emphasises internal supervisory governance systems. Such legislation would benefit from a specific definition of family foundations, which is not required here because the model law does not attach special meaning to family foundations beyond accepting their legality.

The legality of private foundations, especially family foundations, is not universally accepted. In some countries, for example Spain, France and Portugal, family foundations are not permitted.[202] Such foundations may require special regulation in respect of their governance systems and special tax law. However, not all legal systems have such rules. In some countries, there are certain limitations even in the constitution on the prohibition of *fideicommissum* such as in Denmark.[203] The wording 'In accordance with the law, especially tax law' refers to such national legislation which may restrict the acceptance of family foundations. Moreover, in many countries, family foundations can only be set up for a limited period of time. A legislator would, of course, be free to adopt such a path. This can be helpful, for example, to bring foundations in line with inheritance law that often prescribes time limits for regulating one's property beyond death.

Foundations are regarded as an important tool for business succession.[204] In many European countries, the question of business succession in small- and medium-sized companies is a pressing issue. A continuation of such businesses in foundation ownership may provide benefits to society through long-term ownership. In some countries like Germany and Austria, family foundations are as an important tool for planning the succession of family businesses.[205] In Germany, it is possible to keep the family involved through careful design of the foundation and company while preventing disputes between family shareholders.[206] In Switzerland, family foundations are also gaining importance.[207] In Poland, in 2023, a new law on family foundations was introduced for that purpose.[208] Therefore, this model law includes family foundations. Nevertheless, the model law assumes that special tax rules can be developed for private foundations. Moreover, the law includes rules securing the independence of the board under Article 17.

In Germany, foundations may also join a limited partnership as a personally liable partner, a practice not considered legal in Austria and Liechtenstein.[209] The model law takes no position in that respect and leaves the question to national partnership law.

The model law clarifies in Article 2 (4) sentence 2 that establishing a foundation only to benefit the founder is not permissible. It is, however, possible to provide for old age and financial support of the founder if this is not the main purpose being pursued.

Business Purpose, Article 2 (5)

Business activities are accepted by Article 11 of the European Commission for the European Foundation, as long as profits are used exclusively for public benefit. The model law requires under Article 2 (2)

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[202] Schöning (2004) which points out that the upkeep of a historic castle or monument of a family may indeed be a foundation purpose; see the comparative chapters in Sanders and Thomsen (forthcoming 2025).

[203] For example, Article 84 of the Danish Constitution states that 'No… family trust (fidei commissum) may be established in the future'. See Danish Parliament. 2005. The Danish Constitution. <https://www.ft.dk/da/dokumenter/bestil-publikationer/publikationer/grundloven/danmarks-riges-grundlov>.

[204] See: Schillaci, Romano and Nicotra (2013); Kraft (2025).

[205] Kalss (2023), Sanders (2023).

[206] Sanders (2023)

[207] Jakob (forthcoming 2025)

[208] Osjada and Weber (forthcoming 2025).

[209] See Sanders (2023), Schurr and Butterstein (forthcoming 2025).

that foundations act as responsible owners of their businesses. However, this draft goes a step further and accepts long-term, active business ownership as a permissible and valuable purpose and thus as the ultimate goal of an enterprise foundation in Article 2 (5). The activity undertaken to pursue this purpose is the responsible administration of the company and the business it pursues.

This approach is not generally accepted either in Europe or around the world.[210] There are numerous countries where a pure business purpose is not accepted and others where this is the case.[211] Arguments against accepting pure business purposes submit that the mere administration of property would not be an acceptable purpose for a foundation, because is not regarded as a sufficiently 'outward-looking' goal. To further an outward-looking goal, it is argued that distributions must be made. Moreover, it is argued that business ownership requires different rules on transparency and governance than regular foundation laws provide.

However, this model law is based on the assumption, supported by empirical research,[212] that long-term business ownership through foundation ownership can provide important benefits for society. Managing a company is not the same as administering a bank account because a business is a constantly changing entity requiring continuous activity and decision making as well as interaction with numerous stakeholders. This is because owning a controlling interest in a business as required by the EF definition suggested above entails a controlling influence over a business and concentrated risk-taking, which differs from managing a diversified investment portfolio. A business offering goods and services on the market interacts with its stakeholders such as consumers, the community and offers employment. It is not convincing that pursuing such business ownership should be considered a less outward-looking goal than supporting a family. Therefore, the business purpose requires a business activity involving interaction with the market. The mere administration of a bank account without any outward activity would not be a permissible business purpose. Moreover, demanding that at least one other purpose, in addition to preserving the business, is pursued can lead to charters with artificial purposes, written in a manner in which the pure business purpose is disguised.

If a charter sets out a business purpose, Article 2 (5) sentence 2 states that the charter should explain the benefits the founder believes the business contributes to society. This is not intended as a limitation to certain businesses, as all legal businesses provide a benefit to society. Rather, the rule is meant as an invitation to founders to reflect on the benefits they believe the business in foundation ownership may contribute to society. This is easy in cases where a business develops drugs to fight illnesses. But even more mundane legal businesses make important contributions to society. For example, while a logistics business may not help to protect the environment, it may promote the exchange of important goods and bettering people's lives. A potential risk may be that such a requirement produces wordy explanations without much consequence. Nevertheless, the requirement establishes the essential conceptual connection between public benefit foundations and long-term business ownership. Moreover, demanding this expression of the contribution to society the business hopes to achieve may help highlight goals to which the EF can donate within Article 7 (1).

A founder may also take this rule as an occasion for explaining the mission of the company, and the values they hope the business should express in the future. Explaining the mission and social contribution of the business will be a considerable help for the adjustment of the purposes of foundations and their businesses over time. The competent authority may object if the mission and its contribution to society are not convincing according to this broad standard. It would also be possible to add a substantial requirement that the corporate activity in question must benefit society. However, an alternative

[210] See for example Rawert (2018), Ørberg (2024), Burgard (2023); Hüttemann (2009).
[211] See with further references: Sanders and Thomsen (2023), 229–232.
[212] For references, see 'The policy case for enterprise foundations' in the introduction.

viewpoint is that every lawful business makes a valuable contribution to society and that there should therefore be no oversight of the purpose from the competent authority.

The project group assumed that, in many cases, the fact that the founder has left a complete business to the foundation might be interpreted as an implicit expectation of the founder that the foundation will act as a responsible owner of it (implicit business purpose). In such a case, the founder is unlikely to have taken the considerations set out in Article 2 (5) sentence 2 into account. In such a case, the EF is still expected to act as responsible owner according to Article 2 (2).

Enterprise foundations are discussed and used in different countries as a means for organising business succession in family businesses. However, some scholars argue that a rigid purpose may make a foundation too inflexible as an owner of a business requiring constant adjustments to a changing economic environment.[213] In a holding foundation, the company conducting the business can, of course, make adjustments without having to change the foundation's purpose. Nevertheless, for enterprise foundations, adjusting their charters in general and purposes in particular to changed circumstances is even more important than for other foundations which pursue their purposes on the basis of diversified foundation assets. Therefore, this model law includes rules on adjusting a charter and purposes under Article 9.

The purpose of an enterprise foundation should be articulated by the founder with great care. Various possible business purposes can be distinguished.

A company purpose may seek to secure the company as an independent entity and its name in order to preserve the founder's achievements. Such a purpose may be combined with requirements in relation to the business model or even products and services provided by the company. A very detailed product/service focused purpose may, however, prove to be too inflexible to ensure the ongoing success of businesses.

A needs/mission-focused business purpose provides greater flexibility. The Novo Nordisk Foundation provides an example of such an approach. Its purpose is fighting diabetes and other chronic illnesses. Such a purpose allows not only the production of drugs but also the development of new drugs through research and improving health care of patients with chronic illnesses.

It may be argued that only a foundation with a business purpose should be considered an enterprise foundation. However, the functional approach adopted in this model law only requires a controlling influence of a business for the law to apply. This assumes that foundations with multiple goals, as well as their businesses and society at large, would benefit from codified rules for enterprise foundations, regardless of whether or not they pursue a business purpose.

A hotly debated issue in relation to pure business purposes is the question if, and under what circumstances, distribution should be required to avoid a 'mindless accumulation' by the EF. Such 'mindless accumulation' might only be a theoretical problem, because such businesses spend money on investments, research and better pay for their employees and there is no public duty of privately held companies to distribute their profits.

Moreover, in this model law, the duty of founders to state the contribution to society which the business makes also opens the possibility that governing boards makes donations from the foundation property in accordance with Article 7 (1), furthering their contributing to society. For example, an EF has the purpose of being a responsible owner to the business that brings meaningful employment and a positive future to the people of the town where the business was established by the founder's family many years previously. The governing board may, in this context, decide to make donations to support

[213] See for example: Block, Jarchow, Kammerlander, Hosseini and Achleitner (2020).

job training for unemployed people in the town alongside administering the business.

If mindless accumulation is seen as a problem, there are various remedies. It is possible to introduce taxation on the profits the EF receives. It is also possible to introduce a rule that EFs with a pure business purpose have to distribute their remaining assets upon dissolution, for example for the benefit of employees, or in pursuit of another public benefit purpose in relation to the contribution to society the business hopes to make. It is also theoretically possible that the competent authority may demand distributions under certain circumstances to a purpose close to the contribution to society the founder wished to make. However, great caution is advisable. In general, it cannot be the decision of a public authority to decide whether the financial reserves of an enterprise foundation or a foundation-owned company are too high. This is a business decision that should be reserved for the governing board or the boards of corporate subsidiaries. This is especially important since the potential for EFs to raise finance on the capital market are limited if they want to keep control of the business. Refinancing through savings is therefore of special importance.

Article 3 Establishment

This Article used Article 13 of the European Commission for the European Foundation as a starting point but with a few amendments. While the declaration to establish a foundation and a charter are distinguished in Article 3 (1) a) and b), they can be combined physically in a single document.

An important point is the minimum capital requirement of € 50,000. Not only Danish law, but also the Austrian private foundation[214] and the Hungarian asset management foundation[215] require a minimum amount of capital as the initial endowment necessary for a foundation. The draft of the European Commission demanded € 25,000 in Article 7 (2). Of course, most businesses will be far more valuable than the sum stipulated here. However, it was assumed that a low minimum capital requirement might ease the registration process and make it possible to establish a foundation even as a shareholder for smaller businesses still under development, even though the enterprise foundation model may be more difficult for start-ups to adopt. It is noted that there is no minimum requirement in certain countries, eg in the Netherlands. A national legislator is free to follow this path to make the foundation accessible to even more founders or to decide in favour of a higher or lower minimum capital.

The model law does not require that a business already exists at the time the foundation is established. It is therefore possible to establish a foundation with the intention of building a business later. However, while there are an increasing number of start-ups wishing to work with an asset lock, it is unlikely that they will often start with a foundation rather than a company, association or cooperative.

The founder of an EF can be one or more persons, as made clear in Article 4 (3). Moreover, the founders may be both natural as well as legal persons. Legal persons setting up a foundation may, for example, be other enterprise foundations, but also a stock corporation donating shares to a subsidiary of the new enterprise foundation.

Article 3 (1) d) requires registration according to Article 5 but not acknowledgement by the competent authority. Thus, requirements for the establishment have to be checked not by the competent authority but by the register as is the case with the establishment of a company. This is intended to underline the fact that the establishment of enterprise foundations should not require a concession. A national legislator may prefer to require acknowledgement by the competent authority in order to ensure that all legal requirements have been met. In order to prevent

[214] € 70,000 § 4 Privatstiftungsgesetz, see also Kalss (2023).
[215] See Menyhei (2019), 599; Sandor (2023) 1; Sandor (forthcoming 2025).

refusal of establishment eg for political reasons, the law could establish a right of the founder to have an EF acknowledged unless there are legal reasons for not doing so.

Article 4 Charter

The Article is based on Article 19 of the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final).

Article 4 (1) includes the necessary components of a charter, while Article 4 (2) sets out additional regulations that can be added to the charter or in an organisational document separate from the charter. The latter approach can make the foundation more flexible as amendments to organisational documents do not require the approval of the competent authority. While the name of the EF is included as a minimum requirement, it might be possible to allow the foundation's name to be added later in the process, especially when the foundation is established in a will.

Article 4 (2) sentence 1 includes additional matters that may be set out in the charter, eg regarding the governing board and its beneficiaries. In particular, Article 4 (2) sentence 1 e) mentions that the charter may include provisions on the foundation's activities, in particular business activities. Such provisions are not strictly necessary: a board may decide how to implement a foundation's purpose. However, a founder may not only provide a purpose but also has to state with what specific activity this purpose is to be pursued.

Article 4 (2) sentence 2 clarifies that the charter can be supplemented by organisational documents drawn up by the board of directors. Such documents are separate from the charter and thus easier to amend. However, they may not contradict the charter.

Article 5 Registration

The Article is based on Article 23 of the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final). However, the Article has added a duty of the registry to notify the foundation and the responsible competent authority to ensure the adequate flow of information. The reporters believes that registration is a crucial aspect in achieving the necessary transparency that can help avoid risks in relation to foundation business ownership.

Article 5 (4) establishes a right of the general public to access the register. General information such as its name, address, website, information on the governing board, and the names and registration numbers of controlled business companies shall be accessible by anyone, while more sensitive information can only be accessed with a substantial interest. The model law takes note of the case law of the CJEU[216] on the transparency register while insuring a necessary degree of transparency.

Article 6 Name

The Article states that enterprise foundations should add the term enterprise foundation to their name in order to clarify their status to society. Article 25 of the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final) also includes a part on an addition to a foundation's name. Such an addition is important, for example for future creditors. Since enterprise foundations may interact more with the business community than other foundations, clarifying their status in comparison to other legal entities, for example companies, is of special importance.

[216] Judgment of 22.11.2022 WM and Sovim SA v. Luxembourg Business Registers, C-37/20 and C-601/20.

In Article 6 sentence 2, the model law makes provisions on how the EF needs to present itself on its website and in written communication. The text of the model law makes clear that the name and abbreviation has to be specified by the national legislator in the respective language of the specific Member State adopting the model law.

II. Foundation Property and Changes in Status

Article 7 Distribution and Foundation Property

The Article states in (1) that the foundation property may only be used for the purpose of the foundation. This general rule is specified in Article 18 on remuneration of board members. This is the asset lock and non-distribution constraint typical for non-profits in general and foundations in particular.[217] (2) explains that unless the charter provides otherwise, the governing board is free to administer the foundation's assets. In particular, there is no general rule to preserve the foundation's original property (*Grundkapital*) unless the charter states so. Thus, the governing board is free to restructure, invest and sell property. In the process, taking calculated risks is permissible (see also Article 14 (2) d). The project team consider such freedom necessary for an economic player such as an enterprise foundation. It is to be expected that some enterprise foundations will fail in business. This is normal in business and enterprise foundations cannot not be exempted from that risk. Careful risk-taking is also necessary in pursuit of public good purposes, as the success of philanthropic projects is often as uncertain as the success of a business project.

Article 8 Changes in EF Status

Since the definition of an enterprise foundation in Article 1 (1) refers to the control of a business or business company, there must be rules on the effects of a change in the ownership structure ending or establishing such control.

Article 8 (1) provides that an enterprise foundation may come into existence after the establishment of a foundation that only later gains control over a business or business company worth at least € 50,000. In this situation, the EF must comply with the rules on enterprise foundations within six months, in particular, to register as such. The timeframe was chosen arbitrarily; a shorter timeframe could be introduced. However, it is important to find a good balance between complying with EF rules, especially compliance, and providing EFs with enough time to adjust to new circumstances. Since an EF may not be able to influence the work of the register, application, not registration itself, is mentioned in the text. However, a register working slowly would be a cause for concern.

If an EF loses control over a business, it must notify the register within one year, Article 8 (2). The timeframe is longer because it is assumed that having former EFs on the register will not cause problems. Moreover, if the foundation regains its status during that time, there is no need for a back-and-forth process of deregistering and reregistering. The model law assumes that a Member State has a general foundation law in place that can regulate the former EF. If the purpose so demands, a foundation may have to obtain control over another business.

[217] Hansmann (1980).

III. Amendment, Merger, Split, and Spin-off

Article 9 Amendment of the Charter

The Article provides rules for the important topic of charter amendments.

Article 9 (1) builds on German foundation law and Article 20 (2) of the Proposal by the European Commission for the European Foundation. The proposal distinguishes between ordinary amendments of a charter, which just need to support the foundation's pursuit of its purpose, and fundamental changes of a charter, including purpose amendments. The importance of special rules for purpose amendments is easy to understand, but the proposal includes fundamental changes of the charter as well. Such a change might include a completely new governance structure. Both changes are permissible if there has been a significant change of circumstances or 'where the purpose has clearly ceased to provide a suitable and effective method of using the EF's assets'. The second part of this sentence is based on Article 20 (2) of the Proposal by the European Commission for the European Foundation.

Article 9 (1) sentence 3 provides that all changes of the charter must be consistent with the original will of the founder. Thus, the proposal does not grant founders the right to amend a charter after a 'change of heart'. This might be discussed again in order to give more flexibility to the founder. However, a degree of stability is also necessary in order to achieve the foundation's purpose. In Croatia, changes of a foundation's charter apparently only require approval of a majority on the foundation's board.[218] It is unlikely that this offers the stability a founder expects.

Social, economic, scientific and technological developments may justify the adjustment of a business purpose in light of the businesses' mission and societal contribution as envisaged by the founder.

Sentence 4 sets out the will of the founder at the time of establishment as the relevant boundary for charter amendments.

(2) establishes a limited right of the founder(s) to change the charter outside the normal process under (1). There is great diversity among European legal systems with respect to the role of founders after setting up a foundation. While in most countries, the founder has no right to amend the charter, some legal systems, in particular the Austrian private foundation,[219] allow the founder to reserve the right to change the charter and even revoke the foundation. It has been argued that such flexibility is particularly suitable for enterprise foundations[220] and might make the foundation more attractive compared to functional equivalents such as trusts. This might be of particular importance because many founders today set up foundations during their lifetime.[221]

A right of the founder to revoke the foundation altogether would change the foundation in a fundamental way and was thus not adopted. The project team also had reservations as regards the establishment of a right to change the charter at will and to amend the purpose. Therefore, the model law suggests a compromise, which gives some right to the founder to amend errors but not to fundamentally change the charter.

Rather than approval from the competent authority, a change according to sentence 1 only requires notification of the competent authority and the foundation board. This rule is intended to encourage

[218] Article 27 (4) Foundation Act 2018, see Braut Filipovic and Pahljina (2024).
[219] §§ 33 (2), 34 Privatstiftungsgesetz Private Foundation Act.
[220] Weinmann (2024) 259 et seq.
[221] Richter, Stiftungsrecht § 10 para 6; In the German reform of 2021, a right of founders to change the foundation's charter during their lifetime was discussed but not ultimately adopted, see BT-Drucks 19/28173 31.

founders to correct errors. Fears of making mistakes should not prevent founders from setting up foundations in the first place. The period in which charter changes can be made is limited to 20 years and not to the founder's lifetime in order to create an adequate rule for founders who are both legal and natural persons.

Sentence 4 establishes the possibility for a founder to reserve a right to veto changes within the first 20 years of the foundation. Again, this is not a right to be transferred or inherited.

Sentence 5 refers to Article 1 (3) sentences 3 and 4, which clarify that this is a personal right that can neither be transferred nor inherited. A legislator who wishes to provide even more flexibility to founders may take inspiration, for example, from the Austrian private foundation.

(3) repeats the rule set out in Article 4 (2) d) that the charter may provide additional procedures and rules for charter amendments. This may include restrictions and additional requirements or procedural rules.

(4) sentence 1 explains that charter amendments require the approval of the competent authority. Such an authority must be defined by the respective legislator and may either be a public authority or a court. Sentence 2 builds on Danish foundation law and allows changes of the charter in significant cases by the competent authority without an application of the board. This may be important in cases where the competent authority has removed the board for manifest breaches of their duties. However, it has to be acknowledged that such a right can only be exercised as an *ultima ratio*. Legislators may also decide not to include such a right in order to secure the private character of the foundation.

Article 10 Merger

The model law provides rules on the merger of foundations but not on the conversion of foundations as the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final) does in Articles 12, 17, 18, 21, 23, 40-42. The proposal thereby allows the conversion from, and back into, public benefit purpose entities. However, it is not clear whether it is necessary to include rules on conversion, although the conversion of foundations into other legal forms is possible in some legal systems. A legal system that wishes to allow such flexibility should add such regulation.

The model law is based on Articles 14-16 of the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final). However, mergers of foundations are also accepted in Swiss[222] and German foundation law,[223] for example. Mergers are important because foundations are often established but they are too small and lack the necessary capital to pursue their purpose.[224] Mergers can concentrate resources in such situations.

Article 10 (1) states the possibility of a merger with the approval of the competent authority if the merger supports the respective purposes of the foundations involved.

Article 10 (2) regulates the legal effects of a merger. It uses the wording of Article 16 of the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final). With the European proposal, this proposal assumes that foundations may be merged through absorption and the creation of a new foundation. Not all legal systems recognise

[222] Article 78 Bundesgesetz über Fusion, Spaltung, Umwandlung und Vermögensübertragung (Swiss Merger Law) <https://www.fedlex.admin.ch/eli/cc/2004/320/de>

[223] Mergers and acquisitions ('Zulegung und Zusammenlegung') have been regulated in the new German foundation law 2021 for the first time on the federal level §§ 86 ff BGB; see on the need for such regulation: Hüttemann and Rawert (2013).

[224] In Germany, before the reform of 2021, this situation led to a demand for a proper federal basis for mergers. See 2016: Bericht der Bund-Länder-Arbeitsgruppe „Stiftungsrecht" vom 09.09.2016., <https://www.innenministerkonferenz.de/IMK/DE/termine/to-beschluesse/2016-11-29_30/nummer%2026%20reform%20stiftungsrecht.pdf?__blob=publicationFile&v=2>, last accessed 16.11.2024.

both approaches. In the new German foundation law, both alternatives are provided for in sections 86-86h of the German Civil Code.

Article 10 (3) provides a rudimentary proposal for the application to the foundation board and clarifies that all responsible foundation authorities must approve of the merger. While many countries have only one central competent authority, in federal systems, there might be a number of them. Of course, national legislators should adjust this point to their needs. The foundations need to supply the necessary information to the competent authority to enable it to make a well-reasoned decision. The model law suggests that the competent authority must be supplied with information on: (a) the work of the merged foundation in the future; (b) the effects of the merger for all foundations concerned and their ability to pursue their purposes; and (c) that the merger will have no negative effects for the debtors of the foundations concerned. Point c) is of special importance to ensure the protection of creditors.

Article 11 Split and Spin-off

The Article establishes a right of foundations to split and create new foundations by means of a spin-off. Like mergers, these changes must serve the EF's purpose and require the approval of the competent authority. Moreover, such changes require special measures to ensure that the interests of creditors and employees are not endangered.

IV. Governance of Enterprise Foundations

General Comments on EF Governance

In accordance with the general definition of corporate governance, enterprise foundation governance is defined as *'the direction and control of enterprise foundations.'* [225] EF governance is intended to ensure that the EF acts in accordance with the law and – to the greatest degree possible – in order to fulfil its purpose.

Enterprise foundations have many features in common with general (non-enterprise) foundations, which make governance of the utmost importance, and which are addressed for example in the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final), from which the current proposal draws much of its inspiration. The key decision makers (the governing board members) are not motivated by economic incentives, and neither are they sanctioned by other private agents (like shareholders), who can replace them. This means that the two arguably most important governance mechanisms – ownership control and ownership incentives – are absent in foundations. It is therefore crucial that foundation governance is secured in other ways, including board self-control[226], transparency[227], foundation law[228], and supervision by competent authorities[229] (the last point being addressed in a subsequent section, IV.).

[225] See, for example, the UK corporate Governance code (2024) p 4. For a comparative study of non-profit governance, see Hopt and von Hippel (2010).
[226] See, for example, Ortega-Rodríguez et al (2024), who underline the unique importance of self-regulation in the non-profit sector. See also Hoque and Parker (2014).
[227] See Ortega-Rodríguez et al (2024) and Costa and da Silva (2019), who emphasise transparency as a way to build trust.
[228] See for example Ben-Ner and Van Hoomissen (1994).
[229] See for example van der Ploeg (1995).

Enterprise foundations have special characteristics which, in many ways, make their governance more complex and demanding than general foundation governance. In particular, they engage in business activities (either directly or as shareholders) with the added complexities and risks that this entails. General foundations usually have financial assets from which they derive the income they use for charitable purposes. They may invest in company shares. However, they do not, on their own behalf, engage in business activities and neither do they have a controlling interest in business companies, which they can influence through the election of board members and other means. Instead, they operate at arm's length to the companies that they invest in and can reduce their risk exposure by investing in relatively risk-free assets (bank deposits, government bonds) and by risk diversification. The risks that they face are essentially the same as those faced by other financial investors like pension funds, and they can rely on well-established methods for financial management. In contrast, enterprise foundations engage in business activities and entrepreneurship either directly or indirectly. Holding foundations that have a controlling influence in one or more business companies concentrate their investments and take on more risks than diversified investors. They engage in their companies as business owners with a controlling influence rather than as passive investors. The success of the companies that they own is often a goal in itself in addition to any philanthropic goal, which the foundation may have. It may even be the foundation's most important goal.[230]

This has consequences for enterprise foundation governance, since their governing boards are responsible for a broader set of activities, for which they must be held accountable without resorting to economic incentives or permitting founders or other stakeholders to replace them. EF law can therefore, to a greater extent than general foundation law, be informed by corporate governance requirements in company law. This is reflected in the following provisions.

Article 12 Governing Board

This Article reflects the general principle of collective self-governance[231] by a designated board of directors that is responsible for directing the EF. The Article is adopted from the Proposal for a Council Regulation on the Statute for a European Foundation (COM (2012) 35 final Article 27.

The principle of collective responsibility is standard in company and non-profit law. For example, the UK Charity Governance Code (2017) states that: 'The board, as a whole, and trustees individually, accept collective responsibility for ensuring that the charity has a clear and relevant set of aims and an appropriate strategy for achieving them.'

If the charter does not specify the number of directors, the governing board can decide their number, but at least three have to be elected. The rationale for a minimum board size is to allow board members to engage in self-governance through teamwork and mutual monitoring[232], which is not possible to the same extent in a single-person board. The key idea is that the board members hold both managers and each other mutually accountable.

In many cases a board of three members may be insufficient for the EF to effectively conduct its business. It may be difficult to ensure sufficient breadth of experience on the governing board and even to reach a quorum. This may even, for example, be the case in private (family) EFs in which both

[230] Thomsen (2017).

[231] Collective responsibility is a common characteristic of both company and foundation boards, which are responsible for the success of the organisations they serve. For example, the Institute of Chartered Accountants in England and Wales (ICAEW) states that 'Directors' powers are given to them collectively as a board and must generally, subject to any proper delegation … be exercised by the board, as a whole. Directors therefore have a collective responsibility to manage the company.' See also the emphasis on self-regulation in the literature review on non-profit governance by Ortega-Rodríguez et al (2024).

[232] See Bainbridge (2002).

family members and independent board members are represented. In such cases, a governing board of five or more members may be advisable. However, in small EFs with fewer resources and less complex activities, a small board may be sufficient.

Since governing board acts as a collective, the EF is represented by the governing board as a whole. However, the governing board may on occasion delegate this power to the chair, other board members or to managing directors.

Article 13 Appointment and Membership of the Governing Board

This Article is inspired by the Proposal for a Council Regulation on the Statute for a European Foundation Article 10 'Appointment and membership of the governing board'. The first board members in a newly created EF must be appointed by the founder subject to legal eligibility. Subsequent board appointments (also subject to eligibility) are to be made by a majority of the incumbent board members or as specified in the EF charter. The founder may, for example, decide that founding family members or directors with particular competences should serve on the board.

Unless the foundation charter specifies otherwise, it is proposed that members of the governing board are appointed for a five-year term subject to re-election by a majority of the foundation board. This reflects a balance between continuity through relatively long appointment terms and the possibility of reappointment and renewal that is much easier after the end of a term rather than removal. Given the long-term nature of EFs, it is expected that many governing board members will be reappointed for several terms.

The EF governing board members must be natural persons that are legally qualified to serve. The procedure for their appointment must be set up in the charter according to Article 4 (1) d). Board members may resign at any time, but if they do so, they are required to explain their reasons to the governing board as a whole. Both the resignation and the reasons must be communicated to the competent authority.

A member of the governing board has to resign if they are disqualified; fail to meet the admission requirements in the founding documents or the charter of the EF; are found guilty by a court of financial impropriety; have been proven, by the member's acts or omissions, to be clearly unfit to fulfil the duties of board membership; or wilfully fail to comply with the foundation charter and rules of procedure. If the charter of the EF provides for this, the governing board may alternatively dismiss a member of the governing board for the same reasons. The competent authority shall similarly dismiss a member of the governing board for these reasons or, where provided for in the applicable national law, propose the dismissal to a competent court.

Where national law warrants employee-elected members on enterprise foundation boards, employee-elected directors shall be appointed to the EF board according to national rules for employee representation. Employee-elected members are not expected to constitute a majority of the EF governing board.

To safeguard the independence of the EF vis-à-vis the operating company, the board of directors or executive management of subsidiary companies may not appoint members to the EF governing board. However, the EF governing board may appoint EF governing board members or EF managing directors to serve on the board of subsidiary companies. The EF governing board may also appoint former board members or managers in subsidiary companies to serve on the EF governing board.

Article 14 Duties of the Governing Board and its Members

This Article is adopted from the Proposal for a Council Regulation on the Statute for a European Foundation (COM (2012) 35 final Article 29 with some additions reflecting the greater importance of business activities in enterprise foundations. The governing board has a general duty to act in the best interests of the foundation

and its purpose as well as to bear the residual responsibility for the affairs and success of the EF. Business decisions of the board and its members are subject to the business judgement rule. The specific duties additionally include: governance of the EF in accordance with its purpose, overall strategic management of the EF, appointment and dismissal of EF managers, monitoring the activities and the financial situation of the EF, financial management of the EF, risk management of the EF, and working to ensure sufficient diversity by setting gender targets for the governing board. In addition – of special interest to enterprise foundations – the EF board is responsible for monitoring the operations, finances and risks of subsidiary companies as well as participating in the election of their board of directors and taking other steps as needed, such as informal dialogue with the company board and company managers or calling an extraordinary shareholder meeting. EF directors' duties thus go beyond administration, management (including bookkeeping) and compliance.

Similar provisions are found in company and charity law. For example, the UK Charity Governance Code (2017)[233] states that:

- Principle 2. Every charity is headed by an effective board that provides strategic leadership in line with the charity's aims and values.
- 2.4.3. In the case of the most senior member of staff (eg CEO) the board makes sure that there are proper arrangements for their appointment, supervision, support, appraisal, remuneration and, if necessary, dismissal.
- 4.4. Where aspects of the board's role are delegated to committees, staff, volunteers or contractors, the board keeps responsibility and oversight.

However, as made clear by the term 'in compliance with company law', foundation directors need to respect the limits company law, in particular the law of groups, sets for owners to exercise influence over subsidiary companies which are independent entities. In the case of an operating enterprise foundation, the duties of the board of directors are, of course, even more extensive.

Article 14 (3) sentence 1 states that directors are liable for losses they cause by a breach of their duties. (3) sentence 2 introduces a business judgement rule for decisions made by directors that are not prescribed by law. A director who fails to act according to a legal duty will be liable for any loss the breach causes. Other decisions, however, which are not prescribed by law but require a weighing of pros and cons, as typically business decisions do, are subject to the safe harbour of the business judgement rule. The model law does not use the term 'business decision', because the governing board of an EF does not only make decisions with respect to business activities, but also with respect to pursuing other purposes of the EF, in particular public good purposes. Choosing philanthropic projects, for example, may, like business decisions, involve a certain degree of risk. Directors should not be liable for losses occurring in this context if the decision was made in good faith based on appropriate information. The German foundation law of 2021 also includes such a rule in § 84a (2) s.2 BGB.[234]

To ensure adequate financial control and risk management, the model law requires in Article 14 (6) that governing boards of large EFs (with assets greater than €250 million) must appoint an audit committee to monitor the financial accounting and risk management of the EF as well as related tasks decided by the EF governing board. The audit committee shall examine the EF's financial reporting and control system as well as its risk management. However, the audit committee is not a decision-making organ but makes recommendations to the governing board as a whole, which makes all financial decisions not delegated to EF managerial directors.

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[233] See <https://www.charitygovernancecode.org/en/about-the-code-1> Principle 2, Outcome 2.4.3 and Outcome 4.4. (last accessed March 24, 2025).
[234] See for the German discussion with further references: Arnold (2021) 87; Gollan (2009) 127 et seq; von Hippel (2007) 84 et seq.

Audit committee members must have sufficient financial expertise to fulfil the committee's functions adequately and be composed of three governing board members, a majority of whom must be independent of the founders, EF managing directors, board members as well as executives in subsidiary companies and other interested parties in order to safeguard its independent function. The audit committee shall meet at least twice a year without the presence of other EF governing board members or EF managing directors.

The mandatory audit committee in large EFs should be seen as an additional safeguard to ensure the integrity and independence of the EF governing board given its crucial role in EF governance. The audit committee thus reinforces other independence requirements including independent board managers and the prohibition on duality, which prevents EF managing directors and subsidiary managerial directors from membership of EF governing boards.

Since the governing board is not subject to the checks and balances of election by shareholders or members, additional governance tools can be useful. Thus, a supervisory body may be established by the founder in the EF charter or by the governing board if the charter allows. Supervisory boards are charged with monitoring the activities of the EF and its subsidiaries to ensure that they are conducted in the best interests of the foundation and its purpose. Supervisory boards may also have other functions, for example if the charter allows it, electing or re-electing board members. In any case, supervisory board members must fulfil their functions in the best interests of the EF and its purpose.

Article 15 Board Meetings

This Article is not based on the Proposal for a Council Regulation on the Statute for a European Foundation (COM (2012) 35 final but draws on Article 52 of the Danish law on enterprise foundations 2019. For board self-control to function efficiently, it is necessary for the board to be active as a collective decision-making body and to avoid a concentration of power on specific individuals like the chairperson or members of the founding family.

The Article therefore provides rules on the chairperson of the board as vested with certain limited powers. It prescribes that the governing board must elect a chairperson responsible for calling and directing board meetings, to which all board members must be invited with due notice of two weeks (unless otherwise decided by the rules of procedure). According to the EF charter, the chair may also cast the decisive vote if the governing board is evenly split on an issue.

Beyond this, the chair has no special authority compared to other board members and can only represent the EF if so authorised by the governing board. The rationale is to avoid excessive concentration of power in a single individual, which is important since the EF chairperson is not subject to checks and balances other that those exercised by other members and the EF authority. As an extra precaution, board meetings may, in exceptional circumstances, be called by any board member. Exceptional circumstances may, for example, be acute financial problems which threaten the survival of the EF and thus necessitate immediate action.

To enable all governing board members to attend meetings while ensuring that enterprise foundations can act sufficiently fast in unusual situations, we propose a minimum notice period of one week.

To exercise its functions in a meaningful way, the model law stipulates that the governing board must meet at least twice a year. Under normal circumstances, it is to be expected that EF boards meet more frequently, for example four times a year, to keep track of activities in the EF and its subsidiary companies.

Unless otherwise stated in the charter, the governing board has a quorum when a majority of its members are present.

Decisions of the governing board are to be made by majority vote with each member having one vote. In the case of a split vote, the rules of procedure may endow the board chairperson with two votes.

In accordance with standard board practice, it

is proposed that EF governing board meetings are confidential to ensure the integrity of the governing board as a collective body. However, the governing board may authorise the chair, another governing board member, a foundation manager or an administrator to implement governing board decisions and to communicate decisions as well as relevant deliberations by the governing board to foundation managers, corporate subsidiaries or other stakeholders.

Article 16 Managing Directors

This Article is inspired by the Proposal for a Council Regulation on the Statute for a European Foundation (COM (2012) 35 final Article 30.

Delegation of tasks to managing directors can play an important role in foundation governance since it introduces a level of checks and balances that is not found in a unitary governance structure where all decisions are made by the governing board. Instead, such a board structure comes closer to a two-tier board structure that is well known in Germany and the Netherlands.[235]

Company law may, in some circumstances, require a managing director, but a similar requirement is regarded as unnecessary in smaller EFs, which are owners rather than managers of the foundation-owned companies, where daily business management takes place.

The governing board may decide to engage one or more managing directors to be responsible for the day-to-day management of the EF while subject to the directions of the governing board. The governing board and foundation managers are jointly responsible for the success of the EF. 'Unusual' (eg major) decisions must be approved by the governing board, which shares overall responsibility. Managing directors are obligated to act in the best interests of the EF and its purpose and to observe a duty of loyalty to the EF. Among their tasks are to oversee the foundation's financial accounting, to comply with statutory regulations, to ensure that its assets are properly managed, and that the foundation's capital resources, and liquidity are adequate at all times.

To ensure the independence of the governing board, managing directors of the EF or foundation-owned companies are not allowed to be members of this board. In this sense EF governance resembles the two-tier model of German company law, which requires a strict separation between the supervisory board (*Aufsichtsrat*) and the management board (*Vorstand*).[236] However, the EF governing board has the ultimate responsibility for many tasks such as strategic and financial management that would normally be carried out by managers. Moreover, the EF governing board may decide to do without managing directors altogether, which may for example be the case in smaller EFs with limited resources.

However, since the managing directors partake in the overall management and leadership of the company, it is proposed that they should attend and be able to give their views at governing board meetings unless otherwise decided by the governing board in particular cases. This may, for example, be the case when the EF board reviews the remuneration and performance of managing directors. Moreover, unless the governing board decides otherwise, governing board meetings shall include a closed session, in which managing directors do not participate. This closed session ensures that the governing board can effectively supervise managing directors. If a formal decision to exclude the managing directors is required, taking such a decision might be understood as a lack of trust and thus should be avoided to ensure a good relationship with the managing directors.

In accordance with the instructions of the governing board, for example in the rules of procedure,

[235] See Kraakman et al (2017), 50–51.
[236] See on the increasing convergence of the one- and two-tier approachesl Hopt (2019), 515 et seq.

managing directors are responsible for managing the foundation and at the same time share responsibility with the governing board for exercising control of subsidiary companies, which can be regarded as part of the same company group. If the EF is an active shareholder, the responsibility of managing directors extends as far as possible under company law in order to facilitate such active ownership through monitoring and interaction with subsidiary company officers and directors.

Article 17 Board Independence

This Article is adopted from the Proposal for a Council Regulation on the Statute for a European Foundation (COM (2012) 35 final Article 32 (Conflicts of interest).

To ensure the integrity of the governing board and the viability of its self-governance, it is essential that a sufficient number of governing board members are *independent* of interested parties such as the founding family, businesses with a relation to EF or its subsidiaries or other board members. For the same reason, managers of the EF or its operating companies must not constitute a majority of the governing board.

What constitutes a sufficiently independent board may vary according to the EF's purpose and other circumstances. For example, in family enterprise foundations, the charter may specify that a majority of the governing board members should be related to the founding family to reflect the purpose of the EF. However, in EFs with mixed private and public purposes, family members may not be independent because they can be said to have a vested economic interest in donations to founding family members. Conversely, in public EFs with a purely charitable purpose, affiliation with a founding family does not necessarily compromise independence. It is up to the EF governing board to determine if a board member can be regarded as independent in a specific situation.

However, at a minimum, at least two governing board members, or in small governing boards of three members at least one, shall not be a founder, a member of the founder's family, a foundation manager, a board member or a manager in a subsidiary company.

The governing board must ensure that only disinterested board members can participate in voting decisions. EF board members and managerial directors may not participate in decisions in which they have a personal economic interest and must ask to be excused from discussions pertaining to such decisions. However, they may communicate their opinions to the board in writing.

Independence requirements are standard in the corporate governance of listed companies and are also found in some non-profit law, which requires that interested persons cannot constitute a majority of the board.[237] Academic research has found that the

[237] See <https://danishbusinessauthority.dk/sites/default/files/2023-10/consolidated-act-commercial-foundations-20092019_WA.pdf> and specifically regarding the founder's representation in the board of directors:
40.-(1) The founder, his or her spouse or cohabiting partner or persons related to said persons. by kinship or relationship by marriage in the direct line of ascent or descent or collaterally as close as siblings, may not constitute the majority of the board of directors without the consent of the foundation authority.
(2) See California Non-profit law <https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations.> *'If a commercial foundation is formed by an undertaking, a person who, either directly or indirectly, owns more than 50% of the ownership interests or voting interests in the undertaking may not, without the consent of the foundation authority, constitute the majority of the board of directors together with persons who are as closely related to the person in question as stated in subsection (1), just as the latter persons may not constitute the majority of the board of directors without the consent of the foundation authority. Similarly, the majority of the management of the founder undertaking may not, without the consent of the foundation authority, constitute the majority of the board of directors together with persons who have a relationship stated in subsection (1) with said members of the management.*
See also Oatfield (2022), who notes that: *'California law provides that no more than 49 percent of the persons serving on the board of any public benefit or religious corporation may be 'interested persons'... An 'interested person' is (1) any person being compensated by the corporation for services rendered to it within the previous 12 months, whether as a full-time or part-time employee, independent contractor, or otherwise, excluding any reasonable compensation paid to a director as director; or (2) any brother, sister, ancestor, descendant, spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, or father-in-law of any such person.'*

independence of US non-profit boards is positively correlated with mission attainment.[238] However, family membership as such does not appear to be a problem.[239]

Independence is particularly important in decision making, in which some board members may have a private interest. Therefore, transactions between the EF or its subsidiaries and related parties – such as foundation board members, managerial directors, founders or parties related to them, such as family members – must be approved by a majority of disinterested governing board members. They must take place at fair value, be assessed by an independent auditor and be disclosed in the annual report of the foundation.

Conflicts-of-interest clauses are standard in company and non-profit law. For example, the Charity Commission for England and Wales. (2022)[240] states that:

'*Trustees have a legal duty to act only in the best interests of their charity. They must not put themselves in any position where their duties as trustee may conflict with any personal interest they may have. This means that they should handle conflicts of interest using the following steps: Identify conflicts of interest. Prevent the conflict of interest from affecting the decision. Record conflicts of interest.*'

Article 18 Remuneration

This Article draws on the Danish law on enterprise foundations (2019) Article 87.1.

Since the governing board decides on its own remuneration with no outside control except possibly by the competent authority, it seems important to prevent governing board members from overpaying themselves and thus violating the rule in Article 7 that foundation property may only be used for the purpose of the foundation. Moreover, it is important to prevent circumvention of the foundation's non-profit status through excessive incentive remuneration to governing board members or foundation managers. On the other hand, it is no less important to recruit board members with the right qualifications, which requires competitive remuneration.

Members of the EF governing board shall, therefore, be able to receive a fixed fee proportionate to their workload and responsibility or, alternatively, (if they choose) to waive their fee. To prevent overpayment, the board fee or other payments shall not exceed the market rate, i.e. what is customary for similar positions in enterprise foundations taking into consideration the tasks involved. Merely referring to similar foundations might be difficult at times because their number is smaller and because enterprise foundations engage in business activities and thus require business competences that are often in short supply. Taking into consideration remuneration in business companies should thus be possible but should not be regarded as an excuse to increase the remuneration of board members indiscriminately.

Foundation board members shall not receive variable forms of remuneration such as bonuses or performance-related pay from the EF or its subsidiaries but may on occasion receive additional fixed payments for specific tasks performed in the service of the EF as agreed in advance by disinterested members of the EF board.

The competent authority and the EF shall have the right to demand that excessive board fees or payments are paid back to the EF.

Founders, governing board members, managing directors or auditors and their family or business partners cannot receive donations from the EF, but

[238] See Blevins, Ragozzino and Eckardt (2022).
[239] Boland Harris and Neely (2022).
[240] Charity Commission for England and Wales (2022). Guidance. Conflicts of interest: a guide for charity trustees. Updated 31 October 2022 2. Conflicts of interest: at a glance summary (legal requirement).

may recieve payment for the performance of their duties within the EF.

Similar provisions to prevent for-profit compensation are found in non-profit law around the world which seeks to prevent *'inurement'.* For example, the US Internal Revenue Service. (2024)[241] states that '*no part of the net earnings of a section 501(c)(3) organization may inure to the benefit of any private shareholder or individual.*' This rule is designed to ensure that the income or assets of a tax-exempt non-profit organisation do not unduly benefit private interests, including those of the founders, their families, or other insiders.[242]

Article 19 Transparency and Accountability

This Article is inspired by the Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final Article 34.

Given the special characteristics of enterprise foundations identified above (no ownership control and the absence of financial incentives for board members), it is necessary to rely on other mechanisms to ensure good governance. Transparency has a crucial role to play in this respect, in part as a basis for efficient regulation by the relevant foundation authorities and in part to discourage dubious practices. The US Supreme Court Justice Brandeis famously quipped that '*Sunlight is said to be the best of disinfectants'243* and this is particularly true for enterprise foundations which, in many cases, have a material impact on business and society. Moreover, general disclosure is important to ensure the public legitimacy of EFs.

The model law thus proposes that the EF is subject to standard financial accounting and has to prepare an audited annual financial report which is submitted to the competent authority. To ensure validity, the annual financial report is to be audited by a certified auditor in accordance with the national rules.

It is furthermore suggested that a summary financial statement, including an overview of donations by type, is publicly disclosed in the relevant national register or in another suitable format such as the EF's homepage. This is a compromise between the need for privacy in private foundations and the public need for transparency.

Publicly available annual reports are standard for listed companies. Private European companies are also often required to publish their annual reports to facilitate market efficiency and competition. Likewise, some types of non-profits are required to disclose accounting information. The US Internal Revenue Service[244] requires non-profits to file Form 990 annually with the IRS. This form discloses detailed information about the organisation's finances, including revenues, expenditures, and compensation of its highest-paid employees and officers. Form 990 is a public document, and non-profits must make it available upon request or through the IRS website.

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[241] Internal Revenue Service. (2024a).

[242] The US IRS defines inurement as the direct or indirect transfer of an organization's income or assets to, or for the use or benefit of, any individual, particularly those who have a significant influence over the organization (often termed as 'insiders'), where the transfer is not provided as fair market value compensation for services rendered to the organization. The key aspects of inurement are:

1. **No part of a nonprofit's net earnings** may benefit any private shareholder or individual associated with the nonprofit.
2. **Benefit to private interests**: The IRS scrutinizes transactions between a nonprofit and its insiders to ensure that the nonprofit operates for public benefit rather than private interests.
3. **Reasonable compensation**: While nonprofits can pay reasonable salaries to their employees, including board members and officers, any compensation that exceeds the value of services provided could be considered inurement. This prohibition is critical because it ensures that the organization's resources are used in support of its tax-exempt purposes rather than for personal gain.

[243] Brandeis (2014) Chapter V.

[244] Internal Revenue Service (2024b).

Article 20 Best Practice Recommendations on the Governance of Enterprise Foundations

This provision is inspired by the Danish law on enterprise foundations Article 60.

Article 20 (1) requires that a relevant national authority set up a committee of experienced managing directors and governing board members in enterprise foundations tasked with proposing a set of best practice recommendations for EF governance. A national committee can take national characteristics like legislation, history and culture into account and thus draw on a local understanding of what constitutes best practice for enterprise foundations in this context.

For simplicity, the rule assumes a single national authority, which might not be the case in countries with a federal structure. National legislators are invited to adjust the rule in this case, for example by suggesting that the committee is established jointly by the competent authorities or by the competent federal ministry.

Article 20 (2) states that the competent authority adopts this set of recommendations on a comply-and-explain basis, requiring EF governing boards to explain publicly, for example in their annual report, how they comply with each recommendation in case they are in compliance. In the case of non-compliance, EFs must explain their reasons for not complying as well as whether and how they have addressed the issues in question by other means.

Such best practice governance recommendations are regarded as soft law.[245]They have gained general acceptance for listed companies in almost all European countries. Compared to hard law at the national or European level, soft law can be more flexible and is less onerous for EFs in terms of regulatory burdens since compliance is not mandatory.

Codes are often adopted by charitable foundations to align with best practice, for example the UK Charity Code (2017, 2024),[246] but in most cases on a voluntary basis.[247] They are regarded as a particularly important governance mechanism for non-profits.[248] Danish enterprise foundation law has adopted a set of best practice recommendations that apply on a comply-or-explain basis to all Danish *enterprise* foundations. Codes are applied in this model law as instruments to improve enterprise foundation governance, which can be more flexible and adjust faster than conventional hard law. EF governance is a public concern because EFs engage in business activities and therefore influence competitiveness and market efficiency. It is expected that best practice recommendations will increase transparency as regards the governance of enterprise foundations and thus be helpful in building trust and legitimacy for the EF model.

V. Competent Authority

Enterprise foundations in this model law are private law institutions. However, as they are unowned and memberless, and bound by their purpose, they pose specific governance challenges (an 'accountability gap'), which may be addressed by various kinds of supervision. Different legal systems have taken different approaches to this issue, which all have advantages and disadvantages. Some Member States mainly use public law instruments, others use private law instruments, still others combine both.

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[245] On corporate governance codes, see Du Plessis and Low (2017).
[246] UK Charity Code (2017, 2024) <https://www.charitygovernancecode.org/en>
[247] See also: National Council of Nonprofits. (2024); Komiteen for God Fondsledelse (2020).
[248] See the overview article by Costa and Goulart da Silva (2019).

A. Public Law Instruments

There are three approaches using **public law instruments** for supervision:

1. In many legal systems, supervisory powers are vested in an administrative agency, eg Swedish, Norwegian, and Danish Foundation Authorities. In some legal systems, like Austria and some German states, public supervision is (mostly) limited to public foundations while private foundations are largely unregulated or regulated by private supervision. The UK has the specialised Charity Commission with immense powers to supervise different entities pursuing the public benefit.

2. In other legal systems, like the Netherlands and Belgium, supervisory powers are exercised by courts and/or prosecutors.

3. Moreover, in many countries, tax authorities provide additional supervision for public benefit entities.

Public supervision can be highly effective if it is exercised competently, equipped with adequate resources, and subject to judicial review. In a society with high trust in public institutions and effective judicial review, it can help avoid scandals and establish public trust in enterprise foundations. Therefore, appropriate public law control powers are included in the model law. These powers may either be designated to national administrative authorities or to national courts. Either way, the proposed supervision powers are based on principles of subsidiarity, proportionality and the business judgement rule. Although there may be many reasons to require a public law legality oversight system of foundations, the protection of the original will of the founder is a fundamental rationale in many European countries. Additionally, the tax treatment of the foundation at the time of formation and during its lifespan is an important reason for public supervision by tax authorities.

However, appropriate rules are not sufficient to establish an effective competent authority. It is necessary to provide adequate resources and personal with the right skills and a service mentality. Of course, competent authorities must work to prevent abuse and financial scandals. However, officers working at the competent authority must not only be highly competent but must also see their institution as a helper and advisor, working to develop and promote trust in enterprise foundations. Moreover, to gain and maintain public trust, a competent authority must also work within a rule of law framework.

The Proposal for a Council Regulation on the Statute for a European Foundation (COM(2012) 35 final considered public supervision an essential element of foundation law. An effective and supportive competent authority may potentially be both helpful and confer legitimacy to enterprise foundations in general. EU anti-money laundering legislation – including the new regulations on authorities, supervision and traceability – effectively subjects all foundations to a certain level of public scrutiny.

In order to facilitate adequate financing of foundation authorities, Members States may impose a small fee on enterprise foundations. In most countries, this fee may simply contribute to the authorities' funding. However, this option may also be the only source of funding in jurisdictions with a sufficiently large pool of foundations. Self-financing is held to work well in Denmark, which has approximately 1,400 enterprise foundations (of which about 400 are holding foundations). Such financing may not only improve the financial basis for the competent authority but may also facilitate a service-minded approach in such authorities.

B. Private Law Instruments

However, public supervision might not be felt to be appropriate in some legal systems that wish to stress the independence of foundations as private institutions. In times of a growing polarisation of politics and loss of trust in public institutions, political influence through public agencies supervising foundations may be regarded as a risk. Moreover, inadequately funded agencies that are slow to act may not improve trust in, and the attractiveness of, enterprise foundations. If an approach via strong public supervision is not regarded as appropriate, it is possible to rely on private instruments such as:

1. internal governance tools, such as supervisory boards;

2. audits and transparency;

3. powers of the beneficiaries, the founder or other interested parties such as NGOs to sue the foundation to hold the foundation board accountable;

4. supervision through membership in a private organisation of the foundation's choice, which receives annual reports from the foundation and may sue the foundation and members of its board in the name of the foundation. Such private supervision is well known in Germany for cooperatives, which have to be members of supervisory associations. In a German draft law for steward-owned companies, membership in a similar supervisory association was suggested to combine effective external governance with self-regulation;[249]

5. a private supervisory body appointed to ensure that *all* governing boards of all foundations comply with the law and their charters. This model has so far not been implemented, but a state could appoint a private institution to undertake supervision in this way.

Again, such private approaches can be supplemented by the supervision of tax authorities. In addition, national legislators should ensure that whistleblowers from within the foundation are adequately protected when reporting irregularities.

This model law is designed to facilitate the establishment and governance of enterprise foundations. If a legal system has already established effective supervision, it need not be changed. However, if national legislators wish to encourage enterprise foundations, adequate supervisory mechanisms must be in place.

Article 21 Competent Authorities

This Article is directed towards the national legislator deciding on the right approach to take as regards a competent authority. This model law suggests that the legislator implements a public competent authority or court which must have the necessary legal competences and business understanding to be able to evaluate the situations of EFs fully. The authority may primarily be an administrative agency as in eg Germany, Sweden, Denmark, or Spain, or a national court as in eg The Netherlands. However, as pointed out above, the approach taken here is optional and other approaches using private supervision can be taken instead.

The competent authority suggested in this Article should act according to the principles of proportionality and subsidiarity and undertake legal supervision. Thus, it is not the competent authority's responsibility to question business decisions by the EF governing board. It is, however, considered possible that the competent authority provides guidance if approached by a foundation.

Decisions by the competent authority can be challenged in court. This is important to ensure that the competent authority can be held accountable. If the competent authority is a court itself, it must be possible to appeal its decision at a higher court.

Article 22 Information

The Article allows the competent authority to make inquiries and request information if it has reason to believe that the EF is not acting in accordance with its charter or the law. This rule is intended to secure the effective working of the competent authority as well as privacy rights of the EF and its stakeholders.

[249] See also the draft law on steward-ownership. Sanders et all (2024) para 44 et seq, para 109 et seq.

Article 23 Legality Supervision

The fundamental principle of the governing board's supremacy should be respected. However, the protection of the foundation's interests against potential abuse is equally fundamental. The specific powers of the competent authority in the model law reflect this balancing exercise.

The model law should include specific rules about the supervisory powers exercised by the competent authority in order to ensure accountability. The enumeration of powers in the suggested Article 23 is not exhaustive but sets minimum requirements.

As stipulated in the suggested Article 21, Member States may decide to confer some competent authority powers to courts and others to administrative public agencies. This optionality is intended to give Member States the appropriate flexibility to maintain their specific legal tradition.

The extensive powers of the competent authority listed in Article 23 may appear unusual in a foundation law context. Alternatively, the definition of powers could have been phrased more generally here and be made more concrete at the national level. On balance, though, because of the need for a level playing field, to ensure accountability of foundations and the competent authority alike and the need for effective oversight of enterprise foundations, the model law includes an extensive enumeration of powers.

Where the foundation charter or national foundation law is violated, the competent authority may order the governing board or the auditor to ensure that the violations are addressed in order to achieve conformity. The typical process involves a recommendation from the competent authority (Article 23 (1) sentence 2 a). If the governing board does not provide a satisfactory explanation for the violation, the competent authority should typically provide a reasoned statement to the EF on how it intends to act and invite the governing board to provide comments on the intended measures. The competent authority then decides on appropriate, proportional actions. The EF can challenge such decisions in court. However, taking into account the Danish experiences, the initiation of court proceedings rarely occurs in practice.

According to Article 23 (1) g) (cancellation powers), the competent authority may decide that a governing board's decisions which violate the foundation charter or national foundation law are invalid. For example, the competent authority may cancel an illegal distribution, and if the beneficiary does not return the distribution, the members of the governing board may be held liable for the loss inflicted by their decision. Another example of invalidity is where the governing board members sell the foundation's company's shares to themselves despite the conflict of interest. In such cases, the competent authority may cancel the illegal decision. Given the principle of proportionality, cancellation powers must only be used where necessary, and cancellation decisions made by an administrative agency must be subject to court review.

The duty of care, a standard duty in legal entities and instruments managed by physical persons, also applies to enterprise foundations, as regulated in Article 14 (2). Business judgements (Article 14 (3)) by the governing board are not reviewed by the competent authority (Article 23 (1) sentence 2 g). The governing board's duty to faithfully manage the foundation's activities is merely subject to a 'rational basis review'. This means that business judgements regarding administration of the enterprise foundation are not to be reviewed by the competent authority, unless they are based on clearly insufficient information or influenced by improper considerations. In the management of the foundation, the governing board may be liable if it fails to exercise reasonable skill, care and caution, and authorities and courts must defer to reasonable business decisions, i.e. investments. This standard is already made clear in Article 14 (3) in relation to liability. Here, however, the standard of review of the competent authority is in question.

Removal powers (Article 23 (2)) allow the competent authority to remove board members. Such powers should only be used as the very last resort, since the governing board is the supreme body in the enterprise foundation. Typically, it would be necessary to engage with the members of the governing board to find an operational solution to a legal problem or other conflicts, before the competent authority considers removing a member. Moreover, it would typically be required to give the governing board or the specific member notification and a possibility to comment on

the competent authority's explicitly stated reasons for considering removal. If the decision to remove a member is made by an administrative agency, this decision is subject to court review.

Article 24 Approval of Amendments, Mergers and Dissolution

The charter and purpose amendment powers (Article 24) refer to Article 9 in the model law. The competent authority shall have the power to approve amendments suggested by the governing board, but there may also be cases where the board disregards the purpose fulfilment of the foundation, and removal of the board members is not in the interest of the foundation. In extraordinary cases, where it is manifestly evident that a purpose amendment is necessary, the competent authority may – potentially with approval from the courts – amend the purpose without application from the governing board, in accordance with the rules in Article 9 (4) sentence 3. This rule may seem far-reaching even if court involvement is a possible precondition for invoking it. However, the mere statement of intention to amend the purpose is likely to persuade governing boards to act, and hence the rule has been included in the model law.

Besides charter amendments and mergers (Articles 9 and 10), and splits and spin-offs (Article 11) mentioned in Article 24 (3), the legislators may opt to include a requirement that the competent authority must also approve 'extraordinary decisions'. That could be, inter alia, decisions by the governing board that may risk the foundation's existence and the pursuit of its purpose. However, such a prerequisite is only advisable if the competent authority is staffed with sufficiently competent officers who arrive at a decision quickly and will not let foundations wait too long for their decision. Another example is dispensation from non-essential charter rules, eg age limits, instead of formal changes to the foundation's charter. Moreover, under this optional rule, a governing board may ask the competent authority to consent to distributions 'on the edge' of the purpose, or to consent to the establishment of a new holding structure in the foundation-owned company. An additional example is cases where the foundation was founded with a specific company as its main asset, but the ownership of the asset was not required explicitly by the founder. In these cases, under the optional rule, approval by the competent authority would be required to sell the company, as the authorities would assess not the business decision itself, but rather if sufficient information has been taken into consideration, and if there are potential conflicts of interest. The optional rule could also be relevant in case of the foundation taking excessive risks in the form of huge loans or highly speculative financial investments.

The competent authority may also, according to Article 24 (3), initiate the dissolution of the EF according to Articles 26 and 27.

Article 25 Supervisory Complaint

The Article provides the possibility to file a supervisory complaint to anyone with a legitimate interest who wants the competent authority to act in case of an assumed breach of law in the EF. Such an option is considered useful to force an unwilling competent authority to act. The founders or beneficiaries clearly have such a legitimate interest, but such an interest may also be assumed by former members of the governing board, employees or NGOs.

Dutch law includes (in Article 2: 298 Dutch Civil Code [*Burgerlijkt Wetboek*]) a right to interested parties to appeal to the court to remove a member of the board. This is an important tool in the supervision of foundations through private means.[250]

[250] Stokkermans and van Uchelen (2025 forthcoming).

VI. Dissolution/winding up

Articles 26 and 27 provide rules on the winding up of an EF. The rules are based on Articles 42 and 44 of the draft of the European Commission European Foundation. However, the Articles also include rules on the winding up of a family foundation and on liquidators. The rules also ensure that any surplus is distributed according to the will of the founder.

Part D. Tax Principles

I. Introduction

The model law on enterprise foundations is not intended to encompass taxation as this topic is key to national sovereignty and is regulated differently in every country. The model law respects this diversity and takes it as a given. However, in practice, taxation has an important effect on the viability of enterprise foundations. Moreover, it is not immediately obvious how these entities should be taxed. On the one hand, many enterprise foundations are charitable and thus traditionally tax exempt. On the other hand, they engage in business activities which are similar to those of companies, which are typically subject to corporate taxes. Moreover, some enterprise foundations have private purposes like supporting a founding family, which are not charitable in a conventional sense. It adds to the complexity that many EFs have mixed purposes which include both philanthropy and family support. Finally, concerns that enterprise foundations could be used for tax evasion may endanger the legitimacy and public trust in the enterprise foundation model.

To begin to address these fundamental issues, we suggest a set of tax principles that mainly rely on the concept of tax neutrality, meaning that foundations should not be created or excluded for tax reasons, that they should neither be privileged nor punished by the tax system and that management decisions of foundations should not be distorted by tax considerations. As far as possible, the tax system should be neutral to ensure that enterprise foundations are incentivised to make decisions that create value for their companies and society in general.

In section II, we state the principles that these considerations give rise to. In the Explanatory Remarks we elaborate on the reasoning.

II. Tax Principles for Enterprise Foundations

The tax principles are as follows:

1. Tax neutrality. The tax system should aim to be tax neutral in order to not artificially encourage or discourage the creation of enterprise foundations for tax reasons.

The tax system should neither favour nor disadvantage business activities by enterprise foundations compared to other ownership models, nor should it distort their financial decisions.

2. Enterprise foundations should not be created for tax reason. Private individuals should not be able to increase their personal wealth, income, or consumption by creating an enterprise foundation.

3. Private individuals who establish enterprise foundations should not be able to deduct donations from their taxable income, but neither should they pay private wealth or capital gains taxes on their donations of company shares to an enterprise foundation. This implies a net sacrifice of private wealth by the founder when an enterprise foundation is established. However, to ensure tax neutrality between the after-tax income streams obtainable by succession to family members through inheritance and by after-tax income streams obtainable by donations from a family foundation, a proportionate gift tax may be imposed.

4. Enterprise foundations that engage in business activity directly through the foundation should be taxed as companies to maintain a level playing field with business companies. However, enterprise foundations which engage in business activities through companies that pay tax should not be double-taxed. Enterprise foundation taxation should not depend on whether or not the foundation engages in business activities through a corporate subsidiary.

5. Enterprise foundations with a public good purpose – whose income is exclusively used for public purposes – should be exempted from taxation in order to further their contribution to the public good. In particular, enterprise foundations should be tax exempt on investment income generated from subsidiary companies (which already pay tax). However, recipients, who receive donations from a foundation as income should pay income tax.

6. The taxation of enterprise foundations with a private (family) purpose should be adjusted to ensure after-tax neutrality between family income obtainable by creating a family enterprise foundation and family income obtainable on inheritance by family members. Family enterprise foundations should not be established for tax reasons.

7. Capital allocation by an enterprise foundation should not influence its tax position, which should be the same regardless of whether it functions as an enterprise foundation that owns a controlling share in one or more business companies or as a general foundation that owns a diversified portfolio of assets including non-controlling shares in one or more business companies.

8. The taxation of enterprise foundations should be independent of whether or not its assets are actively or passively managed by the enterprise foundation, or whether they are conducted in a foundation-owned holding company or by an independent asset management company.

9. The taxation of enterprise foundations should be independent of whether they engage in donations or operating philanthropy, for example through socially useful activities in the companies that they own.

10. The taxation of enterprise foundations – whether private or public — should be independent of whether they use their income for donations that benefit current beneficiaries or for reinvestment that benefits future beneficiaries.

11. Enterprise foundations that fail to serve their distribution purposes for extended periods of time may be required by the competent authority to justify their behaviour and, if they are unable to do so in a satisfactory way, the competent authority may instruct them to distribute more. Likewise, if excessive donations endanger the financial health of the foundation, the competent authority may instruct the foundation to distribute less.

12. To prevent mindless capital accumulation in enterprise foundations with a company purpose and their subsidiaries, the competent authority may require the enterprise foundation to document that the activities of the foundation or the company meet social or environmental needs that would not otherwise be met. If this is not adequately documented, they should be taxed as companies.

III. Tax Principles for Enterprise Foundations: Explanatory Remarks

The tax principles advanced above emphasise tax neutrality in several ways.[251] In these Explanatory Remarks, we outline the reasoning behind the principles in greater detail. The central argument is that business decisions – like establishing or managing an enterprise foundation – should not be made for tax reasons (to reduce taxation), but because they create value for the business, its stakeholders and society in general.

1. Tax Neutrality at Formation

In order not to distort economic activity (or to distort it as little as possible), tax law should aim at neutrality in the decision to establish an enterprise foundation. This is particularly important in the case of enterprise foundations which engage in business activity and compete with other ownership structures, against which they might have unfair advantages if they are taxed more lightly. Enterprise foundations should be established on their own merits – for example, as a means to for secure the continuation of the company purpose – rather than for tax reasons. This is expressed as principle 1, which follows the general principle of tax neutrality articulated for example by the OECD.[252]

2. Tax and Incentive Neutrality

When enterprise foundations are set up, founders give up part of their wealth by donation. In this case, the relevant criterion for tax neutrality is not equivalence of tax revenue, but equivalence of after-tax income and consumption possibilities, which is well known from other types of taxation.[253] In other words, founders should not be economically better off by establishing an enterprise foundation and thus be incentivised to do so for tax reasons. This should be the case regardless of the foundation purpose (public, private or corporate). We express this as principle 2.

In contrast, equivalence of tax revenue, regardless of whether or not an enterprise foundation is established. would be prohibitive for the creation of enterprise foundations. It would typically imply that the founder (or the estate) should pay inheritance and capital gains taxes in addition to donating a controlling share position in a business company to the enterprise foundation. Aside from strongly penalising the founder's and the founding family's renunciation of wealth by treating the foundation endowment as personal property in terms of taxation, such taxes can, in most cases, only be paid by dividends from the company, which would weaken its solidity and thus defeat the purpose of providing a secure base for continuation of the company.

The principle of tax neutrality also applies to managerial decisions.[254]

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[251] Very little has been written about the taxation of enterprise foundations with the exception of Thomsen and Kavadis (2022) 280–297, to which we refer in this commentary.

[252] See OECD (2021), Fundamental Principles of Taxation, ch 2: *'Taxation should seek to be neutral and equitable between forms of business activities. A neutral tax will contribute to efficiency by ensuring that optimal allocation of the means of production is achieved. A distortion, and the corresponding deadweight loss, will occur when changes in price trigger different changes in supply 'Taxation should seek to be neutral and equitable between forms of business activities. A neutral tax will contribute to efficiency by ensuring that optimal allocation of the means of production is achieved. A distortion, and the corresponding deadweight loss, will occur when changes in price trigger different changes in supply and demand than would occur in the absence of tax. In this sense, neutrality also entails that the tax system raises revenue while minimising discrimination in favour of, or against, any particular economic choice. This implies that the same principles of taxation should apply to all forms of business, while addressing specific features that may otherwise undermine an equal and neutral application of those principles.'*

[253] As argued by Formby, Smith and Thistle (1992), there are two ways to define tax neutrality: 1) equality of taxes paid and 2) equality of after-tax income shares*: 'It is important to recognize that a proportionate increase or decrease in tax burdens is only one possible definition of tax neutrality and not necessarily the best one from society's viewpoint. An equally compelling and defensible definition is based on preservation of the distribution of after-tax income shares'.* For further validation of the after-tax income definition of tax neutrality, see Formby, Medema and Smith (1995). For a discussion of different approaches to tax neutrality, see Kahn (1990).

[254] For example, Boadway and Bruce (1984), who apply tax neutrality to investment decisions arguing that they should not be distorted by company taxation.

3. Tax Neutrality and Wealth Sacrifice

The tax principles do not aim for complete tax neutrality in the sense that the founder's wealth position is unaffected by the donation, which would be the case if the founder were able to deduct donations to the enterprise foundation from their taxable income or overall wealth taxes. Instead, they aim for a balance between prohibitive taxation (which would effectively prevent the formation of enterprise foundations) and tax deductions which would seek to eliminate the wealth renunciation by establishing a foundation (and quite possibly lead to excessive formation of enterprise foundations). This balance is expressed as principle 3.

The net sacrifice of private wealth by establishing an enterprise foundation implies an economic disincentive, which will limit the establishment of such foundations. With full tax deduction from estate taxes, the tax authorities would potentially finance the creation of enterprise foundation making it free of costs for the founders. To the extent that enterprise foundations increase social welfare, this economic disincentive implies a social opportunity loss. However, the economic disincentive also provides a way to limit the ill-considered formation of enterprise foundations in areas that they are less suitable for and where they would reduce social welfare.

Wealth in the form of company shares inherited by family members is normally taxed by inheritance and capital gains tax, while subsequent dividends on shares are taxed as capital income. In comparison, wealth in the form of shares transferred to a family enterprise foundation are not subject to inheritance and capital gains tax, but donations from the foundation are income taxed at a rate that is normally substantially higher than the capital income tax paid by heirs receiving dividends on inherited shares. This may result in a tax advantage for descendants through succession to family enterprise foundations if capital gains and wealth taxes paid by inheritance are high, while income taxation on donations to descendants is low. If, and only if this is the case, can a gift tax be imposed on estates that are transferred to family enterprise foundations that ensure after-tax equivalence between income streams obtained by donations from family enterprise foundations and the after-tax income streams obtained by dividend income on inherited shares.

In contrast, when capital gains and inheritance taxes on inheritance by private individuals are low or entirely absent, the higher taxation of income on donations from a family enterprise foundation compared to dividend taxation of private shareholder wealth provides a tax disincentive to the establishment of enterprise foundations, which may justify lowering the taxation of income obtained by donations from family enterprise foundations.

4. Tax Neutrality Compared to Companies

To maintain a level playing field when competing with companies, enterprise foundations that engage directly in business activities through foundations should be taxed as companies. If they engage in business activities through a corporate subsidiary, taxes should be paid by the subsidiary and not by the foundation. In other words, the taxation of enterprise foundations should not depend on whether they engage in business activities directly through the foundation or indirectly through a corporate subsidiary.

These considerations are expressed as principle 4.

According to this principle, tax neutrality should apply both relative to other business entities, such as companies, and relative to the enterprise foundation's mode of operation, i.e. whether or not it engages in business activities though the foundation or through a corporate subsidiary. Double taxation – taxing both the company and foundation as companies – would obviously put enterprise foundations at a serious disadvantage if they decide to do business through a corporate subsidiary.

5. Taxation of Public Enterprise Foundations

Public foundations are generally granted tax exemption because they contribute to public good

purposes.[255] This provides an assurance to founders that their donations are used for the public good purpose envisioned in the charter rather than as a source of taxation.

Tax exemption may at first glance seem to be a breach of tax neutrality since private owners do in fact have to pay tax. However, public foundations function as intermediaries that distribute donations to beneficiaries which are taxed on the income they receive, so neutrality is preserved. This is expressed in principle 5.

If – in spite of the principle of tax exemption – public enterprise foundations are subject to income tax, they should be able to deduct donations to public purposes from their taxable income in order to retain the incentive to establish public enterprise foundations and to donate to public purposes.

6. Taxation of Private (Family) Enterprise Foundations

Family enterprise foundations may serve a number of useful purposes, such as continuation of the family business across generations, providing a steady source of income for family members and insuring family members against misfortune. However, they should not be established for tax evasion.

A founder who establishes a family enterprise foundation to support their descendants avoids wealth taxes (including inheritance and capital gains tax). However, their descendants will pay income tax on donations from the family enterprise foundation.

In comparison, founders who leave their company to their children will pay wealth taxes (including inheritance and capital gains tax), which will reduce the value of the estate. However, the descendant will typically pay a dividend tax on their capital income at a rate lower than the income tax rate.

Depending on the level of wealth taxation (including capital gains and inheritance tax), income and dividend taxes, this may or may not imply a tax advantage for family foundations.

According to the principle of tax neutrality, any such advantage may be neutralised by adjusting the taxation of private (family) foundations on establishment, the taxation on foundation income or the taxation on donations family descendants in order to ensure that family foundations are not created for tax reasons. This is expressed in principle 6.

7. Capital Allocation

Tax neutrality implies that foundation taxation should be independent of the composition of foundation assets and in particular, whether the foundation endowment is invested in a single company or in a diversified portfolio of stocks, bonds or an alternative. The decision as to whether or not to diversify should be a business decision rather than a tax management decision. This is expressed in principle 7.

8. Active or Passive Management

The decision to engage in active management of a business subsidiary should be a business decision depending on factors such as the purpose and capabilities of the enterprise foundation, management quality of the subsidiary and its current financial situation. However, neither active nor passive management should be employed for tax reasons. This is expressed in principle 8.

9. Donations or Operating Philanthropy

Philanthropy should aim for the most favourable impact possible given the purpose of the enterprise foundation. It should not be influenced by tax considerations. In particular, it should make donations where this is deemed more appropriate and engage more actively in pursuing philanthropic purposes when this is deemed have a greater impact. This is expressed in principle 9.

[255] Hopt et al (2018).

10. Donations or Reinvestment

The timing of donations (for example, whether to donate this year or the next) should not be influenced by tax considerations. In particular, the decision to donate or reinvest in the expectation of donating more or with greater impact in the future should reflect what is expected to have the most favourable impact on achieving the distribution purpose of the enterprise foundation. This is expressed in principle 10.

11. Neglect of the Distribution Purposes

Although foundations should have considerable flexibility in planning their distributions in the best interest of the foundation purpose, they must not neglect their distribution purposes altogether. If necessary, the competent authority may be required to intervene to ensure that the foundation complies with its purposes. This is expressed in principle 11.

12. Mindless Capital Accumulation

A company purpose is justified by the company's contribution to society through the provision of products or services at particularly affordable prices or of particularly high quality, as well as the retention and creation of employment in areas where employment opportunities are limited or other favourable effects result. To ensure that the company does indeed create value for society, the competent authority may ask enterprise foundations to document their contribution. If it is unable to do so, the foundation should be taxed as a company and create value for society through financing general public expenditure. This is expressed in principle 12.

Part E. Good Governance of Enterprise Foundations: Best Practice Recommendations

I. Introduction

Given the special governance characteristics of enterprise foundations (no ownership control and no financial incentives), best practice recommendations may play an important role in fostering good EF governance. Moreover, in many (perhaps most) cases, purpose and governance statements in the EF charter are kept deliberately broad in order to ensure and maintain future flexibility. This implies significant freedom for the EF governing board, which can improve their ability to create value for society. However, this freedom comes with a responsibility. It should not be taken to indicate that 'anything goes'. In this situation, best practice recommendations can play a useful role in promoting good governance practices that are in the best interests of the enterprise foundation and which achieve the fulfilment of their purpose.

To ensure good governance of enterprise foundations in accordance with best practice, the EF model law recommends that the relevant national competent authority authorises a committee of experienced foundation directors to draw up and regularly revisit a set of best practice recommendations for EF governance. A set of model recommendations is included below for inspiration. The recommendations have been discussed with members of the European Network of Enterprise Foundations as well as other relevant experts, and their feedback has been taken into account.

If the relevant national competent authority decides to adopt best practice recommendations, it is recommended that the competent authority adopts an enhanced version of the comply-or- explain-approach known from corporate governance codes around the world. Comply-and-explain (rather than the traditional comply-or-explain) requires the EF governing board to explain in the annual report and the summary financial statement disclosed to the public whether and how it complies with each recommendation. In the case of non-compliance, the EF must explain its reasons for not complying as well as whether and how it has addressed the issues in question by other means.

Best practice recommendations are soft law, and EFs are not obligated to comply with them. While they can have a positive effect in facilitating knowledge sharing and social legitimacy, this means that they are not a substitute for hard law, but rather a complement to it. In this respect, they have many advantages. They are less onerous than hard law because EFs can react to them as they see fit in view of their specific circumstances. They are also more flexible, since the national best practice committee can revise them quickly in view of new circumstances without going through a lengthy and complex legislation process.

The recommendations reflect what is believed to be generally accepted principles for good EF governance, such as loyalty to the foundation purpose, transparency, strategic oversight, board competencies and independence, and proportional remuneration.

Below we outline a model set of best practice recommendations, which should be regarded not as a universal copy-and-paste application of these principles, but as an example of how they might be expressed. The recommendations proposed build on the provisions of the model law, but suggest, eg in respect of the membership of the board, to go beyond its minimum standards. It is expected that national best practice committees will adopt their own versions of such recommendations to fit national traditions and practices.

To minimise the regulatory burden of reacting to the recommendations and to facilitate

general acceptance of them, the number of recommendations is deliberately kept low. More recommendations can be added over time in response to a perceived need to emphasise certain issues, and some recommendations could be dropped if they are no longer perceived to be relevant, for example if they have already gained such universal acceptance in a given jurisdiction that they appear self-evident or because they are now covered by hard law. In other words, the best practice recommendations should be a living document, updated in accordance with current governance practices and circumstances.

In some cases (for example, regarding compensation), the proposed recommendations overlap with hard law provisions in the model law. This is because countries may not (in the spirit of optionality) have implemented the relevant hard law provisions but nevertheless see a need to guide compensation practices using a less restrictive soft law approach.

II. Good Governance of Enterprise Foundations: Best Practice Recommendations

1. Purpose

1.1 The governing board of the EF should ensure that the enterprise foundation remains true to the purpose laid down by their founders in the foundation charter while taking into consideration changes in society and new global challenges.

1.2 The governing board of the EF should ensure that the enterprise foundation benefits society and the natural environment by responsible long-term ownership of the companies that it owns as well as by impactful philanthropy or donations to private purposes in accordance with its charter.

1.3 The governing board of the EF should ensure that the purpose of subsidiary companies is consistent with the purpose of the EF and that the company purpose is adequately reflected in their business activities.

2. Transparency and communications

2.1 Enterprise foundations of certain size (assets > €100m) should have a website and an accessible e-mail account.

2.2 The website should at least contain the following basic information:

- the EF's name, address, email, register number;
- a brief description of the EF, including its purpose;
- a summary of annual reports including financial accounts and the names of governing board members;
- the ownership share of business companies (%) in which the EF has control; and
- a brief description of the EF's goals and activities.

2.3 The governing board should ensure the EF adopts a communication policy detailing who can communicate on the foundation's behalf on what topics and under what circumstances.

2.4 The governing board should ensure that the EF engages in an active and open dialogue with its stakeholders, including their operating businesses, beneficiaries, public authorities and media.

3. Strategy

The governing board should revisit and – if necessary – revise the EF's strategy at least annually, including business ownership, financial investments and philanthropy.

4. Governing Board Composition and Organisation

4.1 The governing board should annually revisit and evaluate the expertise of the board members in view of the foundation's purpose, strategy and current situation.

4.2 Governing board nominations should take place through a formal process emphasising the need for competence, continuity, renewal, independence and diversity.

4.3 The governing board should aim to balance the need for continuity and renewal in the election and re-election of board members.

4.4 The governing board should be sufficiently independent to make decisions in the best interests of the EF and no single party — be they founders, founding family members, foundation managers, beneficiaries, managers or board members in subsidiary companies or other stakeholders – should constitute a majority of the governing board members.

4.5 The governing board should annually revisit and asses the mandates of the board chair, board committees (if any), foundation managers (if any), and administrators (if any).

4.6 Particularly in large EFs with assets greater than €100 million, the governing board should consider establishing board committees composed of a majority of independent board members in the area of auditing (audit committee), the replacement of governing board members and managerial directors (nomination committee) and the remuneration of board members and managerial directors (compensation committee).

5. Remuneration

5.1 The fees for a governing board member of an EF should reflect board members' roles such as chair, vice chair, committee chair or committee membership, etc.

5.2 The fees of governing board members and any fees they earn in foundation-owned companies should be disclosed in the foundation's annual report.

III. Explanatory Remarks on the Best Practice Recommendations on Enterprise Foundation Governance

Best practice recommendations have been successfully implemented to improve the corporate governance of listed companies around the world. The concept is particularly relevant to ensure good governance in enterprise foundations which have traditionally been less transparent than public companies as regards their governance models and practices.

Best practice recommendation may, therefore, enable enterprise foundations to learn from each other and particularly from practices in respected, prominent EFs. Moreover, the recommendations can facilitate the legitimacy of the enterprise foundation model in the general public.

The recommendations should be revisited and, if necessary, updated annually.

Comments on the individual model recommendations are given below. The model recommendations draw on the Danish recommendations for good foundation governance but do not replicate them.

1. Purpose

To secure the integrity of enterprise foundation model, it is crucial that members of the governing board take the purpose of the foundation to heart and use it rather than their own personal preferences as a guiding star in the exercise of their duties. Therefore, the best practice code recommends that the EF governing board must ensure that the EF remains true to the foundation purpose, meaning that the purpose should be reflected in all EF activities.

However, the governing board also needs to recognise that changes in society and new global challenges may on occasion require attention and possibly reinterpretation of the purpose in view of present circumstances and future trends. The purpose should therefore be regularly (at least annually) revisited to ensure that it is kept in mind and that its implications for the present are correctly understood.

In particular, the governing board of the EF should ensure that enterprise foundations benefit society and the natural environment by responsible long-term ownership of the companies that they own and by impactful philanthropy or family support in accordance with their charters.

The purpose of the EF may differ from the purpose of the operating companies in which it owns a controlling interest. In particular, the EF's purpose is typically more general in nature than the company purpose and includes distribution purposes such as philanthropy. In contrast, company purpose is typically more specific to its business and related to the current situation. However, the two purposes should be mutually consistent rather than contradictory, and recommendation 1.3 encourages the EF governing board to ensure that this is in fact the case.

Synergies between the EF's purpose and the foundation purpose may consist in the ability of the company to generate dividends, which the foundation can use for philanthropy or reinvestment. But they may also consist in business activities in the company that contribute to the fulfilment of the EF purpose.

2. Transparency and Communications

Openness (transparency) is particularly important because EFs are economic actors which influence the business communities and societies in which they operate. They are business actors which influence their subsidiaries, and they often contribute to civil society and the public sector through donations or their philanthropic activities. Transparency may enable their stakeholders in both to engage with them in a more adequate way. It may, for example, help banks make better credit decision or help civil society organisations to direct their fundraising activities. In addition, transparency is important to the social legitimacy of the enterprise foundation model.

However, transparency may also be costly and, as such, onerous for smaller enterprise foundations that have limited resources. The best practice code therefore restricts its demand for transparency to larger enterprise foundations with assets greater than €100 million, which have a greater impact on the economy and society, and which can better afford to comply with the recommendation. It is recommended that such large EFs have a website with basic information including summary annual reports, the names of their governing board members and, at a minimum, an overview of their percentage ownership in companies in which they have a controlling interest.

It is recommended that large EFs publish an e-mail address that makes them accessible to the general public in the same way that most business companies are. The rationale is that this accessibility enhances public legitimacy and facilitates mutually beneficial interaction with their stakeholders, such as business partners and recipients of donations.

It is furthermore recommended that all EFs adopt a communication policy detailing who can communicate on the foundation's behalf. This may, for example, be an advantage in crisis situations, in which the governance board may be unable to meet at very short notice. The policy can be every simple – eg the chairperson or the managing directors speaks on behalf of the foundation unless the board decides otherwise. However, the communication policy may also, particularly in large EFs, be more differentiated depending on the topic in questions. For example, questions regarding a foundation-owned company may be directed to the company and not answered at the foundation level.

In general, for the reasons highlighted above, it is recommended that the governing board should ensure that the EF engages in an active and open dialogue with its stakeholders. Obviously, the dialogue may be limited for small EFs.

3. Strategy

It is recommended that the governance board revisits and – if necessary – updates the EF's strategy annually, including both business ownership, financial investments and philanthropy. This may take place at an annual strategy meeting.

It is expected that EFs have long time horizons and long-term strategies that change infrequently. However, this all depends on current circumstances. In some situations, the EF may need to change its strategy before a full year has elapsed and should of course do so.

4. Governing Board Composition and Organisation

The governing board plays a crucial role in enterprise foundations. It is the top decision-making body in an EF since it has no shareholders. For the same reason, the governing board is not held accountable by anyone except in extreme cases by the competent authorities. In some cases, when there are no managerial directors (as is common in smaller EFs), the governing board is the only decision-making authority. Much, therefore, depends on the quality of the governing board membership and its ability to exercise self-control.

It is therefore recommended that the governing board should revisit and evaluate the adequacy of its expertise annually, taking into account the foundation's purpose, strategy and current situation. In self-elected EF boards, there is otherwise a risk that board members are mechanically re-elected.

Moreover, for the same reason, board nominations should take place through a formal process rather than selecting from the chairperson's personal contacts and the need for relevant competencies, balancing the needs for continuity and renewal, as well as considering independence and diversity, should be emphasised.

Moreover, the composition of the governing board should be flexible and be able to adjust to changing circumstances if this is deemed to be in the interests of the EF.

The governing board should be sufficiently independent to make decisions in the best interests of the EF, and no single interested party – be they founders, founding family members, foundation managers, beneficiaries, managers or board members in subsidiary companies or other stakeholders – should therefore constitute a majority of the governing board members. The need for independence of the operating company is especially important in enterprise foundations which often have close relations and board overlaps with their subsidiary companies. Some board overlaps and representation by managers of corporate subsidiaries can be a valuable way to ensure an advancement of business knowledge and values, but these insiders need to be balanced by independent members who can provide fresh perspectives and outside knowledge.

The definition of an interested party and what 'independence' means will vary according to the purpose of the EF and its circumstances. For example, in EFs with a public good purpose, founding family members do not have an inappropriate economic interest in the foundation's philanthropic activities and are therefore not necessarily 'dependent'. It is up the EF governing board to determine if a board member can be regarded as independent.

Recommendation 4.5 states that the governing board should, on an annual basis, revisit and asses the mandates of the board chair, foundation managers (if any) and administrators. Evaluation of the chairperson is particularly important because board chairs often take on administrative responsibilities on behalf of governing boards which do not employ managing directors. Such roles should be decided on by the board as whole, and decision mandates should be recorded in the rules of procedure.

Recommendation 4.6 suggests the establishment of board committees in large EFs. Since EFs are not controlled by shareholders, it is important to safeguard the integrity of their governance systems particularly in large EFs (with assets greater than €100 million). The governing board in large EFs should, therefore, consider establishing board committees composed of a majority of independent board members. Board committees may be particularly appropriate in areas such as auditing (audit committee), replacement of governing board members and managerial directors (nomination committee) and remuneration of board members and managerial directors (compensation committee). Independent financial monitoring is particularly important in large EFs, and board remuneration remains a sensitive issue, which may benefit from independent judgement. Nomination committees may promote the appointment of directors in the long-term interest of the EF.

5. Remuneration

Remuneration is a delicate issue in enterprise foundations, since the governing board effectively decides on its own remuneration without much in the way of checks and balances except perhaps (in exceptional cases) by the competent authorities. It is therefore crucial that decisions concerning remuneration are carefully governed. Hence the recommendations on this issue.

Board fees may be graduated to reflect the responsibilities and workload involved in functional board roles such as chairs, vice chairs, committee chairs or committee membership, etc.

Finally, the fees of governing board members and any board fees they earn in foundation-owned companies should be disclosed in the foundation's annual report. The idea here is that transparency provides some level of accountability.

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ISBN: 978-3-9505990-0-8