

SHAREHOLDER FOUNDATIONS

THE FIRST EUROPEAN STUDY

Prophil
Beyond Philanthropy

IN COLLABORATION
WITH



WITH
THE SUPPORT OF



A STUDY PRODUCED BY:

PROPHIL

Prophil is a French strategic consulting firm, specialised in new philanthropic and economic models. Founded in 2013 by Virginie Seghers and Geneviève Ferone Creuzet, Prophil leads companies and entrepreneurs, in France and abroad, in the design and management of social-innovation projects – combining philanthropy with impact investment. These novel models harness the synergies between economic efficiency and positive social impact.

IN COLLABORATION WITH:

DELSOL AVOCATS

DELSOL Avocats is a law firm operating in Paris and Lyon. Founded more than 40 years ago, the firm brings together the expertise of 23 partners in a variety of domains related to business law (tax, social, public, real-estate, health, planning law, etc.) and nearly 100 lawyers and jurists, orienting them towards two main areas: corporate law and non-profit law.

The latter area, created and handled by Xavier Delsol, founder of the journal “Juris-associations”, provides daily counsel and accompanies numerous French and foreign non-profit organizations through litigation processes. Whether they are associations, foundations, mutual and pension institutions, or congregations, DELSOL caters to all the legal needs of the client through recognized knowledge and expertise in these areas of law.

The market economy is not incompatible – and certainly not antithetical – to a social economy and philanthropy. The former is nothing but a means to function efficiently, while the latter is oriented towards an altruistic end in service of humanity and society. However, these notions have been in opposition for too long in French society. The example of shareholder foundations, in many European countries, demonstrates that this economic model can effectively pair both aspects together. It's time to import it into France.

Xavier Delsol, Partner

THE ESSEC PHILANTHROPY CHAIR

Established in 2011 at ESSEC Business School, the ESSEC Philanthropy Chair is a research chair that seeks to produce and diffuse knowledge about philanthropy, combining French, European and international perspectives.

The Chair is supported by BNP Paribas Wealth Management, Fondation de France, Fondation Daniel & Nina Carasso, the Edmond de Rothschild Foundations and Fondation Caritas France. It is also the recipient of support from three individual co-founders and other individual donors.

The team of the Chair is comprised of Anne-Claire Pache, Chaired Professor and Dean of the Masters Programs at ESSEC Business School, Arthur Gautier, Executive Director, and Joel Bothello and Sarah Sandford, Research Fellows.

The subject of shareholder foundations is as fascinating as it is unknown! These foundations are “hybrid” organizations, representing an original alternative to the traditional dispersed ownership model, while directly financing public interest causes according to the vision and values of their founders. Very little research exists on shareholder foundations: as numerous and powerful as they are in Europe, they are also very discreet. The team at the ESSEC Philanthropy Chair is very excited to contribute to a better understanding of this growing phenomenon.

Arthur Gautier, Executive Director

WITH THE SUPPORT OF:

MAZARS

Mazars is an international, integrated and independent organization, specializing in audit, accountancy, tax, legal and advisory services. The Group draws on the expertise of over 15,000 professionals to assist major international groups, SMEs, private investors and public bodies in the 73 countries that are part of its integrated partnership.

Editor's Note

Ikea (Sweden), Bosch and Bertelsmann (Germany), Rolex and Sandoz (Switzerland), Lego and Carlsberg (Denmark), and even Tata (India): Who knew that these companies belonged to foundations? There are more than 1,300 cases in Denmark – with 500 in Germany and 1,000 in Norway – of companies where the founders made the fateful decision to transmit all or part of their capital and voting rights to a foundation. Why?

In raising this question in four European countries (France, Denmark, Germany and Switzerland), Prophil dedicated its first study to reveal an economic phenomenon that has thus far escaped attention: “shareholder foundations”. Here is a model that is paradoxical: widespread yet unknown, influential yet discreet, virtuous for some and subversive for others.

Shareholder foundations are entities that reverse the traditional relationship between a firm and a foundation. In contrast to a business that allocates a small portion of profits to endow a peripheral foundation, a shareholder foundation is itself a majority or full owner of a firm. It can thus influence, either directly or indirectly, the strategy of the firm, and can also finance philanthropic initiatives through the dividends it receives as a shareholder.

The mission of such a foundation is not limited to supporting cultural or social projects. Rather, the priority is to protect the firm, retain company assets within national borders, and develop employment – all while serving the common good.

In France, the media group La Montagne and the pharmaceutical laboratories of Pierre Fabre have been pioneers of this structure – and thus far, the outliers. Yet over the next fifteen years, 700,000 family-owned firms will face the issue of succession; many of them will seek a stable and long-range oriented governance structure that can not only develop the firm, but also preserve the humanistic values of the founder and family.

With the support of Mazars in the various countries studied, and in close collaboration with Delsol Avocats and the ESSEC Philanthropy Chair, we were able to conduct interviews with key actors involved in shareholder foundations. We discovered, in their vast diversity, the unknown yet inspiring models of shareholder foundations that exist across Europe. We gratefully acknowledge the assistance of our partners in exploring this *terra incognita*. We are certain that our contribution, on this subject of future interest, is just a starting point.

This first European study aims to open a new path and objectively reveal how an innovative new economic model functions, one that makes no distinction between giving and investment, responsibility and altruism, capitalism and philanthropy.

We articulate this as a third path, one that represents the core of the Prophil philosophy.

Virginie Seghers and Geneviève Ferone-Creuzet

Co-founders of Prophil

05 INTRODUCTION

SHAREHOLDER FOUNDATIONS:
A EUROPEAN INSPIRATION
FOR FRANCE

DENMARK

09 OVERVIEW

A PARAGON OF EFFECTIVE SHAREHOLDER
FOUNDATION GOVERNANCE

11 KEY FIGURES

12 THE LEGAL AND FISCAL CONTEXT

An incentivizing legal structure

14 PORTRAIT

THE NOVO NORDISK FOUNDATION

18 PORTRAIT

THE HEMPEL FOUNDATION

20 FROM ANOTHER ANGLE

FLEMMING FRIBORG
THE NY CARLSBERG GLYPTOTEK

GERMANY

23 OVERVIEW

SERVING THE COMMON GOOD
THROUGH "PATIENT CAPITALISM"

25 KEY FIGURES

26 THE LEGAL AND FISCAL CONTEXT

A proliferation of statuses

28 PORTRAIT

THE ROBERT BOSCH FOUNDATION

31 PORTRAITS

THREE EXAMPLES
OF SHAREHOLDER FOUNDATIONS

32 FROM ANOTHER ANGLE

EMMANUELLE BAUTISTA
FRENCH EMBASSY IN BERLIN

33 FROM ANOTHER ANGLE

VOLKER THEN
UNIVERSITY OF HEIDELBERG

FRANCE

47 OVERVIEW

A LACK OF AWARENESS
OF THE SHAREHOLDER
FOUNDATION MODEL

48 KEY FIGURES

49 THE LEGAL AND FISCAL CONTEXT

An under-utilized legislation

54 PORTRAIT

THE VARENNE FOUNDATION

55 PORTRAIT

THE PIERRE FABRE
FOUNDATION

58 FROM ANOTHER ANGLE

JEAN-PASCAL ARCHIMBAUD
ARCHIMBAUD GROUP

59 PORTRAIT

LA CHICORÉE LEROUX

60 FROM ANOTHER ANGLE

YANNICK BLANC
PREFECT OF THE VAL D'OISE REGION

61 FROM ANOTHER ANGLE

BÉATRICE DE DURFORT
CENTRE FRANÇAIS DES FONDATIONS (CFF)

SWITZERLAND

35 OVERVIEW

SHAREHOLDER FOUNDATIONS
IN SWITZERLAND:
A TABOO TOPIC?

36 KEY FIGURES

37 FROM ANOTHER ANGLE

MARC PFIZER
FSG-SOCIAL IMPACT ADVISORS EUROPE

38 THE LEGAL AND FISCAL CONTEXT

An unknown model

42 A FEW WORDS WITH...

THIERRY LOMBARD
FAMILY BUSINESS NETWORK INTERNATIONAL (FBN-I)
LOMBARD ODIER FOUNDATION
PHILANTHROPIA FOUNDATION

44 PORTRAITS

FROM SWISS WATCHES
TO THE FAMOUS
SWISS ARMY KNIFE

45 FROM ANOTHER ANGLE

ETIENNE EICHENBERGER
WISE

62 PERSPECTIVE
AND ELSEWHERE?

Mazars and shareholder foundations: a natural partnership built upon shared values

For Mazars, a business is first and foremost a collective human endeavor built over time. Our philosophy rests on two pillars: The first, for each generation of managers, is to consciously ensure that subsequent generations will be left with the best possible conditions for further development of the enterprise. The second is an acknowledgment and adoption of economic and social responsibility, based on the understanding that a firm operates as a part of society.

Our history and our professional practice are testimony to this double conviction. Mazars was conceived from the initiative of one man, Robert Mazars, who nurtured the growth of our organization before transmitting his ownership, in 1983, to a group of young partners. On their part, these partners developed the firm, enriching the services offered and increasing Mazars' presence both in Europe and the rest of the world. They, in turn, passed the torch on to a new generation that pursued internationalization while remaining true to the shared values of independence, ethics, and excellent technical service. Today, Mazars is comprised of more than 15,000 professionals operating directly in 73 countries.

Over the past 75 years, our trajectory and our guiding principles – in addition to our constant desire to contribute towards the development of our clients, communities, profession and environment – have provided us with excellent reasons to collaborate with Prophil on this report. The shareholder foundation is a pioneering and innovative model of governance; in promoting our dual values of continuity and independence, we are convinced that this model can offer our clients a new perspective on major issues related to succession. As a privileged partner of mid-sized businesses and family firms, Mazars assists numerous foundations across Europe in their development plans, whether they relate to transformation, internationalization and/or transmission. In this study, we have been particularly keen to associate ourselves with the last challenge of transmission, as a way to guarantee the long-term sustainability of a company.

In those principal countries covered by this study where shareholder foundations operate – France, Denmark, Germany and Switzerland – we have developed a solid expertise that permits us to respond to the specific needs of these organizations; we are convinced that they represent a model of ownership that will only grow in the future.

Reading through this study, we have no doubt that you will share in our enthusiasm.

Cyrille Brouard, Partner – Mazars France

Pia Lillebæk, Partner – Mazars Denmark

INTRODUCTION

SHAREHOLDER FOUNDATIONS: A EUROPEAN INSPIRATION FOR FRANCE

Few people in France know about a model of corporate governance that has spread throughout the rest of Europe. In Denmark, Switzerland and Germany, many large industrial and service multinationals have the peculiarity of being owned by a foundation, sporting a type of governance that has thus far proven to be both durable and virtuous. What are the features of these “shareholder foundations”? We present 15 key words that effectively summarize this model.

INDUSTRY

Ikea, Lego, Rolex, Bosch, Carlsberg: these are all world famous brands. But among their millions of customers, how many know about another shared (and peculiar) characteristic? For many decades, the industrial groups at the origin of these success stories have been the property of foundations. These “shareholder foundations” – a term that we coin here – may appear from the outside to be a paradox because of the misconception that business and philanthropy are mutually exclusive; ostensibly, philanthropy is associated with giving, while shareholding connotes investment.

Although the term “shareholder foundation” is nascent, and does not correspond to any specific legal status in the countries surveyed, the spirit of the concept is nonetheless pervasive. The Swiss employ the terms “entrepreneurial foundation” or “economic foundation”, while the Danish invoke “commercial foundation”, with Anglo-Saxons preferring “industrial foundations”. Despite the diversity in vocabulary, these countries have proven that industry and philanthropy can be feasibly paired.

MAJORITY

A shareholder foundation describes a non-profit foundation that owns an industrial or commercial firm. The former holds all or

part of the shares of the latter, in addition to the majority of voting rights – or at least a blocking minority. However, this does not prevent the held firms from being partially listed on the stock market; in countries where this occurs, we can more readily identify the economic weight of foundations. In Denmark, for example, shareholder foundation ownership represents 54% of market capitalization in the Copenhagen Stock Exchange. Additionally, there are many firms owned by foundations that are outside the scope of this study, notably those enterprises that are spun off from the existing foundation activities (e.g. a publishing house established by a cultural foundation).

FAMILY

Shareholder foundations are essentially embodiments of personal or family philosophies, as attested to by the numerous cases in this study. Whether these values are based on a spirit of independence (La Montagne), the will to protect and develop an industrial heritage (Bosch), or the desire to articulate humanistic goals when transmitting a company in the absence of heirs (Pierre Fabre), each story is that of a man or of a family seeking to establish a legacy. Each is based on the will of the entrepreneur to preserve the culture of the firm he started, through both economic and social activities.

TRANSMISSION

To our knowledge, no foundation owns a company upon creation. In the countries studied, foundations with highly diverse statuses (notably in Germany) were created to become sole proprietors only after the succession of the firm. The story is similar across contexts: an entrepreneur makes the irrevocable decision to transmit all or part of his capital to a “public utility” organization (or equivalent), one that has no owner and is non-profit by nature.

Without exception, the allocated assets can never be transferred to another shareholder, essentially guaranteeing the perpetuity of the firm.

PHILANTHROPY

Transmission is, in itself, a considerable act of philanthropy: A founder donates his holdings to a structure of his own making and, in the process, gives up any potential future income, whether from rent generation or from the sale of his assets. In a sense, he is thus already considered a philanthropist. But philanthropy is more fundamentally expressed through foundation philanthropy, derived either from dividends and/or returns on the endowment. For example, in Denmark – the only country where foundation statistics are sufficiently precise – shareholder foundations distribute €800 million per year, with one foundation alone (Novo Nordisk) accounting for €120 million. The Novo Nordisk endowment is large enough for the foundation to be self-sufficient – dividends are no longer needed to engage in philanthropic activities!

PUBLIC INTEREST

In Denmark, the primary mission of most shareholder foundations is to protect and develop the firm, while the second is to support cultural and/or social causes. This dual economic and philanthropic mission is a normalized component in the governance of firms. Among the issues that are considered to be “public interest” priorities are: Protecting and retaining industrial assets within Danish borders, supporting Danish industrial champions and maintaining employment.

This is not the case in France, where the public interest and commercial activity are not easy to reconcile. The French “principle of specialization” imposes upon domestic foundations the obligation to cater exclusively to the public interest, a narrow conceptualization that is distinct from economic activity. This stands in stark contrast to Germany, where an entrepreneur does not need to state a public interest mission to create any type of foundation, let alone a corporate foundation. As the well-known banker Thierry Lombard states in our study, shareholder foundations not only reveal the specificities of the legal context in each country, but also shed light on ideological differences.

GOVERNANCE

The key subject: In the countries studied, and according to their national laws, we find two types of governance that are predominant: 1) direct management of the firm by the foundation, where the “philanthro-capitalist” mission is normalized and the board is capable of making decisions that are both philanthropically and economically oriented; 2) indirect management, with a clear distinction between the entities governing the firm and the foundation (generally through a holding intermediary). The law and the tax regimes are often complex, varying from one country to another; we have thus solicited experts in each country to describe their respective “legal and fiscal contexts”. Note that in shareholder foundations, the succession of managers is not a subject that is as sensitive as others. The issue is usually decided far in advance, at the level of the foundation.

TRANSPARENCY

It is very difficult to obtain precise data on shareholder foundations. Neither the European Foundation Centre (EFC) nor any national associations of foundations in Europe retain statistics on the subject. For example, it is estimated that there are “between 500 and... 1000” foundations in Germany – a rather imprecise range! With the exception of isolated academic articles, no major baseline study to date has been published on this model of governance, despite the fact that so many iconic companies fall into this category.

The hybrid economic/philanthropic nature is openly acknowledged by some shareholder foundations but obscured by others; hence the difference in communication approaches. For example, the recent annual reports from the Pierre Fabre and Novo Nordisk foundations are highly comprehensive and transparent, while it is nearly impossible to get even minor statistics in Switzerland. The Swiss culture of discretion is deeply entrenched: On the website of Kuoni, for example, no visitor would be remotely aware that the company is owned by a foundation.

HYBRIDITY

Shareholder foundations are by nature hybrid structures. At a time when capitalism is confronted by its own excesses and seeks to be more responsible, and when social entrepreneurship is growing worldwide, new articulations between economic efficiency and social impact are emerging. A number of new business statuses with this dual purpose are now visible, such as the Californian

“flexible purpose companies” that can pursue one or more non-financial targets towards the public good rather than simple profit-maximization. Shareholder foundations, despite being highly relevant in the contemporary context, have long embodied the virtues of capitalism beyond profit seeking – aiming towards “performance” writ large.

SOCIAL RESPONSIBILITY

The idea of performance – especially towards the common good – is not simply based on an accumulation of good contributions, but on a strategic orientation of the firm towards economic and social issues. The most forward thinking businesses recognize that their interests are geared towards the common good, and do not fix their focus on management in the short term. While the practice of CSR has increasingly become a mandatory exercise – and indeed, too often a tool of communication –, shareholder foundations by contrast have intrinsically integrated social responsibility and a long term approach into the core of their strategy: this is often expressed through cross-fertilization, where the firm and foundation are tightly linked and influence each other.

LONG RANGE

In a world that is increasingly instable and short-term oriented, the shareholder foundation offers a model of ownership that is stable and resilient. The possibility of hostile takeovers is non-existent, as the ownership structure renders such a threat impossible. A long range vision dominates the firm's strategy, rather than a parochial focus on improving the return-on-equity for shareholders.

EFFECTIVE

Are philanthropic governance and economic efficiency compatible? Some existing scientific studies (see the overview of Denmark) have provided us with proof: the performance of companies owned by foundations is at least equal – and in some cases superior – to those firms with dispersed ownership, a phenomenon that is comparable to the performance of family owned businesses. From a social point of view, this type of firm is more resilient in the face of a crisis. Thanks to the stability of the ownership structure, managers can push for greater involvement and engagement by the firm employees and partners. Furthermore, at a time when executives seek meaning in their work, the values espoused by a foundation provide a motivation for personal investment in the organization.

SME

Aside from large multinational groups with global recognition, shareholder foundations are also prominent in many SMEs (Small and Medium Enterprises). From Hempel in Denmark to the famous Victorinox Swiss Army Knife, several examples in our study demonstrate that the model is not solely applicable to large enterprises, but to firms of all size. The testimony of Jean-Pascal Archimbaud, who wishes to transmit his ownership of a 200 employee sawmill to a foundation in the coming years, attests to this appeal. Given that hundreds of thousands of French family enterprises will be passed down in the coming years (particularly with SMEs) the shareholder foundation model offers a promising possibility for succession planning – if it is more widely known and promoted.

COOPERATION

The foundation-held firms examined in this study are contributors to the economic, social and cultural lives of their communities, and are involved participants in public policy-making. In an era when many governments are adapting to tightening budgets, we find that shareholder foundations are compensating as major contributors to the provision of public services. New and unprecedented opportunities for cooperation thus open up between the state, communities and businesses. This cooperation is not only limited to the philanthropic activities but commercial ones as well, given that the two are so tightly interrelated.

A THIRD WAY

This endeavor is appealing for proponents of a positive and altruistic economy. Intrinsically, shareholder foundations build consensus: they merge the power of economic value creation with that of gift-giving, contributing to a sustainable economy while reinforcing social cohesion. This is why they are so important to the development of the “third way” path, which in France remains hitherto largely unexplored. Shareholder foundations can help us realize a new type of capitalism, one that is altruistic and resilient. In attending to the needs of future generations, this model offers promise to reshape the economic and social landscape in an indelible manner.

DENMARK



OVERVIEW

A PARAGON OF EFFECTIVE SHAREHOLDER FOUNDATION GOVERNANCE

Denmark is a unique country in Europe: In this small country of only five million inhabitants, shareholder foundations have embedded themselves into the fabric of the country's economy, playing an important role in shaping the industrial and social landscape.

In Europe, there are few countries that parallel the phenomenon: In 2013, ten percent of Denmark's wealth was accounted for by 1,350 shareholder foundations¹, with the most iconic firms in the country featuring foundation control. Despite their economic influence, foundations have no less of an impact on the social context in Denmark. They not only seek to guarantee the longevity of their owned firms, but also simultaneously support important philanthropic causes, both within Denmark and internationally. These entities thus cement the economic and social spheres together with this two-fold mission.

Foundations constitute a distinctive organizational presence in Denmark. There are approximately 14,000 of them; a considerable number for a nation of only a few million inhabitants. Their collective revenue is estimated to be €55 billion a year, or in other words, 20% of the Danish GDP². This figure is matched only by their capacity to give to philanthropic causes: Each year, shareholder foundations give an estimated €800 million towards causes deemed as "general interest"³. Five shareholder foundations alone account for 20% of the total Danish expenditure on research and development.

What is the general result of this "philanthro-capitalist" structure on the Danish context? On the United Nations list of the happiest countries in the world, Denmark unsurprisingly ranks as number one on a regular basis.

THE ADOPTION OF A TWO-FOLD MISSION

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The shipping company Maersk, the brewing conglomerate Carlsberg, and the pharmaceutical firms Novo Nordisk and Lundbeck are the most well-known multinationals with Danish origins. But who in Europe – and especially in France – is aware that these giants belong to foundations, along with roughly 20% of the largest Danish firms?

These foundations do not have owners, and consequently, do not have a profit motive. Instead, their interests revolve around their two-fold mission: Not only do they focus on the growth and development of their owned firms by re-investing profits, but also support – through their dividends – social issues related to public welfare. The two purposes of these foundations are what characterize them as unique. However, the structure of control varies: either the foundations directly exercise control over their namesake enterprise (as is the case with Carlsberg) or they do so indirectly through a holding company (as observed with Novo Nordisk and Lundbeck).

FOUNDATION PRESENCE IN THE STOCK MARKET – AND BEYOND

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Many firms controlled by foundations are also listed on stock exchanges, most notably on the Copenhagen Stock Exchange (CSE). As majority shareholders, foundations exercise control through their possession of class "A" shares, giving them the majority of voting rights. In the Danish context, such shares are irrevocable and inalienable once transferred to the foundation, yet shareholder boards can also elect to issue limited amounts of class "B" shares with 1/10th of the voting rights. In this way, external individual and institutional investors can also benefit from the stable performance of foundation held firms.

The Danish Stock Market Index C20 is a stock market index of the largest firms in Denmark. Within this index, 68% of the market capitalization is accounted for by firms held by foundations. At a more general level, foundation-held firms comprise a quarter of the capitalization of the entire Danish market.

In their capacity as shareholders, foundations are oriented towards guiding the strategy of the companies that they own. In the pharmaceutical sector, for example, the company Leo Pharma is owned 100% by a foundation, with Lundbeck featuring a 70% holding. As philanthropists, foundations offer considerable support for cultural and social causes in Denmark. As an example, the Ny Carlsberg Glyptotek was founded by a member of the Carlsberg family and is currently the most well-known museum in Copenhagen. Similarly, the Maersk foundation (*AP Møllers Fond*) recently financed the €300 million construction of the first Danish opera house in the capital. In addition, the foundation also provided €135 million to the Danish Ministry of Education for use towards elementary and middle school programs.

FOUNDATIONS: A SOURCE OF EMPLOYMENT AND STABILITY

Companies held by foundations represent a fifth of private employment in Denmark. Yet foundations themselves are job creators: Novo Nordisk, for example, maintains more than a thousand jobs in the country thanks to its philanthropic activities, in addition to the 16,000 staff already employed in Denmark through the core business activities. Each year, the entities of the Novo group contribute €130 million in taxes to the state. Interestingly enough, despite their number and size, Danish foundations are not represented by a professional association that collects information and best practices. As such, there is no comprehensive body of studies and statistics on these organizations. However, several recent studies and initiatives confirm that shares of foundation-held firms account for 54% of the market capitalization of the Copenhagen Stock Exchange (representing €47 billion in 2011)⁴. More importantly, these enterprises are observed as performing just as well as – and in some situations better than – firms with dispersed ownership⁵. Relatedly, their

ownership structure lends itself to resilience, especially in times of economic crisis⁶.

THE CONTEMPORARY MOVEMENT TOWARDS TRANSPARENCY

Often cited in the media – the Carlsberg and Lundbeck foundations, for example, are on average referenced more than 200 times per year in the commercial press⁷ – Danish shareholder foundations evoke a certain admiration from the general public, but also a certain suspicion. The manner in which they function remains relatively unknown to outsiders, raising questions particularly with respect to the transparency of their governance. However, they do not appear to have any political alignment, lacking an association with both the left and the right of the political spectrum. Furthermore, they are increasingly constrained by legal and fiscal requirements: Since January 1st, 2015⁸, a law has been put into effect requiring shareholder foundations to make publicly accessible a variety of information – whether it relates to philanthropic giving, remuneration of board members, or rules of governance.

Regarding this latter aspect, fifteen specific best practices have been put forward, regarding age limits for directors, a cap on terms in office, restrictions on family involvement and “managerial distance” between foundation administrators and company executives.

Supervised by the Danish Ministry of Business and Growth, shareholder foundations act as stewards as much as shareholders, and provide a stable and long-term governance perspective. The unanimous opinion of the informants interviewed for this study is that the “philanthro-capitalist” mission of foundations plays a stabilizing role for the Danish economy, especially with respect to the “crown jewel” firms of Denmark.

1. Industrial foundations in Danish Economy, Steen Thomsen, Center for Corporate Governance, Copenhagen Business School (February 2013). – 2. Study by Mandag Morgen (Monday Morning). – 3. Study by Mandag Morgen (Monday Morning). – 4. Id ref 1. – 5. Steen Thomsen (2002) Corporate Ownership by Industrial Foundation. – 6. According to the final report of the Advisory Committee on Industrial Foundations established by the Ministry of Business and Growth in 2012. – 7. Study by Mandag Morgen (Monday Morning). – 8. Study by Mandag Morgen (Monday Morning).

1,350 SHAREHOLDER FOUNDATIONS
AMONG 14,000 FOUNDATIONS

5 MILLION INHABITANTS

20% OF THE LARGEST DANISH FIRMS BELONG TO FOUNDATIONS

KEY FIGURES OF FOUNDATIONS IN DENMARK

FOUNDATION-HELD FIRMS ACCOUNT FOR

1/5th OF PRIVATE EMPLOYMENT IN DENMARK

PHILANTHROPIC DONATIONS DISTRIBUTED EACH YEAR BY THESE FOUNDATIONS

€800 MILLION

ECONOMIC WEIGHT OF SHAREHOLDER FOUNDATIONS

10% OF THE NATIONAL WEALTH

FINANCIAL WEIGHT OF SHAREHOLDER FOUNDATIONS

54% OF MARKET CAPITALIZATION OF THE COPENHAGEN STOCK EXCHANGE = €47 BILLION

SHAREHOLDER FOUNDATION ACCOUNT FOR

20% OF DANISH SPENDING ON RESEARCH AND DEVELOPMENT

The incentives of the Danish legal structure

BY **PROFESSOR RASMUS KRISTIAN FELDTHUSEN**
UNIVERSITY OF COPENHAGEN, FACULTY OF LAW. MEMBER
OF THE DANISH COMMITTEE ON FOUNDATION GOVERNANCE

A foundation is characterized by the following criteria:

- > An irrevocable transfer of ownership on the part behalf of the donor.
- > The pursuit of one or more objectives related to charity, family, and/or commercial interests.
- > A devolution of the right to dispose of transferred assets to the foundation board.
- > An ability to acquire rights and incur liabilities in its own name (i.e. as a separate legal personality).
- > An inability of any person outside the foundation to acquire assets held by the foundation (i.e. the foundation owns assets in its own right).

Commercial and industrial foundations: The distinction

Danish law makes a distinction between commercial and non-commercial foundations, according to the nature of their activities. Generally, a foundation is considered commercial if income from its subsidiaries reaches 10% of total income. A commercial foundation – of which there are more than 1,400 in Denmark – can pursue commercial activities directly, or through one or more subsidiaries that it controls (cf. Commercial foundations law, section 2). It can also pursue philanthropic or family oriented goals (among others), where the funding would be nonetheless provided through dividends.

In many cases of commercial foundations, there exists an intermediary holding entity between the foundation and the company. The largest foundations in Denmark (for example, Maersk, Carlsberg or Novo Nordisk) have adopted this structure, and are sometimes labeled as “industrial foundations” to differentiate themselves from small and midsize shareholder foundations.

The possibility of control without majority share ownership

With respect to control, it is permissible in Denmark for the board to issue classes of shares that differ in terms of voting rights. It is thus possible, for example, to have so-called “Class B” shares with either no votes or, for example, 1/10th of the votes compared to the more privileged “Class A” shares. In this manner, a commercial foundation may not own all the equity in a company, but can still exercise control through ownership of the majority of Class A shares.

In most cases, the charter of the foundation explicitly forbids ceding shares or control in the firm, and sometimes requires the enterprise to retain the headquarters and some – if not all – activities in Denmark.

Apart from the constraints on commercial activity and subsidiary control, a proposal was recently drafted for a new Act on Commercial Foundations – if it passes, foundations would be subject to the following requirements:

- > Maintenance of a base capital of at least 300,000 Danish crowns (the equivalent of € 40,300).
- > Establishment of a board comprised of at least three members, as well as potential employee representatives.
- > Inclusion of the word “Fond” (foundation) in its name.
- > Registration as a foundation with the state.

Not only is a foundation under supervision by a state authority (The Danish Business Authority), it also has to submit an audited report on an annual basis. The Danish Business Authority does not interfere in business decisions but may intervene if the remuneration of the board members is too high or if the foundation wishes to make amendments to its articles of association.

An occasionally dissuasive tax regime

A foundation is, as a point of departure, taxed the same way and with the same tax rate as a limited liability company. The corporate tax – and thus also the foundation tax – is 23.5% in 2015 with a scheduled decrease to 22% in 2016.

A foundation may deduct not only costs and depreciations, but also distributions from its taxable income, as long as these are congruent with its stated purpose. In other words, a foundation will be exempt from tax if all net income is distributed. Dividends from so-called “subsidiary shares” and “group shares” are generally tax-exempt; this tax is generally paid in the subsidiaries.

As a general rule, gifts and inheritances to a foundation are tax-free, however some important exceptions apply, as illustrated in the tables below¹.

TYPE OF DONATION	INTENTION	FOUNDATIONS WITH A FAMILY PURPOSE	FOUNDATIONS WITH OTHER PURPOSES
CORE CAPITAL WHICH MAY NOT BE DISTRIBUTED BY THE FOUNDATION	Establishment of foundation	20% taxation	Tax-free
	Augmentation of core capital	Foundation Tax (23.5% in 2015)	Tax-free
CORE CAPITAL WHICH MAY BE DISTRIBUTED BY THE FOUNDATION	Establishment of foundation	23.5%	23.5%
	Augmentation of core capital	23.5%	23.5%
OTHER GIFTS		23.5%	23.5%

INHERITANCE TO:	FOUNDATIONS WITH A CHARITABLE PURPOSE	FOUNDATIONS WITH OTHER PURPOSES (EVEN IF ONE OF THESE IS A CHARITABLE PURPOSE)
On establishing the foundation	Tax-free	Approximately 36.25% in Inheritance Tax
To an already existing foundation	Tax-free	Approximately 36.25% in Inheritance Tax

It should be noted that some amendments to Danish tax law which came into effect in 1999 have effectively halted the establishment of new commercial foundations owning large Danish companies. This is attributed to the fact that a founder transferring his or her shares in the company will now be taxed on deemed capital gains on the shares transferred. The Danish Parliament is currently contemplating reinstating the previous rules, according to which the foundation could adopt the tax position of the founder, thus avoiding the aforementioned taxation on capital gains.

¹. There are other types of tax exemptions for inheritance and donations that are not mentioned here.

PORTRAIT

THE NOVO NORDISK FOUNDATION: A LANDMARK DANISH FOUNDATION AND ITS ORIGINS IN INSULIN

THE CHARTER OF THE FOUNDATION PROMOTES TWO CLOSELY RELATED OBJECTIVES THAT ARE BASED ON THE DEVELOPMENT OF RESEARCH. THE AMPLE RESOURCES OF THE FOUNDATION ALLOW IT TO PURSUE ITS MISSION WITHOUT HAVING TO RELY ON DIVIDENDS FROM HELD COMPANIES.

The story begins in 1922, at a time when August Krogh, Nobel laureate and professor of zoophysiology at the University of Copenhagen, was seeking a treatment for his wife who was suffering from diabetes. Krogh's attention was drawn to the new discovery of Insulin in Canada. From the Canadians, he obtained rights to produce the drug in Denmark for the Nordic market, on the condition that it would be made accessible to the general public and that proceeds would support research within endocrinology, metabolism and experimental physiology. To this end, he established in 1924 the Nordisk Insulinlaboratorium as a self-governed research and manufacturing institution; in parallel, he launched the Nordisk Insulin Foundation as a research funding body which would receive funds from Nordisk Insulinlaboratorium.

In 1925 after a disagreement with Krogh, two Danish brothers (Thorvald and Harald Pedersen) launched Novo Terapeutisk Laboratorium and started selling Novo Insulin, sparking decades of rivalry between Novo and Nordisk. In 1951, the family-owned Novo transformed into a foundation-owned pharmaceutical laboratory with a corporate interest. The rivalry lasted until 1989, when both firms and the three foundations merged into one company, Novo Nordisk A/S and one foundation with a corporate interest (i.e. shareholder foundation) – the Novo Nordisk Foundation.

A self-financed approach

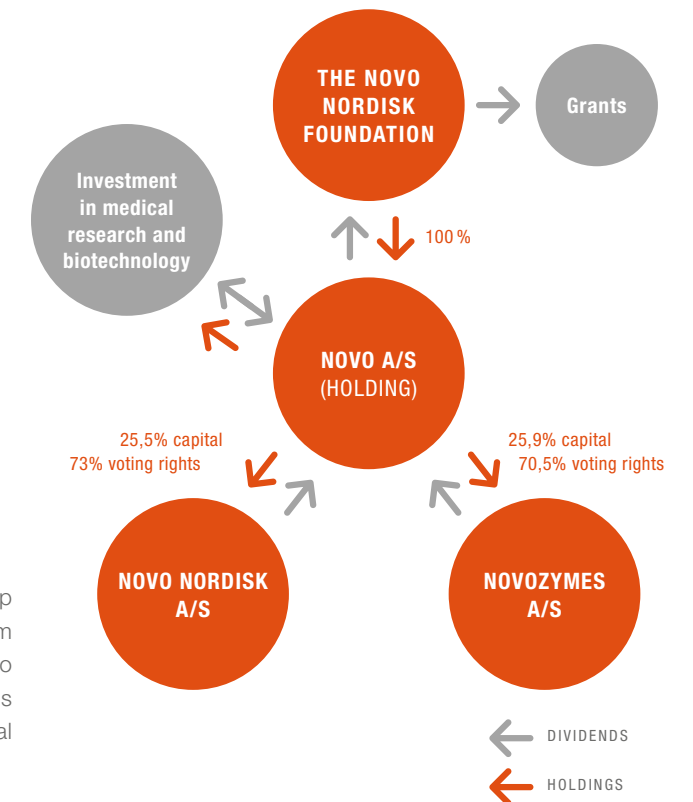
Marianne Philip¹, who is highly involved in the foundation world and administers the Novo Nordisk Foundation, states: *"globalization became increasingly important for Denmark in the 1980s; in order to compete with foreign multinationals, many Danish enterprises – like Novo and Nordisk, or Carlsberg and Tuborg – merged. The creation of shareholder foundations was also a means to protect against foreign acquisition."*

“THE CREATION OF SHAREHOLDER FOUNDATIONS WAS A MEANS TO PROTECT AGAINST FOREIGN ACQUISITION”

MARIANNE PHILIP, PRESIDENT OF THE DANISH COMMITTEE ON FOUNDATION GOVERNANCE

The Novo Nordisk Foundation is one of the most important prominent private foundations in Denmark, with an annual budget of €107 million in 2013, with a projected growth surpassing €200 million by 2018. In 2013, it distributed €42 million towards 238 research grants. The endowment of the foundation is currently €33.6 billion, of which €27 billion corresponds to firm shareholdings. The remaining €6.6 billion in capital is large enough to allow the foundation complete independence in pursuing grant-making activities, regardless of the firms' dividend policies.

FIGURE 1
WHO OWNS WHAT?



The foundation has majority voting rights in all the group entities: through its 100% ownership of the holding firm Novo A/S, the foundation exercises control over two constituent firms: Novo Nordisk A/S and Novozymes A/S. It owns, respectively, 25.5 % and 25.9% of capital but 73% and 70.5% of voting rights. /// SEE FIGURE 1 ///

Dual and interrelated commercial and social goals

The foundation pursues two interlinked missions that are outlined in the articles of association/charter: to provide a stable basis for the commercial and research activities

of the companies of the Novo Group (commercial purpose); to support scientific, social and humanitarian purposes (societal purpose).

The foundation not only protects the values of the group, but also decides upon good social and environmental responsibility practices in the owned firms. While the staff is primarily comprised of thirty core employees, the organization includes sixty employees overall – including executive members of Novo A/S.

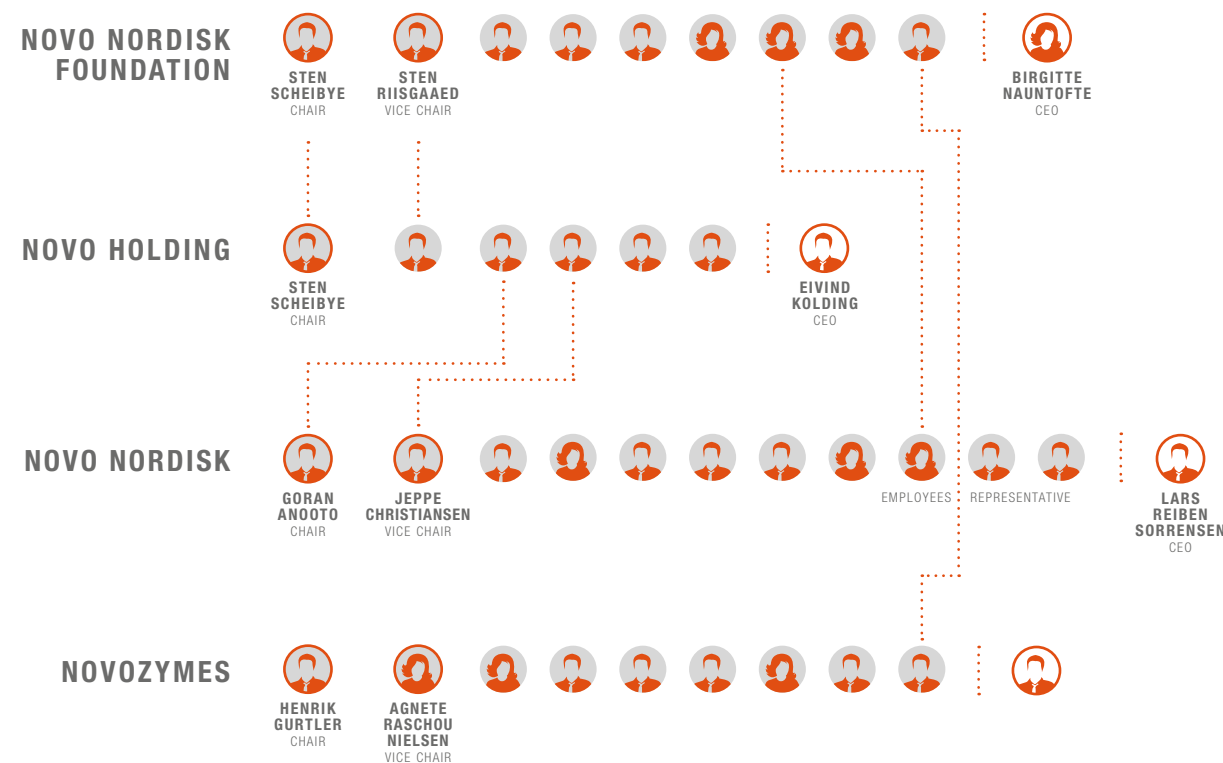
The foundation board, which meets five times a year for an entire day, is comprised of nine members. Six members are elected annually in accordance with the requirements set out in the statutes – of which two must be from the biomedical/natural science sector. Three members are elected among the staff members of Novo Nordisk and Novozymes. The chairman of the foundation's board of directors is also chairman of the board of directors of the holding company Novo A/S. Moreover the deputy chairman of the foundation's board of directors is a member of the Novo A/S board.

THE NOVO NORDISK GROUP IN FIGURES

Revenues (2014) > €11.5 billion
Net Profit > €3.44 billion
Percentage of revenue from outside of Denmark > 99.5%
Number of employees > 41,000
Operating in > 75 countries
Products sold in > 180 countries

**FIGURE 2
THE CORPORATE GOVERNANCE STRUCTURE**

(Source: 2013 Annual Report)



Independent and salaried board members

The remaining Novo A/S board members – as well as the majority of those within the held firms – are independent of the foundation. This practice was adopted well before recent legislation encouraging such separation. Dr. Birgitte Nauntofte, a former professor in physiology at the University of Copenhagen and now CEO of the Novo Nordisk foundation since 2009, states the following about the board: “Half of the subjects on the agenda for the foundation board meetings concern the group strategy; the other half, our philanthropic strategy. The CEOs of the two companies, Novo Nordisk A/S and Novozymes A/S, present their corporate strategy at dedicated meetings while CSOs will present their research, in order to inform the board of directors – on both the foundation and the holding company – about important activities in the companies”.

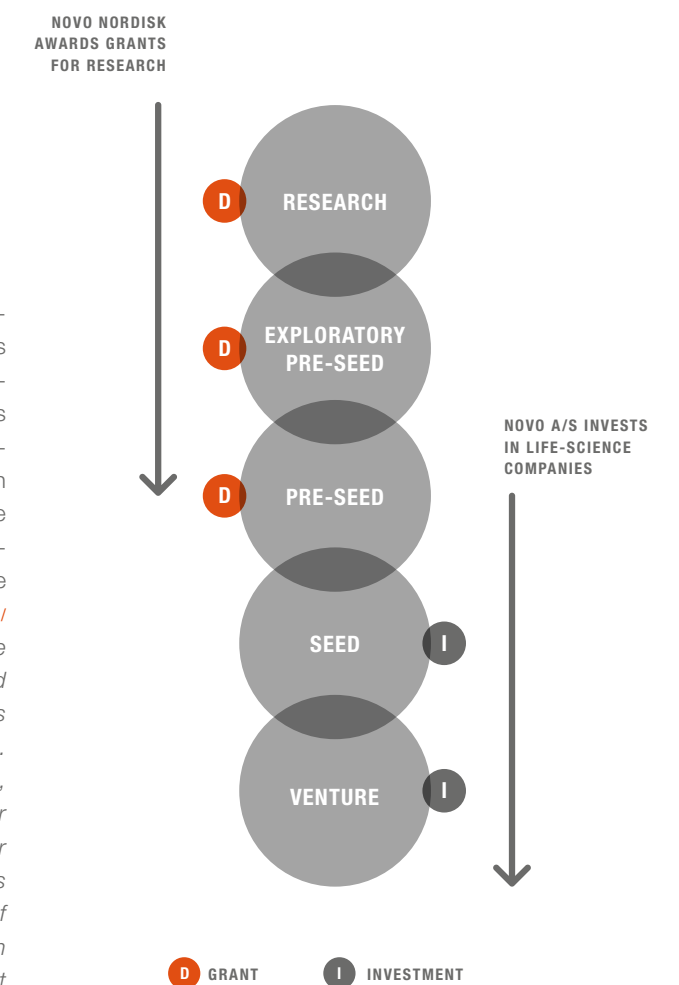
The Novo Nordisk Foundation is open about the compensation received by the board. Board members receive approximately €33,000 per year; while the Chairman is compensated triple that amount. The accounts of the foundation are audited by PriceWaterhouseCoopers (PWC).

/// SEE FIGURE 2 ///

“HALF OF THE SUBJECTS ON THE AGENDA FOR THE FOUNDATION BOARD MEETINGS CONCERN THE GROUP STRATEGY”

BIRGITTE NAUNTOFTE,
CEO OF THE NOVO NORDISK FOUNDATION

**FIGURE 3
THE INNOVATION
VALUE CHAIN**



A bridge between philanthropy and investment

Through its donations and investments of the seed program of Novo A/S, the foundation incubates and accelerates biopharmaceutical and biotechnology start-ups. As illustrated in the figure from the annual report, these grants finance research projects despite uncertain financial outcomes. However, the foundation does aid in the launch and development of scientific projects that may at some point become entrepreneurial. In this manner, the foundation plays a crucial role in the emergence of cutting-edge medical and biotechnological innovations. **/// SEE FIGURE 3 ///** As Dr. Nauntofte highlights, “There is an indirect bridge between the actions of the foundation, the research and the biotech business development. The foundation grants without requiring a return on investment to the foundation. The beneficiaries are completely free to develop patents, research collaborations and future enterprises with other investors. Our role is to create the growth conditions for research in Denmark and the rest of the Nordic countries by providing necessary grants and expertise. The role of the foundation stops at the point of investment; from then on, one of our sections at Novo A/S takes on that opportunity, provided the investee company is interested.”

Recent developments in transparency

Since her appointment as foundation CEO, Dr. Nauntofte has been clear about her desire to communicate openly about the roles, governance, financing and donations of the Novo Nordisk Foundation. She has launched an annual magazine on foundation activities, and has made available on the website all the pertinent information. Marianne Philip notes: “The Novo Nordisk Foundation anticipated many of the recent developments in foundation

legislation and governance, as the Foundation had already implemented best practices in the areas of transparency and good governance.”

1. Partner at Kromann Reumert, a leading Danish law firm, specializing in mergers and acquisitions. Mrs. Philip is also president of the Danish committee on foundation governance.



PORTRAIT

THE HEMPEL FOUNDATION: A HUMANISTIC CULTURE DRIVING ECONOMIC PERFORMANCE

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CELEBRATING ITS CENTENARY THIS YEAR, THE MARINE PAINT MANUFACTURER HEMPEL HAS, FOR MOST OF ITS HISTORY, BEEN GOVERNED BY A FOUNDATION. THIS IS THE SOURCE OF ITS PROFOUND HUMANISTIC CULTURE, AS EXPLAINED BY THE CEO OF HEMPEL, PIERRE-YVES JULLIEN.

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From its humble beginnings in 1915 as a single marine paint factory in Copenhagen, the Hempel Group has since expanded into a global operation employing 5,200 staff in over 80 countries. For most of its history, the firm has been governed by a shareholder foundation established by its founder, Jørgen Christian (J.C.) Hempel. Since its inception in 1948, the foundation has featured a governance structure that is unique even by Danish standards: 100% ownership over the business group. What are the advantages and challenges associated with this particular structure?

The foundation as the conscience of the firm

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According to Pierre-Yves Jullien, CEO of the holding firm Hempel A/S, the core advantage of the foundation structure is that it has permitted the cultivation of a distinct organizational culture, with humanistic values that have remained consistent since the founding of the firm. Regarding his workforce, he states, *“A couple of decades ago, people wanted only a career path, and for social issues they would shrug and say ‘What do I care?’. Now, it’s important for the firm to have a conscience. For the competent people that we want, these things have meaning, and they take pride in working for a company that has them [because of*

foundation ownership]. Today it’s called CSR – because now we’re very good at inventing words – but back then it was an implied part of our business” However, having a single – and more importantly, abstract – owner like a foundation has its constraints. Firstly, given that Hempel is privately owned – with a historical aversion to debt – the company only has limited capital to invest in new projects or make acquisitions.

Performance without an owner

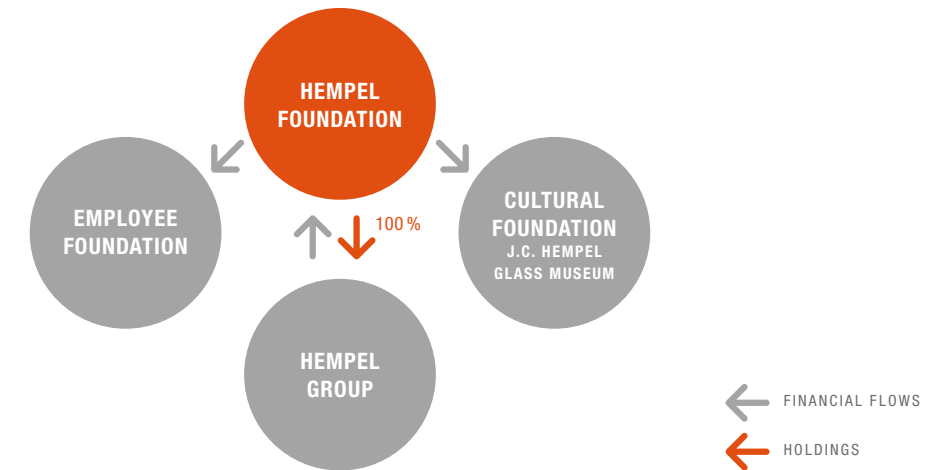
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The second challenge is more behavioral: Given that there are no shareholders pressuring management to perform, there is the risk that the foundation board may become

THE HEMPEL GROUP IN FIGURES

Revenues (2013) > €1.239 billion
Net Profit > €165 million
Percentage of revenue from outside of Europe > 50%
Number of employees > 5,200
Operating in > 80 countries

1 FIRM, 3 FOUNDATIONS



complacent. Mr. Jullien notes, *“there’s an external misconception that having a foundation structure implies not having to earn money. I used to get the sense – even at Hempel sometimes – that we were on another planet, where we didn’t believe we were in a global race. Now though, our company is doing well, and we can attract high quality professional board members who have a little more of that shareholder mentality.”*

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“NOW, IT’S IMPORTANT
FOR THE FIRM
TO HAVE A CONSCIENCE
PIERRE-YVES JULLIEN, CEO OF HEMPEL A/S

Educational programs in eighteen countries

.....

Apart from the Chairman and Deputy Chairman, the Hempel Foundation board of trustees is comprised of six other members, three of which are elected by employees. As part of the charter, the majority of the board must have considerable experience – past or present – with the firm, so that they make decisions consistent with the spirit of Hempel. In 2013, the Hempel Group registered a net profit of €67 million, raising the total equity of both the Group and Foundation to €544 million. No dividends were issued, but €5.9 million was allocated towards grants. Stemming from historically strong growth and profitability of the Hempel Group, Mr. Jullien states, *“in the past ten years, we’ve given*

more dividends to the foundation than in the previous ninety years combined.”

Through these grants, the Hempel Foundation is able to support 18 different projects around the world, educating over 30,000 children. In addition to the main foundation, there are two other Hempel entities that are smaller beneficiaries: The first is The Hempel Employee Foundation, created in 1954 to provide financial support to families in the event of employee illness or death and to fund higher education for Hempel employee children. The second is the Hempel Cultural Foundation, established in 1964 to administer the J.C. Hempel Glass Museum.

Shared values between the firm and the foundation

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The Hempel foundation has a two-fold mission: The primary goal is to provide and maintain adequate capital to ensure a solid economic base for Hempel A/S operations. The secondary mission is to provide support for cultural, social, humanitarian, scientific and artistic causes, with a particular emphasis on educating children in need. The second mission is highly integrated in the operations of Hempel A/S. Not only does the funding activity serve children in need of education in the third world, it also opens opportunities for Hempel employees to visit project sites; this way, employees can see firsthand the Hempel values being implemented.

Carlsberg, two foundations and one museum

AN INTERVIEW WITH **FLEMMING FRIBORG**
DIRECTOR OF THE NY CARLSBERG GLYPTOTEK

A Glyptotek is a museum where sculptures are exhibited. The Ny Carlsberg Glyptotek, one of the largest art museums in Copenhagen, has a heritage that is deeply intertwined with that of the Ny Carlsberg foundation. The director of the Glyptotek, Mr. Flemming Friberg, shares the story of both his museum and the Carlsberg foundations.

“THE CARLSBERG
FOUNDATION
HOLDS 75.25% OF
THE CARLSBERG GROUP”

Could you tell us a little bit about the background of the Ny Carlsberg Foundation?

Well, there are actually two Carlsberg foundations. The first, established by Carlsberg founder Jacob Christian (J.C.) Jacobsen, was created in 1884 and was oriented towards development of natural sciences, instrumentally as a means to purify water and develop better yeast for Carlsberg beer. The Ny (new) Carlsberg Foundation was established in 1902 by J.C.'s son Carl – incidentally, Carlsberg is named after him – and the focus of his foundation is on art and culture. Regarding structure, the “big brother” Carlsberg foundation controls 75.25% of the Carlsberg group, and also decides upon the funding for the Ny Carlsberg Foundation. /// SEE FIGURE ///

The dividends to both foundations amount to approximately € 40 million in donations for scientific but also cultural purposes. The Ny Carlsberg foundation, besides supporting the Glyptotek, distributes between € 6 - 9 million yearly of this amount as grants for which Danish institutions and individuals can apply.

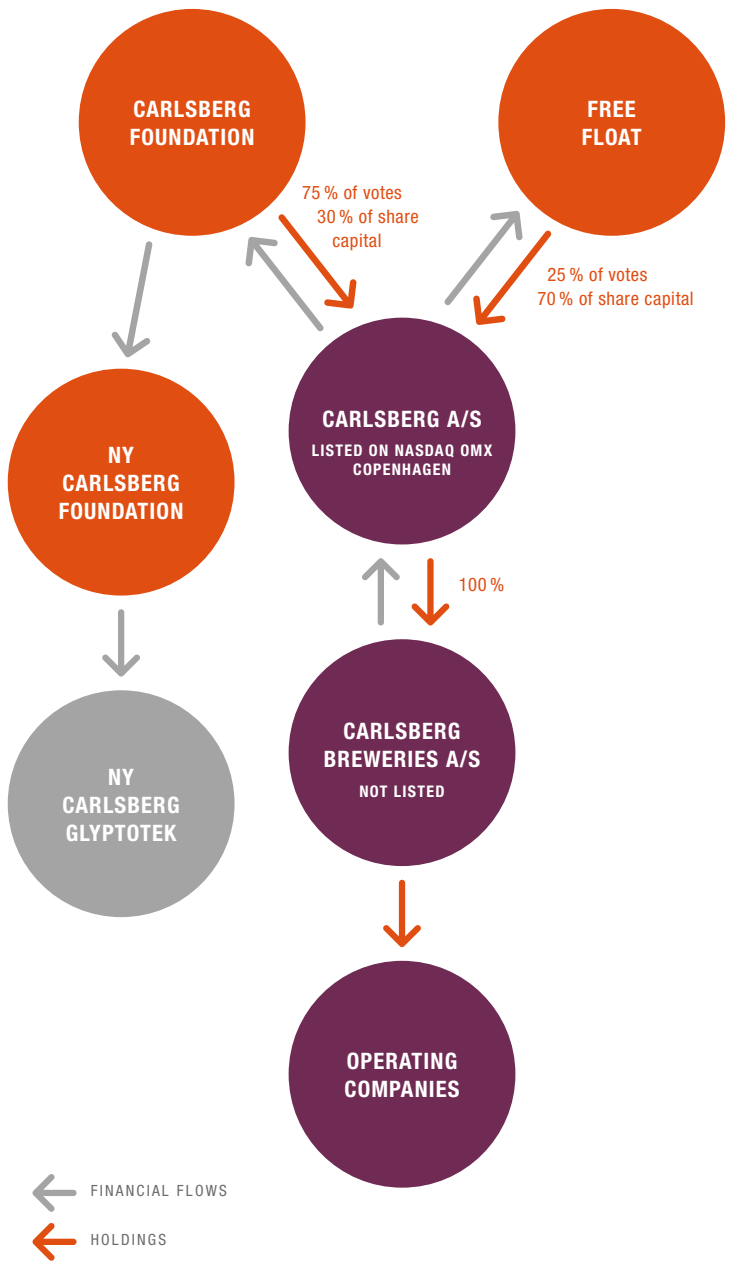
What's the story behind the Ny Carlsberg Glyptotek (NCG)?

In the 1870s, Carl Jacobsen observed that Danish art was stagnating, so he wanted to provide an influx of French art as a source of inspiration – particularly sculpture. Between 1878 and 1883, he bought about 5,000 works of art, and it quickly became evident that they could no longer be accommodated at his private residence. In 1882, he turned a part of his private villa into a museum, the first Glyptotek, with public admission a few days a week. In 1888 he had the idea of donating his collection of contemporary French and Danish sculpture to the state, on the condition that it provide the site for a museum in Copenhagen. The NCG opened in 1897, and Jacobsen soon donated his collection of antiquities as well, adding an even larger wing to the museum in 1906.

We have one of the finest Gauguin collections in the world, numbering 53 works of art. Carl's tastes were quite varied though: He loved sculpture of the French Salon, but also Rodin and Meunier. He personally corresponded with Rodin over 20 years, and bought all the work of Meunier from his widow after Meunier's death. But he also amassed a rather large collection of ancient Egyptian and Greco-Roman artifacts.

“WE HAVE ONE OF
THE FINEST GAUGUIN
COLLECTIONS IN THE WORLD,
NUMBERING 53 WORKS
OF ART”

CARLSBERG AND ITS TWO FOUNDATIONS



How strongly linked is the Glyptotek to the two Carlsberg Foundations?

With respect to our funding, this year we have a budget of 66 million DKK (€9.5 million) out of which 20% is covered by the Ny Carlsberg Foundation. 60% is provided for by the state or other official bodies, while we earn the rest ourselves through tickets, facility rental, sponsorships, etc. But here both Carlsberg foundations are also among our most regular contributors – both with large sums for the acquisition of especially French Impressionist art and for research, project staffing and exhibitions. It has been a basic principle – harking back to Jacobsen's time – that his gift of the collection and the Carlsberg share of the annual budget etc. be matched by the Danish state. The Carlsberg Foundation thus openly signalled that it was based on a sort of ‘matching funds’ principle, probably one of the first of its kind. Both the State and the two Carlsberg foundations are represented on the board which has eight members, three of which are from the Ny Carlsberg Foundation as well as one other from the Carlsberg foundation. It is my impression that they never take a vote for decisions; they sit down in an urbane manner and talk it through. It's a very Danish, democratic way.



GERMANY

OVERVIEW

SERVING THE COMMON GOOD THROUGH “PATIENT CAPITALISM”

As the economic engine of Europe, Germany is known as much for the dynamism of its SMEs as for the dominance of its multinational giants. However, there are numerous cases where founders – concerned about the long-term stability and values of their firm – have chosen to cede their shares to a foundation. These foundations embody the values of “patient capitalism”, an approach that favors not only firm longevity, but also the support of national research, education, art, etc.

Germany is the fifth largest economy in the world and the third largest exporter, with a trade surplus of € 250 billion. The robust health of the German economy, in particular their exports, is owed in large part to the exceptional performance of its industrial and technological firms. Interestingly enough, many German multinational giants – but also numerous SMEs – belong partially or wholly to a foundation (“*Stiftung*” in German).

For example, the Robert Bosch Group with annual revenues approaching € 50 billion, is majority owned (92%) by the Robert Bosch Stiftung. Similarly, the media conglomerate Bertelsmann features 77% ownership by the Bertelsmann Stiftung. This form of ownership is pervasive irrespective of industry or age: Carl Zeiss, one of the oldest optical instrument manufacturers in Europe, has been fully owned and controlled by the Carl Zeiss Stiftung since 1889.

there are between 500 to 1,000 “shareholder foundations”, with at least a third being created after the year 2000.

Shareholder foundations are heavyweights: out of the 15 largest foundations in 2013 (classified according to asset value), six are shareholder foundations. The *Robert Bosch Stiftung* and the *Else Kröner Fresenius Stiftung* (the latter of which owns 27% of the medical firm Fresenius, a multinational with € 20 billion in sales) occupy the top two positions with more than € 5 billion in assets. Similarly, among the list of the most generous foundations in 2013 in terms of donations, four of them were shareholder foundations: Robert Bosch (€ 100 million disbursed annually), Bertelsmann (€ 67 million), Software AG and Else Kröner Fresenius (nearly € 25 million euros).

In the shadow of these well-endowed foundations are hundreds of more modest entities: in Germany, the capital requirement for establishment of a foundation varies between € 50,000 to € 100,000. With less visibility and a narrower philanthropic focus compared to their larger compatriots, these foundations are generally closer to the family enterprises from which they are spawned.

A CONFOUNDING ARRAY OF FOUNDATION FORMS

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The German label for a firm-related foundation (*Unternehmensnahe Stiftung*) is a very general – and misleading – term. From an outsider’s perspective, the term “shareholder foundations” (*Unternehmensverbundene Stiftungen*), is often confounded with foundations created by the firm to handle CSR-related activities (*CSR-Stiftungen*), e.g. the *Siemens Stiftung* or the *Henkel Stiftung*. The foundations in the former category own part or all of the firm’s equity, while the latter are endowed with assets without any equity or ownership control.

THE POPULATION OF GERMAN FOUNDATIONS

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In Germany, there are few official statistics on individual foundations; the diversity of statuses and legal structures prevent the development of a precise account. The most reliable estimates that are available are provided by the *Bundesverband Deutscher Stiftungen*, a professional association that represents German foundations. Out of 20,000 registered foundations in the country,

Another source of confusion emerges from general interest foundations that are created by entrepreneurs having made their fortune, but without any link to the firm. For example, two of the founders of the software giant SAP, Klaus Tschira and Dietmar Hopp, have each sold a part of their shares to create and endow a philanthropic foundation. Rather than providing a lump sum, the endowment is characterized by investments, with the returns being used to finance philanthropic projects. Yet neither the *Klaus Tschira Stiftung* nor the *Dietmar Hopp Stiftung* hold shares of SAP; therefore they are not directly linked to the economic performance of the group.

Finally, there are unique cases, as exemplified by the Volkswagen Stiftung. Following the end of the Second World War, the company Volkswagen found itself largely dismantled and eventually controlled by the British. Without an identifiable owner or potential buyer, the company was ultimately subjected to state appropriation. 60% of the company was subsequently privatized, with the proceeds being used to establish the Volkswagen Foundation in 1961. Thus, the foundation was the result of a transfer of firm ownership, yet without any equity or control.

PHILANTHROPY WHILE RETAINING FOUNDING VALUES

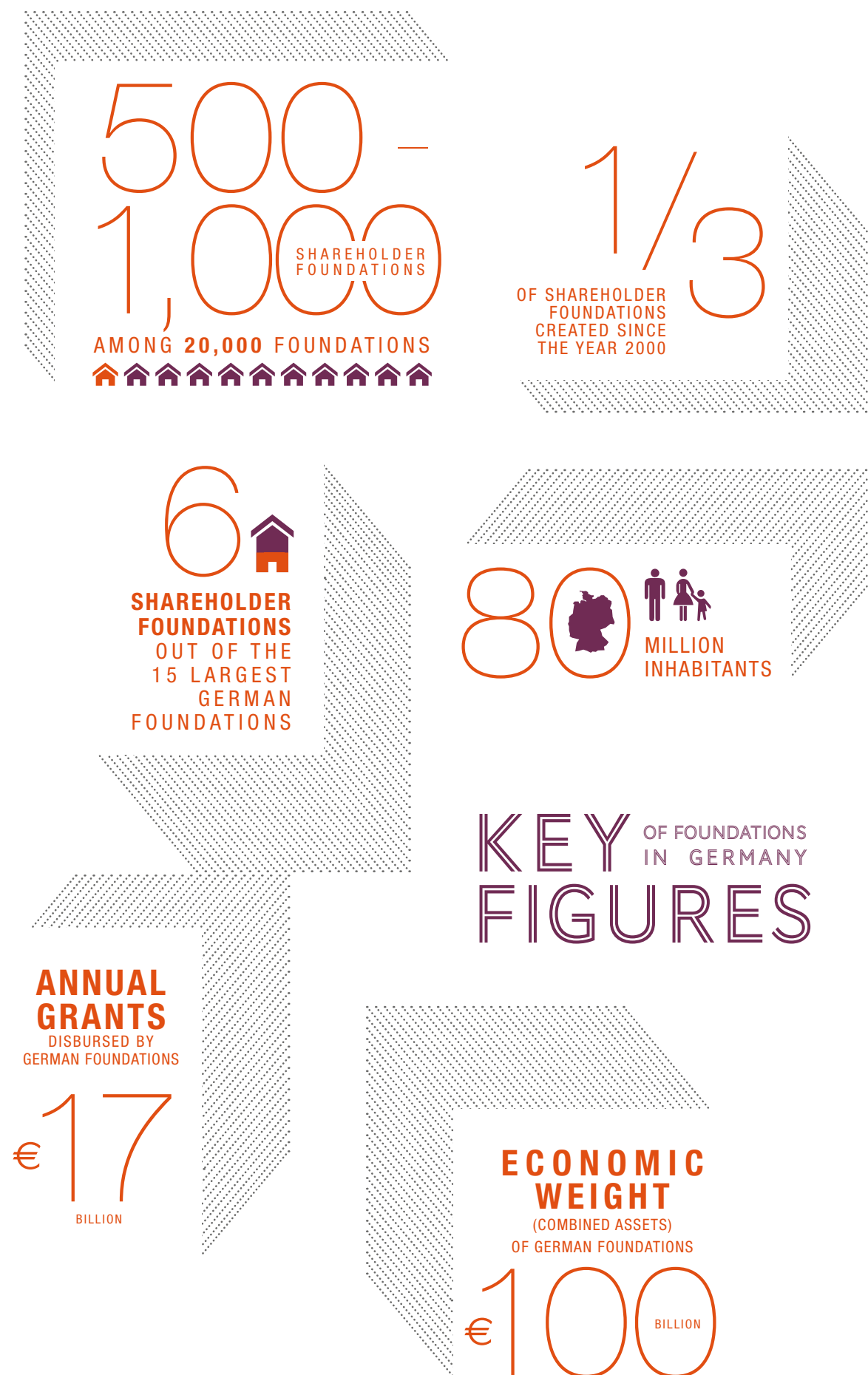
Despite their diversity, shareholder foundations in Germany share a similar history: an entrepreneur becomes wealthy through his shareholding in his firm, but desires a long-term preservation of his commercial and philanthropic vision. He is not inclined to sell his holdings to unknown external parties, and if he lacks confidence in his successors (or does not have any), he elects instead to establish a foundation. Upon creation of his (typically eponymous) foundation, he endows it with all or part of his shares. This act is irreversible, ensuring the longevity of the firm and stabilizing the economic and social presence of the firm in its territory. The foundation, as a “patient” shareholder, uses dividends from its shares to finance philanthropic projects according to the founder’s will. These causes are inscribed in the charter and provide binding principles for foundation managers to follow. However, it is rarely the case that the foundation directly controls the firm; most of the time, an intermediary holding entity is created to exercise the voting rights corresponding to the foundation shares. This intermediary exercises corporate governance functions, leaving the foundation to focus on philanthropic aspects.

In Germany, the three areas receiving the most support from shareholder foundations are scientific research (22%), social welfare (19%) and education (17%); causes targeted must correspond to the will of the founder. Even if the foundation board members have the capacity to interpret and operationalize overall themes, they must remain in accordance with the original vision as inscribed in the charter. There is a strong domestic character in these causes: the majority of shareholder foundations operate within the territory of the firm or of the founder, but the largest foundations are increasingly addressing international issues – notably the foundations of Robert Bosch, Bertelsmann and Körber.

ARE THESE TRULY PHILANTHROPIC FOUNDATIONS?

Although shareholder foundations benefit from a favorable image in Germany, they have still been subject to criticism because of the complexity of their legal arrangements, compounded by their relative opacity regarding governance practices. Shareholder foundations are reproached in particular for focusing on causes linked to the core business of their owned firms. In contrast to the foundations like Robert Bosch and Bertelsmann that receive considerable media attention, many shareholder foundations feature philanthropic approaches that have little separation from the main commercial activities: e.g. support for medical research, training for engineers and IT professionals, etc. This is particularly the case for smaller shareholder foundations that only rarely pursue the public interest and are more concerned with acting as a “blocking shareholder” for the owned company; in this sense they are considered to be more of a management tool, where the foundation and enterprise essentially function as a single entity (*Unternehmensträgerstiftung*).

This behavior is neither unusual nor illegal; in contrast to France, foundations have no obligation to contribute to the public interest. However, foundations may apply for this status if they so desire and in the process obtain a favorable tax arrangement. In yet other cases – notably specific shareholder foundations and the majority of family foundations (*Familienstiftungen*) – the only goal is to protect founder and family interests, with zero philanthropic objectives!



A proliferation of statutes

BY **ARTHUR GAUTIER**

EXECUTIVE DIRECTOR OF THE ESSEC PHILANTHROPY CHAIR

The German context for foundations can be rather confounding: Whether public or private, owning shares or not, oriented towards philanthropy or not – there is a visible lack of vocabulary that clearly differentiates the various forms. This has not, however, prevented the creation of more than 500 shareholder foundations, with a significant portion of them being established since the year 2000.

Although the population of German foundations is highly diverse, they can be loosely defined by the following four characteristics:

- > The utilization of assets towards a particular goal that is often (although not necessarily) philanthropic.
- > A defined purpose and structure as outlined by the charter; this acts as a guide for the actions of managers and ensures the preservation of the foundation.
- > An irreversible transfer of assets to a foundation, in addition to an on-going preservation of said assets; in principle, a foundation has an unlimited lifespan.
- > The usage of endowment income to fulfil a certain mission, although the foundation can also receive donations, government grants and revenue from other activities.

A complex typology

First, the legal tradition in Germany makes a distinction between public law foundations created by the federal state (öffentlich-rechtliche *Stiftung*) and private law foundations (*privatrechtliche Stiftung*) founded by a person; the latter constitute the object of focus for this study, given that they far outnumber the former. Two-thirds of private law foundations are established by physical persons, with the remaining third being created by organizations – most notably corporations. These foundations, like their public law counterparts, can be recognized as “general interest” (*Gemeinnützigkeit*) if they adhere to certain conditions. In doing so, they benefit from an advantageous fiscal regime that includes a partial tax deduction on gifts and exemption from inheritance, commercial and professional taxes.

Second, foundations can be distinguished according to their legal status. For private law foundations, the most common status is what is known as “civil law” (*rechtsfähige Stiftung des bürgerlichen Rechts*): if officially recognized by the supervisory authority of the province (*Land*), a foundation can incorporate and be given a legal personality. Conversely, it is possible to establish an unincorporated foundation (*Treuhandstiftung*), similar to the trust form in France and in Anglo-Saxon countries. However, there are alternatives to the civil law status that nonetheless confer legal personality. Adding to the complexity, existing typologies of foundations for the most part classify foundations according to the identity of the founder. The Association of German Foundations (*Bundesverband Deutscher Stiftungen*) makes a distinction between community foundations (*Bürgerstiftungen*), family foundations (*Familienstiftung*), ecclesiastical foundations (*Kirchliche Stiftung*) and finally corporate foundations (*Unternehmensnahe Stiftung*) of which shareholder foundations (*Unternehmensverbundene Stiftung*) constitute a sub-category.

One expression, two concepts

The byzantine structure of German law – especially in relation to foundations – makes it complicated to identify what applies specifically to shareholder foundations. The first difficulty relates to vocabulary: in the absence of a specific legal status, German lawyers use different terms to describe similar concepts. In another twist, the term “corporation foundation” (*Unternehmensnahe Stiftung*) groups together two distinct types of foundations:

- > *De novo* foundations created by a company that distribute grants and carry the CSR policy of the Company (*CSR Stiftung*).
- > Foundations created by company owners. These are “shareholder foundations” as defined in this study, endowed with shares that may potentially allow the foundation a certain extent of administrative control over the company (*Unternehmensverbundene Stiftung*).

Direct or indirect management of the held company

Whether the foundation is a minority, majority or full owner of a company, it generally uses the dividends it receives to finance philanthropic activities. However, the management function is often transferred – through delegation of voting rights – to an intermediary holding entity. In this manner, there is a buffer organization between the foundation and the firm (*Beteiligungsträgerstiftung*). This separation of roles allows the foundation to focus on its philanthropic mission without interfering in – nor being affected by – firm management. An alternate and less common configuration is where the foundation owns the firm completely and manages it directly without an intermediary (*Unternehmensträgerstiftung*). In this form, the firm and the foundation essentially function as a single body. This structure is used by the Carl Zeiss Stiftung, which is the only shareholder of both firms in the group, Carl Zeiss AG and Schott AG. The mission of the foundation is, on one hand, to ensure the economic and social sustainability of the two firms and on the other, to support education and research in the natural and engineering sciences. Finally, there are other noteworthy configurations for German foundations, particularly the “double foundation” (*Doppelstiftung*). This form allows a family foundation to create a secondary foundation that can hold shares and use dividends to finance its activities, while majority voting rights and decision-making power are retained within the primary foundation. In this manner, the control and interests of the family are preserved.

Regardless of their structure, foundations have to strictly abide by the laws that govern their conduct. In return, foundations benefit from the advantages associated with being a public interest organization: partial tax deductions on gifts and exemption from real estate, corporate and professional taxes.

PORTRAIT

THE ROBERT BOSCH
FOUNDATIONTHE FOUNDATION OWNERSHIP
OF AN INDUSTRIAL POWERHOUSE

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IN THE EARLY 1900S, THE INDUSTRIALIST ROBERT BOSCH BEGAN PAVING THE WAY FOR HIS FIRM TO BE TRANSFERRED TO A FOUNDATION. SINCE HIS DEATH IN 1942, HIS FOUNDATION HAS CONTINUED TO EMBODY THE HUMANISTIC VALUES OF ITS CREATOR. AS ONE OF THE LARGEST ENTERPRISES IN GERMANY, THE BOSCH GROUP HAS ALSO INTERNALIZED HIS VALUES IN ITS GOVERNANCE.

.....

The Bosch Group is one of the largest technology and service companies in Germany: in 2014 it employed over 290,000 workers and reported € 48.9 billion in revenue. Since its founding in Stuttgart by the industrialist Robert Bosch in 1886, the group has since expanded to over 300 subsidiaries in fifty countries. In a stark departure from its early confinement to the German market, the Bosch Group currently generates three quarters of its revenue from outside Germany, producing a variety of products such as automotive parts, appliances, power tools and even security systems.

The corporate governance of the Bosch Group is characterized by foundation ownership, although this is a relatively recent development: the Robert Bosch Stiftung GmbH was only established in 1964, more than two decades after the death of Mr. Bosch in 1942. Although the firm was held by the Bosch family in the interim, Robert Bosch had created an organization in 1921 called the *Vermögensverwaltung Bosch GmbH* (VVB) which was designed to be the executor of his will, specifically with respect to his entrepreneurial and philanthropic wishes. Crucially, the board members of the VVB – personally picked by Robert Bosch – could decide, within 30 years of Bosch's death, whether to transfer his 86% ownership from the heirs to the VVB.

The VVB did indeed acquire the shares from the family in 1964, but simultaneously waived their right to vote in order to reconcile the economic and philanthropic interests.

The voting rights were instead transferred to a newly created body called the *Robert Bosch Industrietreuhand KG*, which would hold only 0.01% equity in the business interest. The Bosch family itself retained 7% of the shares and voting rights. VVB was later renamed the *Robert Bosch Stiftung GmbH* in 1969, and in line with the charter dating back to the founding of the VVB, would attend to the following axes: Health and humanitarian aid, science and research, international relations, education, and culture.

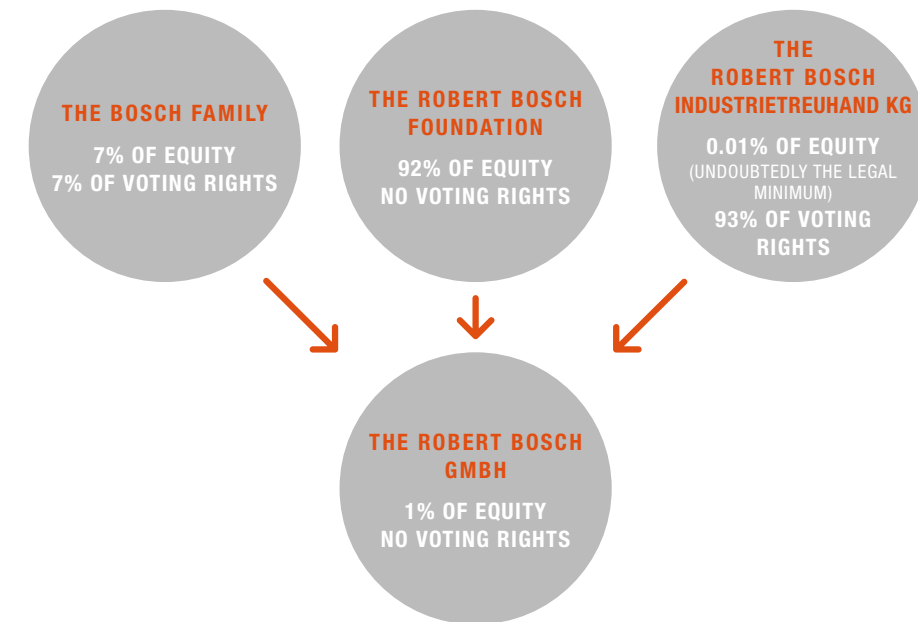
Alleviation of hardship in all forms

.....

"It is my intention, apart from the alleviation of all kinds of hardship, to promote the moral, physical and intellectual development of the people." – Robert Bosch (1934)

The principles that Robert Bosch conveyed to the VVB have left a lasting impact on the structure and practices of the Foundation – notably with respect to the composition of the board. According to Atje Drexler, the head of the International Relations (Europe and its Neighbours) program at the *Robert Bosch Stiftung GmbH*: *"Robert Bosch named 9 people to be executors of his testament. First, there must be representatives of the family interest, and today that is Mr. Christof Bosch and his cousin Mr. Madelung. It is also part of the guidelines that there should be two people that are part of the Robert Bosch company. The remaining five should be recognized figures from different*

WHO OWNS WHAT?



civil society and business spheres, with the important condition that they are entrepreneurs themselves like Robert Bosch and not employed managers..." Through this structure, the various interests of the Bosch constellation are represented in corporate governance without compromising the entrepreneurial character of firm.

are typically related to the core business of the firm. Given the heritage of the Robert Bosch Stiftung, however, the philanthropic activities represent the personal interests of Robert Bosch and demonstrate very little connection to the current core business activities of the Bosch Group – activities that have far outgrown the early foci of the group.

“FOR YOUNG GRADUATES, THE JOB DESCRIPTION IS IMPORTANT – THERE ARE QUITE A FEW BOSCH RECRUITS THAT SAID ‘I PREFER THIS TRADITIONAL COMPANY WHERE THE MONEY EARNED GOES TO THE COMMON GOOD’”

ATJE DREXLER, HEAD OF THE INTERNATIONAL RELATIONS (EUROPE AND ITS NEIGHBOURS) PROGRAM

Foundation ownership as a competitive advantage?

.....

Despite the fact that many philanthropic activities are unrelated to the activities of the Bosch Group, there is one unexpected advantage: such activities reinforce the reputation of Bosch as being a good corporate citizen, benefitting areas such as recruitment and employee retention. As Ms. Drexler states: *"For young graduates, the job description is important – there are quite a few Bosch recruits that said 'I prefer this traditional company where the money earned goes to the common good rather than some anonymous stock market company where philanthropic causes – if they exist at all – are decided upon in an instrumental manner.'"*

In comparison to their competitors with dispersed shareholding, the foundation form provides another advantage for the Bosch group: a comparative advantage in "patience". The managers of the firm can pursue long term objectives without being subject to public accounts and short term

performance indicators. On the other hand, this can also be a drawback as it makes it much more difficult to raise money on the stock market. A publicly traded company can raise funds relatively easily, while a limited company has to finance a lot of their growth from their own resources, and in particular from their own earnings.

The evolution of philanthropic causes

.....

Although the spirit of the founder has had a lasting impact upon the structure and functioning of the Robert Bosch Stiftung, the targets of the foundation have historically not been confined to causes that would decline in relevance over time. In his will in 1935, Robert Bosch acknowledged

that the challenges of his time would not be the same as those faced by managers decades later, and thus he charged his trustees with interpreting his broad areas of interest as they saw fit.

Ms. Drexler gives an instance of this evolution occurring in terms of the healthcare focus of the foundation: *"When we started to fund healthcare, all of our money went to our own hospital, the Robert Bosch Krankenhaus – but after construction finished in 1973 we shifted to healthcare economics. Then for 30 years we focused on training and qualifying nurses in Germany, at a time when nursing wasn't an academic profession here. Now we've moved on to current challenges in the healthcare system like dealing with demographic change and the rising share of elderly people with dementia in our healthcare system. So we evolve over time and we work with current challenges in our society."*

Today, the *Robert Bosch Stiftung* is comprised of 140 employees supporting 800 different projects in various domains. An interesting feature of the foundation is that the causes for each department are made in conjunction with the Bosch board. From her own experience, Ms. Drexler notes that the choice of causes is based on a continuous process of negotiation: the department supplies propositions to the board regarding philanthropic needs, in addition to suggestions for how to best tackle these issues. Here is where the collective entrepreneurial experience of the board becomes a useful asset – the board actively provides oversight throughout the process of implementation for new "start-up" philanthropy projects.

THE BOSCH GROUP IN FIGURES

Revenues (2014) > €48 billion
Net profit > €1.251 billion
Percentage of revenues generated outside
of Germany > 77%
Number of employees > 290,000
Operating in > 50 countries

PORTRAITS

FROM TECHNOLOGY TO MEDIA THREE EXAMPLES OF THE DIVERSITY OF SHAREHOLDER FOUNDATIONS IN GERMANY

The Bertelsmann Foundation was created in 1977, although the group that it owns has a far more storied history. Bertelsmann SE & Co. KGaA was founded in 1835 by publisher Carl Bertelsmann and currently operates in a number of media industries: book and magazine publishing, music labels, and television/radio broadcasting, to name a few. Reinhard Mohn, the descendant of Carl Bertelsmann, established the Bertelsmann Foundation in 1977 to which he subsequently relinquished all his shares – comprising 69% of the total ownership of the titular firm. Deeply passionate about corporate social responsibility, Mohn noted as his motivation: *"Surely every responsible citizen in a democracy is concerned when the social order fails to live up to its promise. It was precisely this concern that prompted my desire to make a difference."* Since the death of Reinhard Mohn, the foundation has been run by an executive board of four members and an advisory board of thirteen members – both of which include Mohn's wife and daughter. The Bertelsmann Foundation has been highly active in a number of causes, from improving international relations to providing vocational training for teachers, and supplying €67 million in philanthropic funding in 2013 alone. Interestingly enough, the Bertelsmann Foundation does not finance third party projects – all investments are made to projects conceived and operationalized in-house.

The Körber Foundation has complete equity control of the firm Körber AG – a German technology group with over 11,000 employees and €2 billion in 2013 sales. The foundation was established by entrepreneur Kurt A. Körber in 1959, and assumed control of Körber AG following his death in 1992.

There are three governance bodies: The Executive Board, which oversees the operational activities; the Board of Trustees, which ensures that the foundation acts in the benefit of the public; and the Financial Board, which supervises the €522 million of foundation capital and exercises shareholder rights in some of the held companies. Being the sole owner of Körber AG, the Körber Foundation is also the sole recipient of firm dividends, which amounts to approximately €17 million per year. Despite the sole ownership structure – or perhaps because of it – the foundation has signed a commitment to transparency regarding what they do, where they receive their money from and how they spend it. The foundation currently employs 70 people across five key focus areas: Dialogue with Asia, Shaping Democracy, STEM (Science, Technology, Engineering and Mathematics) promotion, The "Potential of Old Age" program and Music Education.

The Software-AG Foundation (SAGST) is a charitable foundation with a 29% ownership of the eponymous German software company. The company is now partially listed, but no institutional investor holds more than 3.5% of capital. Voting rights are matched to share ownership, with seemingly no holding company in between. The founder, Dr. Peter Schnell, endowed the foundation with 98% of his shares in 1992, and subsequently became the head of the executive board along with four other members. Regarding philanthropic practice, unlike Bertelsmann, the SAGST does not initiate projects itself. According to its charter, it rather elects to fund existing programs carried out by independent non-profit organizations operating mainly in the areas of education and healthcare. Dr. Schnell notes: *"We help our project partners to realize their initiatives responsibly, for the well-being of others and our society as a whole."*

“Scrutiny is just as important as the amounts received”

INTERVIEW WITH **EMMANUELLE BAUTISTA**
HEAD OF THE INDUSTRIAL AND LEGAL ISSUES DIVISION AT THE REGIONAL
ECONOMY DEPARTMENT OF THE FRENCH EMBASSY IN BERLIN

Based on your experience working on German foundations, what have you found most striking about shareholder foundations in this country?

I was firstly impressed by the finances available to these foundations. I was also surprised by the number of shareholder foundations in Germany beyond the most well-known cases; there are many small and mid-sized shareholder foundations that illustrate the vitality of the German Mittelstand (SME form).
The largest of these foundations are noteworthy as well, because of the projects and the people that they support. There is a real “alumni network” present here; when you have been supported by a large foundation such as Bosch or Bertelsmann, you receive information, invitations to events, and contacts with other “alumni” – and that helps if you wish to apply for funding again. Besides, for beneficiaries, scrutiny is just as important as the amounts received. However foundations are occasionally criticized for how demanding they are with beneficiaries and for how stringent their program evaluations can be.

When we try to understand how shareholder foundations function from an outsider’s perspective, it is surprising how complex they are in reality. What is your perspective on this?

Indeed, they are difficult to understand. Although there are some comparable characteristics for foundations in France, we do not have any equivalent legal structure at all. The permissible separation between share ownership and voting rights is a key element of German shareholder foundations. There is also a certain opacity regarding the specific ways that the foundations function, which includes their relationships between the company and any intermediary entities. It’s not easy at all to understand who does what among the different bodies of governance. Shareholder

foundations do not openly communicate with others about this aspect, but they have no hesitation talking about the projects that they support.

Could you talk about family foundations in Germany? What is their relationship with shareholder foundations?

In Germany, a family foundation (Familienstiftung) is established to prevent dispersal of assets – in particular, the family business – and ensure that the family members receive a regular income. In this case, there is no philanthropic goal or desire to maintain control over the enterprise in question.
However, a legal structure called a “double foundation” (Doppelstiftung) allows for the family foundation to be augmented with a second, public interest foundation. Through this latter entity, the Doppelstiftung is obliged to pursue philanthropic activities – although in such a case, the assets and the voting rights reside in clearly distinct entities. However, this is a form that ends up producing a striking resemblance with shareholder foundations.

: “BEYOND THE MOST
: WELL-KNOWN CASES,
: THERE ARE MANY SMALL
: AND MID-SIZED SHAREHOLDER
: FOUNDATIONS THAT
: ILLUSTRATE THE VITALITY
: OF THE GERMAN
: MITTELSTAND”

“Foundations must not and cannot be involved in the daily running of the business”

INTERVIEW WITH **DR. VOLKER THEN**
MANAGING DIRECTOR OF THE CENTRE FOR SOCIAL INVESTMENT (CSI)
AT THE UNIVERSITY OF HEIDELBERG

Dr. Volker Then was previously the Director of Cultural Orientation at the Bertelsmann Foundation. He shares the specificities of the foundation structure in the German context:

What is the general perception of foundations in German society?

Generally it’s a very favorable climate, which has been evident over the last fifteen years through a process of substantial growth. If you look at the number of foundations – of which there are currently about 20,000 – more than half of them were created after the year 2000, so today’s foundation sector is actually a very recent creation. In general, this has gone along with a fairly favorable public perception; we haven’t seen a very skeptical or even a hostile discussion about foundations and this also applies to public policy.

What are the benefits of shareholder foundations in Germany compared to other forms?

Something overlooked is the fact that foundations are preferred vehicles for German donors that want a sustainable, long-term investment option that is not subject to capital markets. In a country where there were two periods of hyperinflation that wiped out the foundation sector (in WWI and WWII), the only entities that survived during those periods were those that invested in corporate assets or real estate. So you have to keep in mind that donors in this country have a special concern for how to maintain a sustainable structure that is more or less protected against inflation.

What would be the weaknesses/disadvantages?

Once established, it’s fairly inflexible. It’s not a structure that you can change according to our civil code. You can normally only change regulation in the charter if you are adding on to it – for example if you contribute to the endowment you could

add one or two new focus areas or increase the scope. However, you cannot change the existing purpose or reduce the scope because the foundation, in our view, is considered an irreversible gift. This irreversibility is, on the one hand, a guarantee of stability and pursuit of the public benefit, and on the other, a rather inflexible structure for managing family assets. You have to be careful at what point in time you make the decision because of this irreversibility.

How involved are foundations in the operations of the firm?

Unlike in Denmark, charitable foundations must not and cannot be involved in the daily running of the business. They can exercise the normal rights of a shareholder, but cannot have an executive role in the business. In many cases – especially those where the foundation owns 50% or more of the company – voting rights are separated into a trust company, to comply with this regulation to separate the governance and charity functions. So the foundation enjoys the dividends, while voting is separated into different shares that reside within the trust company.

: “IN A COUNTRY WHERE
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: THE ONLY ENTITIES
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: SHAREHOLDER FOUNDATIONS”



SWITZER-
LAND



OVERVIEW

SHAREHOLDER FOUNDATIONS IN SWITZERLAND: A TABOO TOPIC?

Rolex, Sandoz, Victorinox, Kuoni... these emblematic Swiss firms are owned by foundations, of which there are only twenty in Switzerland. Yet as reputable as these firms are, the shareholder foundations that own them operate in complete secrecy.

20 SHAREHOLDER FOUNDATIONS OUT OF 13,000 FOUNDATIONS

Nearly 13,000 charitable foundations operate in Switzerland, or in other terms, 16 foundations for every 10,000 inhabitants. Apart from Denmark, which counts 28 foundations per 10,000 inhabitants, this is one of the highest densities in Europe. In total, these foundations represent a fortune estimated at € 67 billion, with donations each year amounting to € 1.5 billion. The targeted areas vary from risk to healthcare, environment protection, education and culture, whether in Switzerland or abroad ¹.

Relatively simple to establish – although admittedly highly difficult to change – Swiss foundations are somewhat variable in terms of their performance: 380 foundations were established in 2013, while 180 within the existing foundation population ceased operating. Furthermore, according to expert opinions, a third of Swiss foundations in 2013 were considered to be stagnating. Despite this, the Swiss philanthropic sector is experiencing a surge in the creation of new foundation structures like umbrella foundations, accompanied by a professionalization of the industry in terms of new intermediary parties (e.g. specialized philanthropy bankers) and also a proliferation of new statistics and studies ². However, shareholder foundations are totally off the radar: their assets, donations and their economic and social impact are completely unknown. Thus, as much as they inspire admiration

through emblematic cases (e.g. Rolex is the biggest employer and taxpayer in the Geneva Canton), they also elicit suspicion stemming from their lack of transparency and the eccentricity of their governance model. In the Swiss context, shareholder foundations are unidentified entities: they do not correspond to any particular status and are closer to what Swiss experts term “corporate foundations” or “economic foundations” (see subsequent article).

If they are not prohibited by Civil Code, what are shareholder foundations permitted to do? How compatible is their economic purpose with their philanthropic vocation? Why are there so few of them? Could they serve as a model for the future? These are questions that major actors in the Swiss philanthropy field answered for us, but not the foundations themselves: In Switzerland, discretion is the most prized asset.

¹. <http://www.swissfoundations.ch/fr/faits-chiffres>. – ². Recent studies: Advancing Philanthropy in Switzerland (Lombard Odier, 2013); Rapport sur les fondations en Suisse 2014 (Ceps, Universitat Zurich, Swiss Foundation)

“The foundation could be a powerful lever that transforms business”

INTERVIEW WITH **MARC PFIZER**
DIRECTOR OF FSG-SOCIAL IMPACT ADVISORS EUROPE



FSG is an international strategic consultancy specializing in social innovation, overseen by the noted American strategist Michael Porter. FSG regularly publishes referential articles on new economic models (“Creating Shared Value”, Harvard Business Review 2006) and philanthropy (“Catalytic Philanthropy”, Stanford Social Innovation Review 2009)

What comes to mind when the term “shareholder foundation” is brought up?

It's not a well-known model, but there are emblematic cases. I'm thinking of Lego that is owned 25% by the Lego Foundation, the Wilsdorf Foundation that owns 100% of Rolex, in addition to other well-known examples in Denmark and Germany, like Carlsberg and Bertelsmann respectively. But we only have a vague idea – not a fundamental comprehension – of this model.

Would you consider this to be a virtuous model?

I'm not certain about that. Everything depends on what you mean by virtue! For FSG, what's important today is the long-term transformation of economic models, the creation of “shared value” (i.e. value shared by the firm and its eco-system), and “collective impact”, the ability to co-construct social impact in order to have real influence on the development of the eco-system. As of yet, I see no evidence that firms owned by foundations create more impact or shared value than others. Bertelsmann has had a considerable influence in Germany through its foundation, and that's certainly a case that merits close study. However, for the other cases that I think of, foundation-held firms are not particularly innovative, and frankly, certain philanthropic decisions are pathetic... as they are elsewhere!

“AS OF YET, I SEE NO EVIDENCE THAT FIRMS OWNED BY FOUNDATIONS CREATE MORE IMPACT OR SHARED VALUE THAN OTHERS”

Nonetheless, could the shareholder foundation model ultimately promote the creation of long-term shared value?

Indeed, the foundation could be a powerful lever that transforms business, if the economic and social goals of the organization are properly integrated and inscribed in their mission statement or charter. So far, these two have been compartmentalized: one part of the foundation directly or indirectly manages “business as usual”, ensuring the long-term stability of the firm, while the other finances social causes through dividends. The shareholder foundation thus does not guarantee social innovation, but it could become a key actor in the transformation of economic models, towards the goal of shared value. Everything will depend on the shareholders and management, because shared value today is an issue of people and approach, not of status.

20 SHAREHOLDER FOUNDATIONS (ESTIMATED)

AMONG 13,000 “PUBLIC UTILITY” FOUNDATIONS



8 MILLION INHABITANTS



1 FOUNDATION PER DAY WAS CREATED ON AVERAGE IN 2013 (ALTHOUGH 1/3 OF FOUNDATIONS ARE NOT VISIBLY ACTIVE)

WEALTH OF SWISS FOUNDATION

€ 67 BILLION (ESTIMATED)

KEY OF FOUNDATIONS IN SWITZERLAND FIGURES

TOTAL ANNUAL SPENDING BY SWISS FOUNDATIONS

€ 1,5 BILLION

THE LEGAL AND FISCAL CONTEXT

An unknown model

BY JEAN-CHARLES ROGUET

PARTNER – LAW FIRM MEYERLUSTENBERGER/LACHENAL

In contrast to some of his Swiss colleagues, Jean-Charles Roguet is convinced that the shareholder foundation model has a promising future, particularly with respect to the transmission of family firms. As long as they provide the proper conditions for firm development, he believes that foundations can provide a means to overcome the traditional barriers between economic development and philanthropy. He promotes innovative models that can accomplish this double mission: the shareholder foundation is one such form that holds promise, despite being unknown.

A more relaxed framework on shareholder foundations

When they established rules for foundations, Swiss legislators did not consider the possibility that foundations could pursue economic goals, potentially playing a fundamental role in the Swiss economy. As a consequence, there is a divisive doctrine about shareholder foundations, with the law containing no provisions that regulate their status. Their low numbers in Switzerland can be explained partially by the lack of knowledge about this model, but also by the rigidity of the charter once the foundation is established (a foundation is non-modifiable for ten years). In place of this immutability, I prefer flexibility, something that is necessary to pursue an economic purpose. In place of the regulatory obsession, I prefer self-regulation. Clarifications and changes of this status are thus needed.

Foundations for the public interest

In Switzerland, diverse forms of foundations are available. The most pertinent form is chosen based on the type of goal pursued, with “public interest” being the most frequently chosen form. The public interest – which is not distinguished in Switzerland from the concept of “public utility” – can be defined *a contrario*, as something that is not for profit and does not serve the interests of one or few individuals. This form is comprised of activities that are exercised directly for the purpose of general interest: charitable, humanitarian, health, environmental, educational, scientific or cultural activities. The group of intended beneficiaries of such a foundation is either fully open or limited by the goal pursued by the foundation. However, if the foundation pursues any profit making activities, this does not necessarily detract from the foundation’s public interest character¹.

A delayed acknowledgment of economic foundations

While still considered to be public interest, a foundation with an economic goal features certain specificities. Its dividends are distributed without consideration and without condition to a limited circle of people. Such foundations can also be divided into two sub-groups: those foundations operating within an industry under a commercial guise (i.e. a corporate foundation), and those that hold and represent the interests of a legal person engaging in commercial activities (e.g. foundation holding, shareholder foundation or commercial foundation).²

An ideological divide

Some legal authors in Switzerland are highly opposed to the concept of an economic foundation. To them, such foundations follow an idealistic but ultimately impractical goal, one that is incompatible with commercial demands. Others are more cautiously open; they believe that the operation of a business or participation in economic activities should not be the primary goal, but rather subordinate to the pursuit of a superior “public interest” mission. The vast majority of authors, supported by practice and case law, defend the permissibility of economically oriented foundations. For this, legal experts refer to two principles: the absence of a legal base (i.e. the fact that the civil code cannot constrain the freedom of the entrepreneur/founder); and the freedom of the founder to establish a stable asset-base towards the pursuit of an economic goal. However, many believe that shareholder foundations are not a large-scale solution, but one applicable to specific cases – particularly in situations where an heir is absent.

Family foundations and public law: Some rare cases

The third category of family foundations appears to be increasingly obsolete. They can only be constituted to deal with a particular need or necessity, or for the education and support of family members³. Today though, such foundations have largely disappeared⁴.

Finally, there are public law foundations. In contrast to the previous forms discussed earlier, these are established by law. Imbued with a legal personality, these foundations are endowed with assets that they are then required to use for the realization of a specific public task in the cultural field. For example, at the federal level there is the Pro Helvetia foundation⁵, and at the canton level, the Grand Theatre of Geneva Foundation⁶.

“THERE ARE NO PARTICULAR REQUIREMENTS FOR THE CREATION AND REGISTRATION OF A SHAREHOLDER FOUNDATION IN SWITZERLAND.”

Flexible but monitored operations

By necessity, a foundation is constituted by a deed, authenticated by a notary⁷ and registered in the Registry of Commerce⁸. The oversight authority (federal or cantonal) informs the foundation of its monitoring role, including the conditions contained therein⁹. There are no particular requirements for the creation and registration of a shareholder foundation in Switzerland. In addition, the law attaches few obligations regarding the foundation structure and imposes no particular constraint upon foundation holdings.

The foundations are subject to oversight by the public authority (federal or cantonal) to which they belong according to their purpose¹⁰. At the end of each period, they must provide a management report to the authority (based on the annual report, annual accounts with the balance sheet, operating statement and notes, reports of the auditors and approval of management by the Board of Trustees). The oversight authority ensures that the assets are being used in accordance with the public interest mission, notably in the case of a foundation holding where dividends are distributed. Furthermore, it ensures that the organization of the foundation is suitable for the pursued objectives¹¹. The authority can issue recommendations and guidance to foundation members and can intervene if it detects any operational irregularities, even in the cases of complaints or denunciations¹².

As with all Swiss foundations, a founding shareholder must apply the rules of good governance established in the “Swiss Foundation Code”, a code published in 2008 by the association SwissFoundations.

1. La fondation : lacunes et droit désirable, P. Vez, Berne (2004), N 245 et ss. – 2. La fondation: lacunes et droit désirable, P. Vez, Berne (2004), p. 175 et ss. – 3. Article 335 of the Civil Code. – 4. La fondation: lacunes et droit désirable, P. Vez, Berne (2004), p. 127 et ss; p. 209 et ss. – 5. Federal law concerning the Pro Helvetia (17 December 1965). – 6. Law 2764 (20th November 1964), ROLG. – 7. Article 81 of the Civil Code. – 8. Article 52, al. 1 of the Civil Code. – 9. Article 103, al. 1, lit. l and f of the Ordonnance sur le registre du commerce (ORC). – 10. Article 84, al. 1 of the Civil Code. – 11. La fondation : lacunes et droit désirable, P. Vez, Berne (2004), p. 721 et ss. – 12. La fondation : lacunes et droit désirable, P. Vez, Berne (2004), p. 808 et ss; 841 et ss.

Tax benefits...
under certain conditions

Federal and Cantonal: A dual tax regime

In Switzerland, the area of tax law is particular to each canton, and also subject to certain exemptions at the federal level. In all cases, donations and bequests of shares are exempt from transfer taxes when they are made to charitable foundations that are recognized by the tax authorities. Furthermore, for commercial tax, federal and cantonal law states that legal persons pursuing charitable purposes are exempt from federal and cantonal income tax, in addition to any capital employed exclusively and irrevocably for such purposes¹.

The mandatory separation of economic and philanthropic activities

In principle, while economic goals are not considered to be in the realm of public interest, shareholder foundations are still eligible for an exemption, given that their commercial activities help them pursue public interest goals.

Accordingly, “a purely capital investment – even if it consists of a holding of more than 50% in a company – is no longer excluded from a tax exemption, as long as such investments do not lead to an exercise of influence on firm governance. This is particularly the case when a third party holds voting rights; equity participation should therefore not be allowed to influence the economic activity of the company in question. This implies a clear separation between the Board of Trustees and the Board of Directors (which must remain independent of each other), even if an intermediary is tolerated. In the case of significant shareholding, the law additionally requires that this holding in a company serve the public interest. In other words, the held company must provide regular and substantial contributions to the foundation in order for the latter to pursue philanthropic activities towards the general interest².” Donations towards a recognized public utility organization are thus eligible for federal tax deductions, up to 20% of net taxable income of the taxpayer. Numerous cantons have also adopted similar measures³. If the foundation is exempt from income taxes, the dividends it receives from shares are similarly exempt.

1. Article 56 let. G LIFD. – 2. AFC, Swiss Federal Tax Administration, bulletin N°12 (8th July 1994), p. 4. – 3. <http://www.swissfoundations.ch>.

THIERRY LOMBARD

PRESIDENT OF FAMILY BUSINESS NETWORK INTERNATIONAL (FBN-I)
PRESIDENT OF THE LOMBARD ODIER FOUNDATION AND THE PHILANTHROPIA FOUNDATION
FORMER PARTNER OF LOMBARD ODIER

“The shareholder foundation is not only a legal issue, but an ideological one”

Philanthropy is a part of the DNA of Lombard Odier. Although we have aided families in the creation, management and transmission of their assets for over six generations, we have just as often assisted them in their philanthropic activities. We have done this because we ourselves have a foundation that strongly supports innovation and entrepreneurship as well as the development of philanthropy in Geneva (and Switzerland more broadly). Through our experience and expertise, we can facilitate and support corporate philanthropic initiatives through the Philanthropia Foundation, an umbrella foundation created eight years ago.

Within this philosophy of Lombard Odier – created two centuries ago in 1796 – partners are considered to be custodians of the company, not owners: the bank belongs to them for only one generation. Thus, there is a distinct culture based on dual values of transmission and philanthropy. As much as we hold these values dear, we also find that they undergird the core issues associated with shareholder foundations.

The shareholder foundation model is largely unknown; given that there are so few instances of them, I cannot state with conviction that they effectively balance corporate governance, firm development and risk management with their philanthropic mission. However, I find the intrinsic long term commitment and the dual social and economic goals to be compelling features; the model is definitely something that requires future exploration.

Currently, “short-termism” and managerial power are the biggest dangers facing companies. Managers in certain companies are conferred with considerable power, owing to the absence of real owners and developments such as

nano-second trading. This may not only prevent the creation of long term value but may even destroy it. Shareholder foundations could be a solution, acting as counter-examples to the deviant behavior we’ve thus far observed.

However, we need to map good examples and identify countries where laws and frameworks allow for an intelligent combination of a long-term economic mission – involving sensible risk-taking and employment – and an ambitious philanthropic vocation.

In Switzerland today, there is only a narrow sample of roughly twenty foundations to examine, with a relative lack of documentation of their policies and practices. To this twenty, we can add those shareholders of major companies that – if not possessing 51% of shares – exercise majority control of voting rights, in addition to those firms where pension funds are shareholders. However, we lack the tools to comprehend the efficacy of this model: for example, what accounts for the success of the watchmaker Rolex? Is it the fact that it is owned by a foundation? A more likely explanation is that it is a combination of elements, linked as much with good governance and management as being owned by the Hans Wilsdorf Foundation.

Nonetheless, there are certain constraints that become evident with this model, which can help to explain their limited number. It is not an easy task to cede one’s property, nor to dispossess one’s children. Nor is it easy in our Swiss context to convince tax authorities about the merits of a hybridized economic and philanthropic model – despite the fact that it is not forbidden.

I would also add another reservation: in the model of shareholder foundations, there is the potential for a “sclerosis” of capital. The expectations of a charitable foundation that manages the assets of a firm are somewhat antithetical to those of the entrepreneur, who knows how to engage in risk-taking (this does not include an entrepreneur that often has a personal involvement, notably in the case of family firms). Are foundation boards well equipped to make good investment choices and make decisions as entrepreneurs? In Switzerland today, this is not part of their competence. More fundamentally, how can one create economic and social value without taking risks?

Twenty years ago, discussions about ecology and the environment were largely limited to a small circle of insiders or visionaries. This was also the case when talking about family firms as major economic drivers. Times have changed since then, and the urgency of these issues has become more apparent. As President of FBN-International, I have noted that the subject of family businesses and their transmission has become pivotal, garnering widespread interest across the world.

Family firms have two major advantages: their resilience and their adaptability, associated with a long term vision that spans generations. In this context, could shareholder foundations play a role in facilitating the transmission and continuity of family firms? I would say yes, provided that they can indeed fulfill their dual economic and philanthropic mission. This is a topic that requires further investigation.

I am convinced that philanthropy could provide the innovations needed to tackle challenges in the twenty-first century. In attending to issues of public interest, we must think

about new economic models and the creation of economic value. The shareholder foundation is thus not only a legal issue, but an ideological one.

“I AM CONVINCED THAT PHILANTHROPY COULD PROVIDE THE INNOVATIONS NEEDED TO TACKLE CHALLENGES IN THE TWENTY-FIRST CENTURY”

Founded in Geneva in 1796, Lombard Odier is one of the most prominent private banks in Europe with €196 billion of assets under management. Through the Lombard Odier Foundation, the firm supports a number of philanthropic initiatives linked to innovation, entrepreneurship and youth training. While supporting these activities in Switzerland (and Geneva in particular), the bank also facilitates the initiatives of private clients, notably through the umbrella foundation of Philanthropia.

The Family Business Network is the largest network of family businesses in the world, with over 8,500 members representing nearly 3,000 families in 58 countries.

FROM SWISS WATCHES TO THE FAMOUS SWISS ARMY KNIFE

THE CROWN JEWELS OF THE SWISS ECONOMY AND
THEIR OWNERSHIP BY SHAREHOLDER FOUNDATIONS

FOUR FLAGSHIP ENTERPRISES WITHIN THEIR RESPECTIVE INDUSTRIES: IS THEIR ECONOMIC
PERFORMANCE DERIVED FROM THEIR OWNERSHIP STRUCTURE?

The Hans Wilsdorf Foundation, founded in 1945 in Geneva, owns 100% of the watchmaker Rolex. The goal of the foundation is to ensure the continuation of the Rolex Group, with a secondary mission to distribute donations to various charities and sponsorships as outlined in the charter ("The Geneva Watchmaking School, the Industrial Arts department at The School of Decorative Arts in Geneva, the Faculty of Economic and Social Sciences at the University of Geneva, the Swiss Watchmaking Research Laboratory in Neuchâtel, etc."). The final mission of the foundation is to "provide allowances for maintenance, education and assistance for the nieces and nephews of the founder and their descendants". The foundation does not communicate with the public.

The Elisabeth und Leo Henzirohs Studer-Stiftung, founded in 1979 in the canton of Soleure, is the sole proprietor of the appliance firm Jura Henzirohs Holding SA (known for their coffee machines). It has the goal of ensuring the independence and preservation of the Jura Group, but has also engaged in the construction and maintenance of a home for children in need. Under the foundation charter, companies belonging to the group are required to aid in the educational activities of the children in the home.

The Kuoni und Hugentobler Foundation, named after the famous tour operator, was established in 1957 in the Nidwalden Canton. It holds 6.5% of the share capital of Kuoni Voyages Holding SA, but with privileged voting rights amounting to 25% – in this manner, the foundation exercises considerable control over the firm. The budget of the foundation is estimated to be 100 million Swiss francs (€97 million), but the site of Kuoni makes no mention of the foundation ownership, the mission, the governance nor of their philanthropic activities.

The Victorinox Foundation was created in 2000 in the Canton of Schwyz. It holds an 85% capital stake in Victorinox AG, the manufacturer of the famous Swiss Army knife. Although affected by the events of September 11th, 2001, the foundation ownership of the Victorinox AG Group enabled the company to avoid layoffs. During profitable economic periods, this structure gives the firm the flexibility to focus on social and ethical considerations, generated purely from the returns on equity – in addition, this allows them to build up reserves for economic downturns.

"Firm governance and serving the public interest could be mutually enriching goals"

ETIENNE EICHENBERGER

CO-FOUNDER AND MANAGING PARTNER OF WISE



Founded in Geneva in 2004, WISE is considered today to be one of the most well-known European consultancies dealing with issues of family philanthropy.

Shareholder foundation: Is this a term that you are familiar with?

As far as I know, this is a term that doesn't exist – although I'm not a legal expert. In fact, the shareholder foundations are those with private rights and a mission of public interest that own companies; although to my knowledge, this is still rare in Switzerland. An interesting feature is the possibility of transferring a firm to a foundation to assure its continued existence. As much as there are governance issues between the public interest foundation and shareholder responsibility, there is the potential that firm governance and serving the public interest could be mutually enriching goals.

... "TAKING THE EXAMPLE OF
... ROLEX: IF A COMPANY DOESN'T
... NEED TO SHARE ITS NUMBERS,
... IT MAKES SENSE THAT
... THE OWNER – IN THIS CASE
... A FOUNDATION –
... WOULDN'T NEED TO EITHER."

Why is there such an absence of communication and transparency?

I myself would like to know more, as much for my own curiosity as for the interests of my clients. However, I respect the Swiss culture of discretion that allows companies to transmit everything in order to fulfill their civic responsibility.

In Switzerland, the founder has a lot of freedom in terms of organization, and I'm in favor of this kind of diversity that allows each entrepreneur the choice to communicate or not. In Switzerland, the notion of "private sphere" is fundamental, and as long as the monitoring authorities of foundations do their work, I find it totally acceptable that this information is not disclosed to the public. Taking the example of Rolex: if a company doesn't need to share its numbers, it makes sense that the owner – in this case a foundation – wouldn't need to either.

In assisting families, has WISE considered recommending the establishment of shareholder foundations?

The usage of a shareholder foundation model is new for us (although not the foundation model itself). In this regard, we are currently assisting a family that has made the choice – inspired by the German model – to transmit their company (of international scale) to a foundation. But I cannot tell you more than that!

Is there a future for shareholder foundations?

It's necessary to consider the deeper motivations, because this is a choice that has consequences beyond one generation – notably regarding the transmission of firms – and of course on the development of family values. Shareholder foundations will not replace the older forms, but they could be a welcome addition to the tools available for companies and their founders.



FRANCE

OVERVIEW

A LACK OF AWARENESS OF THE SHAREHOLDER FOUNDATION MODEL

Although authorized by law, the shareholder foundation has not yet established itself in French mentality as a feasible model of governance: Two centuries of mistrust cannot be erased so easily!

In France, as elsewhere, the foundation is the act whereby one or more legal persons decide to irrevocably allocate assets, rights or resources to a non-profit entity – one that works in the interest of the common good. However, unlike many other democratic countries, a foundation cannot exist in France unless it is approved beforehand by public authorities. Only in France is there a public belief that the common good cannot be served by a private initiative, unless it is first validated by the state.

WHY ARE THERE SO FEW FOUNDATIONS?

Even though their numbers have grown considerably in recent years – we can count slightly more than 630 foundations that are recognized as “public utility” in France – the number remains very low compared to other countries (e.g. Switzerland and Denmark, even without compensating for the difference in population). If we include “sheltered” foundations (i.e. those under the aegis of a state approved foundation), corporate foundations or special purpose foundations such as hospitals, universities and scientific partnerships (see the following section on “alternative solutions”), this number still only reaches a paltry 2,200.

Certainly, the 2008 law recognizing endowments as a legal form – similar to that of foundations but requiring only a simple declaration – has helped to promote philanthropic and general interest initiatives; to date, there are almost 2,000 of these in France. This form has strong parallels with “declared” associations that do not require prior authorization to be established (based on a law from July 1st, 1901).

RECONCILING BUSINESS AND THE COMMON GOOD

In France, the sphere of the common good remains markedly distinct from economic and commercial spheres. Thus, even associations themselves have not recognized that over the past twenty years, they have had the option of creating a subsidiary firm, and exercising control over the majority of shares. Similarly, it was not until the passing of a law on August 5th, 2005 that this possibility was opened to “publicly recognized” foundations. For ten years, this law has only been applied to the Pierre Fabre Foundation, owner of the eponymous pharmaceutical laboratory, with few others taking advantage of the new regulation.

Excluding spin-off firms established by foundations to house their commercial activities, there is only one other foundation in France that holds a controlling ownership of a for-profit firm: The Marguerite and Alexander Varenne Foundation, established in 1988 and majority owner of the press group Centre France/ La Montagne.

A POTENTIAL SOLUTION TO A VERY IMPORTANT ISSUE

Nevertheless, scientific studies on shareholder foundations demonstrate that firms held by foundations are strong performers, as much in social performance as in economic efficiency. In an era where the welfare state is weakening, and where 700,000 French family firms are poised to be transmitted over the next fifteen years, the shareholder foundation is undeniably a model that merits exploration and development.

2 SHAREHOLDER FOUNDATIONS

AMONG 2,200 FOUNDATIONS

632 | 359
RECOGNIZED PUBLIC UTILITY FOUNDATIONS | CORPORATE FOUNDATIONS

1,200 SHELTERED FOUNDATIONS

AND
1,988 ENDOWMENT FUNDS
INCLUDING 13% CREATED BY FIRMS

66 MILLION INHABITANTS

TOTAL ESTIMATED
VALUE OF
DONATIONS

€ 4 BILLION

INCLUDING €2.2 BILLION FROM
INDIVIDUAL DONORS, WITH
THE REMAINING COMING
FROM COMPANIES

KEY OF FOUNDATIONS
IN FRANCE
FIGURES

GROWTH RATE
IN THE NUMBER
OF FOUNDATIONS BETWEEN
2001 AND 2013

80%

Source: ADMICAL, CSA 2014/ Research and Solidarity (Recherches & Solidarités), 2014. Francis Lefebvre Association Memo, 2014. Deloitte annual report on endowment funds.

THE LEGAL AND FISCAL CONTEXT

An under-utilized legislation

BY XAVIER DELSOL

DELSOL AVOCATS

Over the past ten years, French law has evolved considerably: Foundations can now act as majority owners of a commercial enterprise, regardless of the size of the firm. Yet the provisions for this kind of ownership remain largely unused. Are volunteers needed to put them in action?

The “recognized public utility foundation”¹ is an act by which one or more legal persons decide to irrevocably allocate assets, rights or resources towards a non-profit initiative, one that is oriented towards the common good. Such a foundation is given legal capacity after the Council of State (*Conseil d'Etat*) publicizes a decree recognizing its public utility² – although this process can sometimes be lengthy (more than 18 months on average). The foundation is especially subject to the rules established by the Council of State, whether it relates to adoption of by-laws (including an imposed mode of governance), prohibition of founders acting as controlling managers in decision-making bodies, etc.

Furthermore, in order to preserve the longevity of the foundation, the Council requires founders to make a significant endowment (generally in the area of € 1.5 to € 2 million, whether in cash, real estate, or shares).

A mandatory adherence to the “principle of specialization”

The recognition as being “public utility” prevents a foundation from pursuing a mission of asset protection solely for private interests. More specifically, a foundation cannot hold shares of a company with the sole purpose of preserving family assets.

However, since 2005 it has been acknowledged that, “*in the area of firm succession or transmission, a public utility foundation can – without limits or thresholds – receive shares in a firm having industrial or commercial activity, in addition to voting rights, as long as it respects the principle of specialization.*”³ Taken in the strictest sense, this adherence to the principle of specialization implies that the foundation can only possess a minority share in a given firm, in order to prevent the foundation from diluting its original purpose. The only exception is when the firm’s activities are demonstrably linked to the foundation’s mission (for example, a hospital foundation owning a private clinic)⁴; in such cases, majority shareholding is permitted.

This interpretation remains an entrenched doctrine for foundations. Yet in our view, it is mistaken; such a perspective hampers the income options for a foundation which should, in principle, be based mainly on returns on endowment investments. Although this possibility of majority ownership has been open since the law of August 2nd 2005, only the Pierre Fabre Foundation has fully benefited from it⁵.

No direct management of the firm by a foundation

A foundation must not involve itself directly in the management of a company, but rather exercise a role of oversight – even if it owns preferred shares.

Thus, two outcomes are possible: First, an intermediary holding company can be established, one that is completely controlled and managed by the foundation (as is the case with Pierre Fabre). In this situation, the foundation would only be allowed preferred shares, i.e. it would

have priority in receiving dividends, but would have zero – or severely restricted – voting rights. The second solution is illustrated by the framework of the Avril Foundation and the group formerly known as Sofiprotéol. It consists of transforming a firm into a private limited company (or the creation of an intermediary with this form), which makes a distinction between “sleeping” partners (*commanditaire*) and active partners (*commandité*). In this case, the foundation acts as the sleeping partner – although it needs to have at least three representatives. The foundation cannot interfere in the management of the company, but can benefit from dividends. The active partners, on the other hand, fully assume control of the company, including any related risks⁶. It is permissible, however, for a foundation to entrust or transfer the management of its economic functions (especially if they are taxed) to a subsidiary firm, whether civil or commercial – as long as the foundation is a majority owner. This must be done in accordance with its by-laws, notably with respect to the intended goals, as well as the maintenance of the economic independence of the foundation.

Public supervision over foundations regarding their mission

A foundation that is recognized as public utility has to submit to oversight by the Interior ministry and the Council of State. This is done in order to ensure that the social mission and charter of the foundation are followed; this also provides re-assurance for the founders that their wishes will be respected in the future. However, the ministry and the Council do not involve themselves in the operational management of the foundation.

In certain cases, a foundation can be subject to an audit or inspection – as with any other non-profit organization – depending on the nature of its activities or resources (for example, by the Court of Auditors if the foundation receives subsidies, or by the Inspector General of Social Affairs if it receives private donations through a public fundraising campaign).

Tax advantages as a key benefit

A foundation may freely accept donations that are granted to it (notably donations and bequests of company shares) but it must first declare them to the prefecture, which has the power to object⁷. These donations are exempt from transfer taxes⁸.

Without exception, the foundation is exempt from corporate taxes, and benefits from a reduced rate on income from assets: e.g. securities, rent from real estate, agricultural and forest property⁹. These benefits also extend to revenue derived from ownership of subsidiaries; in this way, the foundation avoids restrictions on dividends when they come from managed investments. However, the titles to the firms – those that the foundation actively controls – must be placed in a completely separate (and taxable) accounting area.

Moreover, the foundation can pursue both profit and non-profit activities. These latter activities should be managed in a separate accounting area if their annual income exceeds € 60,540 (in 2015)¹⁰.

Little or no taxation on income from shares

In principle, a foundation is exempt from all taxes coming from share dividends, as long as they are: 1) from inherited investments, or 2) on the holdings of firms in which the foundation is a passive or minority shareholder. Any eventual capital gains on the resale of these holdings are similarly tax-exempt¹¹.

A notable exception: If the foundation is actively involved in the management of its subsidiary, its holdings must be placed in a separate (and taxable) area¹². As a result of this stipulation, a separate entity will usually be created to house the business management activities related to the foundation (e.g., a foundation having a majority stake in a publishing house, with economic ties between the two, or even common senior managers).

Theoretically, dividends received by the foundation are subject to the ordinary tax rate (33.3%). However, the foundation can benefit from a “parent-subsidiary” regime to avoid double-taxation (i.e. corporate taxation before distribution, then again on dividends). With this regime, only 5% of dividends are taxed at the ordinary rate, corresponding to an effective tax rate of 1.67%. In contrast, any eventual capital gains generated by the sale of a holding are taxable according to common law.

Inheritance law: An obstacle to the creation of shareholder foundations?

French civil law states that a person’s wealth be at least partially reserved for heirs (a concept that is not found in Anglo-Saxon law). The deceased must leave at least half of his wealth to the heir if he has only one child; two-thirds if he has two children; three quarters if he has three children, and so on¹³. He can assign the remaining wealth to a beneficiary of his choosing (for example, a foundation).

In the case of a significant *inter vivos* donation (and also a bequest) – for example, company shares possessed by the donor (or the deceased) – it is mandatory to verify in advance that this act does not impinge upon the share of inheritance reserved for heirs.

Since 2006 though, Article 929 of the civil code¹⁴ has permitted presumed heirs to re-assign all or part of their inheritance in advance, towards one or more others (such as a foundation). They cannot subsequently revoke this reassignment except in exceptional circumstances (for example: if the heir renounces his inheritance in a state of need, he can recover it if his situation subsequently improves). However, it becomes necessary to introduce an act for the heirs, in order to prevent the risk that they reclaim their inheritance during the succession process.

1. Law No. 87-571 of 23 July 1987, Article 18. They are to be distinguished from: i) “Commercial foundations”, created by one or more firms, for as long a duration as necessary to complete the initiative of general interest (Article 19 of the Law of 23 July 1987); ii) “Sheltered foundations” that are unincorporated organizations, without legal personality, sheltered within a recognized public utility foundation (Article 20 of the Law of 23 July 1987); iii) Other special categories that do not fall within the scope of this study (university foundations, partnerships, hospitals, etc.). See box below for “Alternative solutions”. – **2.** Law No. 87-571 of 23 July 1987, Article 18, paragraph 2. – **3.** Articles 18-3 and 19-3 of Law n° 87-571 of 23 July 1987 on the development of sponsorship, added by Act No. 2005-882 of 2 August 2005. – **4.** This might paradoxically result in significant tax consequences, if the tax authorities consider that this proximity demonstrates the existence of “special relationships with a for-profit sector of the business,” thus constituting feasible grounds for commercial taxation on the foundation (cf tax instruction of 18 December 2006, resumption to BOFIP: IS-CHAMP-10-50-10-30, § 10 et seq.). – **5.** The other shareholder foundations (Fondation Mérieux, which holds 28% of shares in the SAS Compagnie Mérieux Alliance or the Avril Foundation) have, at most, a blocking minority ownership. – **6.** Article L.226-1, paragraph 1 of the Commercial Code. – **7.** Article 910, paragraph 3 of the Civil Code. – **8.** Article 795, 2° and 4° of the General Tax Code. – **9.** Article 206, 5 ° of the General Tax Code. – **10.** Article 206.1 bis of the General Tax Code. – **11.** BOFIP, No. IS-BOI-CHAMP-10-50-20-10, § 670. – **12.** BOFIP, No. IS-BOI-CHAMP-10-50-50-10, § 560 et seq. – **13.** Articles 912 and 913 of the Civil Code. – **14.** Relatively recent, from the law of 24 June 2006.

Alternative solutions to the recognized public utility foundation

With fewer constraints and more flexibility in management, there are alternative governance forms available that permit partial or complete holding of a firm. However, these forms demonstrate their limitations over the long-term.

The association law of 1901: a fragile owner

The association law of 1901 is the most widespread non-profit form in France, with approximately 1.5 million organizations actively operating under it. In contrast to the recognized public utility foundation, it can be created by a simple declaration by the founder at the prefecture, along with publication in the official registry; it is henceforth prohibited from distributing profit and shares to its members. However, nothing prevents it from holding a firm, either as part of its purpose (if provided for in its by-laws – see below for the case of Leroux Development) or as a means of operating (if, for example, it pertains to outsourcing commercial activities to a subsidiary that the association itself does not want to manage).

If such holdings are purely asset based, the distributed dividends are subject to a reduced tax rate of 15% (after payment of common corporate taxes – usually 33.33% – within the company before distribution). If, however, this ownership entails active management of the subsidiary, it becomes necessary to establish a distinct accounting system for the firm, subjecting the latter to corporate taxes. Nonetheless, there is the option of using the “parent-subsidiary” regime where only 5% of dividends received are subject to common tax (resulting in an effective tax rate of 1.67%). Any eventual capital gains from the resale of holdings, on the other hand, are fully subject to the common tax rate.

Endowment funds: easy to create, but what about after?

Emerging as the result of the law from August 5th, 2008 (article 140), endowment funds feature both the flexibility of an association as well as certain benefits associated with recognized public utility foundations. As with an association, a simple public declaration at the prefecture is sufficient for creation. Similarly, the operations are not constrained, given that their by-laws are very open. The only stipulation is the initial endowment, which should be at least € 15,000 in cash.

As with a foundation, these funds must have a general interest goal; holding onto the title of a firm would not be a sufficient purpose in and of itself. However, a fund could possess shares of commercial firms as part of an initial or augmented endowment, as long as they corresponded to the allowed investments in Article R. 931-10-21 of the social security code. The list is nonetheless very broad and does not exclude much except for risky investments. In principle, the revenues from assets are tax-exempt, including dividends and capital gains. However, if the by-laws state that the endowment can be consumed – without needing to invest it solely in order to live off its revenues – then the dividends are taxable at the same 15% rate as associations. Similarly, in the case of active management of a subsidiary – and presuming that the endowment represents majority ownership and is no longer a simple asset investment – the fund must establish a separate accounting system that is subject to common tax treatments. However, in this case, it appears necessary for the fund to primarily exercise activities towards the general interest in order to maintain its status; otherwise it must act as a re-distributor of its revenues to other general interest organizations.

Out of the almost 2,000 endowment funds present today, very few are majority owners of a firm. As is the case with associations, founders fear that in holding a business entity, their successors will not fully respect the goal for which the fund was created. This paradoxically implies a great deal of confidence in the heirs or successors that will be appointed as the next administrators.

The corporate foundation: a form that cannot control a company

The third solution is the corporate foundation, emerging after the law of July 4th, 1990 and supplementing the law of July 23rd, 1987 (article 19 and following). This is also a form of foundation established to pursue a general interest mission, but by a legal “person” (whether it be a civil or commercial company, an industrial or commercial establishment, a cooperative, a mutual, etc.) for a limited duration (which may not be less than five years but is renewable) and with a limited capacity. This foundation cannot engage in public fundraising, except among employees and shareholders from the founding company, and also cannot own investment properties. The commercial foundation may certainly hold securities in enterprises (including investment funds in multi-year action programs), but the holding should be at least five years, with a total amount of no less than € 150,000.

However, if it holds shares of the parent company, it cannot exercise any associated voting rights (article 19-3 of the same law of July 23rd, 1987). This stipulation is intended to avoid incentivizing companies to create a foundation as a means to control itself; however, given the limited life of such foundations, this ends up being an unlikely possibility. Given the limitation on voting rights, a corporate foundation is naturally unable to be the sole or even majority owner of a company. Tax-wise, these foundations are subject to a similar regime as associations, particularly with respect to the treatment of holdings, dividends, and any eventual capital gains from resale.

The sheltered foundation: a limited independence

The fourth solution, the sheltered foundation, appeared from the same law of July 23rd, 1987 (Article 20). It is defined as “*the irrevocable assignment, towards a work of general interest and with a non-profit goal, of goods, rights and resources to a recognized public utility foundation, one which allows such holdings in its by-laws*”. It is thus an internal entity within a recognized public utility foundation, without legal personhood but sufficiently autonomous according to the agreement between the founders and the public utility foundation. There are currently 50 umbrella foundations in France that house 700 sheltered foundations.

The major advantage of this form is that it permits founders to create their own foundation quickly and easily, and without the large endowment required by a recognized public utility foundation. Management constraints are handled at the level of the umbrella foundation, while the sheltered entity is endowed with decision-making autonomy (and using the name “*foundation ‘Y’, under the aegis of the recognized public utility foundation ‘X’*”). The umbrella organization bestows upon the sheltered foundation – the latter of which is devoid of legal personality – all benefits, tax or otherwise, of a recognized public utility foundation. The sheltered form can thus legitimately possess (in an analytically distinct account) majority or full ownership of a firm as long as the umbrella foundation accepts it, and as long as it is under the same investment constraints and tax regime.

THE VARENNE FOUNDATION LA MONTAGNE

THE PREDECESSOR TO SHAREHOLDER FOUNDATIONS

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IN THE 1980S, A PROTOTYPE OF THE FRENCH SHAREHOLDER FOUNDATION FORM WAS CREATED, BUILT UPON A DESIRE TO PRESERVE THE INDEPENDENCE OF THE DAILY REGIONAL NEWSPAPER “LA MONTAGNE”. HOWEVER, BACK THEN IT WAS THE NOT THE STATE COUNCIL THAT DECIDED UPON THE CONTOURS OF THIS ORGANIZATION, BUT RATHER THE COURT OF CASSATION.

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After World War II, many former resistance fighters were selected to run a number of regional daily newspapers in France, as the priority was to maintain a spirit of independence. At “La Montagne”, the paper established in 1919, this idea remains as perhaps the most sacred of all the republican ideals instilled by its founder Alexandre Varenne. In 1944, the newspaper was one of the few allowed to appear under its original name. Following the death of Varenne in 1947, his widow Marguerite continued carrying the torch, transforming the paper into an influential media group.

“THE FOUNDATION
ALLOWS THE WINDS OF LIBERTY
TO KEEP BLOWING”

An obsession with securing capital

.....

In 1972, the daily newspaper in Rouen, “Paris-Normandie”, was purchased from 35 former resistance fighters that had held the title to the paper since liberation. In contrast, the new owner, Robert Hersant, was a man who had never known the history of combat – or the ideals of resistance – upon which the paper was built. To avoid falling into the same fate, Marguerite Varenne became obsessed with the idea of securing the assets of the newspaper (of which she had 80% ownership in the 1980s). She decided that a foundation would be the best solution, establishing one in 1979 and having it recognized as “public utility” in 1988. After considerable deliberation, the Interior ministry allowed Mrs. Varenne to provide two bequests to the foundation, raising its equity stake to 36%.

While the foundation still lacks the 15% necessary to fend off unwanted buyers, two companies have been created by managers of the newspaper to progressively purchase the required amount.

The trap of the transfer clause

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This move did not take into account the rights of journalists when a change in ownership occurs, namely with respect to their rights of “conscientious objection” and “divestment”; indeed, some editors did not miss the opportunity to assert their prerogative in these matters. The management retorted by noting that there were no editorial changes and that operational control remained the same; after all, Marguerite Varenne was still on the board. The Court of Cassation refused the journalists appeal in 1991 and recognized the change in ownership. In the process, a foundation became a business owner for the first time in France.

A model adapted to the press

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Here then, is the ancestor of the shareholder foundation model! Its instigators were not seeking to pioneer a new governance form, but rather a means to protect their firm. As a result, the humanist ideals of the founder were preserved, capital was secured, and inheritance was facilitated. Upon the death of the CEO Jean-Pierre Caillard in 2012, his widow Edith was co-opted into the position, as outlined by the by-laws. Only time will tell how the group will handle the striking transformation of the press, but until then, the winds of liberty continue to blow.

THE PIERRE FABRE FOUNDATION

THE FRENCH EXAMPLE OF A SHAREHOLDER FOUNDATION

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THE SOLUTION FOR ASSURING THE LONGEVITY OF ONE OF THE LARGEST PHARMACEUTICAL LABORATORIES IN FRANCE BEGAN FROM A PHILANTHROPIC PROJECT.

.....

Although he founded one of the most illustrious French companies in the medical and cosmetic industries, Pierre Fabre was first and foremost a pharmacist. During a trip to Niger in the 1990s, he participated in a vaccination campaign organized by the Ministry of Health, and out of habitual curiosity, decided to take a sample of vaccines back to France for analysis. We can only imagine his surprise upon discovering the vaccine contained only distilled water.

Thus began his awareness about the rampant problem of counterfeit medicine in the poorest countries, where locals do not have access to essential medication or healthcare. Anxious to aid in this area, Fabre decided to create a recognized public utility foundation in 1999, oriented precisely towards improving access to quality medicine for populations in the poorest countries. This mission was expanded in 2006 towards quality healthcare more generally.

In providing the foundation with the necessary resources, Fabre established an initial endowment: Firstly with cash, then property in Castres (which would become foundation headquarters), and finally 5% of equity in the Pierre Fabre group.

“THE FOUNDATION'S
VERY EXISTENCE PERPETUATES
PIERRE FABRE'S HUMANISTIC
VALUES”

PIERRE-YVES REVOL AND BÉATRICE GARRETTE,
PRESIDENT AND EXECUTIVE DIRECTOR
OF THE PIERRE FABRE FOUNDATION

The foundation as the sole legatee

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As he had no heirs, Pierre Fabre became preoccupied with the issue of succession, and found that the foundation model provided an appealing solution for guaranteeing the longevity of both the group and his values. To this end, Fabre decided in 2008 to donate a 60% holding of the Pierre Fabre group to the foundation. At the same time, he opened up equity ownership to the employees of the group, to a maximum of 7%. Finally, Fabre modified his will to stipulate that the foundation would be his sole legatee. Following his death in July of 2013, the foundation holding in Pierre Fabre was increased to 86%, with employees holding the fully allowed 7%. The rest is currently under control by the group itself. In addition, Pierre Fabre established a legal intermediary structure between the foundation and the group, named Pierre Fabre Holdings (*Participations*). Nothing in the law compelled him to do so, but he did it in order to ensure the highest level of transparency for corporate governance.

PIERRE FABRE IN FIGURES

Revenues (2013) > €2.01 billion
Percentage of revenue from outside
of France > 56%
Number of employees > 10,000
Operating in > 44 countries
Products sold in > 130 countries

THE PRESIDENT AND THE EXECUTIVE DIRECTOR DESCRIBE THE OPERATIONS OF THEIR FOUNDATION – THE FIRST OF ITS KIND IN FRANCE.

The foundation was specifically created to perpetuate Pierre Fabre's humanistic values. Today, the governance is comprised of members that he knew personally. But what about the future?

PIERRE-YVES REVOL – The foundation's very existence perpetuates the humanistic values of Pierre Fabre. It is the governance body of PFP (Pierre Fabre Participations) that is responsible for adhering to the mission of longevity decreed by Pierre Fabre. We must thus ensure that new members in the governance bodies understand and respect these imperatives, and our role in the process is to transmit these values. We have already established very strict rules on the subject. For example, the foundation has the right to veto the nomination of any new members of PFP. Yet we know also that a business is a living organism. It's not impossible that, in the far-off future, the current system shows its limits and should be re-thought. But that's an issue that shouldn't be raised for quite some time.

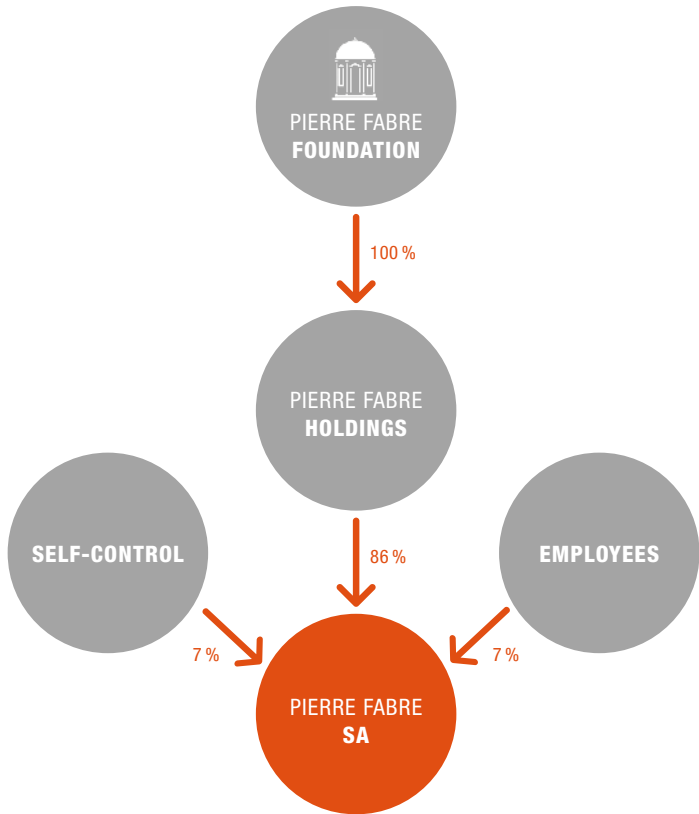
Pierre Fabre Participations (PFP) follows two potentially contradictory objectives: Giving the foundation the means to fulfill its mission through dividends, and encouraging the development of Pierre Fabre SA in its competitive market through re-investment. How are these two objectives handled in practice?

PIERRE-YVES REVOL – The two objectives do not appear to me as contradictory. For a very long time, there has been a policy of limited dividend distribution, where the majority of profits are reinvested in research and development of the firm. Since the establishment of the foundation, dividend distribution has been slightly raised in order to give the foundation the resources to act. However, these dividends still represent a very small part of the annual profit. It's a distribution that we make each year, based on the economic context and needs of the foundation.

On the other hand, is there a risk of collusion between the objectives of the group and those of the foundation?

BEATRICE GARRETTE – By its by-laws, the foundation must act in an independent and disinterested manner, but that does not prevent us from engaging in the areas where the Pierre Fabre Laboratories have acquired certain competencies. This will be the case with the upcoming "tropical dermatology" axis, comprised of caregiver training programs and health-care programs for serious and neglected diseases such as Noma. Since the beginning, the Pierre Fabre Foundation has chosen to target the areas with a lot of demand for healthcare and few providers: this is as much the case with pharmacist training – an essential link in any healthcare system – as with the battle against sickle cell disease that affects 15% of the population of sub-Saharan Africa.

WHO OWNS WHAT?



From a business and competitive point of view, what are the advantages and disadvantages for Pierre Fabre being 86% owned by a recognized public utility foundation?

PIERRE-YVES REVOL – I see multiple advantages. The first is that it permits us to remain independent. You know that Mr. Pierre Fabre didn't have any direct descendants; the foundation was seen as the most useful tool for ensuring that his industrial group wouldn't be put up for a fire sale after his death. The second advantage is the long-term stability of capital. The foundation is contracted to maintain its title for at least ten years, so it truly has a long-range horizon. However, this doesn't mean that the capital is frozen forever. If it's justified, we have the possibility to include minority partners in the future. The third advantage: the fact of being controlled by a recognized public utility foundation reinforces our image as a corporate citizen, notably among our partners. It's difficult to quantify, but it will certainly be verified over time. Regarding the disadvantages, the only one that I see is that the philanthropic activities of the foundation are subordinated to the health of the group. We have a great responsibility for economic performance, because the day that the firm enters into financial difficulty and stops issuing dividends, the foundation will lose the income that gives us the means to act.

“WE HAVE A DUTY OF TRANSPARENCY AND COMMUNICATION.”
BÉATRICE GARRETTE, EXECUTIVE DIRECTOR

How is the Foundation present in the lives of the Pierre Fabre employees?

BEATRICE GARRETTE – We have a duty of transparency and communication vis-à-vis the partners of the Pierre Fabre group. It's why we recently invested in an updated internet site, as well as why we publish an annual report. To a certain extent, we can exploit the existing expertise and competence in the group, and call, for example, for a skills-based sponsorship program. The Pierre Fabre Laboratories make their engineers and researchers available to the foundation. By doing so, these employees are proud to serve the foundation, and at the same time are able to see, on the ground, the work that we do in Africa or in Asia. Moreover, the foundation is now in a highly symbolic location, which was the personal property of Pierre Fabre before being bequeathed. The domain of Doyse near Lavaur (Tarn) was developed to host the headquarters of the foundation as well as to facilitate seminars, workshops and meetings between actors from the North and South, in the areas of health and developmental aid.

“THE PHILANTHROPIC ACTIVITIES OF THE FOUNDATION ARE SUBORDINATED TO THE HEALTH OF THE GROUP. WE HAVE A GREAT RESPONSIBILITY FOR ECONOMIC PERFORMANCE.”
PIERRE-YVES REVOL, PRESIDENT

FROM ANOTHER ANGLE

The inspiration of German and Austrian models for SMEs

INTERVIEW WITH **JEAN-PASCAL ARCHIMBAUD**
PRESIDENT OF THE ARCHIMBAUD GROUPE

The case is sufficiently unique in France to warrant examination: Coming from a family sawmill recovered in 1982 by the current CEO, Jean-Pascal Archimbaud, the eponymous group established in the Deux-Sèvres (Poitou-Charentes) has specialized since 1984 in softwood lumber used for fabrication of wooden pallets. From five production sites in France with 180 employees, the company derives an annual revenue of €75 million.

Although operating in a difficult timber industry, the company has experienced sustained growth. It has invested in the development of related products and production equipment for wood pellets, becoming, with a 30% share, the French leader in this market.

With a looming prospect of firm succession, Jean-Pascal Archimbaud appears convinced of his choice to create a shareholder foundation. He explains his reasoning.

What would you say are the values that will be transmitted?

I, as the descendant of many generations of entrepreneurs, inherited a business legacy. My great-great-grandfather created a firm that originally built water mills. My grandfather, deported to Germany and liberated by the Russians, lived through a dramatic historical period and fought to revive the company after the war and the ruin of his family. My parents experienced the 30 year post-war boom, and participated in the rebirth of the firm. As for myself, I never experienced crises, and have been fortunate to handle the development of the company over the last thirty years. I was raised in a tolerant culture, with no taboos about the subject of money, with strong values of integrity, brotherhood and trust. Our roots were nourished by the local culture of mutualism and cooperation – a founder of Crédit Agricole was born in Coulon – and the concept of solidarity is part of our education. We are entrepreneurs, not annuitants.

Why did you envision transmitting your company to a foundation?

At a time when I'm planning my succession in the company and where numerous attractive purchase offers are emerging – from foreign groups in particular –, my choice is gravitating

towards the shareholder foundation model. Handing over a company is not only about transmitting financial value, but also and especially about transmitting its human and intangible capital and its job-creating capacity. This builds the local economy while allowing us to survive and innovate.

Transmitting our company to a foundation seemed to be the best choice to protect the industrial usefulness of our firm and reinforce our presence in our territories, while respecting the humanistic values attached to my family name. I prefer to give up short term profitability and the potential proceeds from selling my firm for the sake of a long term economic and social vision.

“HANDING OVER A COMPANY IS NOT ONLY ABOUT TRANSMITTING FINANCIAL VALUE, BUT ALSO AND ESPECIALLY ITS HUMAN AND INTANGIBLE CAPITAL”

What model is your inspiration?

Over a decade ago, I discovered that our German, Austrian and Scandinavian contemporaries were structured this way. Through discussion with them, I understood the strength of this model that pairs philanthropic governance with economic activity. Recently, I also realized that Pierre Fabre, which is one of our loyal clients, was the first French firm to belong to a foundation. This seemed to me to be a visionary choice.

Pierre Fabre had no heirs. What do your children say?

My children are very open to this perspective, but they need to be re-assured of the relevance of this choice. Today, I hold 72% of group shares, each of my three children 8%, and my ex-wife 4%. My three children have chosen different paths from the family business, and do not wish to be involved in the hand-over. But we have a well-understood vision that they will be strongly involved in the governance of the future foundation, if we end up creating it. We thus have a proud and confident forecast for our involvement – and for that of the four generations ahead of us.



PORTRAIT

LA CHICORÉE LEROUX

A FIRM BELONGING TO... AN ASSOCIATION

AN ORIGINAL SOLUTION TO GUARANTEE THE STABLE TRANSMISSION OF A FIRM

Created in 1858 in Orchies in the north of France, the Leroux firm is a French leader in chicory based products. The company was passed down from father to son until 1985. In that year, the two brothers, Alain and Robert, who had no descendants, decided to entrust their business to their cousin Michel Leroux and one of the executives, Michel Hermand, a programmer that joined the company in 1968. Loyal to the spirit of innovation that characterized the firm, and in order to assure the longevity of the firm and its social mission, the two brothers decided to bequeath their shares to an association.

Each year, all profits are re-invested into firm development, except for 30,000 euros allocated for financing humanitarian and artistic initiatives each year¹. Named “Leroux development”, the association still holds the title to the Leroux Group enterprises, continues pursuing charitable activities, and functions as an expert committee with rights to accounting information about the Group companies. In particular, it aims to “oversee the founding values of the Groupe FINALER-LEROUX, related to the longevity, on one hand, of the product, brands, culture, employment, and site; on the other hand, shareholding and asset value – notably access to information on activities – and the funding for charitable, humanitarian, social and cultural activities.”²

The association is comprised of qualified members familiar with the firm's culture, and as stated in the by-laws, a former president from one of the Group firms, as well as a member of Alain or Robert Leroux's family. This ensures that the will of the founders of the association – and the family heritage – are preserved.

Furthermore, the by-laws are written in order to guarantee the principle of independence of both the operational entities and the association. To do this, they stipulate that, *inter alia*, active executives and employees of group companies may in no case run for association membership. Executives of the Group's French firms may, however, take part in a special commission; here, they lack voting rights, but are given the right to inspect association activities as well as veto certain decisions at particular general meetings. Thus, placing a shareholder association at the head of a group guarantees a stable transfer of company ownership and respect for the will of the founders, thereby ensuring firm preservation without compromising economic development. The results are visible with the strong performance of the Leroux Group in recent years.

¹. “Leroux, 156 ans de règne sur la chicorée” Josée Pochat, *Valeurs actuelles*, 31 July 2014, p.32. – ². Article 2 of the by-laws of the Leroux Développement Association.

“In France, nothing has ever prevented a foundation from owning a company”

INTERVIEW WITH **YANNICK BLANC**
THE PREFECT OF THE VAL D'OISE REGION

Yannick Blanc was formerly the deputy director of political affairs and community life at the Interior Ministry. Along with parliament member Bernard Carayon, he has also been at the origin of a specific amendment to the Jacob-Dutheil law of 2005 regarding the transmission of firms.

What were the motivations behind this amendment?

The thinking on shareholder foundations had started a little bit in advance of the vote on the Jacob-Dutheil law. It had been inspired by the situation of the media group “La Montagne”. Alexandre and Marguerite Varenne, owners of the journal, had created a foundation and made it their sole heir; it consequently became the majority shareholder of the group. This unusual situation was at the very edge of the Council of State's doctrine, which saw it as a deviation from the specialization principle for legal persons.

What does this mean exactly?

If a legal person is created for a certain activity, it cannot engage in another activity. But at the same time – whether it pertains to the administrative doctrine, legal texts or by-laws – foundations were permitted to own property. This could be in the form of real estate, land and of course, financial assets – particularly holdings in a company. In substantive law, nothing prevented a foundation from company ownership. But the Council of State considered that a foundation, in its capacity as a majority shareholder, would become the de facto firm manager and thus violate the principle of specialization.

And this is the moment when Bernard Carayon came to see you...

Absolutely! Bernard Carayon came to see me to speak about Pierre Fabre. The founder of the pharmaceutical group had already created a public utility foundation, and he had the intention of endowing it with the majority of his shares. His intention was to ensure the sustained autonomy of his firm, and to prevent it from being purchased.

Why was a law needed?

When there is a law, the Council of State adheres to and applies it. In the absence of a text, however, its doctrine evolves. It's what happened to foundations for two centuries, in a very different direction from shareholder foundations! The amendment has given shareholder foundations a fundamental legal status, on the condition that they are not managing a firm. The foundation managers are recruited for their competence regarding philanthropic activities, and not to dictate firm strategy. It's thus a good thing that there is a cut-off between the foundation decisions and those of the company.

“WE WANT TO DEFEND
THE IDEAL OF
CONVERGENCE BETWEEN
BUSINESS AND
THE GENERAL INTEREST!”

Are there still obstacles from a legal and tax perspective?

No, there are no more obstacles in principle. A foundation can receive subsidies of any kind. Thus, nothing prevents them from receiving dividends from a firm. We can reason – as the Germans do – that the foundation can stabilize the shareholder structure and protect the firm from potential predators. This was, among other things, the goal of Pierre Fabre. In addition, this structure is a good way to ensure a sustained income for the foundation. The foundation model provides an ideal of stable shareholding, in contrast to physical owners that have a limited life, and financial investors that have a profitability motive that runs contrary to a long range vision. The foundation, on the other hand, has the imperative in its by-laws to ensure the long term preservation of the firm. We want to defend the ideal of convergence between business and the general interest!

Don't shut the door on economic innovation for foundations!

INTERVIEW WITH **BEATRICE DE DURFORT**
DELEGATE-GENERAL OF THE CENTRE FRANÇAIS DES FONDATIONS (CFF)

Even if they are less numerous than in other European countries, foundations (including umbrella/ sheltered foundations, corporate foundations and endowment funds) are represented as a group at the core of the Centre français des fondations (CFF). The delegate general of the CFF, Beatrice de Durfort, cites the necessity for endowments to hold assets that can generate revenues; these in turn permit a sustained financing of charitable works.

Certain foundations are very old.

How have they endured over time?

From the very beginning, foundations were made on the basis of contributing towards the common good or public utility; these projects are financed from the returns on their assets. Without doubt, the most well known existing examples – and one of the oldest from 1443 – is the Hospices Foundation of Beaune. Although it is now a public institution, the hospital still remains partially financed by income from the Hôtel-Dieu museum, and notably from the Burgundy vineyard and its famous annual auction.

But doesn't the management of such assets require a competence that foundations may not necessarily have in-house?

Numerous foundations possess holdings in the form of real estate, agricultural or forest lands, even vineyards. The most often is in direct assets, and sometimes – although seldom – in external subsidiaries. Their management is not worse, and in some cases better, than that of a commercial or family enterprise. It is therefore difficult to understand why a foundation would not be able to manage economic activities through its majority holding of a firm. When a large company creates its own foundation, the former delegates certain managers to the board of the latter; these managers proceed to combine management skills. Why couldn't the reverse be true? Directors of a foundation may well possess the skills to not only handle the daily operations of a firm, but also assume terms in office for senior posts – whether in administration or representation.

So the possibility of a foundation being a majority owner of a for-profit company could be an advantage?

Yes, we now need new tools to promote the general interest. We need to be inventive for tomorrow, to find other sources of revenue instead of relying on private donations and public subsidies. We need to challenge our existing stock of ideas, and not shut the door on economic innovation for foundations. To sustain the activities of foundations and to allow more of them to be created, the best guarantee of preservation is a stable and substantial asset base. And we've seen from the current crises that a purely financial asset base is not the most stable – far from it. A well-managed company is more likely to survive and sustain employment, especially if it has governance that allows it to endure over time (where the risk of a hostile take-over does not exist, as the foundation has a statutory obligation to preserve its ownership).

“WE NOW NEED NEW TOOLS
TO PROMOTE THE GENERAL
INTEREST, TO BE INVENTIVE
FOR TOMORROW”

But the foundation must be supervised in order to preserve its goals?

Of course, the ultimate goal of the foundation should be carefully preserved, and economic tools are only a means of funding initiatives, at least when it comes to ownership of a company that is completely disconnected from the purpose of the foundation. But this does not imply the need for a rigorous evaluation of the principle of specialization. If necessary, effective governance – like in the cases where there is a body autonomous to the foundation (e.g. a holding entity that is a 100% subsidiary of the foundation) – can be sufficient to guarantee adherence, without contaminating the public utility goals of the foundation.

AND ELSEWHERE?

Numerous countries acknowledge the possibility of a foundation holding the majority of capital in a commercial firm, as is the case in India, for example. But there can be certain constraints, notably with respect to the fiscal environment. In this respect, the Netherlands and the United States offer two strikingly different approaches.

MINIMAL FORMALITIES IN THE NETHERLANDS

There are numerous foundations in Holland, a phenomenon explained in large part by the lack of red-tape in the country. No prior regulatory authorization is required for creation, and a simple notarized act is usually sufficient. In addition, whatever may be their social mission, there are no limits regarding the holding of firm shares, whether it be a blocking minority or majority of capital.

An example is the DOEN Foundation, which seeks to establish a green, socially-inclusive and creative society. Each year, this shareholder foundations supports more than 200 cultural and social pioneers, whether individuals or companies. The foundation is financed by income from the Dutch Postcode Lottery, the BankGiro Lottery, and the Friends Lottery.

The main constraints for the foundation are tax-related. If the tax authorities grant a status of “ANBI” (*algemeen nut beoogende instelling*, the list of which is published on the Dutch tax administration website) the foundation can receive gifts and bequests – including the holdings of commercial firms – benefitting from complete exemption on transfer taxes. Otherwise, the applicable tax is 45%.

The foundation can also be exempt from corporate taxes, as long as: 1) no more than 10% of its activities are commercial, 2) the management of the holding remains passive (even if the foundation is a majority owner), and 3) the primary activity is towards the general interest (in a limited sense as outlined in the tax law). In any other case, the profits become subject to corporate tax. However it is possible, with 5% or less of capital, to apply for the “parent-subsidiary” regime as is the case in France. This system

of “holdings exemption” allows for the complete exemption of taxes on capital gains and dividends (including reimbursement of withheld taxes – 15% – in the distributing firm); therefore, the foundation is effectively fully tax-exempt.

A STRINGENT FISCAL REGIME IN THE UNITED STATES

Foundations that are considered public charities – because their resources are spread among a wide base (and also because they are taxed according to Article 501-c of the Internal Revenue Code – IRC) – can possess holdings of subsidiary firms in a relatively flexible manner, even those firms that are not directly connected to their mission. These charities benefit from a preferential tax treatment (exemption from received dividends, subject to tax only in the upstream subsidiary). It is important to note, however, that if the foundation holds more than 50% of the subsidiary, any other revenues (rent, royalties, interest on loans, etc.) are subject to tax under common law (IRC Article 512-b). Private foundations, controlled by a small group of people and financed in a restrictive manner, benefit from the same federal tax regime but are subject to much tighter constraints, particularly with respect to their participation in commercial activities. Accordingly, in order to avoid abuses and limit the direct involvement of foundations in business activities (i.e. “excess business holdings”), a heavy tax imposition (up to 200% of profits) applies when a foundation holds more than 20% of the voting rights of a business. There are only two exceptions: 1) when there is a direct,

organic link between the mission of the foundation and that of the firm, and 2) when there is an intermediary holding that is itself the owner of one or more subsidiaries (IRC Article 4943). This guarantees the independence of the subsidiary, and notably of its managers who cannot – with very few exceptions – be the same as those of the foundation.

One finds in this sense a similarity to the French doctrine, in that the foundation (if private) does not involve itself in the management of a business subsidiary, ostensibly to preserve its own independence and mission.

Private foundations are also mandated to distribute at least 5% of the value of their assets each year to charities or charitable activities.

THE TATA GROUP: AN INDIAN VARIATION

With 600,000 employees, the Tata Group is one of the most prominent conglomerates in India, operating in a number of diverse industries such as steel, tea, automobiles and telecommunications. Far from being a local enterprise, the group features ownership and control over a number of well-known European and American brands like Jaguar, Land Rover, Tetley Tea – even the Carlton Hotel in Boston. In 2013, Tata recorded revenues of US \$100 billion, of which 60% was generated from foreign operations; on the Mumbai stock exchange, the Group's companies have outperformed competitors for the better part of the past decade¹.

Founded in 1868 by the industrialist Jamsetji Tata, the Tata group has been managed since 1912 by the holding firm Tata Sons

Limited; this body handles strategic decision making for the entire group and also represents the interests of a number of different shareholder groups. Although 66% of the group's equity ownership is represented by five philanthropic trusts, these trusts have a very limited role in governance and have high managerial distance from Group companies. Similarly, the trusts are financially independent from the Tata family, although a number of descendants of the founder still maintain key posts in the Tata Group companies, Tata Sons Limited and the various non-profit organizations financed by philanthropy.

In compliance with Indian law, 85% of trust income must be used for philanthropic purposes. For more than a century, the Tata foundations have contributed to the economic development of India, although the vast majority of donations have taken place since 2000. In 2010 alone, \$170 million was allocated to various philanthropic initiatives, directed towards “institution building”: education, healthcare and economic development projects.

The humanistic values of the Tatas are not only present in the philanthropic activities, but are also inscribed into the heritage of the group. For example, since its founding, the conglomerate has been a leader in human resource management innovation. Between 1877 and 1921 for example, the Tatas pioneered many new labour practices such as pensions, eight hour work days and maternity leave.

¹. Thomsen, S. (2011) Trust Ownership of the Tata Group.

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KEY OF FOUNDATIONS IN EUROPE FIGURES

€350 BILLION

THE MINIMUM
ESTIMATED CAPITAL
OF FOUNDATIONS

€83 BILLION

IN DONATIONS
TOWARDS
THE PUBLIC GOOD

?

NUMBER OF
SHAREHOLDER
FOUNDATIONS

- > GIVING?
- > INVESTMENT?

129,000

PUBLIC UTILITY
FOUNDATIONS



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