

Nonprofit controlling for profit: the role of ‘collective hybrids’ in fostering sustainability

Riccardo Rao*

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A. Introduction

Corporate purpose is currently a pivotal topic in business law agendas. There is indeed a growing debate on whether corporations should just serve shareholders or stakeholders as a whole (eg employees, suppliers, customers, the environment).¹ In other words, the question is whether they should only pursue profits or a more holistic balance with social and environmental outputs.

* Post-doc researcher in business law at the University of Parma, Italy.

1 Colin Mayer, ‘Prosperity: Better Business Makes the Greater Good’ (2018), *passim*; Lucian A. Bebchuk, Roberto Tallarita, ‘The Illusory Promise of Stakeholder Governance’ (2020), 106 Cornell Law Rev., pp. 91–178; Edward Rock, ‘For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose’ (2020), ECGI Law Working Paper no. 515, pp. 1–30.

This is not a new debate, being rather ‘as old as corporate law itself’.² It arose at least in the Middle Ages,³ resurfacing from time to time.⁴ One might recall: the idea, forged in England during the 17th century, that the corporate form could only be conceded when a public benefit was promoted; then, in the 20th century, the vibrant exchange between American Professors Berle and Dodd, as well as the equally intense dispute among European scholars opposing contractual and institutional views.⁵

Recently, to overcome the inner for profit nature of corporations, alternative legal vehicles have been introduced in various jurisdictions. They are a sort of hybrids in between for profit and nonprofit. An initial prototype may be found in the community interest company or CIC, introduced in the UK in 2004⁶ and then implemented by other legal systems too, eg in Canada.⁷ Another form is given by the benefit corporation, devised in the US state of Maryland in 2010 and later transplanted with variations in most of the other US states⁸ and in foreign jurisdictions, including among others Italy⁹ and France.¹⁰

As an approximation, CICs may be seen as leaning more towards the nonprofit side, while benefit corporations appear to remain closer to the for profit one.¹¹ Indeed, whereas CICs can distribute profits to their members

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- 2 David Kershaw/Edmund-Philipp Schuster, ‘The Purposive Transformation of Corporate Law’ (2021), 69(3) Am. J. Comp. L., p. 478, 479.
 - 3 Holger Fleischer, ‘Corporate Purpose: A Management Concept and its Implications for Company Law’ (2021), 18(2) ECFR, pp. 161–189.
 - 4 Jennifer G. Hill, ‘Corporations, Directors’ Duties and the Public/Private Divide’, in Arthur B. Laby/Jacob Hale Russell (eds.), *Fiduciary Obligations in Business* (2021), pp. 285–300.
 - 5 Martin Gelter, ‘Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light’ (2011), 7 NYU J. L. & Bus, pp. 641–730.
 - 6 Joseph S. Liptrap, ‘British Social Enterprise Law’ (2021), 21(2) J. Corp. L. Stud., pp. 595–630.
 - 7 Community contribution companies or C3s, introduced in the province of British Columbia in 2013.
 - 8 J. Haskell Murray, ‘An Early Report on Benefit Corporations’ (2015), 118(1) West Virginia L. Rev., pp. 25–57.
 - 9 Marco Speranzin, ‘Benefit legal entities in Italy: an overview’ (2022), 19(5) Eur. Co. Law, pp. 142–150.
 - 10 Nadège Jullian, ‘Sociétés à mission: bientôt 5 ans d’introduction d’une once de non-lucrativité en droit des sociétés’ [*Sociétés à mission: almost five years since the introduction of a hint of non-profitability into corporate law*] (2024), *Droit des sociétés*, no. 4, pp. 1 et seqq.
 - 11 Dana Brakman Reiser, ‘Benefit Corporations – A Sustainable Form of Organization?’ (2011), 46 Wake Forest L. Rev., p. 591, 606.

up to a certain percentage (eg 35 %), benefit corporations are allowed to distribute profits up to 100 %.

The overall debate is centred on 'single entity' hybrid models, like those aforementioned. However, a certain degree of hybridization between for profit and nonprofit can be achieved also through separate entities. This is comparatively much less explored in legal scholarship and policymaking.¹²

In fact, rather than setting up a hybrid vehicle, a similar result can be reached by placing a for profit entity (corporation) under a nonprofit one (foundation). In a nutshell, the mechanism works as follows: a foundation owns and controls a corporation that carries out business activities in the market. Thus, the foundation is able to greatly influence how the invested-in corporation is run. On the one side, the foundation aims at preserving the profitability of the controlled corporation; on the other side, as a non-profit organization, it promotes one or more social and environmental purposes. Looking at the whole picture, the structure may be seen as a 'collective hybrid'.

The goal of this work is to argue that – in the same way as single entity hybrids, also – collective hybrids may be a valuable tool in order to foster sustainability. As such, lawmakers should enhance the use of collective hybrids by providing a specific and well-rounded regulatory framework. The work is structured as follows: it starts by depicting the main features of collective hybrids (para. B), before examining the current legal landscape in a selection of jurisdictions (para. C); then, it delves into empirical data on the performance of collective hybrids in terms of sustainability, putting forward on these bases a set of policy proposals (para. D).

B. 'Collective hybrids'

I. Main features and limitations

A foundation is characterised by certain main features:¹³ separate legal personality (full or partial), a charter (which specifies, inter alia, the foundation's purpose), a board of directors (chosen by external institutions

12 Henry Hansmann, 'Foreword', in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. i, v.

13 Steen Thomsen/Nikolaos Kavadis, 'Enterprise Foundations: Law, Taxation, Governance, and Performance' (2022), 6(4) *Ann. Corp. Gov.*, pp. 227–333.

or through a co-optation regime, in which directors appoint their own successors), oversight by a state authority.

Its creation usually occurs by an irrevocable donation or will. The initial endowment shall encompass sufficient funds, which can also be shares in a corporation. If these shares endow the foundation with a control over the corporation (not necessarily 100 %, usually 51 % of voting rights would be enough), it gives rise to an 'enterprise foundation' plus a 'subsidiary operating corporation', as they are often called in literature. This combination results into a collective hybrid, as it is also referred to herein.

The profits earned by the corporation can be channelled to its shareholder, ie the foundation, by means of distributing dividends. In turn, pursuant to the non-distribution constraint which generally characterises foundation law,¹⁴ the foundation cannot assign these amounts to its founders, members or directors. Rather, they should be used for the altruistic purpose of the foundation, such as the social and environmental common good. Clearly, all the above is net of peculiar provisions across jurisdictions, which are discussed further below.¹⁵

Before going into the details of the different regulation across jurisdictions, two limitations are here worth pointing out. This work does not deal with 'direct enterprise foundations' and 'subsidiary foundations'. Their differences – compared to enterprise foundations, subject matter of this work – are briefly explained below.

Usually, foundations are allowed to directly run business activities and even gain profits, provided that the non-distribution constraint is fulfilled.¹⁶ So, in order to engage with business activities, a foundation would not strictly need to act through a corporation. But direct enterprise foundations, as they may be called, are not common at all. The major reason is that the foundation form is not designed for directly running a business. Thus, when a foundation intends to engage in business activities, it is way more common to do it by holding participations into a corporation, so resulting into an enterprise foundation's structure.¹⁷

14 Henry Hansmann, 'The Role of Nonprofit Enterprise' (1980), 89 Yale L. J., p. 835, 838.

15 See *infra* C.

16 Hansmann (1980), p. 838.

17 Austria goes further: therein, direct enterprise foundations are not just rare like in other countries, but explicitly prohibited. The main reason for this ban likely lies in the need to protect the foundation's members from potential claims by business creditors. Indeed, to directly perform business activities is perceived too risky for a foundation; while to hold participations into corporations, as an enterprise founda-

Enterprise foundations shall also be distinguished from another phenomenon: a foundation can be part of a corporate group as the vehicle in charge of promoting philanthropic activities within the group. In this case, there is not a foundation that controls a corporation, but the other way around: the foundation is not at the vertex of the corporate chain, instead it is merely a subsidiary to which part of the group's corporate profits are allocated for philanthropic purposes. Therein, decisions are ultimately assumed by the holding corporation, not by the foundation placed at the bottom. In short, subsidiary foundations have not a say in business decisions, and that is a striking difference compared to enterprise foundations.

II. How widespread are collective hybrids at present?

Once depicted the main features of enterprise foundations, it is useful to explore their quantitative dimension and practical relevance to date. For over a century, enterprise foundations have been common in Denmark;¹⁸ according to a recent study enterprise foundations control about 63 % of Danish capital markets (meaning that, in Denmark, the listed corporations owned by enterprise foundations account for such a share of the entire market capitalization).¹⁹ Renowned examples are Novo Nordisk, A.P. Møller Maersk, and Carlsberg.

Outside Denmark, the model is present in other Scandinavian countries like Sweden (19 %, eg it is used by Ikea) and Norway (8 %), as well as in Luxembourg (62 %) and the Netherlands (14 %).²⁰ Furthermore, its deployment is not negligible in German-speaking countries like Austria (26 %), Switzerland (6 %, eg Rolex) and Germany (4 %, eg Carl Zeiss).²¹

tion, is deemed less risky – given the corporate 'shield' – and so admitted by the law. See Susanne Kalss, 'The Austrian Foundation', in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. 61, 66–67.

18 Henry Hansmann/Steen Thomsen, 'The Governance of Foundation-Owned Firms' (2021), 13(1) *J. Leg. Anal.*, p. 172, 173.

19 Steen Thomsen, 'Foundation Ownership around the World', in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. 1, 7 et seq., 15 et seqq.

20 Ibid.

21 Ibid. As a methodological note, the aforementioned figures only refer to listed corporations owned by foundations, for which more reliable data are available. As such, they do not take into account unlisted corporations owned by foundations. This is a significant limitation, due to the difficulty of carrying out empirical analyses on un-

In the rest of the world – with a few exceptions like India (6 %) ²² – enterprise foundations are rare. As a result, at the global level, they account just for an estimated 1.6 % of market capitalization. ²³ The different spread is not easy to explain, but it may be due to several factors.

First of all, religion played a role. In Scandinavia and German-speaking countries, having a strong Protestant influence, the sake of profits was not seen in conflict with religious precepts. Profits and the common good could go *pari passu*. On the contrary, in southern Europe, the rooted Catholicism always looked at profits with suspicion: ²⁴ money, the ‘devil’s excrement’, ²⁵ could not be associated with the ‘holy’ common good.

Secondly, it can be also linked to cultural heritage. In France, during the Revolution – with a powerful echo in neighbouring countries, like Italy or Spain – foundations were viewed as a subtle reinstatement of the feudal type of property. Foundations were indeed seen as tools for perpetual conservation of goods, preventing allocation to the most efficient owners in the market. ²⁶ Another traditional belief in France was that the common good owed to be a prerogative of the state, not of private entities like foundations. ²⁷

However, religious and cultural values are not the only factors. Protestant precepts have been quite influential in the US as well, but therein enterprise foundations are far less common. Thus, there must be another explanation,

listed corporations. But if one considers also the latter, the figures may greatly vary, in particular in relation to countries where firm ownership is not dispersed and capital markets are less wide, because there the vast majority of enterprise foundation-owned corporations may be unlisted.

22 Thomsen (2023), pp. 7 et seq., 15 et seqq.

23 Ibid.

24 Eugenio Barcellona, ‘Industrial Foundations under Italian Law’, in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), 157, 158 et seq.; Mario Notari, ‘Le fondazioni industriali: un nuovo modello di holding no profit per i gruppi quotati?’ [Industrial foundations: a new nonprofit holding company model for listed groups?], in Paolo Montalenti, Mario Notari (eds.), *La nuova società quotata: tutela degli stakeholders, sostenibilità e nuova governance* (2022), p. 59, 69.

25 Old adage attributed to Saint Basil the Great, recalled by Pope Francis a few years ago. See https://www.vatican.va/content/francesco/en/speeches/2015/february/documents/papa-francesco_20150228_confcooperative.html (last accessed: 14 September 2025).

26 Barcellona (2023), pp. 163–164.

27 Pierre-Henri Conac, ‘Le fonds de pérennité: the French Privatstiftung?’ (2019), *RTD Financier*, no. 3, p. 29, 29.

a third factor: ie the different regulatory patterns. In the US, a strict legal regime (in particular, tax law) has indeed made enterprise foundations not attractive.²⁸

C. Regulatory patterns

The various legislative paths for enterprise foundations are examined herein, focusing on five legal systems: Denmark, Germany, Italy, France and the US. One has been historically permissive (Denmark), one has gone halfway (Germany), while the other three have been hostile (Italy, France and the US).²⁹ The analysis is accordingly divided in three parts, plus a final comparative outlook.

I. The permissive pattern: Denmark

In Denmark, enterprise foundations 'began their existence (...) with lawyers, utilizing the freedom of contract, drafting bylaws and transferring assets to (...) foundations',³⁰ including shares in corporations. The first was Carlsberg in 1876.³¹ Typically, in Denmark, a foundation controls only one company and such a structure 'is created by the founder of that company at the end of his (or her) life to maintain control of the company in perpetuity'.³²

The regulatory environment was clarified in 1985 with a double legislation: one applying to ordinary foundations and another one to enterprise foundations (*Erhvervsfondsloven*).³³ A core regulatory point concerns the

28 See especially C.III.

29 For a similar classification (except for France, not examined therein), see Anne Sanders/Steen Thomsen, 'Enterprise Foundation Law in a Comparative Perspective: Concluding Observations', in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. 221, 240, including table 10.

30 Rasmus K. Feldthusen, 'Denmark: Enterprise Foundations', in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. 129, 130.

31 Ibid.

32 Hansmann/Thomsen (2018), p. 4. Often, there is a holding company in between the foundation and the operating company: eg in A.P. Møller Maersk, <https://apmoller.com/the-a-p-moller-foundation-as-an-owner/> (last accessed: 14 September 2025).

33 Feldthusen (2023), pp. 133 et seqq.

purpose. In principle, a Danish foundation (ordinary or enterprise) can seek any purpose, as long as it is not illegal or *contra bonos mores*. Of course, this entails the possibility for the foundation to give all the dividends received to charity. However, it may also decide that the subsidiary corporation shall not distribute any dividends: if so, that foundation's purpose would be to run and expand a business (by means of the subsidiary corporation), with no charitable deeds being made.³⁴

In addition, Danish enterprise foundations may have a family purpose, meaning to carry out distributions (or 'perpetuities') in favour of the settlor's family members. That was a historical feature, heavily disincentivised by the 1985 legislation, which only applies to foundations established after its entrance into force. As a consequence, in practice, family foundations are not established any longer – while there are older ones which still distribute generous family perpetuities.³⁵

In sum, in terms of purpose, Danish enterprise foundations may be distinguished in three categories:

- (i) charity (using profits to finance charitable deeds);
- (ii) fully business-oriented (keeping all profits within the subsidiary corporation to further develop its business); and
- (iii) family (allocating profits, at least partially, to family members).

II. The halfway pattern: Germany

Until the 21st century, freedom of self-regulation in governing foundations was given to each federal state (*Länder*). That led to deep divergences, with some states being very permissive, while others being much stricter.³⁶

A unification of the legal regime was achieved in 2002. Then a further reform of foundation law, clarifying the applicable rules, was passed in 2021.³⁷ A major innovation is the establishment of a federal foundation

34 Although still partially debated, the point can be considered ascertained; cf *ibid*, pp. 137–140, including fn. 19 therein for further references.

35 *Ibid*, pp. 146–147.

36 Anne Sanders, 'Enterprise Foundations in Germany', in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. 25, 28 *et seqq*.

37 See Rainer Hüttemann/Peter Rawert, 'Das neue Bundesstiftungsrecht – Darstellung und Analyse sowie Vorschläge für notwendige Reformen der Landesstiftungsgesetze'

register, to be kept at the *Bundesamt für Justiz* in Bonn, with effect from 2026.³⁸

Yet, the reform did not specifically address enterprise foundations, with the consequence that to date there are still no express rules governing them in Germany. Hence, the question is: are they allowed or not? Overall, a foundation shall not be harmful to the public benefit. This means that, implicitly, enterprise foundations can be deemed permitted. This comes with a limit: according to the majority of scholars and practitioners, there must be a further purpose beyond running and developing a business.³⁹

As a result, *stricto sensu*, in Germany only two categories of enterprise foundations are legitimate: charity and family;⁴⁰ while fully business-oriented foundations would risk to be declared unlawful. However, on the latter point, a clarification is needed: in practice, the 'prohibition of foundations with the sole purpose of managing businesses is (...) [not seen] as a major obstacle'⁴¹. It is simply a matter of finding the right phrasing in the foundation's charter, combining the purpose of managing a business (which can be the major one) with other purposes (which can be designed in a way to remain minor), such as preserving the charitable intentions of the founder or supporting a family.⁴² All in all, in terms of purpose, Germany is not significantly different from Denmark, since with the above caveat all three purposes are *de facto* conceivable.

It remains to be tackled why, albeit the religious and cultural environment is not strongly dissimilar, enterprise foundations are much less widespread in Germany than in Denmark. As previously put forward,⁴³ an important reason may be found in the legal regime. German entrepreneurs may deem more attractive to use other legal forms, for which rules are

[New federal foundation law – presentation, analysis and proposals for necessary reforms of state foundation laws] (2021), ZIP, p. 3.

38 Sanders (2023), pp. 53–54.

39 Ibid, pp. 34–42, including fn. 59 therein for further references.

40 These two purposes are sometimes combined through 'double foundations', where the capital share of the underlying corporation is split between two foundations: a family foundation (set up for the benefit of family members) and a charity foundation (created to finance altruistic deeds). Usually, all or most of voting rights in the underlying corporation are given to the family foundation, so that family members retain control over the corporation. See *ibid*, p. 37, including fn. 50 therein for further references.

41 Ibid, p. 40.

42 Ibid, including fn. 62 therein.

43 See *supra* B.II.

more certain (compared to enterprise foundations, on which even after the reform there are no express rules) and the public authority's oversight is less pervasive.⁴⁴ Ultimately, the German legal regime for enterprise foundations may be deemed not yet fully satisfactory.⁴⁵

III. The hostile pattern: Italy, France and the US

Historically, Italian law has been hostile to foundations in general. The civil code of 1942, enacted during the fascist era, empowered the government with a strong control over any private institutions and especially foundations (so-called 'police law' or also 'fascist corporatism'). At that time, the prevailing idea was that a foundation could not be involved in business: neither directly, nor indirectly as an enterprise foundation.⁴⁶

With the Italian constitution of 1948, a less strict approach came to light. Foundations were deemed free to engage in business activities, so opening up to enterprise foundations.⁴⁷ But this movement was not accompanied by an express set of rules, save for one exception: banking foundations,

44 Among others, a more attractive alternative is given by the limited liability company, GmbH. Being the latter compatible with any purpose, it can be shaped in a way to combine business needs, charity or family goals. Here, the holding vehicle would have a GmbH form, in lieu of the enterprise foundation. As an example of its high flexibility, amendments to its articles of associations are much easier to be adopted than to an enterprise foundation's charter. A renowned case is Robert Bosch Stiftung GmbH: <https://www.bosch.com/company/> (last accessed: 14 September 2025).

45 For a *de lege ferenda* view, see Mathias Habersack, 'Stiftungsunternehmen in Deutschland: Gesetzliche Grundlagen, unternehmerische Motive, Reformvorschläge' [Foundation enterprises in Germany: legal bases, entrepreneurial motives, reform proposals] (2021).

46 Barcellona (2023), pp. 160–170.

47 In this development, a crucial role was played by scholars: above all, Pietro Rescigno, 'Fondazione e impresa' [Foundation and enterprise] (1967), *Riv. soc.*, p. 812, and Renzo Costi, 'Fondazione e impresa' [Foundation and enterprise] (1968), *Riv. dir. civ.*, p. 1; for an analysis of their views, Andrea Zoppini, 'Quattro tesi per una rilettura delle norme sulle fondazioni' [Four theses for a reinterpretation of foundation law], in Giulio Ponzanelli (ed.), 'Gli enti "non profit" in Italia' (1994), p. 57, 62 et seqq. On the contrary, courts remained hostile for a while: they kept requalifying enterprise foundations into *de facto* partnerships (whose members were subject to unlimited liability), see in this regard: Barcellona (2023), pp. 176–177.

governed by a special law issued in the 1990s.⁴⁸ Therefore, enterprise foundations – except for those active in the banking sector (a not minor exception, given the importance of banks in the economy, but nevertheless limited in its scope to a sector only) – are still governed by the general provisions of the 1942 civil code, which are rather old, inadequate and incomplete.⁴⁹ This regulatory vacuum contributes to explain why enterprise foundations are rarely employed in Italy.

The same uncertainty surrounds their purpose. Clearly, a charitable purpose would not be questioned, but what about a fully business-oriented or a family one? Although various views have been proposed, it seems preferable to maintain that all these purposes would be lawful for an enterprise foundation; after all, the civil code is silent and it does not necessarily require a charity purpose.⁵⁰

Similar to the Italian legislative situation, French law has been traditionally hostile to enterprise foundations. Whereas subsidiary foundations (at the bottom, not at the vertex of corporate groups, see *supra* B.I.) have been regulated since 1990,⁵¹ enterprise foundations have been governed only recently: with the introduction of *fonds de pérennité* in 2019.⁵²

The latter is a special type of foundation, whose distinguishing feature is to acquire and manage participations into corporations as a '*tour de contrôle*', ergo an enterprise foundation. The 2019 law comprehensively regulates its formation, governance and dissolution. Thus, rules on ordinary foundations do not apply.⁵³

48 See Vincenzo De Stasio, 'Fondazione (di origine) bancaria (fob) e terzo settore. Appunti' [Banking (originated) foundation (fob) and third-sector. Notes] (2022), Banca Borsa Tit. Credito, p. 523.

49 A new regulation, so-called 'Third-sector reform', was passed in 2017: however, it only applies to foundations whose main activity is not connected to business. Hence, it would be a bit of a stretch to apply it to enterprise foundations, in which business is at the core. See Notari (2022), p. 62. In the same context of the Third-sector reform, the Italian legislator was expected to issue a separate regulation for those foundations that are mainly active in business (directly or indirectly, like enterprise foundations), but such a regulation is yet to be approved, see Barcellona (2023), pp. 193 et seqq.

50 For the same view, see Notari (2022), pp. 63 et seqq. For a reconstruction of the debate and the various opinions held, see Barcellona (2023), pp. 184 et seqq.

51 An example is the Fondation Louis Vuitton, fully owned by the LVMH group led by Bernard Arnault.

52 See Art. 177 of law no. 486, 22 May 2019, so-called '*Loi PACTE*'.

53 Emmanuel Masset, 'L'introduction de nouveaux modèles : Les sociétés à mission et les fonds de pérennité' [Introduction of new models: *sociétés à mission* and *fonds de pérennité*] (2021), *Rev. des sociétés*, p. 581, no. 21 therein.

In terms of purpose, the paramount aim of a *fond de pérennité* is to preserve and possibly enhance the profitability of invested-in corporations. Additionally, it may promote the social and environmental common good. As such, a *fond de pérennité* has an inner fully business-oriented purpose; optionally, that may be combined with a charity purpose.

Lastly, moving to the US, the general approach has been traditionally hostile too. Whereas it was legally feasible to form enterprise foundations, they were rarely created since heavily discouraged by tax policies,⁵⁴ in particular under the reform of 1969.⁵⁵

However, recent tax innovations may increase the popularity of enterprise foundations over time: eg the 2018 ‘Newman’s Own’ exception. Pursuant to the latter, a foundation owning 100 % of voting stock in a corporation can enjoy tax benefits. This is subject to the fulfillment of a strict set of conditions, requiring inter alia that the underlying corporation distributes all its profits to the controlling foundation.⁵⁶

Another innovation is worth mentioning. Several US states, such as Delaware, have recently enabled trusts to control corporations. If properly structured (with a non-distribution constraint, which prevents the assets of the underlying corporation from being used for private gain), a trust or more generally a nonprofit entity may work ‘in such a way that it is functionally identical or at least similar’⁵⁷ to an enterprise foundation. Two examples of corporations having been recently placed under the control of a trust or nonprofit entity are Open AI⁵⁸ and Patagonia.⁵⁹

54 Ofer Eldar, ‘Are Enterprise Foundations Possible in the United States?’, in Anne Sanders/Steen Thomsen (eds.), *Enterprise Foundation Law in a Comparative Perspective* (2023), p. 201, 219.

55 Joel Fleischman, ‘Public policy and philanthropic purpose – foundation ownership and control of corporations in Germany and the United States’, in Andreas Schlüter/Volker Then/Peter Walkenhorst (eds), *Foundations in Europe: Society, Management and Law* (2001), pp. 372–408.

56 Eldar (2023), pp. 212–213.

57 Steen Thomsen, ‘Foundation Ownership and Firm Performance: A Review of the International Evidence’, in Ciaran Driver/Grahame Thompson (eds.), *Corporate Governance in Contention* (2018), p. 66, 77; see also Eldar (2023), pp. 204–206, 219.

58 Its legal structure is led by a nonprofit entity (OpenAI, Inc.), which controls a for profit subsidiary. See <https://openai.com/our-structure/> (last accessed: 14 September 2025).

59 As of 2022, the voting stock of the corporation (2 % of the capital share) is held by a trust, while the non-voting stock (98 %) by a nonprofit organization (respectively, Patagonia Purpose Trust and Holdfast Collective). See <https://www.patagonia.com/ownership/> (last accessed: 14 September 2025).

IV. Comparative outlook: advancements in the regulatory framework (albeit slowly)

The legal landscape for foundations greatly varies across the world.⁶⁰ But certain common trends may be identified. First of all, compared to other entities, foundations are not heavily regulated. This is true for any foundation, as well as specifically in relation to enterprise foundations.

Among the jurisdictions herein considered: except for Denmark and recently France, there are no specific rules governing enterprise foundations. Nevertheless, they are everywhere permitted, with general foundation rules applying to fill in the gaps.

In Denmark, where the historical pattern was permissive, the legal landscape is quite stable (save for the restrictions to family foundations dated 1985, which are not recent anymore and should be anyway considered more of an adjustment to prevent abuses than a disruptive change). In all the other examined jurisdictions, the legal landscape is advancing, somehow leaning towards a more permissive approach: ie more liberal interpretation in Italy, express regime in France, new tax exceptions and enabled entities in the US; with respect to Germany, it is true that the reform has not directly governed enterprise foundations, but it has at least contributed to clarify the surrounding regulatory environment (eg with the establishment of a federal foundation register).⁶¹

Certainly, the gap between Denmark and the other analysed jurisdictions in terms of the spread of enterprise foundations in business practice is likely to survive. However, in light of the above emerging trend, a slight reduction of the distance, albeit slowly, can be predicted (due to an increase in the use of enterprise foundations within the other analysed jurisdictions). Of course, this is merely a theoretical hypothesis that will need to be tested by future empirical analyses.

60 Sanders/Thomsen (2023), p. 241 et seqq.

61 For a similar view (except for France, not examined therein), see *ibid*, p. 241, including table II.

D. What role may collective hybrids play in fostering sustainability?

I. Comparatively high ESG (and no worse financial) performance

The growing attention devoted to enterprise foundations by lawmakers, as resulting from the comparative outlook above, raises the question of whether this is desirable. In particular, the dilemma is whether enterprise foundations, as collective hybrids, can or cannot represent a valid model for promoting sustainability. For instance, at least in the intentions, the specific regulation recently passed in France aimed exactly at enabling a scheme ‘*d’avant-garde*’, where the social and environmental common good is taken into account alongside profits.⁶²

As a matter of fact, it can be observed in practice that several enterprise foundations have been accused of poor behaviour and associated with bad reputation. The claim is that a foundation-structure may be just employed for tax evasion (eg to escape inheritance taxes) or for social-green washing (declaring to be sustainable, while actually violating human rights and damaging the environment).⁶³

In this regard, net of controversial cases and looking at aggregate data, there seems to be a positive correlation between enterprise foundations and environmental-social-governance (ESG) performance. In fact, albeit not yet conclusive, some studies in literature find that enterprise foundation-owned firms have higher ESG rates, compared to other firms.⁶⁴ They

62 Nicole Notat/Jean-Dominique Senard, ‘L’entreprise, objet d’intérêt collectif’ [Enterprise, a subject of collective interest] (2018), p. 1, 8, 75. Moreover, it is not surprising that the same reform (*Loi PACTE*, see fn. 52 supra) has introduced in France both enterprise foundations (*fonds de pérennité*) and benefit corporations (called *sociétés à mission*); thus, both collective and single hybrids, using the expressions coined herein. See Masset (2021), no. 17: ‘*la philosophie commune (...) transparait*’ [the common vision (...) is evident].

63 Eg see https://www.business-humanrights.org/en/companies/ikea/#associated_allegations (last accessed: 14 September 2025), concerning IKEA. Allegations are made also against structures similar to enterprise foundations: eg see <https://www.technologyreview.com/2020/02/17/844721/ai-openai-moonshot-elon-musk-sam-altman-greg-brockman-messy-secretive-reality/>, regarding the nonprofit entity OpenAI, Inc.; or <https://www.business-humanrights.org/en/companies/tata-group/>, concerning Tata, an Indian group owning numerous companies worldwide with a set of trusts at the vertex (both links last accessed: 14 September 2025).

64 David Schröder/Steen Thomsen, ‘Foundation Ownership and Sustainability’ (2025), 91 J. Corp. Fin., no. 102740, p. 1, 5–14, 18–19; on the relevant methodology and sample, see *ibid.*, pp. 3–4.

appear to be purpose-driven, attempting to holistically balance profits with social and environmental goals; long-term oriented (eg they replace board members less often), in sharp contrast with the often nearsighted short-termism of investor-owned firms;⁶⁵ to treat employees and the environment better;⁶⁶ to put in place a better governance, in terms of CSR strategies, board representation and stakeholders' engagement;⁶⁷ to invest more in research and development (R&D),⁶⁸ so being a potential catalyst for sustainable innovation.

Moreover, enterprise foundation-owned firms appear to perform no worse financially than other firms.⁶⁹ The latter finding goes against traditional agency theory: one may indeed expect that, without being backed by a for profit motivated shareholder, a firm would perform poorly in financial terms; plus, there would be higher agency costs given that the foundation self-perpetuating board of directors may be inclined to opportunistic behaviours.⁷⁰ But this seems not to be the case. A possible explanation is that enterprise foundation-owned firms receive more trust by stakeholders (eg talented employees, loyal consumers), with positive effects on the balance sheet too.⁷¹

II. Policy proposals: with a focus on charity enterprise foundations

If collective hybrids represent a sustainable tool, they should be adequately regulated by the law. As argued throughout this work, advancements in the regulatory framework are emerging (albeit slowly) and that can be seen favourably. However, the overall legal landscape appears still inadequate,

65 Christa Børsting et al, 'Industrial Foundations as Long-Term Owners' (2018), 26 *Corp. Govern. Int. Rev.*, pp. 180–196.

66 Schröder/Thomsen (2025), p. 8: eg employees of enterprise foundation-owned firms are approximately 6 % more satisfied compared to the average employee satisfaction, and they also show lower injury rates; with respect to the environment, they demonstrate a lower environmental damage cost, both directly and indirectly, so causing less externalities and contributing less to the total environmental harm.

67 Ibid, p. 13: eg enterprise foundation-owned firms are more likely to establish sustainability committees and exhibit a 19 % increase of female directors' representation in their boards compared to other firms.

68 Thomsen (2023), pp. 10–11.

69 Ibid.

70 Hansmann/Thomsen (2018), pp. 4–5.

71 Thomsen (2018), p. 66, 69–70; Feldthusen (2023), p. 133.

with a wide uncertainty on how gaps will be filled in by the relevant national authorities and courts.

As previously pointed out, enterprise foundations may be gathered in three categories, according to the chased purpose: charity, fully business-oriented and family. Even if fully-business oriented and family purposes can be equally deserving, the most suited tool in sustainability terms seems to be an enterprise foundation animated by a charity purpose. This is because the subsidiary's profits would neither be fully reinvested in the business, nor assigned to family members; rather, they would be used to finance charitable deeds for the common good.

It is true that *per se* a charity enterprise foundation cannot guarantee orientation towards sustainability. After all, sustainability is not about making charity but about running a business in a more balanced way. In theory, a charity enterprise foundation may still be keen on maximising profits through the operating company. However, in practice, it creates an institutional set-up that discourages the above to occur. It removes indeed the incentive to do so, because no profits would be allocated for the benefit of investors or family members. As such, a well-rounded balance may be expected, with the operating company producing a moderate amount of profits, to be later used by the foundation according to the charitable aims precisely identified in the foundation's charter (eg green initiatives, social projects, education or art, etc.).

This conclusion is partially corroborated by some empirical findings, although not final. Charity enterprise foundations demonstrate stronger ESG performance, compared especially to family foundations,⁷² but also to foundations that are not animated by meaningful environmental or social goals, ie those called herein fully business-oriented.⁷³ Such findings somehow match the theoretical assumptions that family foundations may be too focused on personal goals like family legacy and reputation; while fully business-oriented ones may excessively care about pursuing profits, given that the for profit motive (albeit slightly more blurred compared to investor-owned corporations) is still quite profound.

Hence, legislators should pay special attention to charity enterprise foundations, giving them an adequate and complete legal framework, so that they can free all their potential. This is crucial: currently, even the most advanced legal systems (eg Denmark) do not sufficiently differentiate in

72 Schröder/Thomsen (2025), pp. 3–4, 9.

73 Ibid, pp. 13–14.

terms of purpose. There is not a specific set of rules for charity enterprise foundations, as opposed to fully-business oriented and family ones.

Thus, *de lege ferenda*, it would be advisable to introduce a special regime for charity enterprise foundations.⁷⁴ This is the scope of the reform advocated herein, while its exact content may be more conveniently discussed in a future work.⁷⁵ In light of their sustainable aptitude – provided that effective mechanisms are in place to prevent abuses – having such foundations at the top of the (corporate) world may hold potential for a real transition.

74 Clearly, the hypothetical law can allow a margin of flexibility: it may also apply to enterprise foundations that combine multiple purposes, provided that charity is prevalent (eg the yearly share of profits reinvested and/or assigned to family members shall be below 50 %).

75 Eg combining valuable features of various jurisdictions: a transparent register (like in Germany), independence of board members, inclusion of employees into the governance through a co-determination system (like in Denmark), stakeholders' engagement, mandatory auditors at least in bigger foundations beyond certain thresholds (like in France). Moreover, considering the altruistic purpose, a tax benefit would need to be granted; as a general principle, this benefit should not be excessively generous, since it would break neutrality and open up to this form being simply chosen for tax motives.

