ENTERPRISE FOUNDATIONS IN FRANCE

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ABSTRACT

Enterprise foundations in France are structures that hold company shares to ensure business continuity while funding public-interest initiatives. There are three forms: '*la fondation reconnue d'utilité publique*' – the public benefit foundation (heavily regulated with high capital); '*le fonds de dotation*' – the endowment fund (flexible and accessible);and '*le fonds de pérennité*' – the sustainability fund (focused on economic stability). They protect against hostile takeovers, preserve corporate identity and support social and environmental commitments. However, French law remains restrictive, often opposing public interest and economic goals. The European Enterprise Foundation model law is a source of inspiration and suggests for example more freedom and sustainability for these models.

1. INTRODUCTION

1.1. ORIGINS OF THE FOUNDATION

The concept of the foundation first appeared in Greek and Roman antiquity: a foundation is independent of its founder and requires, in principle, an irrevocable transfer of property.[1]

But it is traditionally from the opinion of the French Council of State of 24 December 1805 and Article 910 of the Civil Code of 1804,[2] which required public interest establishments to obtain administrative authorisation in order to accept donations and legacies, that the system of recognition of public interest, characteristic of foundations,[3] was really built.

This was followed by Law no. 87-571 of 23 July 1987 on the development of philanthropy, which defined the concept of a foundation in Article 18, para. 1 where it states the following, in general terms:

> A foundation is an act by which one or more natural persons or legal entities decide to irrevocably allocate property, rights or resources to the realisation of a work of general interest and not for profit.

This law created the legal status of the foundation. In 1987, this was the only type of foundation in existence.

Until the passing of this law, the foundation had no legal existence in the French legal landscape. This was due to the historic hostility of the republican state to this institution, which was too contrary to the individualism of 1789.

1 H. Souleau, *L'acte de fondation en droit français*, Th. dact., Paris 1968.

2 P.-H. Dutheil, *Juris Corpus Droit des associations et fondations*, Dalloz, Paris 2016, n° 63.01; M. Pomey, *Traité des fondations d'utilité publique*, PUF, Paris 1980.

3 At least the largest and most famous of them.

Whereas foundations had flourished under the *Ancien Régime*, and probably because of this, they were held from 1804 in suspicion by the Civil Code.[4]

Since then, French legislation has been active for several reasons. First and foremost, it was felt necessary to create a new category of legal entity, one that would be able to carry out its activities over the long term, thanks to the autonomy of resources provided by a separate asset base.[5] This patrimonial autonomy makes it possible to choose which philanthropic fields to invest in, while managing the sums invested as closely as possible. Foundation philanthropy is also a means of strengthening family cohesion and unity. Family members can be invited to reflect on the foundation's main principles and methods of action, and to define its areas of intervention. In this way, a foundation can act as a link between different generations.[6] For a variety of reasons, a foundation can also be a means of protecting or even passing on a family business. More generally, the emergence and success of foundations is evidence of a simultaneous retreat of the state and an increase in corporate intervention in the public interest.

However, as we will study below, the notion of shareholder foundation is not defined in French law. Indeed, the legislator has not given a general definition of the notion of foundation, as he has done for example for a '*société*' (a company) in Article 1832 of the Civil Code.[7] However, it is accepted that several conditions must be cumulatively met, and this applies to all types of foundation: the creation by a single founder, whether an individual or a legal entity; an irrevocable allocation of assets, rights or resources (gifts) at inception (initial endowment) or during its lifetime (additional endowment or resources); non-profit-making; realisation and/or support of actions of general interest; and simple governance based on a governing board or equivalent. Thus the advantages of a shareholder foundation are various. First, the shareholder foundation protects the company's capital through the irrevocable nature of the transfer of shares to the shareholder foundation (which can be reinforced by inalienability clauses). Second, the holding of capital provides the foundation with regular income. The third advantage lies in the tax benefits.

Nevertheless, the economic role of foundations is not as far-reaching as it could be. There are several reasons for this, perhaps the lack of a legal basis, the fear of deviating from the very nature of the foundation, or the need for a

4 A.-S. Mescheriakoff, 'Notion de fondation en droit français' (2025) *Lamy Associations*, n° 805-2.

5 D. Roskis, 'Fondation d'entreprise' (2017) 1 *Revue d'économie politique*, p. 285.

6 J. Mestre and S. Dupouy, 'Par-delà les générations: la structure juridique de la foundation' in A.-L. Fabas-Serlooten, S. Lacroix-de Sousa and J. Mestre (eds), *Les Juristes au soutien du transgénérationnel*, Mare&Martin, Le Kremlin-Bicêtre 2023, p. 285, especially p. 287.

7 Article 1832: 'A company is formed by two or more persons who agree by contract to allocate assets or their industry to a business enterprise in common, with a view to sharing the profits or benefitting from any savings that may result. In the cases provided for by law, it may be set up by an act of will by a single person. Partners undertake to contribute to losses' (translated).

reference point. As French positive law is not a complete set of rules, there is a degree of legal uncertainty and lack of clarity on some issues. If necessary, the judge will have to decide a question by relying on other branches of law, such as contract law, company law or the law governing associations.

There are three types of legal structure[8] that fulfil the functions of a shareholder foundation: *le fonds de dotation* (the endowment fund), *la fondation reconnue d'utilité publique* (the public benefit foundation) and *le fonds de pérennité* (the sustainability fund). All three of them can be majority or minority shareholders.

The first is *la fondation reconnue d'utilité publique* (the public benefit foundation), which has been authorised to hold shares since 2005. In 2008, *le fonds de dotation* (the endowment fund) was created, offering more or less the same advantages as the public benefit foundation, but with much greater flexibility. The formalities involved in setting it up and the rules governing its operation are far less demanding, and in this respect, it is enjoying great success today. There were 2,665 'active' endowment funds in 2023.[9]

One of the major differences between the public benefit foundation and the endowment fund is the size of the initial endowment. The average initial endowment for the public benefit foundation is €1.5 million, while that for the endowment fund is just €15,000.

Then, more than ten years later, in 2019,[10] two new legal regimes were created to encourage the development of responsible capitalism: *les sociétés à mission* and *le fonds de pérennité* (the sustainability fund). This fund is constituted by the free and irrevocable contribution of capital securities – shares or corporate units – of one or more companies carrying on an industrial, commercial, craft or agricultural activity, with philanthropic activity optional.

According to Bruno Le Maire (Minister of the Economy, Finance, Industrial and Digital Sovereignty from 2017 to 2024) during the debates before the special commission of the National Assembly, 'the objective is to ensure the transmission and sustainability of our businesses, particularly family businesses'.[11] According to Le Maire:

> this new structure must be clearly distinguished from foundations recognised as being in the public interest or endowment funds, which have a philanthropic purpose: it will primarily have an economic vocation, which is to guarantee the long-term stability of companies.[12]

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8 We will explore these legal regimes further below.

9 C. Amblard (updated by S. Couchoux), 'Les fondations d'entreprise en chiffres' (2024) *Lamy Associations*, n° 815-1.

10 Law no. 2019-486 of 22 May 2019 on the growth and transformation of businesses (PACTE).

11 Sénat (J.-F. Rapin), 'Rapport n° 207, fait au nom de la commission des affaires européennes sur le projet de loi relatif à la croissance et à la transformation des entreprises' (2018–2019).

12 Ibid.

The *fonds de pérennité* is a kind of antechamber to the shareholder foundation. It is a laboratory, a status that enables us to try our hand at the shareholder foundation. The pursuit of a general interest is optional, and dissolution is possible. With this fund, founders can try the adventure of a shareholder foundation and, if they do not like the idea, they can walk away. In fact, if the founders find that the commitments required are too great or do not correspond to their real aspirations, they can use this fund as a simple economic management tool, like a holding company.

1.2. DEFINING THE SCOPE OF THE STUDY

In the chapter 'Introduction' (earlier in this volume), written by Anne Sanders and Steen Thomsen,[13] it is explained that the definition includes not only foundations in a classical sense, but also other legal structures employed to construct long-term oriented action. According to Anne Sanders and Steen Thomsen,[14] the most important point is that the enterprise foundation controls a business either as a shareholder or administrates a foundation directly.

In accordance with this definition of 'enterprise foundation', we do not include *la fondation d'entreprise* (the French corporate foundation) in this chapter. *La fondation d'entreprise* has existed since a law was passed in 1990:[15]

> Any civil or commercial company, as well as public establishments of an industrial or commercial nature, cooperatives, provident institutions and mutual societies, may set up a non-profit legal entity, known as a company foundation, with a view to carrying out a work of general interest.

This type of foundation has proved highly successful in practice, and there are now more than 400 of them. Among the largest are the foundations set up by EDF, GDF, Louis Vuitton, Alstom, Vivendi, L'Oréal, Danone, Orange (formerly France Télécom), Cartier and others. The Louis Vuitton Foundation,[16] for example, has been committed to art, culture and heritage for almost 25 years. The Hermès Foundation, for its part, is committed to the public interest in four areas: passing on know-how, creating works of art, protecting the environment and encouraging

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13 A. Sanders and S. Thomsen, 'Introduction' S. Thomsen and A. Sanders (eds.), in *Enterprise Foundation Law in a Comparative Perspective*, Intersentia, Cambridge 2023 p. 1, esp. p. 2.

14 Ibid., p. 2.

15 Law no. 90-559 of 4 July 1990 creating company foundations and Decree no. 91-1005 of 30 September 1991.

16 See 'Un lieu dédié à la création', *Fondation Louis Vuitton*: https://www.fondationlouisvuitton.fr/fr/fondation.

acts of solidarity.[17] The KPMG Foundation, which supports initiatives that contribute to the social and professional integration of disadvantaged groups.[18]

According to Article 19-2 of Law no. 87-571, a foundation is established for a fixed term of more than five years, and may be renewed for a period of at least three years, possibly with the support of new founders. At the end of this period, the founders or some of them may decide to extend the foundation for a further period of at least three years. Founding companies must commit to a multi-year program of action, with a value of at least €150,000 euros. This sum may be paid in instalments over a maximum period of five years. However, a corporate foundation may not make public appeals for donations, nor receive gifts or bequests (except in the case of donations from employees of the founding company or group). Under the terms of Article 19-9 of the same law, corporate foundations are required to draw up an annual balance sheet, income statement and notes to the accounts, which must be submitted to a statutory auditor. Article 19-10 of the same law entrusts the administrative authority with the task of ensuring that the corporate foundation is operating properly and stipulates that every corporate foundation must send the administrative authority an annual report, together with the auditor's report and the annual financial statements.[19]

With regard to shareholdings per se, it is interesting to note that Article 19-3 of Law no. 87-571 stipulates in para. 6 that if the corporate foundation holds shares in founding companies or companies controlled by them, it may not exercise the voting rights attached to these shares.[20] Despite this ability to hold equity interests, the corporate foundation cannot be qualified as a shareholder foundation for several reasons. First of all, because it is created by the company, there is a risk of confusion between the corporate purpose of the corporate foundation and the interests of its founders, who, it should be remembered, are first and foremost companies. This point is all the more important as the corporate foundation is increasingly becoming the social arm of a company's corporate social responsibility (CSR) approach, with the attendant risk of 'gender confusion'. Then, at the time of extension, the founders commit to a new multi-year action programme, as defined in Article 19-7, and, if necessary, supplement the endowment defined in Article 19-6. This is the main difference between this type of foundation and the shareholder foundation, whose activities are necessarily

17 See 'La Fondation' (2021) *Fondation d'Entreprise Hermés*: https://www.fondationdentreprise hermes.org/fr/la-fondation.

18 J.-L. Chaussende, 'Témoignage. La démarche de la fondation d'entreprise KPMG France' (2012) 461 *JA* 33.

19 C. Debbasch, 'Le nouveau statut des fondations: Fondations d'entreprise et fondations classiques' (1990) *D.* 269.

20 This *de jure* exclusion of any possibility of active management of the company held by the foundation clearly demonstrates that the legislator had, in the case of the corporate foundation, identified active management as incompatible with the exercise of the foundation's general interest mission, implying disinterested management and non-profit-making.

more long term. Lastly, unlike the charitable foundation, whose creation is always disinterested, he corporate foundation stems, on the contrary, from the desire to institutionalise the patronage actions of an industrial or commercial company. More precisely, in today's competitive, media-driven society, 'companies are faced with a new imperative: to improve their communication'.[21] The corporate foundation creates value for the company by enhancing its image. Corporate philanthropy through the corporate foundation is thus recognised as a corporate communications strategy.[22]

Since the term enterprise foundation tends to cause misunderstandings in the French discussion, we use the term shareholder foundation (*fondation actionnaire*).

2. THE CONCEPT OF FRENCH SHAREHOLDER FOUNDATION

No article of law defines what a shareholder foundation is. There is a general agreement that a foundation is an irrevocable allocation of assets to realise a work of general interest. Upstream, the company owner dispossesses him/herself by donating all or part of his/her shares to a foundation created for this purpose. Downstream, the foundation supports public interest causes, notably through the dividends it receives from the company. The shareholder foundation is special in this respect, because in addition to the philanthropic action usually entrusted to a foundation, it is also entrusted with the mission of protecting the company that has been donated to the foundation, in line with a certain strategy and values: 'The aim is to safeguard the values of a company and give it an extra soul'.[23] They include large companies such as Pierre Fabre, as well as small and medium-sized companies. A review of relevant literature indicates a commonality amongst the subjects of interest in the presence of a visionary entrepreneur who exhibits a marked humanist tendency.[24] There are different types of companies that are likely to turn to a foundation as a shareholder: the family business handed down from generation to generation, the fast-growing startup (which wants to preserve

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21 Sénat (P. Laffitte), 'Rapport n° 213, fait au nom de la commission des Affaires culturelles sur le projet de loi relatif aux fondations et modifiant la loi n° 87-571 du 23 juillet 1987 sur le développement du mécénat' (1990), p. 22. 'Une bonne communication est nécessaire pour que les personnels de l'entreprise, les clients, les pouvoirs publics, les médias aient le sentiment de mieux la connaître. Il est devenu difficile sinon impossible à une grande entreprise de rester silencieuse' (p. 7).

22 Ibid., p. 9.

23 A. Jevakhoff and D. Cavaillolés, 'Le rôle économique des fondations' (April 2017) *IGF Rapport* N° 2017-M-008, p. 27.

24 V. Seghers, G. Ferone Creuzet and E. Nordstrom, 'La fondation actionnaire, un levier de transmission et de contribution des entreprises au bien commun' (October 2023) *RLDA* 7813.

certain values without worrying about future fundraising), or any company that wants to ensure that social and environmental issues are considered in its business activities in a more sustainable way.

Some basic rules to be observed when setting up a foundation are the same for shareholder and non-shareholder foundations. All foundations in France must comply with certain formalities when they are set up. For a foundation to get legal capacity, a specific procedure must be followed. It is an approval by decree of the Council of State, or an administrative authorisation.

Shareholder foundations are non-profit organisations, but they can manage a business directly – around 20% to 30% of the organisation's total funding. However, to avoid the risk of losing its non-profit status, the company may be forced to turn its activities into a subsidiary. The purpose of this profit-making activity is the funding of the foundation's activities which are of general interest.

That is why there is a controversy about what a shareholder foundation is. Some representatives of public benefit foundations[25] (which can be shareholder foundations when it holds shares in a company) assume that only this type of foundation is a shareholder foundation, because it is subject to administrative control through the presence of state representatives on its governing board. The non-profit nature of the public benefit foundation is reinforced by its tax status. The public benefit foundation is exempt from business taxes. Donations made by taxpayers benefit from tax reductions equal to 66% of their amount, up to a limit of 20% of taxable income for those made by individuals, and 60% of their amount, up to a limit of €20,000 or 0.5% of sales when they are made by companies subject to income tax or corporation tax. Donations and bequests made by individuals are also exempt from transfer duties and are eligible for a reduction in the property wealth tax (IFI) up to 75% of their amount, up to a limit of €50,000. According to certain schools of thought, this disinterested management justifies tax exemption and is proof of foundation character. In our view, this is an outdated conception of the notion of general interest. We believe that shareholder foundations have a hard time fitting into the French legal landscape because of this requirement that non-profit activities be predominant. However, the most important thing is that profits from profit-making activities should be allocated to general interest projects carried out by the shareholder foundation. The French vision of the public interest therefore needs to evolve, especially at a time when public interest causes are increasingly supported by structures with hybrid financing methods such as shareholder foundations.

Furthermore, the shareholder foundation's function is not limited to the realisation of a work of general interest. To achieve this goal, it also plays a more original role, that of a shareholder that enables it, among other advantages, to

25 See below for a definition.

secure a permanent source of funding. And it is precisely this role of shareholder that is difficult to establish in the French tradition.

In France, it is difficult to fully accept the concurrence of interests between the general interest and the economic interest. In other words, the notion of the shareholder foundation, as it exists in Denmark, has difficulty taking root.[26]

It is generally accepted that the sole mission of a foundation, even a shareholder foundation, is philanthropic. For the tax authorities, for example, the fact that a shareholder foundation holds shares in a company is a means to an end, and nothing more. In short, in French thinking, a shareholder foundation serves the general interest, not the particular interest of the company in which it is a shareholder. Of course, it benefits from advantages and facilities, in terms of taxation or legacy, but that is where it ends.

The way the Pierre Fabre Foundation, a major public benefit foundation, is run reflects this idea. The Pierre Fabre Foundation holds its stake in Pierre Fabre through a 'passive' holding company, Pierre Fabre Participations, which is not involved in the operational management of the Pierre Fabre Group.[27] The governing board of Pierre Fabre Participations is made up of members appointed for life and any co-option of a new director is subject to the approval of the Pierre Fabre Foundation. The Pierre Fabre Foundation and the company Pierre Fabre Participations have the same chairperson.

And yet, after discussions with the heads of other shareholder foundations, it is *possible* and *even necessary* to be both philanthropically oriented and at the service of the company's performance. In fact, there is a gap between the image of the French-style shareholder foundation, which focuses exclusively on the general interest, and the expectations of certain business leaders. Perhaps this is why the shareholder foundation is not yet very popular with French companies, because such an image can be discouraging to economic actors.

Indeed, to be very attractive in the context of ecological crisis and competitive pressures, a legal vehicle cannot be just philanthropic. Some major companies, such as Pierre Fabre Laboratories, have set up shareholder foundations, and, even if the economic interest of society is not clearly expressed, it does exist. And yet the two are intimately linked: the general interest of the foundation is intimately linked to the private interest of the foundation. For example, each year, the foundation, as a shareholder, decides how much of its profits are to be reinvested in the company and how much is to be raised for its public interest initiatives. The amount that can be allocated to community projects thus depends on the company's performance.

However, French law has never declared that sponsorship and shareholder status are incompatible for a foundation. In other words, the fact that a

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26 Prophil, 'Voyage au pays des fondations actionnaires' (March 2015).

27 See 'Notre actionnariat' (2025) *Laboratoires Pierre Fabre*: https://www.pierre-fabre.com/fr-be/notre-groupe/notre-actionnariat.

foundation is a shareholder in a company does not deprive it of the tax benefits associated with general interest. More precisely, the application of the 'common law' sponsorship tax scheme set out in Articles 200-1-b and 238 bis-1-a of the French General Tax Code requires six conditions to be cumulatively met by a foundation in order for it to benefit from the advantageous general interest tax scheme. The first condition is laid down by law, while the others are set out in tax administration doctrine. First of all, the foundation must be involved in one of the fields covered by the General Tax Code: art, culture, heritage, social, environmental, education, higher education, research, amateur sport, etc. Finally, it must act or support actions in France or in the European area (with exceptions for humanitarian or environmental projects, or those contributing to the promotion of French culture, language or scientific knowledge abroad).

Lastly, one shareholder foundation can be transformed into another. This is the case for the sustainability fund, whose net assets are transferred on dissolution to a beneficiary designated in the foundation's by-laws, another sustainability fund, the public benefit foundation or an endowment fund.

3. THE THREE TYPES OF FRENCH SHAREHOLDER FOUNDATION

Funds and foundations held €40 billion in assets in 2021, an increase of 37% over the 2017–2021 period.[28]

3.1. THE PUBLIC BENEFIT FOUNDATION

Defined by Article 18 of Law no. 87-571, a foundation is recognised as being in the public interest by decree of the Council of State. This is a demanding condition. It may receive donations and bequests from individuals or legal entities other than the original founders. In principle, it is created 'for eternity'. It must carry on the personality of the deceased founder, who wished to 'defy death'.[29]

Like all foundations, the public benefit foundation must have a real public interest objective. And, in application of the principle of speciality of the foundation provided for in Article 18-3[30] and its restrictive interpretation by the French Council of State, the corporate object of the company must be similar to that of the foundation.[31] To guarantee its independence and longevity, it must

28 Observatoire de le Philanthropie, *Les fondations et fonds de dotation en France, Enquête nationale 2001–2022*, 6th ed., Fondation de France, Paris 2023, p. 27.

29 M. Pomey, above n. 2, p. 83.

30 Law no. 87-571 of 23 July 1987 on the development of philanthropy.

31 CE, avis, 24 mai 1977, Rec. CE 1977, p. 418.

also have a very substantial endowment, with a minimum capital of €1.5 million, paid out over a maximum period of ten years from the date of its creation[32] and which is legally irrevocable.[33] Although the French Council of State has never ruled on the amount, a minimum endowment of around €1.5 million is required.[34]

The Council of State's standard foundation by-laws of 22 April 2020 state that:

> the income from the endowment must be sufficient to finance the foundation's corporate purpose. This financing can be presumed to be sufficient when the endowment reaches at least one and a half million euros and in view of the resources forecast over the last three years of operation. Beyond this amount, it is recommended that other financial and real estate assets held by the foundation be allocated to a reserve fund.[35]

If the endowment is the result of payments spread over ten years, as authorised by the amended 1987 law, these payments must be effective, failing which recognition as a public utility may be withdrawn by the administrative authority. The founder may decide to pay out the endowment in instalments, according to a schedule laid down in the by-laws. In this case, the by-laws must specify the number of instalments, their amount, the founder required to make them and the payment schedule.[36] Failure to comply with the payment schedule laid down in the by-laws may result in withdrawal of recognition as a public benefit foundation and dissolution of the foundation (standard by-laws, Article 13). The endowment cannot be taken over, even if the foundation is dissolved. But this principle does not mean that the endowment is inalienable. In other words, if it is appropriate to sell certain elements of the endowment, the by-laws can provide for this and ensure that the assets disposed of are replaced by those obtained or acquired in return. In addition, practice has seen the development of temporary donations of usufruct, which enable a foundation to obtain regular income. In such cases, the irrevocability of the endowment does not prevent the return of the usufruct to the settlor at the agreed term. In order to undertake the activities for which it was established, the foundation may, over time, utilise the assets received at the time of its inception. This is known as a consumable endowment. It is also possible to retain the assets received and use the income from these assets.

There are several principles governing the formation and life of the foundation. First of all, as mentioned above, there is the principle of speciality.

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32 Law no. 2003-709 of 1 August 2003 on sponsorship, associations and foundations.

33 S. Couchoux and A. Vinas, 'Les fondations reconnues d'utilité publique' (2025) *Lamy Associations*, n° 809-14.

34 C. Nouel, 'Les "fondations actionnaires"' (2020) 2 *BJS* 49.

35 Article 11, note no. 29.

36 Article 11, no. 32.

Recognition as a public utility requires compliance with the principle of speciality, which stipulates that the activities of any public non-profit establishment must be strictly in line with its purpose, otherwise it will lose its nature.[37]

The 1987 law does not specify how public interest foundations are to operate. As a result, governance is governed by the foundation's by-laws and internal regulations. The foundation's governance can be organised around the usual governing board or a supervisory board and a management board.[38] However, another characteristic principle of the foundation, the principle of independence of the foundation from its directors, requires a certain degree of organisation. The composition of the foundation's governance must respect this principle of independence in order to obtain and maintain recognition as a charitable organisation. The practical consequences of this principle of independence are far-reaching. In application of this principle, a foundation recognised as being in the public interest is independent, founded and endowed by its founders, is not dependent on anyone, serves no particular interest and is not, directly or indirectly, managed exclusively or principally by its founders.

The independence of a public benefit foundation from its founders is based on the principles of the Civil Code relating to gifts, in particular Article 893, which states that 'a gift is an act by which a person disposes of all or part of his property or rights free of charge for the benefit of another person …', and Article 894, which states that 'a gift inter vivos is an act by which the donor disposes of the thing given …', which can only be derogated from by law. In consequence, the Conseil d'État, in its doctrine and in the standard by-laws of public benefit foundations, prohibits founders or their representatives from holding more than a third of the positions on the foundation's governing board or supervisory board (depending on the chosen mode of governance), and therefore from holding a majority in the decision-making body, but it now even seeks to oust their heirs or successors as much as possible, or even to make them disappear altogether.

La Fondation des Treilles (the Foundation des Treilles) case illustrates the legitimate fear that this legal organisation arouses in its founders. The Fondation des Treilles was created by Anne Gruner-Schlumberger and recognised as a charitable organisation in 1986 to manage a centre for study and research in the fields of science, literature and the arts. On the death of its founder and

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37 H. Ripert, *Le principe de la spécialité chez les personnes morales de droit administratif: son application en matière de dons et legs* (thesis) 1906.

38 A. Verjat, 'Fondations d'utilité publique. Gouvernance de la fondation' in P.-H. Dutheil, above n. 2, n° 63.124: 'The Governing board is a sovereign body which appoints the officers, decides on delegations of powers, adopts all decisions and oversees their implementation. Public interest foundations operating with a governing board under the control of a supervisory board have what is known as "two-headed governance", as the functions of management and control are clearly separated and entrusted to two distinct bodies. It is therefore a case of two-headed executive power, a principle inspired by corporate law'.

in accordance with her wishes, her granddaughter was appointed president. However, following differences of opinion between the board members and another foundation set up by the same founder, the Fondation des Treilles statutes were amended for the first time in 2004, at the request of the Conseil d'État, to reduce the number of family representatives – the founders' college now comprising just three members, in accordance with the 'three-thirds' rule, with four *ex officio* members and five qualified personalities. Most surprising of all, however, is the appointment of a Councillor of State as president of the Foundation.

The Minister of the Interior's decree approving these changes to the by-laws was first challenged before the administrative courts on the grounds of *ultra vires* non-compliance with the founder's wishes and misuse of procedure. However, the Conseil d'État rejected this request in a ruling dated 16 April 2010,[39] stating that:

> the arguments based on the fact that the amendments made to the foundation's by-laws disregard the founder's wishes cannot be usefully invoked in support of an appeal for excess of power.

According to lawyer Xavier Delsol,[40] the conclusions of the public rapporteur in this case are likely to discourage people wishing to set up a public benefit foundation and invest themselves personally:

> The French concept of foundations recognised as being of public utility is dominated by the principle of non-patrimoniality: in other words, once the foundation has been set up, it must escape the exclusive control of the founder … We believe that by submitting to the administrative authorities for approval a project that conforms to these standard statutes, the founder should be deemed to have accepted in advance that, through successive modifications, the public utility of the foundation may evolve in a direction that he or she had not necessarily wished.[41]

In 2005, a parliamentary amendment was introduced into a law relating to companies, known as the *loi Dutreil*[42] with the aim of securing the transfer of the majority of shares in Laboratoires Pierre Fabre to a public interest foundation. It was done especially for Pierre Fabre. Before that amendment, it was illegal for a public interest foundation to hold shares. In the past, a public benefit foundation was not allowed to hold all or part of the capital of a company with an economic purpose because of its public interest nature.

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39 CE, 16 avril 2010, n° 305649.

40 X. Delsol, 'Quelle gouvernance pour les Fondations RUP? Un plaidoyer pour les fondateurs' (2011) 448 *Juris associations* 34.

41 CE, 16 avril 2010, n° 305649, conclusions of the public rapporteur.

42 Law no. 2005-882 of 2 August 2005 in favour of small and medium-sized enterprises.

Consequently, Article 18-3 was incorporated into the French legislation on corporate philanthropy,[43] which stipulates that:

> in the context of the sale or transfer of a company, a foundation recognised as being in the public interest may receive shares in a company with an industrial or commercial activity, with no limitation on the threshold or voting rights, provided that the foundation's principle of speciality is respected.

After that, the Law of 22 May 2019, (*Loi PACTE*)[44] gave a new, broader wording, since it was no longer necessarily linked to a transfer transaction. The first paragraph of Article 18-3 of Law no. 87-571 now stipulates that:

> A foundation recognised as being in the public interest may receive and hold shares in a company carrying on an industrial or commercial activity, with no limit on capital or voting rights.

In more detail, the second paragraph of Article 18-3 states that:

> A foundation recognised as being in the public interest may receive and hold shares in a company with an industrial or commercial activity, without limitation as to capital threshold or voting rights. When these shares give the foundation control of the company within the meaning of Article L. 233-3 of the French Commercial Code, the foundation's by-laws must specify how, in application of the principle of speciality, the foundation will manage these shares without interfering in the management of the company, and the conditions under which the foundation will decide, in particular, on the approval of the company's accounts, the distribution of its dividends, the increase or reduction of its capital, as well as on decisions likely to lead to a modification of its by-laws.[45]

When these shares give the foundation control of the company according to Article L233-3 of the French Commercial Code, the foundation's by-laws must specify how, in application of the principle of specialty,[46] the foundation manages these shares without interfering in the management of the company. They must also specify the conditions under which the foundation is to vote on the approval of the company's financial statements, the distribution of dividends, the increase or reduction of its capital, and on decisions likely to entail a modification of its by-laws.

La section de l'Intérieur deduced from these terms that the principle of speciality governing a public interest foundation does not prohibit it from

43 Law no. 87-571 of 23 July 1987 on the development of philanthropy.
44 Law no. 2019-486 of 22 May 2019 on the growth and transformation of businesses.
45 Law no. 87-571 of 23 July 1987 on the development of philanthropy.
46 The principle of speciality is set out in Article 18-3 of Law no. 87-571 of 23 July 1987 on the development of philanthropy.

exercising control over a company with an industrial or commercial activity in a field unrelated to the general interest mission which justified its recognition as a public interest establishment, but it does oblige it to exercise its rights as a shareholder or unitholder under conditions specified in its by-laws and designed to ensure that the foundation does not interfere in the management of the controlled company, that it operates in a disinterested manner and that it devotes itself exclusively to fulfilling its mission, while taking care to preserve the value and yield of the assets that enable it to finance its activity.[47]

In order to comply with this legal provision and for tax reasons, it could be necessary to interpose a holding company between the two entities in the event of a foundation holding a majority stake in a commercial company. The Varenne Foundation,[48] for example, was recognised as a public benefit foundation a long time ago, by decree on 7 October 1988. Today, it is the majority shareholder in the La Montagne press group. Its aim is to promote the press and communication in all its forms, to encourage young people to enter the professions and trades of the press, and to provide moral or material assistance to all professionals in the sector, active or retired, and their families. It helps to promote democracy, tolerance and good press and communication practices, through its many local initiatives.

Another example, the Christophe et Rodolphe Mérieux Foundation[49] holds a 32% stake in Institut Mérieux. The Mérieux Foundation bases its action on historical expertise in clinical biology and a global approach to public health issues, with one objective: to fight in the field against infectious diseases affecting developing countries.

Also, the Avril Foundation[50] was recognised as a public benefit foundation by decree on 11 December 2014. The Avril Foundation supports the transition of agriculture towards models that create sustainable economic, social and environmental value, and works in the regions to promote healthy, sustainable food for all. In Africa, the Foundation aims to contribute to the country's protein self-sufficiency, through active support for the structuring of supply chains and for agro-ecological initiatives that promote crop biodiversity and soil preservation. It controls the limited partnership with shares Avril SCA, in which it holds (the majority) 50.7% of the voting rights (but only 34.7% of the dividend rights). The aim of this arrangement is to ensure that the foundation does not interfere in the management of the company, while at the same time enabling it to make structuring decisions (choice of directors).

47 Section de l'intérieur, 'Fondation Avril' (23 July 2019), n° 397.890.
48 See: https://www.fondationvarenne.fr.
49 See: https://www.fondation-merieux.org.
50 See: https://www.fondationavril.org.

It should be noted, however, that a report by the French Inspectorate of Finance, published in April 2017,[51] states that, while possible in public benefit foundations, majority shareholding in a company's capital has remained fairly rare. The authors of the report therefore advocate the use of other forms of foundation in the broadest sense, principally endowment funds, to fulfil this function.

As a conclusion, the principle of independence devised and imposed by the Conseil d'État is one of the main obstacles to the development of charitable foundations in France. While the founders must 'contribute' an initial endowment of a very high amount, which is also open to criticism,[52] they will not be able to directly control 'their' foundation. How can we justify today a principle of independence based essentially on the legal regime governing gifts when, for example, endowment funds, which have a philanthropic capacity equivalent to that of public interest foundations, are not bound by the same principle?[53] Alongside the principle of independent governance, the principle of financial independence, which translates into the requirement for a high, intangible initial endowment, is the second major obstacle to the development of public benefit foundations in France. In 2008, these two very strict principles led to the emergence of a new form of 'competing' foundation, the endowment fund, which gives the project owner complete freedom to define the rules of governance within a legal and philanthropic framework (donations) similar to that of the public utility foundation.

3.2. ENDOWMENT FUND

This new form of foundation in the French landscape is directly inspired by the American endowment fund.[54] The endowment fund's unrestrictive legal status and attractive tax treatment have won the favour of new philanthropists, even if it is regrettable that the creation of a new foundation status has been favoured over the simplification of the public utility foundation status requested by practitioners.[55]

The endowment fund was created in 2008.[56] In 2024, there were over 2,455 active endowment funds[57] out of a total of 7,392 funds and foundations in

51 Inspection Générale des Finances (IGF), 'Rapport d'activité' (September 2018), p. 54.

52 S. Couchoux, 'Le fonds de dotation'(2025) *Lamy Associations*, n° 809-52.

53 The governing board of an endowment fund can be totally controlled by the founders.

54 S. Couchoux and A. Vinas, above n. 34, n° 810-1.

55 Fidal avocats, 'Étude Fidal "Évolution des Fondations 2009–2018: les fonds de dotation en vedette"' (7 November 2018) *Fidal*: https://www.fidal.com/fr/actualites/etude-fidal-evolution-des-fondations-2009-2018-les-fonds-de-dotation-en-vedette.

56 Law no. 2008-776 of 4 August 2008 on the modernisation of the economy.

57 I. Scolan and P. Gaboriau, 'Fonds de dotation en pratique' (June 2024), p. 1, available online: https://www.centre-francais-fondations.org/wp-content/uploads/2024/10/Guide-Fonds-de-dotation-en-pratique-2024-10-1.pdf.

2024.[58] In accordance with Article 140 of the French law of 4 August 2008 on the modernisation of the economy (*Loi de modernisation de l'économie*):[59]

> I. – An endowment fund is a non-profit legal entity governed by private law, which receives and manages, by capitalisation, assets and rights of any kind donated to it free of charge and irrevocably, and uses the income from the capitalisation to carry out a work or mission in the general interest, or redistributes it to assist a non-profit legal entity in carrying out its works and missions in the general interest.
>
> An endowment fund is created by one or more individuals or legal entities for a fixed or indefinite period.

When the endowment fund was established in 2008, no initial endowment was mandatory, the reference text merely stating that 'the founder(s) may provide an initial endowment to the fund'. Since the entry into force of Decree no. 2015-49 of 22 January 2015 the founder must contribute an initial endowment in cash, which may not be less than €15,000. An endowment fund can be set up simply by registering with the prefecture with an initial capital of €15,000. It has almost all the same tax benefits as a public interest foundation provided that its management is disinterested.[60]

The report by the French Inspectorate of Finance[61] noted in particular that the endowment fund was undoubtedly the most suitable instrument for majority ownership of a company. However, and this is a major difference, unlike associations or public benefit foundations, endowment funds may not receive public funding of any kind. The very few derogations granted will be subject to a joint decree by the ministers responsible for the economy and the budget. Public establishments and local authorities setting up an endowment fund must take care not to grant any gratuitous benefits, such as the provision of premises or staff, as this would be considered a disguised subsidy.[62]

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58 Centre français des Fonds et Fondations (CFF), Les entreprises pour la Cité and Ernst & Young Société d'Avocats (EY), '2024: Panorama des fondations et fonds de dotation créés par des entreprises mécènes' (2024), p. 9, available online: https://www.centre-francais-fondations.org/wp-content/uploads/2024/10/ey-panorama-des-fondations-2024.pdf.

59 Law no. 2008-776 of 4 August 2008 on the modernisation of the economy.

60 BOI-IS-CHAMP-10-50-10-20, 7 June 2017, §60: 'The disinterested nature of an organisation's management is proven if the following conditions are met: the organisation is managed and administered on a voluntary basis by persons who have no direct or indirect interest, either themselves or through an intermediary, in the results of its operations; the organisation makes no direct or indirect distribution of profits in any form whatsoever; the organisation's members and their successors cannot be declared beneficiaries of any part of the assets, subject to the right to take back contributions'.

61 IGF, above n. 52, p. 55.

62 I. Scolan and P. Gaboriau, above n. 58, p. 57.

At the time of its creation, by-laws must be drawn up for all endowment funds. The drafting of the by-laws is unrestricted, and the French government does not impose any standard statutes, unlike for foundations recognised as being in the public interest. As with all foundations, the governing board is the sovereign governing body of the endowment fund, and as such has very broad powers. It takes all decisions in the interests of the fund. It is not possible to set up a 'dual' form of governance with a supervisory board and a management board in an endowment fund.

The fund is 'administered by a governing board comprising at least three members appointed, for the first time, by the founder(s)'.[63] In addition to this legal obligation, the fund's by-laws are free to set the composition and operating rules of the governing board, including the number of directors and their number, terms of office, right of veto, powers of representation, rules governing appointment, dismissal, quorum and majority, number of board meetings and procedures, presence of guests, etc. On this point, the by-laws expressly state that the governing board is composed of a minimum of three members. On this point, the by-laws fully express the application of the principle of contractual freedom that characterises the governance of an endowment fund, unlike other foundations.[64]

Furthermore, directors' duties are generally performed free of charge, but this principle is not enshrined in law, unlike in the case of other types of foundation (like corporate foundations). As a result, members of the governing board of an endowment fund may benefit from the administrative tolerance whereby the granting of an indemnity to directors does not call into question the disinterested nature of the management, provided that it does not exceed three-quarters of the minimum wage (*salaire minimum interprofessionnel de croissance*/Smic).[65] In addition, and most importantly, under the provisions of Article 261, section 7, para. 1°(d) of the French General Tax Code, it is possible to remunerate officers (board members) of an endowment fund up to an annual ceiling equal to three times the social security ceiling. The number of directors remunerated varies according to the fund's own resources: one director may be remunerated if the fund's resources are between €200,000 and €500,000; two directors if the fund's resources are between €500,000 and €1 million; three directors if the fund's resources exceed €1 milion. The income threshold is assessed 'on average over the three financial years preceding that in which the remuneration is paid'. Consequently, it is not possible to remunerate one or more of the fund's

63 Law no. 2008-776 of 4 August 2008 on the modernisation of the economy, Article 140, para. V.

64 S. Couchoux, 'Le fonds de dotation publique' (2025) *Lamy Associations*, n° 810-18.

65 BOI-IS-CHAMP-10-50-10-20, 7 June 2017, §100.

directors before the expiry of the three-year period required to verify that the own resources conditions have been validated over this period.[66]

It is important to note that the non-profit nature of an organisation may be called into question:

> if there are economic links between the two entities, or if the directors of the subsidiary are also directors of the association, or if there are family ties between the director of the association and the director of the subsidiary.[67]

In order to avoid this type of situation, it is common to set up a holding company between the foundation and the company. For example, the endowment fund called Pour une Presse Libre holds all the shares in Mediapart through another company called Pour la Protection de l'Indépendance de Mediapart, which is a passive holding company.

About governance, unlike public benefit foundation, the governance of endowment funds is freely organised, which distinguishes them from public benefit foundations which are subject to administrative supervision. Consequently, the organisation of the endowment fund is more flexible. It is administered by a governing board comprising at least three members, appointed for the first time by the founder. The fund's by-laws must specify its composition as well as the conditions of appointment and renewal. In particular, the governing board is responsible for producing the endowment fund's annual report and financial statements, and in this capacity responds to any requests for explanations from the statutory auditor.

In addition, above an endowment of €1 million, the fund must set up an investment advisory committee. This committee will be responsible for considering the investment policy, the policy for investing and monitoring the fund's endowments. In principle, unless otherwise stipulated in the by-laws, the directors are free to make their own choices and may therefore decide not to accept the proposals put forward by the investment committee. The appointment of committee members is governed by Article 2 of the Decree of 11 February 2009,[68] which stipulates that the persons chosen must not be members of the governing board, and must be qualified to carry out expert appraisals and investment studies. The renewal of members and the duration of their mandates must be stipulated in the by-laws. A duration of three to four years and an initial partial renewal of members is recommended to enable the gradual renewal of the body while preserving a certain continuity.[69] Four other committees can also be created but there is no obligation to do so. These are: the Honorary Committee,

66 S. Couchoux, 'Le fonds de dotation publique' (2025) *Lamy Associations*, n° 810-18.
67 BOI-IS-CHAMP-10-50-20-10, 3 October 2018, §610.
68 Decree no. 2009-158 of 11 February 2009 on endowment funds.
69 I. Scolan and P. Gaboriau, above n. 58, p. 18.

made up of donors/patrons, to whom a role must be assigned and a role defined in order to include them concretely in the life of the fund; the Scientific Committee (or Committee of Experts), which can advise the governing board and pre-select projects for funding; the Ethics Committee, which can ensure that by-laws and procedures in force concerning the probity and ethics of people, actions and decisions are implemented and respected; and the Strategic Committee, made up of qualified individuals from a variety of backgrounds, to consider longer-term strategy.[70]

And there are two types of funds. On one hand, there are operational funds, which carry out their own public interest activities and manage their assets with this objective in mind.

An example of a clause for an operator fund is:

> The purpose of the endowment fund is to carry out any initiative in the field of contemporary and living artistic and cultural creation, by the following means:- the production and organisation of shows, concerts, events and demonstrations;- the payment of grants to artists;- the constitution and animation of networks of spectators and the provision of information to the public on the fund's activities and cultural and artistic news;- the organisation of workshops, courses, training courses and any activity promoting the dissemination of arts and culture.[71]

On the other hand, there are funds that help other not-for-profit legal entities achieve their objectives by providing them with financial resources. These are known as redistributing endowment funds.

An example of a clause for a redistribution fund is:

> The purpose of the endowment fund is to contribute to the protection of the natural environment, to participate in the preservation of animal, plant and mineral biodiversity, and to promote public education on all issues relating to the preservation of the planet's heritage. Within the strict framework of its purpose, the endowment fund may select and finance any project for the protection of the natural environment or for raising awareness of the challenges of biodiversity and the conservation of natural heritage, presented by a public interest organisation.[72]

In 2022, the breakdown of endowment funds by type of operation was 77% redistributing funds and 23% operating funds.[73]

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70 Ibid., p. 19.

71 Legal Affairs Department of the Ministry of the Economy, Finance and Industrial and Economic Sovereignty, 'Clausier pour la rédaction des statuts d'un fonds de dotation' (December 2023), p. 6.

72 Ibid.

73 I. Scolan and P. Gaboriau, above n. 58, p. 22.

There are also funds that both operate and redistribute, known as mixed funds. An example of a clause for a mixed fund is:

> The purpose of the endowment fund is to facilitate the development of children and to protect all children, whatever their nationality, in France or throughout the world, to ensure their future. The fund will give priority to supporting projects presented by humanitarian organisations. In order to achieve its objectives, the fund will use all means it deems appropriate, and in particular:- information and education initiatives in the health field, whether these involve working with the populations concerned, training those involved at local level, or organising conferences or colloquia, in particular to publicise innovative practices that can serve as a reference,- direct support in the health field for vulnerable children, with the financing of scientific studies in the pharmaceutical field,- finally, cooperation initiatives with humanitarian organisations and support for all child protection projects.[74]

In most cases, endowment funds use only the income from their assets to carry out their activities. These are capital endowment funds. The fund may also invest in a range of movable and immovable assets, including shares, as indicated in Article 1 of the Decree of 11 February 2009.[75] In the case of the Jean-Noël Foundation,[76] the endowment fund holds 85% of the assets and therefore the capital of NAOS, while a company called B612 holds 51% of the voting rights and therefore has the decision-making power. The originality of the model is based on the separation of capital and decision-making powers with a view to creating value and ensuring the sustainable development of all NAOS activities in a spirit of loyalty, fairness and independence. This system of governance sacralises the company, its cause and its raison d'être.

Another example, Yann Rolland, CETIH's main shareholder, has contributed 40% of his shares to a philanthropic endowment fund called Superbloom.[77] As part of a capital reorganisation, Yann Rolland, who held 50.5% of CETIH's shares, has irrevocably transferred 40% of his holding to this philanthropic endowment fund, which in effect becomes a 35% shareholder in the group. He and his family manage this fund, the dividends of which are used exclusively for philanthropy and charitable associations, particularly those focusing on the theme of fragility.

As far as controls are concerned, they are very light when the company is set up. On creation, when the by-laws are filed and the application for declaration is submitted, the relevant departments of the prefecture check that the by-laws contain the minimum legal requirements. During the life of the endowment fund, the prefect ensures that it is operating properly and may request any documents

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74 Legal Affairs Department of the Ministry of the Economy, Finance and Industrial and Economic Sovereignty, above n. 72, p. 7.

75 Decree no. 2009-158 of 11 February 2009 on endowment funds.

76 See: https://www.jeannoelthorel-foundation.org/.

77 See: https://superbloom.fr/.

and investigations he/she deems necessary. To this end, within six months of the end of the financial year, the endowment fund must send the prefecture to which it reports, by registered letter with acknowledgement of receipt, the activity report, the annual financial statements and the auditor's report.

Firstly, the activity report: each year, the endowment fund must draw up an activity report which, like the financial report, must be submitted to the governing board for approval.[78] If the activity report has not been submitted within the timeframe mentioned in the first paragraph, or if the report is incomplete, the administrative authority may give the endowment fund formal notice to comply with its obligations within one month.

Secondly, the annual financial statements (including balance sheet, income statement and notes) must be sent to the prefecture within six months of the year-end and published on the Direction des Journaux Officiels website. Thirdly, *le rapport du commissaire aux comptes* (the statutory auditor's report) must also be sent to the prefect within six months of the year-end. A statutory auditor is appointed when the endowment fund's resources exceed the threshold of €10,000 during management. The auditor certifies the accounts for the year in which this threshold was exceeded.

The statutory auditor has a specific duty to alert endowment funds when,[79] in the course of his or her work, he or she becomes aware of facts likely to jeopardise the continuity of the fund's activities. He/she first requests explanations from the chairperson of the governing board and the chairperson of the fund is required to reply within 15 days. The statutory auditor informs the administrative authority and if these provisions are not complied with, or if the statutory auditor finds that, despite the decisions taken, the continuity of the business remains compromised, he/she draws up a special report and, in writing, a copy of which is sent to the administrative authority, invites the chairperson to have the governing board, convened in accordance with the conditions and deadlines laid down by decree, to deliberate on the facts raised. If, following the meeting of the fund's governing board, the auditor finds that the decisions taken do not ensure the continuity of the business, he/she informs the administrative authority of his/her actions and communicates the results.

In addition, the statutory auditor contributes to the transparency of any transactions between the fund and its directors that fall within the scope of Article L612-5 of the French Commercial Code. Each year, he/she is required to

78 It must contain a certain amount of information, such as a report on the endowment fund's activities, a list of public interest actions financed by the endowment fund and their amounts; a list of legal entities benefitting from redistributions and their amounts; whether the endowment fund makes a public appeal for generosity and whether the legal thresholds have been exceeded; the statement of use of resources collected from the public; a list of gifts received.

79 Law no. 2008-776 of 4 August 2008 on the modernisation of the economy, Article 140, VI, para. 4 and Decree no. 2009-158 of 11 February 2009 on endowment funds, Article 5, para. 2.

draw up a special report on the existence or otherwise of such transactions, which will be sent to the prefecture after being presented to the fund's governing board. Given the specific nature of this mission, it is advisable to choose an auditor familiar with the legal, tax and accounting particularities of endowment funds. Finally, there is a procedure for dealing with serious malfunctions. Under this procedure, the prefect may decide to suspend the fund's activity for a maximum of six months if serious malfunctions are observed. Serious malfunctions are those which affect the achievement of the endowment fund's purpose,[80] for example, when the endowment fund uses up all or part of the capital endowment it has received or if the by-laws do not authorise the use of this endowment.[81]

In addition to *ex post* administrative control, financial control may also be implemented. As soon as the endowment fund has recourse to public generosity, it will be subject to the control of the Cour des Comptes, which will verify the conformity of expenditure with the objectives pursued by the appeal to public generosity.[82] If necessary, the Cour des Comptes will attach to its report a declaration of non-compliance between the objectives pursued by the endowment fund and the expenses incurred, which will be forwarded to the minister responsible for the Budget. It is therefore necessary to pay particular attention to potential conflicts of interest. As a legal entity under private law, an endowment fund may employ staff for its own activities. However, these employees are subject to private law and the provisions of the French Labour Code. French law strictly regulates conflicts of interest. In corporate law, for example, salary increases for directors bound to the company by an employment contract are strictly regulated.[83]

3.3. THE SUSTAINABILITY FUND

Article 177-I of the 2019 Law[84] lays down the principle of setting up a sustainability fund through the unavoidable free and irrevocable contribution of capital securities or shares in one or more operating companies or group holding companies in order to manage these securities or shares, exercise the rights attached to them and use its resources with the aim of contributing to the economic sustainability of this or these companies[85] and, if it so wishes, to carry

80 Decree no. 2009-158 of 11 February 2009 on endowment funds, Article 9.

81 Law no. 2008-776 of 4 August 2008 on the modernisation of the economy.

82 Law no. 91-772 of 7 August 1991 on representation leave for associations and mutual societies and to the control of the accounts of organisations appealing to public generosity, Articles 5 and 7.

83 I. Balensi, (1977) *Revue des société* 251.

84 Law no. 2019-486 of 22 May 2019 on the growth and transformation of businesses. Application Decree no. 2020-537 of 7 May 2020 on sustainability funds.

85 P.-H. Conac, 'Le fonds de pérennité: the French Privatstiftung?' (2019) 3 *RTDF* 29, 30.

out or finance works or missions in the public interest.[86] The main idea here is to create an irremovable shareholder;[87] on the other hand, general interest activities are optional, unlike the endowment fund and the public benefit foundation.

The sustainability fund, for its part, can be considered a shareholder foundation when it has chosen in the foundation's by-laws to pursue an activity of general interest (this is an optional purpose).[88] Moreover, in accordance with the nature of the fund, Article 900-4 of the French Civil Code provides that the sustainability fund may be judicially authorised to dispose of the securities or shares subject to inalienability if the economic survival of the company or companies so requires.

It should be noted that as of 31 December 2023 there are only six. It is not yet very popular mainly due to its unattractive tax regime[89] because it carries on a business comparable to that of a holding company, which is lucrative by nature. It is therefore subject to commercial taxes under ordinary law. Gifts, whether made by individuals or corporations, are not tax deductible. Gifts made by individuals are subject to a 60% transfer tax. On the other hand, under Article 38, section 7 quater of the French General Tax Code, companies subject to corporate income tax that transfer a holding to a Sustainability Fund are entitled to a tax deferral. According to this article:

> the capital gain or loss resulting from the irrevocable transfer, free of charge, of equity securities or shares to a sustainability fund when it is set up is included in the income for the financial year during which these securities or shares are subsequently sold.

The endowment of the *fonds de pérennité* is made up of the securities or shares contributed by the founder(s) at the time of its creation, as well as assets and rights of any kind that may be contributed to it free of charge and irrevocably. Article 910 of the French Civil Code, which provides, in particular and under certain conditions, for a right of opposition by the representative of the state, does not apply to such gifts.

The legislature found it was good idea to establish an irremovable shareholder because putting a company's assets in perpetuity funds means making them safe and, above all, separating them from the interests of individual shareholders,

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86 J.-J. Lubin, 'Le fonds de pérennité: la fondation actionnaire à la française' (2019) 9 *RFP*, étude 22.

87 N. Dupouy and A.-F. Zattara Gros, 'Les fonds de pérennité: aspects juridiques et fiscaux' (2019) 47 *JCP N* 1321.

88 J. Mestre, 'Fonds de pérennité' in J. Mestre and B. Lemercier, *Le Lamy Sociétés commerciales*, Lamy, online 2024, n° 1661.

89 Ministère de l'Économie, des Finances et de la Relance (B. Rocher), 'Rapport Rocher: Repenser la place des entreprises dans la société: bilan et perspectives deux ans après la loi Pacte' (2021), p. 54. R. Mortier, 'Pourquoi il faut corriger la fiscalité du fonds de pérennité' (2019) 42 *JCP N* 808: according to this author, the legislator should simply exempt the creation of the sustainability fund from transfer duties.

now known as beneficial owners. By its very nature, a *fonds de pérennité* can devote its resources to contributing to the economic sustainability of the company whose shares it holds. What is more, the economic sustainability of the company is intended to benefit the fund in return, so that it can carry out or finance works or missions in the public interest. The shares of the company or companies concerned are indeed inalienable. However, where the *fonds de pérennité* controls one or more of these companies, within the meaning of Article L233-3 of the French Commercial Code, as a result of the bequest or acquisition or of the situation prior to the latter, the contributor or testator, at the time of the bequest, or the governing board, at the time of an acquisition, may decide that this inalienability does not apply to all or part of the securities or shares within the limit of the fraction of the share capital which is not necessary for the exercise of this control.

In addition, the management of equity securities by the sustainability fund is of major importance in stabilising a company's shareholder base. Indeed, at first glance, it is clear from the legal rules that the fund is a veritable manager of company shares. It collects the shares of one or more companies it manages with a view to ensuring their long-term survival. This is the meaning of Article 177 of the 2019 Law,[90] which created the fund as an entity that manages the shares or corporate units transferred to it by its founders. It manages the company's shares to make an obligatory contribution to the company's economic survival or, on an optional basis, to carry out works of general interest. As such, it can exercise control over the company's managers, dismissing them if necessary. In exercising this control, the fund has the power to put a stop to any managerial, social or patrimonial policy that may have a negative impact on the company's perennity. In brief it may act as an active shareholder.[91] In order to achieve the objective of longevity and apply the principles chosen by the founder, the new structure should be able to exercise voting rights in the investee company as the law states. Indeed, in addition, the Decree of 2020[92] specifies:

> An account of the way in which the sustainability fund has managed the securities or shares making up its endowment, exercised the voting rights and other rights attached there to, and used its resources.

Regarding the formal requirements to be observed when creating it, the by-laws must be drawn up in writing. In particular, they determine the name, object, registered office and operating procedures of the *fonds de pérennité*, as well as the composition, conditions of appointment and renewal of the governing board and management committee. The object of the by-laws must include an indication

90 Law no. 2019-486 of 22 May 2019 on the growth and transformation of businesses.

91 S. Couchoux, 'Le fonds de pérennité: quel avenir ?' (2022) 187 *RLDA* 38.

92 Decree no. 2020-537 of 7 May 2020 on sustainability funds.

of the principles and objectives applied to the management of the securities or shares of the company or companies in which the fund is a partner, to the exercise of the rights attached thereto and to the use of the fund's resources, as well as an indication of the actions envisaged in this context. It also includes, where applicable, an indication of the works or missions of general interest that the fund intends to carry out or finance. The sustainability fund is registered with the prefecture of the department in which its head office is located.

The governance of the *fonds de pérennité* is simple. It is administered by a governing board comprising at least three members appointed, for the first time, by the founder(s) or, in the case of a bequest made to the *fonds* before it is set up, by the persons designated by the testator to set it up. The governing board is vested with the broadest powers to act in all circumstances on behalf of the *fonds de pérennité*, within the limits of its corporate purpose. Clauses in the by-laws limiting the legal powers of the governing board may not be invoked against third parties. Furthermore, in dealings with third parties, the governing board binds the *fonds de pérennité* by acts falling within its purpose. Acts performed outside this scope are null and void, without this nullity being enforceable against third parties acting in good faith.

The by-laws must also provide for the creation of a management committee reporting to the governing board, comprising at least one member of the governing board and two members who are not members of the board. This committee is responsible for the ongoing monitoring of the company or companies referred to in point I of Article 197 of the 2019 Law[93] and makes recommendations to the governing board on the financial management of the endowment on the exercise of the rights attached to the securities or shares held, and on the actions, and associated financial requirements, making it possible to contribute to the economic sustainability of these companies. The committee may also propose studies and expert appraisals. Each year, the *fonds de pérennité* draws up accounts that include at least a balance sheet and an income statement. These accounts are published within six months of the end of the financial year. The *fonds de pérennité* appoints at least one statutory auditor, chosen from the list mentioned in point I of Article L822-1 of the French Commercial Code, whenever the total amount of its resources exceeds €10,000 at the close of the last financial year. In this case, the annual financial statements are made available to the statutory auditor at least 45 days before the date of the governing board meeting scheduled to approve them. When, in the course of his/her work, the statutory auditor identifies facts likely to jeopardise the continuity of the fund's operations, he/she informs the governing board and seeks its explanations. The governing board is required to respond within a time limit set by decree. In the absence of a response, or if the measures taken appear insufficient, he/she draws

93 Law no. 2019-486 of 22 May 2019 on the growth and transformation of businesses.

up a special report which he submits to the governing board, a copy of which is sent to the Management Committee and the administrative authority, and invites the board to deliberate on the facts raised, under the conditions and within the timeframe specified in Article 9 of the Decree of 7 May 2020.[94]

Finally, it should be noted that the administrative authority ensures that the perpetuity fund is operating properly. To this end, it may request any documents and carry out any useful investigations. Each year, the perpetuity fund must send the administrative authority an activity report, together with the auditor's report and the annual financial statements. And if the administrative authority observes serious malfunctions affecting the achievement of the fund's purpose, it may, after a formal notice which has not been followed up within six months, decide, by a reasoned decision published in the *Journal Officiel*, to refer the matter to the judicial authority for dissolution.[95]

4. THE LITTLE-KNOWN BENEFITS OF SHAREHOLDER FOUNDATION

The term *shareholder* in connection with *foundation* is not meaningless. We are witnessing a mutation in the foundation landscape, a mutation whose existence we must accept, to identify its risks and benefits.

The term 'shareholder foundation' includes not only foundations, a general-interest concept, but also the notion of corporation. And the deeper nature of what a corporation is and why it exists in the legal landscape cannot be overlooked, at the risk of undermining its very groundwork. So, there are many reasons why the shareholder foundation is becoming more and more popular and why it will continue to do so in the future. It seems that the future success of foundations lies in this balance between the private and the public interest, between the economic and the human.

4.1. A PROTECTIVE SHAREHOLDER

First and foremost, the foundation is a protective shareholder, helping to affirm the company's identity.

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94 Application Decree no. 2020-537 of 7 May 2020 on sustainability funds.

95 In particular, Article 5 (Decree no. 2020-537 of 7 May 2020 on sustainability funds) clarifies what is meant by serious malfunctions. These include, in particular, where they affect the achievement of the fund's purpose, the fact that the fund disposes of or consumes all or part of its endowment in breach of legal or statutory provisions, or disposes of its resources in breach of its statutory purpose, or has failed to send activity reports to the prefecture for two consecutive financial years despite having been given formal notice to do so.

As a shareholder, a foundation can make it easier for the values of a company to shine through, as the Pierre Fabre company has done. The Pierre Fabre company, founded in 1962 by Mr. Pierre Fabre, is an international French pharmaceutical and dermo-cosmetics group with revenues of almost €3 billion by 2023 (€2.83 billion precisely), and its foundation works in the field of healthcare. Another example is Mobil Wood, a small business based in the north of France, which specialises in ecological store fixtures and fittings. Today, it employs 180 people and generates sales of €20 million. In 2018, it sold part of its capital to an Ulterïa endowment fund, passing on 10% of its shares. It pursues two public interest missions: education and societal and ecological transition in the territories where Ulterïa is based. It is even in the DNA of certain shareholder foundations, since in application of the principle of specialty, introduced by the Council of State and imposed on the *public benefit foundation*, the foundation must own shares in a company related to its corporate purpose.

The identity of the company is also preserved by a shareholder foundation.[96] It can be a way of raising funds for a startup, while protecting the company against subsequent fundraising (such as hostile takeover bids when the company is listed) that could distort its DNA. For example, Yann Rolland was the main shareholder in CETIH. He created the Superbloom endowment fund to guarantee CETIH's independence. Here are the words of Yann Roland:

> I would have been extremely saddened and deeply affected if the company had fallen into the hands of financiers or even a competing industrial family. We had to ensure the company's independence.[97]

However, care must be taken because, although the contribution made to the shareholders' foundation is irrevocable, the shares held by the shareholders' foundation are only relatively unsellable. In the case of a usufruct[98] gift, for example, the irrevocability of the endowment does not prevent the restitution of the usufruct to the grantor at the agreed term. Indeed, this cannot be permanent for fear of violating the foundation's fundamental rights and freedoms, such as freedom of contract, property rights, etc.

The shareholder foundation also makes it possible to ensure that non-financial interests are effectively considered. A shareholder foundation enables a company to acquire a long-term, non-profit shareholder dedicated to the public interest. From this point of view, the shareholder foundation can be the guarantor of

96 C. Dagbedji, 'L'apport du fonds de pérennité à la longévité des entreprises' (2024) 5 *Revue des sociétés* 281.

97 Interview of 8 March 2024.

98 J. Mestre and S. Dupouy, above n. 6, especially p. 287.

compliance with various legal obligations relating to the consideration of social and environmental issues. More generally, it is also a shareholder guaranteeing compliance with the performance of the *contrat de société* (partnership agreement) 'taking into account social and environmental issues', as now stipulated in Article 1833 of the French Civil Code introduced with the 2019 *Loi PACTE*.[99]

The creation of a shareholders' foundation is therefore a way to anticipate the risk of litigation. For example, created in the summer of 2021 by the Rolland family, Superbloom is the first French family endowment fund to become a shareholder in a *société à mission* (mission company). The 'mission company'[100] label requires companies choosing to adopt it to make strong social and environmental commitments. And a strong sign of respect for these obligations is the creation of a shareholder foundation whose purpose is precisely to meet these requirements.[101]

Beyond this example, it is true that step by step, companies are becoming obliged to take environmental and social interests into account. Legislation is evolving in this direction. For example, *la directive relative au devoir de vigilance* (the Directive on corporate sustainability due diligence)[102] imposes many transparency obligations on companies. In the same way, and more generally, the law imposes *un devoir de bon comportement en matière de durabilité* (a duty to behave in a sustainable way).

4.2. AN AMBITIOUS SHAREHOLDER

The shareholder foundation is also ambitious. First and foremost, it attracts investors. According to the investment fund Alter Equity,[103] the presence of an endowment in a company's capital suggests that its shareholders are committed to strong values – and that is attractive! Such a shareholder is very important for a company because this is in line with current trends.[104] Expectations of companies today are high; they have a role to play in addressing contemporary

99 Law no. 2019-486 of 22 May 2019 on the growth and transformation of businesses.

100 Article 1835 of the Civil Code, 'The by-laws may specify a raison d'être, consisting of the principles which the company adopts and for which it intends to allocate resources in order to carry out its activity'.

101 S. Couchoux, 'Mécénat et fondation comme supports de l'entreprise "à impact"' (2020) 165 *RLDA* 47.

102 Directive (EU) 2024/1760 of 13 June 2024 on corporate sustainability due diligence [2024] OJ L1760/1.

103 See: https://www.alter-equity.com/mission.

104 B. Oppetit, 'Éthique et vie des affaires' in *Mélanges offerts à André Colomer*, Litec, Paris 1993, p. 327.

societal challenges such as environmental protection and the defence of human rights.

It is also a way of ensuring the company's long-term future.[105] It is firstly a shareholder who is willing to stay with the company for a long, even very long time. Unlike companies, the legislator has not specified the period, which suggests that these foundations can be set up for a fixed or indefinite period. And second, it is a shareholder willing to financially support the company for years to come. They can do this by exercising their right to participate in collective decisions. A voting right will clearly be in the best interests of the company. However, particular care should be taken in the selection of directors to ensure that they have the necessary skills to take on the role of shareholder.

5. FOUNDATION STRATEGY

The values of the founder or owner, as well as the values of the business being transferred, are often at the heart of the strategy. Strategy can be difficult to organise and requires considerable thought and consultation. First and foremost, the strategy must be coherent between the company's business and the foundation's public benefit activities. Second, governance must be fair. Care must be taken to ensure that the foundation does not fall into the trap of *green and social washing*.

In practice, shareholder foundations often draw up *une charte* (commitments), which is appended to the by-laws to give it a certain normative force. It is possible, for example, to stipulate that the foundation will have stronger political rights with regard to certain strategic decisions. For example, the foundation may be called upon to approve any change in the company's capital structure, such as the entry or exit of a shareholder, a capital increase, the allocation of voting and dividend rights, or the appointment of senior management. For example, it could reject a hostile takeover bid or dismiss a CEO (which would be difficult to imagine in the context of a shareholder foundation, which is often chaired by the company's CEO). The foundation can also give its opinion on the evolution of the social and environmental commitments of the company in which it is a shareholder, and, for example, advocate obtaining certification (such as ISO 14001 on environmental management systems).

In these by-laws, it is important to specify the foundation's means of action in order to prevent potential conflicts between the company and the foundation over the points listed above. A clause may first provide for a privileged right to information and warning, or a mechanism for the amicable resolution of conflicts

105 A. Jevakhoff and D. Cavaillolès, above n. 24, p. 25.

through a mediation committee, for example. And if need be, the foundation can use its prerogatives as a shareholder, such as the right of veto.

6. PERSPECTIVES

Looking to the future, and in the light of the 'Draft contribution to a European Enterprise Foundation model law',[106] let us now consider what might be in store for French law in the future.

6.1. A COMMON DEFINITION FOR ALL SHAREHOLDER FOUNDATIONS

The European enterprise foundation model law notably offers as a source of inspiration an Article 1 dedicated to this definition. This definition is firmly rooted in reality, as it is based on the notion of control. In this project, the notion of control is broadly apprehended in Article 1 (Définitions):

> A controlling interest can be assumed if the enterprise foundation holds a majority of votes in the company (holding enterprise foundation) or if the foundation conducts a business itself (operating enterprise foundation). If a foundation does not hold a majority of votes in a business, a shareholder agreement or an otherwise dispersed shareholder structure may still suffice for the foundation to exercise effective control and classification as an enterprise foundation.

In France, as mentioned above, there is no common definition of shareholder foundations in legislation or case law. It is through a combination of practice and legal doctrine that the three types of shareholder foundation – public interest foundation, endowment fund and perpetuity fund – are described as shareholder foundations. In order to establish greater legal certainty and in the interests of education, it might also be interesting to enshrine such a legal concept in French law, based as it is in this draft on the concept of control. In France, it is not so much a legal and social barrier as a lack of awareness of the advantages of a shareholder foundation.

There is, however, one major obstacle to such a definition. Under French law, the term 'foundation' is reserved exclusively for foundations recognised as being in the public interest. Only the the public benefit foundation may use the single

106 A. Sanders, S. Thomsen and M. Ørberg, 'Draft contribution to a European Enterprise Foundation model law Including guidelines (best practice recommendations) and tax principles' (January 2025), prepared for the European Law Institute project on enterprise foundations.

term 'foundation' in their title, by-laws, contracts, documents or advertising.[107] For an endowment fund, the term 'foundation' may not be used in the name. Conversely, the use of the term 'endowment fund' is not compulsory. In practice, however, it is possible to use the English term 'foundation' in the name of endowment funds, particularly when they have international ambitions.

6.2. TO ADOPT SUSTAINABLE BEHAVIOUR

As mentioned above, the foundation's corporate purpose is naturally sustainable. The examples described above illustrate the fact that it is either human values that are chosen, or environmental protection. Sustainability values are therefore only partially taken into account.

Given this observation, the question arises as to whether it would be appropriate to create the equivalent of Article 1833 of the Civil Code for shareholder foundations. Pursuant to the second paragraph of Article 1833 of the French Civil Code: 'A company shall be managed in its corporate interest, taking into consideration the social and environmental challenges of its activity'. For the sake of consistency of legislation, it might be worth extending such a rule to shareholder foundations. Indeed, in addition to companies, under French law, other private not-for-profit legal entities – such as mutual societies[108] and provident institutions[109] – must also take sustainability issues into account when carrying out their activities.

In the same vein, the 'Draft contribution to a European Enterprise Foundation model law'[110] refers to the requirement for foundations to adopt 'Responsible Business Ownership'. In Article 2, para. 2, the model law establishes the obligation for shareholder foundations to act as responsible owners, bearing in mind the long-term interest of the company and its stakeholders:

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

It should be noted that this notion of stakeholders is understood in a broad sense in this draft European law:

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107 Law no. 87-571 of 23 July 1987 on the development of philanthropy, Article 20.

108 Code de la mutualité, Article L.111-1: 'Elles sont gérées en prenant en considération les enjeux sociaux et environnementaux de leur activité'.

109 Code de la sécurité sociale, Article L.931-1: 'Les institutions de prévoyance sont des personnes morales de droit privé ayant un but non lucratif, administrées paritairement par des membres adhérents et des membres participants définis à l'article L. 931-3'.

110 A. Sanders, S. Thomsen and M. Ørberg, above n. 107.

> Stakeholders include not only the foundation's beneficiaries, its employees and the employees and minority shareholders of a company it controls. Moreover, it includes the interests of communities benefitting from the foundation and or the business. The interest of the environment may also be included. If a national legislator wishes to so, concepts such as planetary boundaries and doing business without doing harm may be explicitly mentioned.

This vision of stakeholders, encompassing not only stakeholders but also non-financial interests, is in line with the spirit of Article 1833 of the French Civil Code, which focuses on the sustainable operation of a business.

6.3. FREEDOM TO MANAGE THE FOUNDATION GOVERNED BY THE BY-LAWS

A principle of freedom runs very strongly through these European guidelines, which France could learn from. In an original way, the project enshrines the freedom to choose an object dedicated solely to responsible business ownership.

6.3.1. Freedom to Choose the Purpose

Article 2 of the draft model law,[111] entitled 'Purpose', makes it possible for a shareholder foundation to choose as its purpose a 'responsible corporate ownership' within the meaning of Article 4. Could this be possible in France? At present, in France, this is not possible because the three types of shareholder foundation studied above require the foundation's purpose to be philanthropic. However, allowing a shareholder foundation to have such a purpose would be beneficial in France. Generally speaking, in fact, companies are now being asked to demonstrate responsible governance and to take account of sustainability issues in their strategic decisions. The responsibilities of companies in terms of sustainability are constantly increasing. Against this backdrop, it would be highly beneficial for the company to have a shareholder specifically dedicated to these issues. Not only would the shareholder foundation protect the company from the risk of litigation if sustainability issues were not taken into account, but it would also be committed to making the best decisions for the company over the long term. The focus would no longer be on short-term returns, but on protecting the long-term future of the company and the environment in which it operates.

111 Ibid.

6.3.2. Freedom to Manage the Assets

Article 7 of the draft model law, entitled 'Distribution and foundation property', makes it possible for a shareholder foundation, unless the by-laws provide otherwise, to administrate, sell, reinvest and restructure its assets irrespective of whether they have been donated by its founders or received later through donations or profits. Here again, this freedom to manage assets is not found in all French shareholder foundation statutes, and French law could draw inspiration from this freedom. This would certainly increase their attractiveness.

6.3.3. Freedom to Remunerate the Governing Board

Article 18 of the draft model law, entitled 'Remuneration', states that:

> Members of the enterprise foundation governing board shall be remunerated by a fixed fee proportionate to the workload and responsibility involved. Alternatively, the governing board may decide not to renumerate its members.

It is a real job, and it requires real work, to take on the role of shareholder and manager – and the tasks that go with it – and it is important to ensure that they are fairly remunerated, not least in terms of motivation. Despite this, French law provides a very strict framework for remuneration. However, it is interpreted rather flexibly by the courts. For example, in a ruling handed down by the Versailles Administrative Court of Appeal on 22 September 2016,[112] the judge did not hesitate to interpret the spirit of the law in a way that was favourable to the remuneration set up:

> The fact that the remuneration of the ten directors exceeds the limit of three times the social security ceiling is not such as to call into question the disinterested nature of the management of a foreign foundation seeking to be treated for tax purposes as a foundation recognised as being in the public interest under French law. The amount of remuneration and benefits in kind must be assessed in the light of the duties imposed and taking into account the specific rules of the state in which the foundation is resident. The task of managing and investing the foundation's resources requires the full-time services of four directors, with total assets of €2.5 billion and an annual operating budget of €100 million. The directors are personally responsible for the financial consequences of their decisions, which are subject to ongoing control by independent chartered accountants and an internal control committee.

It would therefore be beneficial if legislation regarding this matter were to undergo a change.

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112 CAA Versailles, 22 septembre 2016, n° 14VE01080.

6.3.4. Freedom to Choose the Appropriate Governance

Article 13 of the draft model law,[113] entitled 'Appointment and membership of the governing board', could be a source of inspiration for improving charitable foundations.

The principle of independence described above[114] is one of the main obstacles to the development of shareholder foundations in France. In application of this principle, the founders will have to 'contribute' an initial endowment of a very large amount at the time of creation, but they will not be able to directly control 'their' foundation. In the context of a prospective study carried out in 2017 by the law firm Fidal,[115] proposal numbers 2 and 5 aim, in a relatively radical way, to reduce the scope of the principle of independence imposed on foundations which excessively limits the role of founders in governance.

6.4. CONTROL

6.4.1. Control via Information

Article 13 of the draft model law[116] is entitled 'Right to information'. The article allows the competent authority to make inquiries and request information if it has reason to believe that the enterprise foundation is not acting in accordance with its by-laws or the law. Transparency is one of the best ways of controlling a shareholder foundation, as the draft model law rightly proposes.

An obstacle in French case law stems from the right to privacy. According to the *Conseil d'État*, the documents relating in particular to the internal operation and financial situation of a legal person under private law, in this case a *fondation d'entreprise* (a corporate foundation), fall within its private life and the administration that holds them cannot therefore communicate them to third parties.[117] Although certain texts expressly authorise the communication of certain documents relating to private life – such as the articles of association of a foundation[118] or its accounts but only if it has received public subsidies[119] – there is no obligation to disclose them. There is therefore no general obligation

113 A. Sanders, S. Thomsen and M. Ørberg, above n. 107.
114 No. 3.1; no. 3.2; no. 3.3.
115 FIDAL Avocats, 'Étude Fidal: "Mécénat & Fondations en France: un nouveau souffle"' (5 October 2017) *Fidal*: https://www.fidal.com/actualites/etude-fidal-mecenat-fondations-en-france-un-nouveau-souffle.
116 A. Sanders, S. Thomsen and M. Ørberg, above n. 107.
117 CE, 7 octobre 2022, n° 44826, BRDA 24/22, inf. 3.
118 Decree no. 91-1005 of 30 September 1991.
119 Law no. 2000-321 of 12 April 2000 on the rights of citizens in their relations with administrations, Article 10.

of transparency on shareholder foundations, and consequently no right to information for the authorities.

6.4.2. Competent Authorities

According to Article 21 of the draft model law,[120] entitled 'Competent authorities':

> This model law suggests that the legislator implements a public competent authority or court which must have the right legal competences and business understanding to be able to evaluate the situations of enterprise foundations fully. The authority may primarily be an administrative agency.

In France, it is the judge who sanctions any malfunctions, but an authority would be welcome. This would provide greater legal certainty.

Such an authority dedicated to shareholder foundations could be inspired by *l'Autorité de la Concurrence* (the French competition authority), which is an independent French administrative authority that oversees the competitive functioning of the French economy. In addition to instilling confidence in shareholder foundations, such an authority would provide guidance on best practices.

6.5. LES BONNES PRATIQUES

6.5.1. Transparency and Communications

As proposed in the draft model law,[121] it would be a good idea for shareholder foundations to communicate systematically with the public, in particular via a dedicated website.[122] The trend is certainly towards transparency, as demonstrated by the recent publication of the Decree of 5 July 2024[123] on the dematerialisation and simplification of procedures applicable to philanthropic organisations, which came into force on 8 July 2024. In particular, this text changes the regulatory framework applicable to endowment funds. Stakeholders have, indeed, high expectations in terms of financial communication. With a view to harmonising the content of the activity reports of philanthropic organisations, the report must now contain an account of the organisation's activities – covering

120 A. Sanders, S. Thomsen and M. Ørberg, above n. 107.

121 A. Sanders, S. Thomsen and M. Ørberg, above n. 107, p. 107.

122 Ibid.: 'It is recommended that such large EFs have a home page with basic information including summary annual reports, the names of its governing board members and an and overview of its ownership (%) in companies in which the EF has a controlling interest'.

123 Decree no. 2024-720 of 5 July 2024 dematerialising and simplifying procedures applicable to philanthropic organisations, *JO* of 7 July 2024, n° 704.

both its internal operations and its relations with third parties – and a detailed description of the public interest initiatives financed by the organisation and the amounts involved, the name, registered office address, email address, telephone numbers and nature of the legal entities benefiting from the organisation's funding and the amounts of redistributions paid out as part of its general interest missions. The Decree increases the information held by the authorities on foundations and endowment funds. Consequently, as recommended in the draft model law, it would be useful for this information to be made more widely available to the general public.

6.5.2. The Duty of Care

According to the draft model law:[124]

> to secure the integrity of enterprise foundation model, it is crucial that members of the governance board take the purpose of the foundation to heart and use it rather than their own personal preferences as a guiding star in the exercise of their duties. Therefore, the best practice code recommends that the enterprise foundation governing board must ensure that the enterprise foundation remains true to the foundation purpose meaning that the purpose should be reflected in all enterprise foundation activities.[125]

And a liability action is also available to penalise any serious breach:

> Board members who breach their duties and thereby cause a loss, are liable to the enterprise foundation. They shall not be liable for losses if they have acted carefully and in good faith in a decision not prescribed by law based on appropriate information (business judgement rule).[126]

Would it be interesting to create a specific liability action for shareholder foundations in France based on the draft model law?

In France, there is the notion of '*intérêt social*' specific to corporate law, which could be transposed here for shareholder foundations. In corporate law, when the company's own interest – the '*intérêt social*' – is infringed, directors can be held liable on two legal grounds: abuse of minority and abuse of majority. The second paragraph of Article 1833 of the French Civil Code states: 'The company is managed in its corporate interests'. If a transaction decided by the managing partner or authorised by *les associés majoritaires* (the majority adminstrators) is contrary to the company's interests and harms the minority adminstrators to the

124 A. Sanders, S. Thomsen and M. Ørberg, above n. 107.
125 Ibid., p. 109.
126 Ibid., p. 51.

benefit of the majority adminstrators, it may be annulled on the grounds of abuse of majority voting rights. Similarly, if, *les associés minoritaires* (associates holding a blocking minority) refuse, in an untimely manner and in contradiction with the company's interests, a transaction that is essential for the company, on which its very survival depends, the abuse of minority rights may be characterised.

It is imperative to establish an action of this nature, analogous to the framework of corporate law. This will establish a framework for the practice, which is highly desirable because, akin to corporations, shareholder foundations wield significant economic influence. The magnitude of the financial stakes involved justifies this approach.

6.6. THE CREATION OF A COMMON LAW FOR SHAREHOLDER FOUNDATIONS

What could be '*le droit commun, les principes communs*' (the common law, the common principles) to shareholder foundations? In order to make them more attractive, such a common law adapted to the specific features of shareholder foundations would provide greater legal certainty and inspire greater confidence among investors. Major principles common to all shareholder foundations could be created, such as transparency, sustainable governance and integrity.

Political decision-makers can promote the creation of corporate foundations by increasing legal certainty regarding their establishment and operation. A separate law dedicated to corporate foundations could help in this respect.