european corporate governance institute

ecgi

The Anatomy of Nonprofit Control of Business Enterprise

Law Working Paper N° 820/2025
February 2025

Ofer Eldar
University of California at Berkeley and ECGI
Mark Orberg
Copenhagen Business School

© Ofer Eldar and Mark Orberg 2025. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

This paper can be downloaded without charge from:
https://doi.org/10.67929/ecgi-law-820-2025

european corporate governance institute

ECGI Working Paper Series in Law

The Anatomy of Nonprofit Control of Business Enterprise

Working Paper N° 820/2025

February 2025

Ofer Eldar
Mark Orberg

© Ofer Eldar and Mark Orberg 2025. All rights reserved. Short sections of text, not to exceed two paragraphs, may be quoted without explicit permission provided that full credit, including © notice, is given to the source.

Abstract

Nonprofit control of operating businesses has long been a feature of European corporations such as Novo Nordisk, Ikea, Carlsberg, and Rolex, which are governed by enterprise foundations—nonprofits with charitable missions explicitly permitted to hold controlling stakes in businesses. In the U.S., nonprofit control is becoming more prominent due to recent legal developments, with companies like Patagonia and OpenAI now under nonprofit ownership. Despite this growing interest, the economic rationale behind nonprofit control remains poorly understood: why would nonprofits with social missions choose to control businesses that sell products and services? We identify two primary models of nonprofit control. The income-generating for-profit is controlled by a nonprofit to generate funding for its charitable mission, ensuring steady long-term cash flows and mitigating systematic risk. The socially-oriented for-profit is controlled to ensure the operating business adheres to the nonprofit's mission. Unlike simplistic accounts that treat all nonprofit-controlled businesses as uniformly purpose-driven, our analysis clarifies the benefits and risks of these models and provides a framework for evaluating legal regimes governing them. Our comparative analysis of legal systems in Europe, the U.K., and the U.S. highlights significant differences in how nonprofit control is regulated. European and U.K. laws support income-generating for-profits through enterprise foundations and trading companies while incorporating oversight to ensure socially-oriented for-profits remain mission-driven. U.S. law, by contrast, imposes strict limits on private foundations while allowing other nonprofits to control businesses with few safeguards against outside investor influence. We propose an optimal legal framework to facilitate income-generating for-profits where mission-drift risks are relatively low while imposing stronger safeguards on socially-oriented for-profits to prevent outside investors from undermining their social missions, as seen in the recent OpenAI controversy. Rather than focusing on independence from donors or founders, legal reforms should prioritize independence from investors with economic interests in the for-profit subsidiary. Our proposal ensures that nonprofit-owned businesses remain both financially sustainable and committed to their stated social purposes.

Keywords: control, purpose, nonprofit, foundations, governance

Ofer Eldar*
Professor of Law
University of California at Berkeley
Law Building
Berkeley, CA 94720-7200, USA
phone: +1 919-613-7068
e-mail: ofer.eldar@berkeley.edu

Mark Orberg
Assistant professor
Copenhagen Business School
Room: POR/18.B-1.149, Solbjerg Pl. 3
2000 Frederiksberg, Denmark
e-mail: mo.bhl@cbs.dk

*Corresponding Author

THE ANATOMY OF NONPROFIT CONTROL OF BUSINESS ENTERPRISE

Ofer Eldar & *Mark Ørberg*[*]

Nonprofit control of operating businesses has long been a feature of European corporations such as Novo Nordisk, Ikea, Carlsberg, and Rolex, which are governed by enterprise foundations—nonprofits with charitable missions explicitly permitted to hold controlling stakes in businesses. In the U.S., nonprofit control is becoming more prominent due to recent legal developments, with companies like Patagonia and OpenAI now under nonprofit ownership. Despite this growing interest, the economic rationale behind nonprofit control remains poorly understood: why would nonprofits with social missions choose to control businesses that sell products and services?

We identify two primary models of nonprofit control. The *income-generating for-profit* is controlled by a nonprofit to generate funding for its charitable mission, ensuring steady long-term cash flows and mitigating systematic risk. The *socially-oriented for-profit* is controlled to ensure the operating business adheres to the nonprofit's mission. Unlike simplistic accounts that treat all nonprofit-controlled businesses as uniformly purpose-driven, our analysis clarifies the benefits and risks of these models and provides a framework for evaluating legal regimes governing them.

Our comparative analysis of legal systems in Europe, the U.K., and the U.S. highlights significant differences in how nonprofit control is regulated. European and U.K. laws support income-generating for-profits through enterprise foundations and trading companies while incorporating oversight to ensure socially-oriented for-profits remain mission-driven. U.S. law, by contrast, imposes strict limits on private foundations while allowing other nonprofits to control businesses with few safeguards against outside investor influence.

We propose an optimal legal framework to facilitate income-generating for-profits where mission-drift risks are relatively low while imposing stronger safeguards on socially-oriented for-profits to prevent outside investors from undermining their social missions, as seen in the recent OpenAI controversy. Rather than focusing on independence from donors or founders, legal reforms should prioritize independence from investors with economic interests in the for-profit subsidiary. Our proposal ensures that nonprofit-owned businesses remain both financially sustainable and committed to their stated social purposes.

[*] UC Berkeley School of Law and Copenhagen Business School. Both authors are members of the European Law Institute project on Enterprise Foundations in Europe. All views presented in this paper are solely our own and do represent the views of the European Law Institute. We thank [To be added].

Table of Contents

Introduction 3
I. The Role of Nonprofit Control 11
A. The Income-Generating For-profit 12
B. The Socially-Oriented For-profit 17
II. The Risks of Nonprofit Control 21
A. Nonprofit Mission-Drift 22
B. For-Profit Mission-Drift 26
III. The Law of Nonprofit Control 29
A. The Three Main Legal Systems for Nonprofit Control 30
1. European Jurisdictions 30
2. United Kingdom 34
3. United States 36
B. A Comparative Legal Analysis of Nonprofit Control 39
1. Income-generating For-profits and Nonprofit Mission-drift 39
2. Socially-Oriented For-Profits and For-profit Mission-drift 43
IV. The Optimal Regime for Regulating Nonprofit Control 46
A. Distinguishing Income-Generating and Socially-Oriented For-Profits 46
B. Addressing Outside Investor Influence 47
C. Income-Generating For-Profits: A Liberal Approach with Safeguards 48
D. Socially-Oriented For-Profits: Certifying and Monitoring Social Impact 49
E. Rethinking Independence from Founders and Donors 51
V. The Purpose of Corporations 52
Conclusion 53
Appendix 55
Table 1 - List of Sample Companies Controlled by Nonprofits 55
Table 2 – Summary: Regulations of Nonprofit control 63

INTRODUCTION

Nonprofit control of operating business enterprises is a global phenomenon and has been particularly prominent in Europe, where it has long been a feature of major corporations.[1] Companies such as Novo Nordisk, Ikea, Carlsberg, and Rolex are controlled by "enterprise foundations,"— nonprofits with charitable missions explicitly permitted to hold controlling stakes in business firms.[2] The combination of nonprofit control and for-profit operations is a fascinating anomaly, as these entities often demonstrate strong performance despite appearing counterintuitive to traditional governance theories that emphasize minimizing agency costs.[3] More recently, nonprofit control has gained traction in the United States, driven by a combination of factors, including the relaxation of certain restrictions on private foundations,[4] the relatively few limitations placed on non-private foundations,[5] the emergence of perpetual purpose trusts,[6] and creative legal strategies to navigate tax laws.[7] High-profile examples like OpenAI, Newman's Own, and Patagonia illustrate this trend, with their operations shaped by the social missions of their nonprofit owners.

While nonprofit control is not a new phenomenon, and despite its growing prevalence, the economic rationale for this model remains poorly understood. Simply observing that nonprofit-controlled businesses perform relatively well financially compared to standard

---

[1] By nonprofit control, we mean a structure in which a nonprofit entity owns a for-profit subsidiary and actively manages it by exerting decisive influence over its operations. This typically occurs through majority ownership of voting rights, board appointment power, or other governance mechanisms that enable the nonprofit to direct the firm's strategic and operational decisions.

[2] *See* Henry B. Hansmann & Steen Thomsen, *The Governance of Foundation-Owned Firms*, 13 J. LEGAL ANAL. 172, 173 (2021).

[3] *See* generally Hansmann & Thomsen, *supra* note 2, (finding that foundation-owned firms in Denmark, despite nonprofit governance structures, exhibit strong performance and exploring the governance structures enabling this success). For a description of the standard agency model, *see* Eugene Fama & Michael Jensen, *Agency Problems and Residual Claims*, 26 J. LAW & ECON. 327 (1983) and Separation of Ownership and Control, 26 J. LAW & ECON. 301 (1983). *See also* STEEN THOMSEN & MARTIN CONYON, CORPORATE GOVERNANCE AND BOARD DECISIONS 248 (2019) (noting agency theory predicts weaker performance for foundation-owned firms due to limited incentives and constrained capital access).

[4] Private foundations face an excess business holdings tax of up to 200% if they hold more than 20% of a business enterprise and fail to divest the excess within the required timeframe; *see* Richard Schmalbeck, *Reconsidering Private Foundation Investment Limitations*, 58 TAX L. REV. 59, 64-66 (2004) (explaining the Excess Business Holdings rule in I.R.C. § 4943).

[5] If a nonprofit is not classified as a private foundation, it faces few limitations on owning or controlling a business corporation. Broadly speaking, a private foundation is a tax-exempt nonprofit that is not a hospital, university, or other public charity and typically receives most of its funding from a single donor or a small group of donors. *See infra* text accompanying notes 167-169. *See also* Ofer Eldar, *Are Enterprise Foundations Possible in the United States?*, 201, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023).

[6] In 2006, Delaware enacted a law allowing the creation of perpetual purpose trusts, even if the trust is noncharitable and lacks an ascertainable beneficiary; *See* 12 Del. C. § 3556. *See also* Eldar, *supra* note 5.

[7] *See* Eldar, *Id.*

investor-owned firms,[8] or that they are guided by long-term purpose or sustainability,[9] overlooks a more fundamental question: why would nonprofits with social or charitable missions choose to actively control businesses selling products and services?[10] U.S. foundations, for example, are bound by fiduciary duties of prudence, which require them to maintain diversified portfolios and avoid excessive risks to safeguard assets for their charitable missions.[11] Without a clear understanding of the economic rationale behind nonprofit control, it is impossible to fully evaluate its potential benefits or the risks it may entail, or to assess the merits of different regulatory regime for nonprofit control.

Our article's first contribution is to identify and distinguish between the two primary models of nonprofit control. The first model is the *income-generating for-profit*, where the nonprofit owns and controls the business firm primarily for profit purposes. The nonprofit sources income from the for-profit entity and distributes it to further its social mission, often through grants or other charitable activities. This model is exemplified by European entities such as Novo Nordisk, Rolex, and Ikea, which are controlled by nonprofit enterprise foundations. In this model, the for-profit firms are not driven by purpose, as some have argued, but are actually maximizing the value of cash flows similar to other for-profits that compete with them. The nonprofit owner that actively influences the for-profit's management may prefer to pursue long-term value to create a steady long-run cash flows, but it may prefer short-term extraction of dividends over reinvestment of profits, because it needs cashflows every period to fund its charitable projects.[12] Consistent with the traditional theory of nonprofits, the fact that the owner is a nonprofit firm – and thus subject to the non-distribution constraint – serves as a commitment device by the nonprofit managers to use the nonprofit's income towards charitable purposes.

The second model is the *socially-oriented for-profit*, where the nonprofit controls the business to ensure that the for-profit firm directly pursues a social purpose aligned with the

---

[8] *See* Hansmann & Thomsen, *supra* note 2, at 172, 176 and 224.

[9] *See* Cathy Hwang & Dorothy S. Lund, *Purpose and the Nonprofit Enterprise*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE - LAW WORKING PAPER NO. 819/2024, https://ssrn.com/abstract=5061739. *See* also COLIN MAYER, CAPITALISM AND CRISES: HOW TO FIX THEM (Oxford Univ. Press 2024).

[10] On the benefits of corporate control, see Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2015) (explaining how controlling shareholders bear costs associated with lack of diversification and how concentrated ownership can create value); and Albert H. Choi, Concentrated Ownership and Long-Term Shareholder Value, 8 HARV. BUS. L. REV. 53 (2018) (discussing control's role in fostering long-term commitment and value maximization, including through R&D investment and reputation-building).

[11] *See* Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, 14 J. EMPIRICAL LEGAL STUD. 129 (2017) (exploring the application of the prudent investor rule to trust investments, analyzing how trustees manage market risk and portfolio diversification in practice); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 384-85 (2020).

[12] In this sense, income-generating for-profits are analogous to family-controlled firms, where the family seeks to generate long-term cash flows while also extracting income periodically to cover day-to-day living expenses. Similarly, nonprofit-controlled firms are typically managed to maximize profits in order to generate long-term cash flows while also extracting income periodically to fund their ongoing charitable projects.

nonprofit's mission. The nonprofit is likely to be committed to its social purpose due to the non-distribution constraint, consistent with traditional nonprofit models. The charter of the for-profit firm will typically specify that the for-profit must adhere to certain social missions, whether it is supporting low-income farmers, employing disadvantaged workers, promoting environmental sustainability, or ensuring the socially responsible development of new technologies. A notable example is the nonprofit entity OpenAI, which controls the for-profit OpenAI to ensure its stated mission of ensuring that artificial general intelligence benefits all of humanity. In this model, the nonprofit itself does not need to make substantial distributions for charitable causes; rather, its charitable mission is to control the for-profit, ensuring that the charter cannot be modified by other investors and monitoring the for-profit's management to ensure it acts in line with the social purpose enshrined in the for-profit's charter. Thus, the nonprofit owner is not typically expected to extract substantial cash dividends for its own use, but to reinvest profits in the for-profit subsidiary to support its social mission.[13] While socially-oriented for-profits are driven by a long-term purpose, as the recent turmoil at OpenAI demonstrates, ensuring that they actually pursue social missions effectively is challenging, especially when there are for-profit investors who exert influence over management.

We argue, drawing on many examples listed in Table 1 in the Appendix, that all nonprofit-controlled businesses belong to one of these two categories. However, we emphasize that the two categories of nonprofit control, while distinct, are not mutually exclusive. For example, Patagonia represents a hybrid of these models. As an income-generating for-profit, the cash flow rights of the clothing company are held by a tax-exempt nonprofit, which uses the revenue to fund environmental causes. At the same time, Patagonia is managed by another nonprofit, which is legally structured as a perpetual purpose trust,[14] ensuring that its clothing production aligns with environmentally sustainable practices.[15]

The distinction between income-generating and socially-oriented for-profits is necessary to understand the economic rationale behind these models. In the case of an

---

[13] For example, the OpenAI Charter limits distributions by capping financial returns to investors and employees, ensuring that profits beyond this cap are reinvested into advancing OpenAI's mission to benefit humanity. *See* Ellen P. Aprill et al, *Board Control of a Charity's Subsidiaries: The Saga of OpenAI*, TAX NOTES FED. 289 (2024) (describing how OpenAI transitioned from a nonprofit to a capped for-profit structure).

[14] On perpetual purpose trusts, *see* Eldar, *supra* note 5. The reason for splitting cash flow rights and voting rights in Patagonia is driven by tax considerations. Because the social welfare organization does not actively manage the corporation the income from the for-profit clothing business is treated as passive income and therefore not subject to income tax. The trust actively manages the company to ensure that the for-profit is committed to environmental sustainability. *See infra* text accompanying notes 80 and 250 and Eldar, *supra* note 5, at 217-219.

[15] Another example of this hybrid model is Better World Books, an online bookseller and book recycling company wholly owned by Better World Libraries, a mission-aligned nonprofit affiliated with the Internet Archive. Like Patagonia, Better World Books functions as an income-generating for-profit, with its operations generating revenue for the nonprofit. But it also functions as a socially-oriented for-profit by integrating social impact into its core business activities, including book donations, revenue-sharing with libraries, and sustainable book recycling. *See* Table 1 in the Appendix.

income-generating for-profit, the primary goal is to create a stable source of income shielded from systemic risk, enabling the nonprofit to extract cash as needed to fund its charitable purposes.[16] Many for-profits in this category, particularly in Europe, are strong consumer brands with established reputations, such as Rolex and Ikea, or pharmaceutical firms like Novo Nordisk, which rely on robust patent protections and the sale of essential medicines. These businesses provide a reliable, low-risk income stream that is largely insulated from market shocks and volatility, ensuring financial stability for the nonprofit and availability of cash to fund charitable projects. In contrast, investing in a market portfolio may leave the nonprofit parent capital-constrained during difficult economic times, when its diversified investment portfolio is struggling, and donations tend to dry up.[17]

In the case of a socially-oriented for-profit, the rationale is to create a commitment device ensuring that the for-profit pursues a social mission, particularly when the social mission is misaligned with profit maximization and cannot be adequately fulfilled by a nonprofit.[18] Broadly, these firms fall into two categories. The first includes social enterprises that transact with disadvantaged groups, such as work integration firms employing individuals facing systemic unemployment, fair trade firms that source products from low-income farmers, social investment firms that make investments in rural communities, and community development financial institutions (CDFIs) providing financial services to those lacking access to capital.[19] The second category consists of for-profits that provide public goods by ensuring compliance with standards in areas such as environmental sustainability, promoting and enforcing compliance with professional safety standards, or the responsible use of new technology such as artificial intelligence.[20] Both categories of socially-oriented for-profits perform functions that nonprofits may be ill-suited to perform directly, prompting nonprofits to control for-profit subsidiaries to create a structure that aligns the for-profits' operations with their social missions.[21]

The distinction between income-generating for-profits and socially-oriented ones is equally crucial in evaluating the potential pitfalls and risks of nonprofit control. The actual type of mission-drift, often due to the influence of minority for-profit investors, depends on the type of nonprofit control at stake.

In the case of an income-generating nonprofit, the main risk is nonprofit mission-drift,[22] which encompasses two related issues.[23] First, the nonprofit may focus excessively on managing the for-profit, neglecting its obligation to distribute funds to its intended

---

[16] *See* Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, COLUM. BUS. L. REV., 92 (2017), at 168-169 (discussing Housing Works that is a nonprofit owning for-profit businesses that generate profit to the nonprofit owner, which allocate subsidies to external beneficiaries, e.g. housing assistance).

[17] *See infra* Section I.A.

[18] *See infra* Section I.A.

[19] *See* Eldar, *supra* note 16.

[20] *See Id*, at 166-169.

[21] *See infra* text accompanying notes 84-87.

[22] *See* Eldar, *supra* note 16, at 170-172.

[23] *See infra* text accompanying notes 90-100.

beneficiaries and failing to fulfill its charitable purpose.[24] Second, the for-profit may fail to distribute income to the nonprofit if its managers prioritize reinvesting revenues for growth, even when the nonprofit requires cash for its programs. The nonprofit owner may wish to prioritize long-term value creation to build a profitable business that expands its donative capital over time. However, to fund its charitable projects, the nonprofit owner typically needs to extract dividends periodically from the for-profit or even liquidate the business, and to this extent it is expected to prioritize short-term income-realization over long-term growth.[25] This underscores the need for for-profit managers to remain accountable to the nonprofit and align their strategies with its evolving priorities.

In the case of the socially-oriented for-profit, the primary risk is that the for-profit fails to fulfill its social mission.[26] This concern is particularly severe when the for-profit uses resources from its nonprofit parent, such as donations, to fuel business growth while neglecting its social objectives. The risk is further amplified when the nonprofit's sole mission is to oversee the for-profit's adherence to the social mission, rather than directly distributing funds to beneficiaries.[27] This dynamic was exemplified in the recent OpenAI saga, where the nonprofit parent, tasked with ensuring that the for-profit subsidiary developed artificial intelligence as a public good, clashed with the for-profit's CEO, Sam Altman, who pursued a more commercially driven strategy focused on rapid growth and increased revenues.[28]

We argue that mission-drift is higher when a minority outside investor in the for-profit subsidiary exerts substantial influence despite nonprofit control, particularly in the case of socially-oriented for-profits. Such outside investors can wield power or even de facto control in two primary ways. First, they may influence the nonprofit parent directly, for instance, by making large donations to ensure the for-profit is managed in their own interests rather than those of the nonprofit. This type of exploitation of nonprofits to control for-profit entities was a key motivation behind the extensive regulation of U.S. foundations in 1969.[29] Second, the for-profit subsidiary's reliance on minority investors for capital can undermine the practical significance of the nonprofit's voting control, as financial

---

[24] *See* Schmalbeck, *supra* note 4, at 83-88; and U.S. TREASURY DEPARTMENT REPORT ON PRIVATE FOUNDATIONS, 35 (Comm. Print 1965) (https://www.finance.senate.gov/imo/media/doc/SPrt101.pdf) [hereinafter TREASURY REPORT].

[25] For a discussion of the Wellcome Trust's decision to sell its pharmaceutical company, Wellcome plc, due to substantial competition, *see* the text accompanying footnotes 72-74.

[26] On the risk of for-profits failing to fulfill charitable missions, *see* Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213 (2009) (critiquing claims that for-profits are more efficient due to high-powered cost-cutting incentives and highlighting risks and misaligned incentives in the charitable sector).

[27] *See infra* Section II.B.

[28] *See* Aprill et al, *supra* note 13 (discussing the OpenAI turmoil and conflict between the nonprofit and donors); and David A. Fahrenthold, Cade Metz & Mike Isaac, *How OpenAI Hopes to Sever Its Nonprofit Roots*, N.Y. TIMES (Dec. 17 2024), https://www.nytimes.com/2024/12/17/technology/openai-nonprofit-control.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb (describing that Microsoft, which invested 13 billion dollars in OpenAI, has the right to use the OpenAI technology and that when the nonprofit attempted to remove Altman, it was pressured by Microsoft).

[29] *See* TREASURY REPORT, *supra* note 24, at 40-45 (describing the risk of a donor being also an outside investor in the for-profit subsidiary and exerting substantial influence on the nonprofit).

dependence gives minority investors leverage to shape the subsidiary's strategy. A recent example is the turmoil at OpenAI, where the nonprofit parent's board ultimately yielded to the interests of Microsoft, a minority investor. Through CEO Sam Altman, Microsoft imposed its strategic direction, illustrating how financial influence can override formal governance structures.[30]

Once we outline the anatomy of nonprofit control, we can conduct a comparative analysis of the legal regimes governing it in Europe, the U.K., and the U.S., which vary significantly across jurisdictions.[31] Broadly, European and U.K. systems provide a robust framework for income-generating for-profits. In Europe, this is achieved through dedicated enterprise foundation laws, which explicitly permit foundations to actively own a for-profit business, and in the U.K., by permitting charities to actively own trading companies. These laws are generally permissive but impose two key requirements: that the nonprofit makes reasonable distributions to advance its charitable mission,[32] and that the nonprofit ensures reasonable income flows from the for-profit subsidiary to support its charitable mission.[33] These provisions help mitigate nonprofit mission-drift by safeguarding the flow of income to charitable objectives.

These legal systems diverge with respect to socially-oriented for-profits. European jurisdictions do not appear to have a clear legal framework designed for socially-oriented for-profits with a dual mission, whereas the U.K. explicitly permits and regulates social investments by charities in for-profit firms that have a dual purpose of seeking financial return while pursuing a social mission. To address the risk of for-profit mission-drift—because it is difficult to measure and monitor social purposes, and given the pressures from investors to focus on financial returns—both systems rely heavily on the nonprofit regulator, whether it be the foundation authority or the Charity Commission, as applicable, to monitor socially-oriented missions and ensure that they do not deviate from their social purpose.

The U.S. system is far more complex and lacks a cohesive framework. It revolves around a distinction between private foundations and other nonprofits, with private foundations generally subject to prohibitive taxes if they acquire a controlling stake in a for-profit, except in specific cases. The first exception, known as the Newman's Own exception,[34] applies to income-generating nonprofits. Similar in spirit to the European approach, it is more restrictive, requiring that the nonprofit own 100 percent of the business enterprise and that the enterprise distribute all its net operating income to the nonprofit owner. This rule effectively eliminates the risk of outside investor influence by prohibiting for-profit investors from holding stakes in the subsidiary.[35] The second exception, program-related investments (PRIs), facilitates socially-oriented for-profits by allowing

---

[30] *See infra* text accompanying notes 117-122.

[31] *See* Table 2 in the Appendix for a summary of the main legal differences across selected European jurisdictions (Denmark, Germany, Sweden, Austria, and Switzerland), the U.K. and the U.S..

[32] *See infra* text accompanying notes 139-142, 154-157.

[33] *Id.*

[34] *See* Eldar, *supra* note 5, at 212-213.

[35] *See infra* text accompanying notes 174-175.

foundations to invest in for-profit firms, provided income generation is not the primary purpose.[36] Foundations must adhere to strict IRS guidelines on qualifying businesses, which require that the investment significantly further the foundation's charitable purpose and would not have been made but for its social objectives. Additionally, foundations must comply with expenditure responsibility rules, requiring ongoing monitoring of the for-profit and appropriate disclosures to tax authorities.[37]

In this sense, the U.S. system as it applies to private foundations reflects our distinction between income-generating and socially-oriented for-profits and directly addresses the risks of nonprofit and for-profit mission-drift inherent to these two models of nonprofit control. Strikingly, however, nonprofits that do not qualify as private foundations face few restrictions under U.S. law. Nonprofits classified as public charities or social welfare organizations—those not heavily reliant on a single donor—have broad freedom to own and control for-profits.[38] This freedom allows them to form both income-generating and socially-oriented for-profits without mandates for distributing net income, or stringent expenditure responsibility rules.[39] The OpenAI saga illustrates that mission-drift can occur even in the absence of a major donor, due to pressures from outside investors.

We argue that the excessive focus on nonprofit independence from founders or major donors is fundamentally misguided. This issue is especially pronounced under U.S. law, where private foundations are heavily—perhaps excessively—protected from mission-drift, while other nonprofits are left entirely vulnerable.[40] The recent OpenAI saga highlights how this vulnerability can lead to for-profit mission-drift. Rather than emphasizing independence from donors or founders, the focus should be on safeguarding independence from outside investors who may unduly influence for-profit management, steering it toward their own interests at the expense of the nonprofit's objectives—whether ensuring income distributions to the nonprofit or adherence to specific social standards. Donors who have no financial interest in the for-profit subsidiary as investors typically align with the nonprofit's mission, making requirements for independence from these donors unnecessary.[41]

Building on the above analysis, we propose several principles to inform an optimal approach to regulating nonprofit control. First, we recommend that legal systems adopt the distinction between the two economic models of nonprofit control: the income-generating

---

[36] *See* Eldar, *supra* note 5, at 210-212.

[37] *See infra* text accompanying notes 176-182.

[38] *See* Aprill et al, *supra* note 13, at 291-292.

[39] *See infra* text accompanying notes 183-190.

[40] As we explain below, the sharp contrast between the law's approach to private foundations and other nonprofits was never adequately explained in the 1965 TREASURY REPORT, *see supra* note 24, or previous legislation that the report built on. *See infra* Section III.B.1.

[41] Even the moderate independence requirements under European laws, designed to separate foundations from their founders, may be redundant if adequate safeguards are in place to mitigate the influence of outside investors. *See infra* Section IV.C. On donor monitoring of tax-exempt nonprofits, see David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 256–67 (2008) (explaining how donors assess impact and how large donors can influence nonprofit managers).

model and the socially-oriented for-profit, similar to how the U.K. distinguishes between nonprofit controlled trading companies and businesses controlled through social investments. While U.S. laws on private foundations already partially incorporate this distinction, it should be extended to other U.S. nonprofits and introduced in Europe, where socially-oriented for-profits are beginning to emerge.[42] Second, the regulation of nonprofit control should focus on the presence of outside investors in the for-profit subsidiary, rather than the nonprofit's independence from the founder or major donor. While outside investors may be necessary for raising capital, the nonprofit board must remain independent of anyone with a financial interest in the for-profit, particularly co-investors, to mitigate the risk of undue influence.[43] Third, for income-generating for-profits, there should be a general legal duty requiring the for-profit to make reasonable distributions to its nonprofit owner. This ensures that the for-profit does not accumulate assets at the expense of the nonprofit's charitable mission.[44]

Finally, the greatest challenge for nonprofit control lies in regulating socially-oriented for-profits.[45] We propose that certification mechanisms could help verify that for-profits are pursuing a clear social mission. Certifications could focus on criteria such as transacting with disadvantaged groups, as seen in community development financial institutions or work-integration firms, to ensure alignment with social objectives.[46] However, certification mechanisms may be unavailable or impractical, particularly when the social objective is to generate public goods, such as environmental sustainability or the responsible use of artificial intelligence. Strong enforcement and supervision by government and tax agencies can help mitigate the risk of for-profit mission-drift. Such systems exist in the U.K. and various European jurisdictions, where tax-exempt nonprofits—such as charities and enterprise foundations—are subject to public oversight.[47] While these enforcement mechanisms are inevitably imperfect—because they rely on government authorities to determine which for-profits have a genuine social purpose—they are likely to be instrumental in cases where the for-profit business has largely abandoned its social mission. Again, OpenAI is a case in point.[48]

Our article makes several contributions to the literature. First, we introduce a new nomenclature that clarifies the economic rationale behind the two key models of nonprofit control: the income-generating for-profit and the socially-oriented for-profit. This straightforward categorization encompasses all forms of nonprofit control, as each instance falls into one model, the other, or both.[49]

---

[42] *See infra* Section IV.A.

[43] *See infra* Section IV.B.

[44] *See infra* Section IV.C (highlighting the need for strong enforcement mechanisms and distribution duties).

[45] *See infra* Section III.B.2.

[46] For a proposal for certification of firms that transact with different groups of disadvantaged groups, whether acting as customers, investees, workers, or providers of input, *see* Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106(4) VA. L. REV. 937 (2020). *See also infra* Section IV.D.

[47] *See infra* Sections III.A.1-2 and IV.D.

[48] *See infra* Section IV.D.

[49] *See infra* Section I.

Second, we identify the two major risks associated with nonprofit control: nonprofit mission-drift in the case of income-generating nonprofits, and for-profit mission-drift in the case of socially-oriented for-profits. Crucially, we argue that these risks are most acute not when the nonprofit lacks independence from its main donor, but rather when it is not independent from outside investors in the for-profit subsidiary.[50]

Third, we conduct the first comparative analysis of the principal elements of legal systems regulating nonprofit control. We cover European jurisdictions where income-generating for-profits have been highly prevalent, including Denmark and Germany, U.K. laws, where recent legal changes have facilitated the formation of socially-oriented firms, and U.S. laws, which are highly complex and rely excessively on whether nonprofits qualify as private foundations. Specifically, we offer an analysis of the extent to which these legal systems facilitate the two primary models of nonprofit control, and how they address their risks.[51]

Finally, we propose an optimal legal regime to better facilitate nonprofit control in achieving its objectives while addressing the genuine risks it poses.[52] We advocate a relatively permissive approach to income-generating for-profits modelled on European and U.K. laws, and several legal solutions for addressing the challenges of regulating socially-oriented for-profits due to the tension between the profit incentive and social mission, and the inherent difficulty of verifying that an operating business accomplishes a social purpose.[53]

This Article proceeds as follows: Section I explores the role of nonprofit control in for-profit enterprises by identifying the two primary models: the income-generating for-profit and the socially-oriented for-profit. Understanding the economic rationale behind these models is essential for assessing their benefits and risks. Section II examines the key costs associated with nonprofit control, focusing on nonprofit mission-drift and for-profit mission-drift as they relate to these two models. Section III critically analyzes the existing European, U.K., and U.S. legal frameworks for regulating nonprofit control, and provides a comparative analysis of how they address the core risks inherent in nonprofit control. Finally, Section IV proposes an optimal regime for regulating nonprofit control which is based on our distinction between the two primary economic models of nonprofit control and suggesting a principled approaches to mitigate nonprofit and for-profit mission-drift.

I. THE ROLE OF NONPROFIT CONTROL

In this section, we explore the economic rationale for two models of nonprofit control: the income-generating for-profit and the socially-oriented for-profit. While some accounts treat these models as equivalent, we argue that their underlying rationales are fundamentally distinct. The key question we address is why a nonprofit would choose to control a for-profit entity.

---

[50] *See infra* Section II.
[51] *See infra* Section III.
[52] *See infra* Section IV.
[53] *See infra* Section IV.D.

A. The Income-Generating For-profit

The first model of nonprofit control is the income-generating for-profit, where a nonprofit owns and controls a for-profit enterprise to generate funds for its charitable mission. These funds enable the nonprofit to distribute grants and fulfill its social purpose. In this structure, the nonprofit carries out the social mission, while the for-profit primarily acts as a financial engine, rather than directly advancing the nonprofit's objectives.

This model is especially prevalent in Europe, where many renowned global companies, such as IKEA, Rolex, and Carlsberg, are controlled by nonprofit entities. These operating businesses, known for their strong brand reputations, provide stable and predictable income streams. Similarly, pharmaceutical companies like Novo Nordisk and Lundbeck generate reliable revenue through robust patent portfolios that form the basis of essential medicines that have high and consistent demand. The foundations that own these companies are responsible for their charitable missions. For example, the Novo Nordisk Foundation advances medical research, education, and humanitarian causes, while the Carlsberg Foundation supports scientific research, arts, and cultural preservation, both ensuring stable ownership of their respective companies.

In the U.S., this model is less common but includes notable examples. The Hershey Trust, a longstanding example, owns a controlling stake in The Hershey Company, using its profits to fund the Milton Hershey School, which provides free education and care for children in need.[54] Newman's Own is a more recent example, with the Newman's Own Foundation owning 100 percent of the food and beverage company, producing items like salad dressing and pasta sauces, and directing all profits to charitable initiatives such as children's healthcare and nutrition programs.[55]

It is tempting to think that the primary rationale for income-generating for-profits is financial sustainability. By relying on such entities, nonprofits can reduce their dependence on third-party donations and focus on their social missions. While this explanation is not incorrect, nonprofits have other means to generate revenue for their charitable purposes. For example, many foundations invest in diversified portfolios of public and private firms, an approach that is less risky[56] and, based on standard finance theory, generates steady long-term returns.[57] The puzzling question is why some nonprofits choose to concentrate their resources in one or a few companies instead.

It is important to emphasize that, in some cases, nonprofits do not have the option to

---

[54] The Hershey Trust qualifies as a supporting organization under Section 509(a)(3) and is therefore not subject to the restrictions that apply to private foundations; *see* Eldar, *supra* note 5, at 214. *See also* Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749 (2008) (examining how agency costs and fiduciary duties impact corporate governance within charitable trusts, using the Hershey Trust's attempted sale of Hershey Foods as a case study).

[55] *See* Eldar, *supra* note 5, at 206-212.

[56] *See* Sitkoff, *supra* note 11.

[57] For the seminal work introducing modern portfolio theory advocating diversification to reduce risk and optimize returns, *see* Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952).

fully diversify their investments. In Europe, certain nonprofit foundations, such as the German Carl Zeiss Stiftung and the Danish Carlsberg Foundation, are bound by dual-purpose charters that require them to operate specific businesses alongside their charitable missions.[58] This dual-purpose structure obligates the nonprofit to maintain controlling influence over one or more subsidiaries explicitly enumerated in the founder's charter. Accordingly, the legal and structural mandates can limit a nonprofit's ability to pursue diversified investment strategies.

However, most nonprofits that control operating businesses could, in principle, dispose of these assets and invest the proceeds in a diversified portfolio. Yet, they continue to manage companies spanning industries such as furniture, food products, luxury watches, and medicines for diabetes and obesity. Why do they choose to retain direct control over these businesses instead of pursuing a less risky and more conventional investment strategy?

The primary role of nonprofit control in the income-generating model is to create a stable and consistent source of cash over time that the nonprofit can rely on to fund its charitable activities.[59] Virtually all operating firms controlled by nonprofits in this model are stable businesses that produce a dependable stream of cash flows for their nonprofit parent.[60] Broadly, these firms fall into two categories. The first category includes consumer brand companies, such as Rolex, Carlsberg, and IKEA. These companies manufacture and sell products directly to consumers and are distinguished by their strong brand recognition, high levels of customer loyalty, and longstanding market presence. Many have existed for generations, providing a reliable and invariable source of cash to their shareholders, which in these cases are charitable foundations.

The second type is pharmaceutical companies, such as Novo Nordisk, which is known for its treatments for diabetes and other chronic diseases,[61] and Lundbeck, which specializes in treatments for brain disorders, including depression, schizophrenia, Alzheimer's disease, and Parkinson's disease.[62] These companies leverage strong patent portfolios—Novo Nordisk with patents on insulin therapies and weight-loss products, and Lundbeck with patents on antidepressants and antipsychotics. These patents provide a significant competitive edge, granting exclusivity for 20 years or more and enabling these firms to generate a stable stream of cash throughout the patent lifecycle. For example, in 2023, the Novo Foundation received about $3.6 billion in dividends from the

---

[58] *See* Mark Ørberg, *Enterprise Foundations and Faithful Agency as Drivers of Sustainable Long-Termism in Philanthropy*, 25 EUR. BUS. ORG. L. REV. 765, 769, 778-781 (2024).

[59] *See* Henry Hansmann, *Ownership and Organizational Form*, in THE HANDBOOK OF ORGANIZATIONAL ECONOMICS (Robert Gibbons and John Roberts eds., 2012) 891, at 909 (explaining how managers of enterprise foundations may be principally focused on the income-generating function of for-profits).

[60] *See* STEEN THOMSEN, THE DANISH INDUSTRIAL FOUNDATIONS, 11–12, 27–31 (2017) (describing various examples of enterprise foundation control of businesses in a number of jurisdictions).

[61] *See* Robert Strand, *Global Sustainability Frontrunners: Lessons from the Nordics*, 66 CAL. MGMT. REV. 5 (2024) (discussing the Novo Nordisk's activities and Novo Nordisk Foundation's control and ownership).

[62] *See* LUNDBECK, https://www.lundbeck.com/global/about-us (describing Lundbeck's activities).

pharmaceutical company and its other investments, and made about $1.1 billion in grants.[63] Accordingly, while these pharmaceutical companies differ from consumer brands, they share the key characteristic of providing a reliable and prolonged source of income for the charitable foundations that own them.

In contrast, companies that invest in a diversified portfolio of public firms may be subject to high systematic risk. Systematic risk refers to the inherent risk that affects the entire market or a significant segment of the market, such as economic recessions, interest rate changes, or geopolitical events, and cannot be eliminated through diversification. If there is a market downturn, the value of the portfolio naturally declines, and the total amount of dividends from the underlying firms is likely to be lower. In these circumstances, it would also be untimely to sell part of the portfolio when market valuations are depressed. Accordingly, the ability of the nonprofit owner to extract cash from its investment portfolio is likely to be constrained, particularly during periods of financial distress, such as an economic recession or financial crisis.

In contrast, companies that generate a stable source of cash flows by selling goods and products with consistent and relatively inelastic demand can continue to perform adequately even in periods of financial distress. Even if market valuations and asset prices decline, these companies are likely to withstand such downturns and continue to generate cash. Importantly, the nonprofit parent, which controls the operating business, can extract cash through dividends by leveraging its controlling stake in the company. Accordingly, when the nonprofit needs cash to fund its charitable programs, it can reliably access funds directly from the business, ensuring financial stability even during broader market downturns.

From a governance perspective, the goal of the nonprofit controller is to balance the short-term and long-term interests in extracting cash from the for-profit subsidiary. On the one hand, if the nonprofit parent needs cash in the short term to fund critical grants or urgent programs for its intended beneficiaries, it may extract dividends to address these immediate needs. This approach might require foregoing opportunities to reinvest in the business to capitalize on a timely opportunity to generate social impact. On the other hand, the nonprofit must also ensure that the for-profit subsidiary maintains its ability to generate cash in the long term. For consumer brands, this might involve preserving and enhancing brand recognition, while for pharmaceutical companies, it could mean investing in research and development to secure valuable patents that will provide future income. Consequently, the nonprofit has a strong incentive to allow the for-profit subsidiary to reinvest in the business to ensure its continued growth and sustainability. This dual focus helps the nonprofit achieve a balance between addressing immediate needs and safeguarding the

---

[63] *See* NOVO NORDISK FOUNDATION, Annual Report 2023, https://datacvr.virk.dk/gateway/dokument/downloadDokumentForVirksomhed?dokumentId=amNsb3VkczovLzAzLzMzL2YwLzhiLzk5L2I3YmQtNGRjZS04YjY4LTcyYTJiYWI0MWQ5Mw&cvrNummer=10582989, at 7, 33 (describing awarded grants and the foundation's income); and NOVO HOLDINGS, Annual Report 2023, https://assets.novoholdings.dk/novo-holdings-2023-performance-report.pdf, at 8 (showing the foundation's full ownership of Novo Holdings and that Novo Nordisk is the main asset of the holding company).

long-term viability of its mission.

The tradeoff between short-term and long-term considerations and the foundation's ability to actively control strategic decision-making at the for-profit subsidiary is demonstrated by the story of how Novo Nordisk developed its patented GLP1-medicine for diabetes and obesity.[64] During the 1990s and 2000s, the global pharmaceutical industry faced increasing international competition, driving a wave of mergers. Novo Nordisk, struggling with its diabetes drug pipeline, began losing market share to competitors like Sanofi. The company faced a pivotal decision: sell the company and relinquish control or take a risky bet on developing a new diabetes drug. A sale would have meant the Novo Nordisk Foundation losing its controlling influence.[65]

The Novo Nordisk Foundation's governing board strongly opposed selling, insisting on retaining control unless clear evidence showed a sale would leave the foundation significantly better off. Instead, the company doubled down on developing a promising but high-risk drug: GLP-1 medicine for diabetes and obesity. While many competitors, including Roche and Eli Lilly, abandoned similar projects due to severe side effects like anaphylactic shock, Novo Nordisk persevered.[66]

Developing GLP-1 drugs posed immense challenges,[67] including risks of failure and financial strain. Yet, the company's CEOs and governing board continued to back the project, recognizing its potential to revolutionize diabetes care. Their commitment paid off. Novo Nordisk succeeded in stabilizing insulin production in diabetes patients, creating a breakthrough treatment that set the company apart. This decision not only saved Novo Nordisk from decline but transformed it into Europe's largest pharmaceutical company. The Novo Nordisk Foundation's refusal to sell ensured the company's innovative success and sustained its charitable mission.[68]

The main factor that appears to explain the decision to invest in the development of the drug despite the risks involved is the strong incentives of the foundation to find ways to generate more cash in the long-term. It is true that the development of the GLP-1 patent resonates with the one of the public good purposes of the Novo Nordisk Foundation – that

---

[64] *See* Strand, *supra* note 61, at 7-10 (describing the business challenges Novo Nordisk faced and its success).

[65] *See* KURT JACOBSEN, NOVO NORDISK (2023), 332, 336, 352, 382-87, 392-94 (Explaining in detail how market developments led the Novo Nordisk company to consider mergers with Bayer, Serono, AkzoNobel, Schering, Johnson & Johnson, and Genentech, and describing the foundation's subsequent rejection of suggestions to relinquish foundation control).

[66] *Id*.

[67] *See* Lotte Bjerg Knudsen, *Inventing Liraglutide, a Glucagon-Like Peptide-1 Analogue, for the Treatment of Diabetes and Obesity*, 20.2(6) ACS PHARMACOL. TRANSL. SCI. 468-484 (2019) (describing, as an insider and lead researcher, how Novo Nordisk had other GLP-1 projects and ideas that failed before the GLP-1 receptor 'Liraglutide' was developed, paving the way for the blockbuster drugs Ozempic and Wegovy), and Lotte Bjerg Knudsen and Jesper Lau, *The discovery and development of liraglutide and semaglutide*, 10 FRONT. ENDOCRINOL., 155 (2019) (detailing the scientific breakthroughs and innovative processes behind the creation of these GLP-1 receptor agonists, now key treatments for diabetes and obesity).

[68] *See* JAKOBSEN, *supra* note 65.

is, supporting research hospital activities within diabetes in Denmark diabetes.[69] However, the purposes of the foundation also require the foundation to provide a stable basis for the commercial activities of Novo Nordisk, and patent development is an ideal way to accomplish this goal. Moreover, the expertise of the Novo Nordisk Foundation in medical research more broadly gave its managers the necessary confidence to make a risky gamble on the development of the product.[70] This is similar to the way visionary entrepreneurs pursue high risk-visions that end up benefiting all shareholders in the long-term.[71]

In contrast to Novo Nordisk's story, the Wellcome Trust, a U.K. charitable trust focused on improving health through science and research, took a different path. Established in 1936, the Wellcome Trust owned and controlled Wellcome PLC, a highly successful pharmaceutical company.[72] The trust's trustees managed the company on its behalf, but by the 1980s and 1990s, challenges arose. The trust struggled to reconcile the commercial needs of the company, such as reinvesting in R&D and competing internationally, with its philanthropic goals, which required steady distributions for charitable purposes.[73] With all its assets concentrated in one company, the trust lacked financial flexibility and was exposed to significant risks.

The trustees ultimately decided to sell their stake, believing the trust's long-term philanthropic interests would be better served by a diversified portfolio. In March 1995, the trust sold its remaining shares to Glaxo (now GlaxoSmithKline), transitioning to a broader investment strategy. Today, the Wellcome Trust is one of Europe's largest nonprofits, supported by a diversified portfolio that provides steady income for its activities.[74] The Wellcome Trust's experience demonstrates that when a for-profit fails to generate stable long-term cash flow, the nonprofit parent may dispose of the business and revert to the conventional strategy of diversified investing to ensure financial sustainability.

---

[69] *See* the charter of the Novo Nordisk Foundation, § 2(3), NOVO NORDISK FOUNDATION, https://novonordiskfonden.dk/en/who-we-are/articles-of-association/.

[70] The Novo Nordisk Foundation has health and pharma experts within its organization. Some experts serve on its committees for biotechnology, insulin resistance, metabolism, biomedicine, etc. *See* NOVO NORDISK FOUNDATION, https://novonordiskfonden.dk/en/committees/. In addition to the appointees on these committees, the Novo Nordisk Foundation also employs a couple of hundred staff members, many of whom have expert backgrounds in medicine or biotechnology. The foundation's board is composed, inter alia, of former executives from the Novo Nordisk company.

[71] *See* Goshen & Hamdani, *supra* note 10, (discussing how a controlling shareholder's idiosyncratic vision can benefit minority shareholders if balanced with their protection). However, private foundations may struggle to uphold founders' visions. See Brian Galle, *The Quick (Spending) and the Dead: The Agency Costs of Forever Philanthropy*, 74 VAND. L. REV. 757 (2021) (providing empirical evidence of managerial divergence from donor preferences after their deaths).

[72] *See* Chay Brooks & Thomas R. Buckley, *The evolution of the Wellcome Trust and market-based philanthropy in the UK*, BUS. HIST., 1 (2024) (examining the transformation of the Wellcome Trust into a leading market-based philanthropic organization, including the history of the nonprofit owner and the Wellcome company).

[73] Under English charity law there are requirements about fulfillment of the charitable purpose. *See* e.g. Richard Fries, *The Charity Commission for England and Wales*, in COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS (Klaus Hopt et al eds., 2010) 896, 898.

[74] *See* Brooks & Buckley, *supra* note 72.

B. The Socially-Oriented For-profit

The second model of nonprofit control is the socially-oriented for-profit**.** In this category, the nonprofit controls the for-profit enterprise to ensure the fulfillment of the social mission for which the nonprofit was created. The primary function of the nonprofit in this arrangement is to monitor and enforce the for-profit's commitment to the social mission, which is typically enshrined in the nonprofit's charter. The nonprofit functions as a control mechanism to ensure that the for-profit remains perpetually dedicated to its social objectives.[75]

There are two primary types of socially-oriented for-profits. The first consists of social enterprises that transact with disadvantaged groups**.** These disadvantaged groups are persons that are unable to transact with standard commercial firms either because they lack the necessary abilities to do so, or because commercial firms face information asymmetries with respect to their abilities. This class of social enterprises contains a narrowly defined but broad set of organizations, including microfinance institutions, social investment firms, community development financial institutions (CDFIs), fair trade social enterprises, work integration social enterprises (WISEs), and firms that sell low-cost products and services to disadvantaged groups.[76] These firms step in where standard commercial firms refuse to transact with disadvantaged groups by incurring the costs of such transactions. These costs include the additional costs of measuring the abilities of disadvantaged groups and the costs associated with the average lower abilities of these groups. Through these transactions, social enterprises acquire information about their beneficiaries' abilities, needs, and preferences. This information enables social enterprises to tailor their assistance to the needs of their beneficiaries and help them enhance their abilities. Thus, the measurement function makes social enterprises effective in pursuing complex development missions, such as increasing access to capital, enhancing employment opportunities, and improving productivity.[77]

---

[75] *See* Eldar, *supra* note 46, at 950, and Eldar, *supra* note 16, at 117-118 and 155-158 (discussing control mechanisms). Note that to create socially-oriented for-profits, the nonprofit need not be entitled to any cash-flow rights since its role is simply to actively manage the for-profit. Two examples where nonprofits have little or no cash-flow rights but retain control over the mission are Cafédirect and Triodos Bank. Cafédirect, a U.K. firm that sells fair trade coffee, tea, and cocoa, is structured as a public limited company (PLC), but its mission is safeguarded by the Guardian Share Company, a nonprofit entity that holds a golden share. This golden share grants the nonprofit veto power over fundamental changes that could compromise Cafédirect's commitment to ethical sourcing and fair trade principles. Triodos Bank, a Dutch ethical bank, follows a similar structure. While its depository receipts are held by individual investors, voting control remains with Stichting Administratiekantoor Aandelen Triodos Bank (SAAT), a nonprofit foundation. SAAT ensures that Triodos Bank's governance and financial activities remain aligned with its mission of financing enterprises that promote environmental sustainability, social inclusion, and cultural development. *See* Table 1 in the Appendix.

[76] *See* U.S. DEPARTMENT OF TREASURY, CDFI CERTIFICATION, https://www.cdfifund.gov/programs-training/certification/cdfi, and WIRELESS INDUSTRY SERVICE EXCELLENCE (WISE) CERTIFICATION PROGRAM, https://www.wisecertification.com/.

[77] *See* Eldar, *supra* note 16, at 117-118 and 155-158.

One example from the U.S. is the Greyston Bakery which is a nonprofit-controlled work integration social enterprise (WISE).[78] The bakery is wholly owned by the Greyston Foundation, a nonprofit organization dedicated to promoting community development, primarily through employment programs. Greyston Bakery operates under an open-hiring policy, providing jobs to individuals without requiring interviews, applications, or background checks. This innovative hiring approach creates opportunities for individuals who face systemic barriers to employment, such as a lack of education, a history of incarceration, or prolonged gaps in employment. The bakery uses its transactional relationship with workers to gather critical information about their abilities, productivity, and needs. This information is then used to tailor support services and training programs to help employees enhance their skills and succeed in the workplace. In addition to job opportunities, the Greyston Foundation provides wraparound services, including childcare, housing assistance, and workforce development, to further support employees and their families.

An example from the U.K. is Better Society Capital (BSC), a social investment firm that funds businesses and organizations addressing entrenched social issues, particularly financial exclusion, employment, and housing.[79] BSC is a public limited company (PLC) controlled by The Oversight Trust, a nonprofit with 80 percent of voting rights. Its governance model limits commercial investors, such as U.K. banks, to a capped 5 percent voting stake, preventing them from influencing investment decisions. BSC provides equity and debt financing to social enterprises, charities, and mission-driven businesses that lack access to traditional finance. It funds companies tackling youth unemployment, financial exclusion, and community regeneration while also supporting growth-stage enterprises in healthcare, education, and employment access. Cash flows are primarily reinvested into new projects that align with BSC's mission, as profit distributions to shareholders are capped at 50 percent of cumulative post-tax earnings. This structure ensures that capital remains dedicated to social impact initiatives rather than maximizing private financial returns.

The second category of socially-oriented for-profits includes for-profits that provide certain public goods. Public goods are typically underprovided by private actors because they cannot be easily monetized and often arise in areas where regulation is politically impossible or impractical. For instance, stringent environmental standards, ethical standards in journalism, or the responsible development of artificial intelligence may not be mandated by law due to political or logistical barriers. In such cases, some firms voluntarily commit to higher standards, with nonprofit organizations acting as monitors to ensure compliance and prevent mission-drift.

Patagonia exemplifies this category of socially-oriented for-profits through its

---

[78] *Id.*, at 90 (describing The Greyston Foundation and the Greyston Bakery).

[79] *See* BETTER SOCIETY CAPITAL, SHAREHOLDERS, https://bettersocietycapital.com/about-us/governance/shareholders/ (describing how The Oversight Trust acts as the majority shareholder of Better Society Capital to ensure it remains true to its mission, while Barclays, HSBC, Lloyds Banking Group, and NatWest Group are also shareholders.); and THE OVERSIGHT TRUST, WHAT WE DO, https://www.oversighttrust.org/what-we-do (describing the trust's oversight role and its subsidiaries).

commitment to environmental sustainability.[80] The company produces outdoor clothing using environmentally friendly practices, including organic and recycled materials and carbon-neutral production methods. Recently, Patagonia restructured its ownership to ensure its environmental mission is preserved in perpetuity. Control of the company has been transferred to a dual-class ownership structure comprising the Patagonia Purpose Trust and the Holdfast Collective, a nonprofit organization. The trust holds the voting rights of the company and actively manages its operations to safeguard its mission against external pressures, such as shareholder demands or acquisition risks. The trust's purpose is to ensure that Patagonia remains committed to its environmental and social objectives, while the nonprofit directs 98% of the company's economic profits toward environmental conservation initiatives.

OpenAI is a for-profit entity designed to ensure that artificial general intelligence (AGI) benefits humanity as a whole. Its corporate structure is centered on nonprofit control: 51% of OpenAI's voting rights are held by the nonprofit OpenAI Inc., while the remaining equity is primarily owned by Microsoft, a key strategic partner. This structure enables the nonprofit to maintain control over OpenAI's strategy, ensuring that the pursuit of profit does not compromise its overarching mission of advancing ethical and socially beneficial AI development.[81] OpenAI operates under a capped-profit model, where returns to investors, including Microsoft, are limited to a predetermined multiple. The nonprofit's control guarantees that OpenAI remains focused on its mission and avoids sacrificing its long-term social goals for short-term profit maximization.

The socially-oriented for-profit is not prevalent in Europe, but there are examples. Det Norske Veritas (DNV) is a Norwegian nonprofit foundation that controls DNV AS, a Norwegian for-profit company.[82] The foundation holds all voting rights and reinvests cash flows from the for-profit into research and public safety. DNV AS provides risk management, certification, and technical advisory services in maritime, energy, and sustainability sectors. The for-profit's social purpose is to enhance safety, environmental protection, and corporate responsibility by setting high technical standards where regulations may be weak or absent. A similar example from the U.K. is Lloyd's Register (LR), a for-profit company controlled by The Lloyd's Register Foundation, a U.K. nonprofit that holds 100 percent of voting rights.[83] Cash flows from LR are reinvested into the foundation's research, education, and safety initiatives. Lloyd's Register provides

---

[80] *See* Susan N. Gary, *The Changing Landscape of Business Succession: How and Why Purpose Trusts Matter*, OHIO ST. BUS. L.J. 18 (2023), and Eldar, *supra* note 5, at 204-205.

[81] *See* https://openai.com/about/ and https://openai.com/index/planning-for-agi-and-beyond/. *See* also Ellen P. Aprill et al, *supra* note 13 (analyzing the legal and governance challenges arising from the complex relationship between the OpenAI nonprofit and the for-profit entities, with implications for tax-exempt organizations managing subsidiary operations).

[82] *See* DNV, ABOUT US, https://www.dnv.com/about/; DNV, Annual report https://www.dnv.com/annualreport/.

[83] *See* LLOYD'S REGISTER FOUNDATION, ABOUT US, https://www.lrfoundation.org.uk/about-us; and LLOYD'S REGISTER FOUNDATION, REPORT AND FINANCIAL STATEMENTS 30 JUNE 2023, https://www.lrfoundation.org.uk/sites/default/files/2024-09/Lloyd%27s%20Register%20Foundation%20-%20Annual%20Statement%20-%2030%20June%202023.pdf, at 35-38, 69-78.

technical assurance, certification, and advisory services in maritime, energy, and engineering. The for-profit's social purpose is to promote safety and risk management by setting rigorous industry standards.

In both categories of socially-oriented for-profits, the question may arise as to why these firms use nonprofit control to monitor and manage a for-profit, rather than simply providing the services themselves. Many social enterprises indeed form as nonprofits. For example, Goodwill stores employ people who suffer from systemic unemployment, and Indigo sells clothing created by low-income artisans and workers in Peru while maintaining nonprofit status.

There are essentially two principal reasons for using a for-profit structure. First, if the nature of the business is highly commercial, it may jeopardize the tax-exempt status of the nonprofit parent.[84] For instance, the Greyston Bakery operates largely as a business like any other bakery, competing with other bakeries to generate profits. Its commercial activities could potentially risk the tax-exempt status of the Greyston Foundation, which operates many charitable programs, such as training and workforce development initiatives to help people find employment. This concern is even stronger in the case of firms like Patagonia, which sells high-end clothing at premium prices and competes directly against other luxury and outdoor brands. Patagonia's operations rely heavily on maintaining a competitive position in the market, developing innovative product lines, and marketing to environmentally conscious consumers. These activities—though aligned with Patagonia's environmental mission—are inherently commercial and cannot easily be categorized as charitable under tax-exempt regulations. A nonprofit structure would constrain Patagonia's ability to operate as a competitive, market-driven entity.

Second, in order to raise equity capital, it is necessary to form a for-profit entity. A nonprofit, by definition, is subject to the non-distribution constraint and therefore cannot issue equity interests to investors.[85] While nonprofits often maintain full ownership of the for-profit business, others either raise capital from outside investors, [86] or may contemplate doing so in the future.[87] The need to raise significant capital is particularly pronounced for

---

[84] *See* e.g. Mark Ørberg & Louise Blichfeldt Fjord, *Enterprise Foundations as 'Non-profit Organizations' Under the EU Pillar Two Directive*, 51 INTERTAX 472, 478-480 (2023) (discussing European enterprise foundations and how certain business activities in subsidiaries may limit their tax-exemptions if they are not "exclusively" pursuing public good purposes).

[85] *See* Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980) (exploring the economic rationale for the nonprofit organizational form, emphasizing its role in mitigating market failures related to trust and information asymmetry in the provision of goods and services).

[86] For example, Cafédirect, a U.K. firm that sells fair trade coffee, and Triodos Bank, a Dutch bank that provides financing to social enterprises contributing to environmental sustainability and social inclusion—both of which are controlled by nonprofits (*see* Table 1 in the Appendix)—are publicly listed on a matched-bargain system in the U.K., a trading platform that allows investors to trade shares directly with each other. See Eldar *supra* note 16, at 110,113,173.

[87] In many cases, the for-profit is 100 percent owned and controlled by the nonprofit. For example, Patagonia is entirely owned through a dual-class structure, with its voting rights held by the Patagonia Purpose Trust and its economic profits directed to the Holdfast Collective, a tax-exempt nonprofit. Similarly, the Greyston Bakery is wholly owned by the Greyston Foundation, which oversees its operations and ensures

firms like OpenAI, which requires substantial funding to develop advanced artificial intelligence (AI) systems and infrastructure. AI research and development involve enormous costs, including hiring highly specialized talent, purchasing computational resources, and maintaining state-of-the-art data centers. These costs far exceed what a typical nonprofit could generate through grants or donations. Forming a for-profit entity enables OpenAI to access large-scale equity investments from partners like Microsoft, which holds a significant stake in the company.

If a business requires raising significant capital from outside investors, it typically needs to be structured as a for-profit. Nonprofit control, however, is essential to ensure that the for-profit does not compromise its social mission in the pursuit of profits. As we discuss in the next section, however, significant involvement of outside investors and dependence on their capital for the company to survive and compete can erode the nonprofit's ability to control key decisions. As discussed more fully below, nonprofit control may weaken under the pressures of profit-driven outside investors.

II. THE RISKS OF NONPROFIT CONTROL

While nonprofit control offers significant benefits, it also comes with distinct risks, which depend on the category of nonprofit control. Each category has its own vulnerabilities because the social mission is delivered by a different entity. For nonprofits controlling an income-generating for-profit, the key risk is nonprofit mission-drift—the risk that the nonprofit prioritizes increasing the value of the for-profit subsidiary over making distributions to its intended beneficiaries, neglecting its stated social mission.[88] For nonprofits controlling a socially-oriented for-profit, the primary risk is for-profit mission-drift—the risk that the for-profit uses the nonprofit's resources without advancing the social mission.[89]

These risks are magnified when the for-profit has minority outside investors that are not nonprofits. For income-generating for-profits, outside investors may prefer to reinvest net income in the business rather than distributing it to the nonprofit parent. For socially-oriented for-profits, outside investors may push the firm to prioritize profits over the social mission. When outside investors influence the nonprofit parent or directly steer the for-profit to serve their interests, nonprofit control risks failing to fulfill its core purpose.

The literature and the law have largely focused on limiting a donor's ability to influence the decision-making of a nonprofit firm with respect to its for-profit subsidiary. However, this emphasis on creating independence from the donor may be misguided. Donor involvement can enhance the nonprofit's accountability, as donors are often deeply

---

alignment with its social mission. However, both companies may consider selling an equity stake to outside investors in the future if raising additional capital becomes necessary to remain commercially competitive.

[88] *See* infra Section II.A. Mission-drift in the social sector (that is, losing sight of the social mission in an effort to generate revenue) is a well-known phenomenon. *See* e.g. Alnoor Ebrahim et al., *The governance of social enterprises: Mission drift and accountability challenges in hybrid organizations*, 34 RES. ORG. BEHAV., 81, 84 (2014). We focus specifically on mission-drift related to nonprofit control.

[89] *See* infra Section II.B.

invested in ensuring that the organization fulfills its mission. We argue that a donor's influence becomes problematic only when the donor has an economic stake in the for-profit subsidiary—essentially acting as an outside investor. In such cases, the donor's ability to sway decision-making could conflict with the underlying purpose of nonprofit control.

A. Nonprofit Mission-Drift

The risk of nonprofit mission-drift is ultimately that the nonprofit would not pursue its mission by making distribution to its beneficiaries in accordance with the purpose stated in its charter.[90] There are two aspects to this risk. The first is that the nonprofit would be distracted from its social mission and focus on growing the for-profit subsidiary. As a result, it would fail to make distributions to its beneficiaries.

This risk was particularly strong in both the U.S. and Europe before foundations became heavily regulated. The ownership and control of for-profit businesses by nonprofit foundations prior to Tax Reform Act of 1969 posed significant risks of distracting these foundations from their social missions. One major concern was the delay in distributing income for charitable purposes, as foundations often deferred making distributions indefinitely, as highlighted in the 1965 Treasury Report.[91] This led to prolonged periods where the intended public benefits of the foundations' activities were not realized. Additionally, the active management of these businesses absorbed significant attention and resources from foundation managers, diverting their focus from identifying and funding innovative charitable programs.[92] These dynamics undermined the foundations' ability to prioritize and fulfill their philanthropic goals effectively.

A similar phenomenon was observed in Denmark, where enterprise foundations are prevalent. Before the enactment of the Danish Law of 1984, there was widespread failure among these foundations to make adequate distributions. A government survey conducted in 1982 revealed that 64.4% of enterprise foundations did not make any distributions during that year. Moreover, the survey found that 78% of the income generated by these foundations in 1982 was allocated to consolidation efforts rather than being distributed for charitable or public purposes.[93]

The risk that nonprofits fail to make distributions has been effectively mitigated through regulation. In the US, the Tax Reform Act of 1969 mandates that private foundations distribute at least 5 percent of their assets annually.[94] Similarly, in Denmark, the U.K., and most other European jurisdictions, there are regulations requiring foundations

---

[90] *See* Eldar, *supra* note 16, at 170-172.

[91] *See* Schmalbeck, *supra* note 4, at 61, 77; and TREASURY REPORT, *supra* note 24, at 23-30, 33.

[92] *See* Schmalbeck, *supra* note 4, at 83-85; and TREASURY REPORT, *supra* note 24, at 35.

[93] *See* appendix to Danish Bill 133, Bill on Foundation Law (*Lov om Fonde og Visse Foreninger*), Mar. 15, 1984, 29-31 https://www.folketingstidende.dk/samling/19832/lovforslag/L133/19832_L133_som_fremsat.pdf.

[94] I.R.C. § 4942 and see *infra* Section III.B.

to make reasonable distributions, which are rigorously enforced by regulatory bodies.[95] Furthermore, many instances of non-distribution have been linked to widespread self-dealing, where foundations controlled by family members or close associates of the donors prioritize personal or familial benefits over the foundation's charitable goals.[96] Such self-dealing is now stringently controlled by laws that prohibit transactions benefiting insiders, including donors, directors, and their families.[97]

The risk of nonprofits failing to make distributions due to distractions from managing for-profit subsidiaries can be addressed by implementing moderate rules that mandate distributions to their intended beneficiaries.[98] Additionally, to prevent such distractions, it is feasible to ensure that while the nonprofit board may influence significant decisions of the for-profit operating firm, there should be a separate board and executive management for the for-profit entity. This arrangement allows the nonprofit board to primarily monitor the operations of the for-profit subsidiary without becoming entangled in its day-to-day decisions, thereby maintaining focus on the nonprofit parent's charitable mission.

The second aspect of nonprofit mission-drift is that the for-profit may fail to distribute earnings to the nonprofit. When nonprofit managers prioritize growing the for-profit over advancing the charitable mission, the for-profit might reinvest its earnings instead of supporting the nonprofit. This deprives the nonprofit of income needed for valuable projects. While this reinvestment may be justified as a strategy to pursue long-term profit maximization,[99] it can come at the expense of the nonprofit's ability to fund valuable short-term projects and initiatives.[100]

---

[95] *See* Fries, *supra* note 73 (exploring the regulatory framework, governance responsibilities, and challenges faced by the Charity Commission in supervising and supporting charities across England and Wales), Dominique Jakob, *Swiss Enterprise Foundations: Overview and Current Challenges*, 83, 98-101, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023) (providing an analysis of the legal framework, governance structures, and contemporary issues facing Swiss enterprise foundations within a comparative perspective); Ørberg & Fjord, *supra* note 84 (analyzing the Danish rules on distributions); and infra Sections III.A.1-2. For a case where a nonprofit foundation failed to fulfill its distribution purpose by allocating all income to maintain a vacation house primarily used by board members, and the foundation board had to sell the vacation house after the foundation authority intervened, *see* CHRISTIAN ANDERSEN-MØLGAARD & RASMUS FELDTHUSEN, VEDTÆGTSÆNDRINGER I FONDE, Djøf Publishing (2021), 220–225.

[96] *See* Schmalbeck, *supra* note 4, at 79-83; TREASURY REPORT, *supra* note 24, at 15-21; and LENNART LYNGE ANDERSEN, *FRA STIFTELSE TIL FOND*, Gads Forlag Publishing, 190-203 (2002).

[97] I.R.C. § 4941; DANISH ENTERPRISE FOUNDATION ACT (984/2019) §§ 51 and 87; and NORWEGIAN FOUNDATION ACT § 37 (59/2001).

[98] *See* Schmalbeck, *supra* note 4, at 108-109 (noting that enforcement of fiduciary duties in private foundations could be possible in the U.S. too).

[99] *See infra* Section I.A for a discussion of Novo Nordisk's investments in R&D.

[100] The nonprofit could be arguing that the investments (accumulations) are strategically aimed at generating greater income, with the actual purpose fulfillment occurring at a later stage. Although consolidating the nonprofit might enable the nonprofit to donate even more in the future, repeated failure to distribute funds would typically be incompatible with the end goal that follows from the purpose. If no distributions are ever made toward fulfilling the purpose, and only accumulation occurs, the duty to faithfully ensure that the foundation purpose is furthered is not considered fulfilled. *See* e.g. Katarina Olsson,

This was again one of the most pressing concerns that motivated the restrictions imposed on private foundations in the U.S. under the Tax Reform Act of 1969. In particular, some private foundations were found to prioritize the management and growth of their for-profit subsidiaries over their charitable missions. For example, foundations often reinvested earnings from business operations into expanding those businesses rather than making meaningful distributions to their beneficiaries.[101] In some cases, foundations held all or a significant portion of their assets in closely-held businesses, effectively operating as tax-advantaged family enterprises rather than fulfilling their stated charitable purposes.[102] The lack of mandatory payout requirements exacerbated this issue, allowing private foundations to indefinitely defer providing public benefit.[103]

The risk of a for-profit failing to make distributions to its nonprofit controllers has led European regulators, such as the Danish Foundation Authority, to intervene in specific cases to ensure that for-profits subsidiaries of enterprise foundations distribute reasonable income to the nonprofit foundation.[104] For instance, in one case, the regulator scrutinized an enterprise foundation and its subsidiaries, which had experienced years of significant returns yet failed to make distributions to their beneficiaries.[105] The foundation justified this by citing the need to consolidate its businesses due to fierce market competition. However, the regulators, noting the substantial surpluses and capital accumulation, determined that neglecting the foundation's purpose was unacceptable and directed it to make distributions. In another case, regulators found that a foundation controlling a for-profit subsidiary had insufficiently distributed funds to its purposes.[106] Despite the foundation owning all the subsidiary's shares, only six percent of the company's surplus was distributed, and half of that went to its stated purposes. The foundation argued that business investments and philanthropic donations made directly by the subsidiary justified the low distributions. The regulators disagreed, emphasizing the foundation's responsibility to use its influence as a shareholder to ensure adequate distributions. These cases highlight the regulatory expectation that nonprofit-controlled for-profits balance reinvestment with fulfilling their charitable missions through meaningful distributions.

The risk of mission-drift in nonprofits is likely to be higher when the for-profit has outside investors, primarily due to potential conflicts of interest. While both the nonprofit parent and external investors typically share an interest in maximizing profits, there may

---

Enterprise Foundations in Sweden, 103, 121-123, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023); Mark Ørberg, *supra* note 58, at 776-781; and TREASURY REPORT, *supra* note 24, at 28.

[101] *See* Schmalbeck, *supra* note 4, at 61, 77, 88; and TREASURY REPORT, *supra* note 24, 33-34 (noting that the problem occurred even if there was no reasonable business need for reinvesting).

[102] *See* Schmalbeck, *supra* note 4, at 73; and TREASURY REPORT, *supra* note 24, 30-31.

[103] *See* Schmalbeck, *supra* note 4, at 77-79; and TREASURY REPORT, *supra* note 24, 33-34.

[104] As discussed *infra* Section III.A.1, the for-profit subsidiary is required by law to make reasonable distributions to its owners, and Danish regulators (*Erhvervsstyrelsen*) have authority to enforce this distribution requirement.

[105] *See* the case described by JYTTE HEJE MIKKELSEN & LARS BUNCH, ERHVERVSDRIVENDE FONDE, Karnov Publishing, 677 (2009).

[106] *Id.* at 677-679.

be disagreements reflecting different timeframes for investment returns. For instance, the nonprofit may prefer to extract dividends from the for-profit subsidiary to fund its charitable activities, whereas outside investors might favor reinvesting the earnings to promote long-term growth. Alternatively, the nonprofit might opt for a long-term investment strategy—as exemplified by Novo Nordisk with the GLP-1 patents[107]—while the investors seek immediate financial returns. The nonprofit maintains control primarily to prioritize its interests, which are significantly influenced by its commitment to a valuable charitable mission.

Outside investors may attempt to sway the decisions of the nonprofit controller. A common method of influence is through substantial donations, given with the expectation that the for-profit will be managed in accordance with the investors' interests, rather than those of the nonprofit. This exploitation of nonprofits to control for-profit entities prompted the extensive regulation of U.S. foundations in 1969. For example, there have been cases where nonprofits were pressured not to sell their shares in for-profit subsidiaries when such sales could harm the interests of donors who are also outside investors in the for-profit firm. This could be due to potential adverse market impacts on the for-profit's value,[108] or because the influential donors are combining their own shareholding with the nonprofit's shareholding to assert control over decision-making.[109]

To mitigate the risk of mission-drift, it is necessary to ensure that the nonprofit board remains independent of any outside investors in the for-profit subsidiary. While raising capital from other investors may be necessary for the growth of the operating business, it is important to prevent these outside investors from exerting undue influence over board decisions. Interestingly, as detailed below, what some legal regimes, particularly U.S. law as it applies to private foundations, strive to enforce is the independence of nonprofit parent boards from their major donors. In fact, the U.S. imposes prohibitive excess business holding taxes to discourage such influence from donors.[110]

However, the risk from donors is primarily significant when such donors are also investors in the for-profit subsidiary. If the donor is not an investor, there is little rationale for insulating nonprofit boards from their influence. After all, major donors have a vested interest in ensuring their contributions are used for worthy causes. It is only when donors

---

[107] *See infra* text accompanying notes 64-71.

[108] Donor influence over the nonprofit and the nonprofit-owned firm was seen as particularly problematic in the TREASURY REPORT: "Where the donor exercises decisive influence over both the foundation and the corporation, he faces difficult divisions of responsibility. When the corporation encounters financial difficulties, for example, his duty to the foundation may dictate efforts to dispose of its shares without delay; but liquidation of the foundation's interest may occasion adverse market consequences and thereby run counter to his obligation to other shareholders or his own self-interest." *See* TREASURY REPORT, *supra* note 24, at 40.

[109] As the TREASURY REPORT highlighted: "Finally, a foundation which is itself under the influence of a donor and which holds stock in a corporation controlled by the donor will, even where its stock holdings amount to less than 20 percent of the corporate equity, almost necessarily find itself involved in the business affairs of the corporation: for the foundation's stock will be used in combination with that of the donor and related parties to govern the commercial enterprise." *See* TREASURY REPORT, *supra* note 24, at 41.

[110] See *infra* text accompanying notes 170-173.

have an ulterior financial motive—using their donations to advance their interests in the for-profit entity—that independence becomes crucial. Similarly, when the nonprofit owns 100 percent of the for-profit subsidiary, with no outside investors, the risk of mission-drift is minimized. In such cases, the nonprofit alone decides whether to reinvest income to maximize long-term value or to make distributions to support its charitable projects.

To effectively address nonprofit mission-drift, three key requirements are essential: First, nonprofits should be obligated to make reasonable distributions. Second, for-profit subsidiaries should be required to make reasonable distributions to their nonprofit parents. Third, the board of the nonprofit parent should maintain independence from outside investors. These measures ensure that the nonprofit's charitable goals are prioritized and protected from potential conflicts of interest, thereby safeguarding the organization's mission.

B. For-Profit Mission-Drift

For nonprofits that control a socially-oriented for-profit, the key cost is for-profit mission-drift – that is, the risk that the for-profit would simply pursue profit rather than the social mission. In the case of firms that transact with disadvantaged groups, the concern is that they would simply engage with individuals that have relatively high abilities, for example make loans to relatively wealthy individuals and businesses, or source raw input, such as coffee or fruits, from highly capable and established farmers.[111] In the case of firms that purport to provide certain public goods, there is simply a risk that such firms will fail to provide them.[112] A company that sells products that purport to be environmentally-friendly may sell goods that actually harm the environment. The profit incentives to renege on social purpose exist because the social purpose involves greater costs, whether it is transacting with less endowed individuals or engaging in more costly production process.

A socially-oriented for-profit implicated in mission-drift may exploit two sources of subsidies. The first source is donations provided to the affiliated nonprofit, which are subsequently invested in the for-profit subsidiary under the premise that the for-profit will pursue a social mission. These donations, being tax-deductible, effectively lower the cost of capital for the for-profit business, potentially granting it an unfair competitive advantage.[113] Additionally, the for-profit may benefit from subsidies in the form of a price premium paid by consumers for products associated with socially-oriented firms, such as fair trade or environmentally-friendly goods.[114] Mission-drift, therefore, constitutes an expropriation of these donations or subsidies, which are intended to support the social mission.

---

[111] *See* Eldar, *supra* note 46, at 949-958.

[112] *See* Aprill et al, *supra* 13, at 294; and Eldar, *supra* note 16, at 170-172 (discussing mission-drift in social enterprises that seek profits at the expense of their social mission).

[113] *See* Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52, 53-54 (2000); Schmalbeck, *supra* note 4, at 77; and TREASURY REPORT, *supra* note 24, at 32-34.

[114] *See* Eldar, *supra* note 5, 104-105, 111-113, 167-168, 183-184.

In principle, the nonprofit parent is responsible for ensuring that the for-profit subsidiary remains aligned with its social mission—this is the core purpose of nonprofit control.[115] However, the presence of outside investors can create challenges, as there may be pressure on the for-profit subsidiary to prioritize the profit-maximizing interests of these investors, potentially at the expense of the social mission.[116]

The recent case of OpenAI highlights the potential tension between a nonprofit investor and outside investors in a socially-oriented for-profit controlled by a nonprofit.[117] OpenAI, Inc., a nonprofit organization, was established with the mission of ensuring that artificial intelligence benefits all of humanity. To support its goals, OpenAI, Inc. formed a for-profit subsidiary, OpenAI LP, which it controls. From the outset, the nonprofit required significant capital and relied on donations, with Elon Musk providing substantial funding as a key donor. OpenAI, Inc. avoided classification as a private foundation by relying on diverse public sources (and hence a public charity), allowing it to maintain a controlling stake in the for-profit subsidiary.

The nonprofit parent invested these donations into the for-profit entity while also securing substantial investment from Microsoft, which acquired a 49 percent stake in OpenAI LP. Under the leadership of Sam Altman, OpenAI LP increasingly focused on business growth and the commercialization of artificial intelligence, raising concerns about mission-drift. The nonprofit board objected to this profit-oriented approach and dismissed Altman from his role as CEO. However, following Microsoft's intervention, Altman was reinstated, and the nonprofit board was replaced. OpenAI has reportedly begun exploring pathways to converting into a fully for-profit entity.

This pattern demonstrates how a for-profit outside investor can pressure a socially-oriented for-profit to relinquish its social mission. When the for-profit relies on the outside investor for capital, talent recruitment, and other resources, the nonprofit's voting control may become effectively meaningless. In Denmark, as discussed below, donors can sue a nonprofit if it fails to pursue its charitable mission.[118] Elon Musk has filed such a lawsuit against OpenAI, alleging that it, along with Sam Altman, intentionally deceived him by promising to chart a safer, more open course than profit-driven tech giants. Musk claims OpenAI executives misused his donations as startup capital to develop valuable technology for personal gain, arguing he would not have contributed had he known this.[119] We do not

---

[115] *See* Ellen P. Aprill et al, *supra* note 13, at 291-292 (with references to e.g. Rev. Rul. 2004-51); Ørberg, *supra* note 58, at 778; and TREASURY REPORT, *supra* note 24, at 14.

[116] *See* TREASURY REPORT, *supra* note 24, at 15-16, 23-24, 40-41(with different descriptions of the existence of risks of undue influence from outside investors).

[117] *See* Ellen P. Aprill et al, *supra* note 13, at 293-294 (discussing the OpenAI turmoil and conflict between the nonprofit and donors); and David A. Fahrenthold, Cade Metz & Mike Isaac, *How OpenAI Hopes to Sever Its Nonprofit Roots*, N.Y. TIMES (Dec. 17 2024), https://www.nytimes.com/2024/12/17/technology/openai-nonprofit-control.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb.

[118] *See infra* text accompanying note 148.

[119] *See* Musk v. Altman, No. 3:24-cv-04722 (N.D. Cal. filed 2024). In November 2024, Musk added Microsoft, which contributed $13 billion to OpenAI, alleging it sought to monopolize the generative AI

address the merits of Musk's claims nor the question of whether he has standing to sue under U.S. law. Rather, we illustrate the risks that outside investors pose for socially-oriented for-profits.

The pressure from outside investors can also manifest in a more traditional manner when a donor or founder who wields substantial influence over the nonprofit is simultaneously an investor in the for-profit subsidiary. Consider a hypothetical scenario in which Musk was the primary donor to OpenAI Inc. and also an investor in OpenAI LP alongside the nonprofit controller. In such a case, there would be serious concerns that Musk might exploit the nonprofit for his own purposes, using it to subsidize the for-profit without adequately pursuing the social mission. Importantly, there is nothing inherently problematic about Musk's involvement with the nonprofit. In fact, his experience and expertise could provide valuable contributions to the nonprofit board, including serving on it.[120] However, the concern about mission-drift arises from Musk's dual role as an outside investor, as his financial interest in the for-profit subsidiary may incentivize him to prioritize profit maximization over the social mission.

It is generally crucial to ensure that the nonprofit board is independent of outside investors.[121] However, in the context of socially-oriented for-profits, independence alone may not suffice. As illustrated by the OpenAI saga, Microsoft was able to exert significant pressure on OpenAI despite the board's formal independence. OpenAI's reliance on Microsoft for capital and business collaborations, combined with Microsoft's ability to create a competing business and hire OpenAI's employees, ultimately forced the nonprofit parent to yield to Microsoft's influence. Accordingly, independence from outside investors may be insufficient to guarantee that the for-profit pursues its social mission.[122]

What is likely necessary in such cases is the implementation of enforcement or certification mechanisms to ensure that the firm genuinely pursues its social mission.[123] In the case of social enterprises, certification mechanisms can help verify compliance with their missions. For example, community development financial institutions are certified to ensure they provide financial services to low-income individuals on favorable terms.[124]

However, certification of social purpose is less practical for socially-oriented for-profits that provide public goods. The challenge lies in the inherent difficulty of defining

---

market and sideline competitors. *See also* Cade Metz, *Elon Musk Adds Microsoft to Suit Against OpenAI*, N.Y. TIMES (Nov. 15 2024), https://www.nytimes.com/2024/11/15/technology/elon-musk-microsoft-openai.html.

[120] *See e.g.* Schizer, *supra* note 26, at 258-259 (emphasizing that donors may provide a source of rare expertise, and discussing the limits of such expertise.)

[121] *See supra* Section II.A (discussing outside investors and risk missions drift in nonprofits).

[122] *See also* Aprill et al, *supra* note 13, at 293-294 (highlighting Altman's influence within OpenAI and the influence of Microsoft as an outside investor).

[123] *See* Eldar, *supra* note 5, at 152-154, 190-194 (discussing certification mechanisms).

[124] *See* U.S. DEPARTMENT OF TREASURY, CDFI CERTIFICATION, https://www.cdfifund.gov/programs-training/certification/cdfi; WIRELESS INDUSTRY SERVICE EXCELLENCE (WISE) CERTIFICATION PROGRAM https://www.wisecertification.com/; and Eldar, *supra* note 46, at 978-985.

public goods or social impact in a concrete, measurable way.[125] In such cases, regulators could play a role by providing guidelines on acceptable ownership structures, requiring for-profits to disclose activities and demonstrate how they align with the stated social mission, and exerting ongoing monitoring. These legal mechanisms for verifying the social impact of socially-oriented for-profits are discussed in the following sections.

III. THE LAW OF NONPROFIT CONTROL

In this section, we compare European, the U.K., and U.S. laws, analyzing how these legal systems regulate the two primary models of nonprofit control: the income-generating model and the socially-oriented for-profit. This comparison includes a critical evaluation of the existing legal frameworks, with a particular emphasis on whether they effectively address the risks of mission-drift in both nonprofit and for-profit entities.

The legal regime for nonprofit control in Europe is dominated by "enterprise foundations," which are nonprofits with charitable missions explicitly allowed to hold controlling stakes in businesses. This model is primarily designed to facilitate the formation of income-generating for-profits, such as Novo Nordisk, Carlsberg, Ikea and Rolex. Other nonprofits, typically called associations, face substantial restrictions in exercising control over for-profit corporations, and they can only do so if the ownership is directly aligned with their mission.[126]

The legal regime for nonprofit control in the U.K. allows charities to engage with for-profit enterprises through two distinct frameworks: trading companies and social investments. Trading companies are separate legal entities established by charities to carry out income-generating commercial activities that the charity itself cannot directly undertake. Wellcome plc, which was owned by the Wellcome Trust, is a prominent example of such a trading company. Similarly, U.K. law under the Charities Act 2016 enables charities to make social investments in socially-oriented for-profits.[127]

The U.S. system, which is more complex than other legal regimes, revolves around the distinction between private foundations and other nonprofits, with private foundations generally subject to prohibitive taxes if they acquire a controlling stake in a for-profit, unless they qualify under one of two exceptions. The first exception, the Newman's Own exception, applies to income-generating nonprofits. The second exception, for program-related investments, applies to socially-oriented for-profits. Both exceptions impose relatively strict requirements on the ability of nonprofits to control for-profits. In contrast, other U.S. nonprofits that are not classified as private foundations enjoy considerable freedom to own and control for-profits without meaningful regulation or supervision.

---

[125] *See* Eldar, *supra* note 46, at 941, 954, 965 (emphasizing difficulties measuring social impact with precision); Eldar, *supra* note 5, at 99; and Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 423 (2014) (arguing against tax benefits for hybrid organizations because "mechanisms, such as the hybrid enabling statutes, are insufficient to ensure that public benefit is indeed provided").

[126] *See infra* text accompanying notes 149-150.

[127] *See infra* text accompanying notes 160-164.

Accordingly, the U.S. places significant emphasis on whether a nonprofit receives a substantial portion of its donations from a single donor, which would cause it to qualify as a private foundation.[128]

We analyze European, U.K., and U.S. laws, examining their legal frameworks and assessing their effectiveness in mitigating mission-drift. Notably, these laws across all jurisdictions have developed in a path-dependent manner, often as reactive responses to specific scandals or cases of donor abuse, particularly involving self-dealing. Consequently, they are not always well-principled or sufficiently robust to facilitate the role of nonprofit control or to adequately address some of its emerging risks. A key shortcoming across jurisdictions is the lack of sufficient regulation regarding the presence of outside investors who may exert excessive influence over decision-making. Such influence, whether direct or indirect, significantly exacerbates the risk of mission-drift. This risk is particularly acute for socially-oriented for-profits. While the number of socially-oriented for-profits remains relatively small, their prevalence is growing. Cases like the OpenAI saga highlight their potential for significant societal impact. As such, these regulatory gaps demand closer scrutiny and, potentially, reform to address the evolving risks posed by this hybrid model of for-profit and nonprofit interaction.[129]

A. The Three Main Legal Systems for Nonprofit Control

In this section, we describe the key legal systems as they pertain to nonprofit control, starting with European jurisdictions, then U.K. laws, and then U.S. laws. A summary description of these key legal regimes is provided in Table 2 in the Appendix.

1. European Jurisdictions

The enterprise foundation legal form is the predominant structure for forming for-profits controlled by nonprofits, particularly in Continental Europe, where nonprofit control is widespread. Enterprise foundations are ownerless entities established with a dual purpose that combines a charitable mission with the obligation to manage and control one or more for-profit business entities.[130] The purpose of enterprise foundations is enshrined in their charter, which explicitly defines both the social mission and the business objective. These legal structures are specifically designed to facilitate the formation of income-generating for-profit businesses, where the profits of the business are distributed to the foundation to fund its public good purposes.[131] While European laws governing enterprise

---

[128] *See infra* Section III.A.3.

[129] *See infra* Section IV.

[130] *See* Anne Sanders & Steen Thomsen, *Enterprise Foundation Law in a Comparative Perspective - Concluding Observations*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023), 221, 222-226 (discussing the legal definitions of enterprise foundations in European jurisdictions); and Ørberg, *supra* note 58.

[131] *See* Jakob, *supra* note 95, at 100 (describing the conventional Swiss view on philanthropic foundations' income-generating function).

foundations are not identical, they share several key principles. Our focus is on the shared principles of these legal regimes, though we highlight relevant substantive differences where applicable.[132]

The first element is board independence from the foundation's founder. Founders, who are typically the primary donors, often contribute shares in the for-profit subsidiary as their main donation.[133] European law generally adopts a relatively lenient approach to ensuring nonprofit board independence, permitting founders to serve on the board.[134] However, some jurisdictions, including Denmark and Austria, impose requirements for maintaining a degree of independence.[135] For example, Denmark's Enterprise Foundation Act mandates that at least one-third of the board must be appointed independently of the founder and her family, ensuring no close relations.[136] Despite these rules, founders often retain significant influence.[137] In contrast, legal systems in Germany and Switzerland, impose no independence requirements, allowing founders to wield substantial control over the foundation's board and, consequently, the strategies of the for-profit subsidiary.[138]

The second element is the distribution duty, which encompasses two main responsibilities. First, the nonprofit must ensure that the for-profit subsidiary and other investments generate a reasonable income for the nonprofit.[139] Second, the nonprofit must

---

[132] One difference which is not material for our purposes is that the German model sometimes employs a treuhand (a fiduciary arrangement similar to a trust) as part of its foundation governance structure, whereas the Scandinavian models do not typically use such intermediaries. The treuhand in Germany provides additional fiduciary oversight, ensuring that the foundation's purposes are upheld and its for-profit activities are managed responsibly. In contrast, the Scandinavian model relies on direct governance by the foundation's board of directors, which simplifies the structure but places greater responsibility directly on the foundation itself. On the role of the treuhand in Germany, *see* Stefan Grundmann, *Trust and Treuhand at the End of the 20th Century: Key Problems and Shift of Interests*, 47 AM. J. COMP. L., 401 (1999).

[133] For example, J.C. Jakobsen set up the Danish Carlsberg Foundation in 1876 with control of the for-profit beer company Carlsberg, and the foundation remains in control today. See CARLSBERG FOUNDATION, OUR HISTORY, https://www.carlsbergfondet.dk/en/about-the-foundation/our-history/.

[134] Of course, the founder must adhere to the stated purpose of the foundation, and founders must comply with the appropriate rules on self-dealing.

[135] *See* Klaus Hopt et al, FEASIBILITY STUDY ON A EUROPEAN FOUNDATION STATUTE: FINAL REPORT (2009), 64 [hereinafter FEASIBILITY STUDY]; and HOPT ET AL, THE EUROPEAN FOUNDATION: A NEW LEGAL APPROACH, 101-102, 111-112 (2006).

[136] DANISH ENTERPRISE FOUNDATION ACT § 1(2) (154/2014). *See also* Rasmus Kristian Feldthusen, *Denmark - Enterprise Foundation*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023), 129, 141; and EXPLANATORY REMARKS TO THE DANISH ENTERPRISE FOUNDATION ACT § 1, Bill 154, Mar. 12, 2014.

[137] It is noteworthy that founders of many of the enterprise foundations are not alive, though their families and relatives remain involved in managing the foundation.

[138] *See* Anne Sanders, Enterprise Foundations in Germany, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023), 25, 47 (describing that the founder may be the sole member of the governing board in German foundations); and FEASIBILITY STUDY, *supra* note 135, at 63-64 (highlighting the wide freedom of scope for the founder to appoint foundation board members in most European countries).

[139] *See* FEASIBILITY STUDY, *supra* note 135, at 86 (noting that investment rules are usually very vague and general).

itself make reasonable distributions to advance its public good purposes.[140] While the specific standards vary across jurisdictions, the underlying principle is that neither the for-profit entity nor the nonprofit entity should accumulate assets indefinitely. Instead, income generated by the for-profit's business operations should ultimately be directed toward achieving the foundation's charitable objectives. Most jurisdictions adopt flexible distribution standards that allow some accumulation of assets, recognizing that the for-profit may need to reinvest in projects aimed at generating long-term income. However, some jurisdictions impose stricter requirements, mandating that a portion or all of the for-profit's income be distributed to the nonprofit,[141] or that a portion or all of the nonprofit's income be distributed for public purpose purposes.[142] Failure to comply with the distribution duty can prompt regulatory intervention, often by a foundation authority, and may jeopardize the foundation's tax-exempt status. These rules are intended to ensure that the foundation's resources are consistently directed toward its charitable mission rather than being unnecessarily accumulated.

The third element is regulatory authority and enforcement. Most European jurisdictions have strong supervisory public authorities—such as foundation authorities, which may be centralized or operate at a regional level.[143] These authorities are tasked with ensuring that the nonprofit's purpose is upheld by monitoring compliance with statutory law and the foundation's charter. Supervisory authorities typically have the right to intervene in cases of breaches of foundation law or the charter. They can require information from the nonprofit board and conduct investigations into the nonprofit's affairs.[144] These powers are essential for enforcing flexible rules on distributions, as they allow the authority to assess whether, in specific instances, the distribution of income to the nonprofit and from the nonprofit to its beneficiaries meets the applicable standards. However, supervisory authorities are limited in their oversight of the for-profit subsidiary. They have no power to second-guess the business judgment of the for-profit's board or to directly overturn its

---

[140] *See e.g.* DANISH ENTERPRISE FOUNDATION ACT § 77 (explicitly requiring accumulation in the nonprofit to be reasonable).

[141] *See* Olsson, *supra* note 100, at 123 (describing Swedish tax law requirements).

[142] *See* Wino J.M. van Veen, *Supervision of Foundations in Europe: Post-incorporation Restrictions and Requirements*, in FOUNDATIONS IN EUROPE 694, 712 (Andreas Schlüter et al eds., 2001) (noting that percentages in Sweden, Germany, Spain, and Finland range from 50%-80% of revenues); and Olsson, *supra* note 100, at 123 (explaining that the foundation's income must to a reasonable extent be used to promote the charitable and tax-exempt purpose, and that Swedish case law has defined 'reasonable' as 80% of the net return).

[143] The competence and powers of foundation authorities differs quite substantially in the European states. *See* FEASIBILITY STUDY, *supra* note 135, at 73, 103-104; Hopt et al, *supra* note 135, at 245-248 (describing how administrative supervisory bodies are found in the majority of European foundation law regimes). Some countries, such as Denmark and Sweden, have a centralized foundation authority, whereas others, such as Germany and Switzerland, have regional or decentralized authorities responsible for supervision in specific regions. *See* Anne Sanders, *supra* note 138, at 48-49; and Jakob, *supra* note 95, at 85, 92-95.

[144] *See* Wino J.M. van Veen, *supra* note 142; and Ørberg, *supra* note 58, at 781-783 (explaining the Danish foundation regulator's role and powers).

business decisions.[145] This ensures that the operational autonomy of the for-profit is maintained while still holding the nonprofit accountable for ensuring its resources are used in line with its charitable mission.

Importantly, supervisory authorities typically have strong powers to sanction nonprofit organizations. First, they generally have the authority to remove board members and replace them with individuals who are expected to act in alignment with the foundation's purposes, including ensuring that the for-profit subsidiary makes adequate distributions of income to the nonprofit.[146] Second, the foundation could lose its tax-exempt status if it is not managed in compliance with the law and its stated charitable purposes.[147] If the for-profit accumulates income without a legitimate reason, and the foundation fails to exert its influence on the for-profit to make distributions to the nonprofit (and other owners), supervisory authorities may ultimately remove the nonprofit's board members, or tax authorities may threaten to withdraw tax benefits.

Finally, in few jurisdictions, such as Denmark, donors have a direct right to sue the foundation if it fails to fulfill its purpose. In practice, however, given the costs of litigation, donors who are concerned that their donation is misused would typically inform the supervisory authorities about the alleged violation.[148]

While the vast majority of nonprofit-controlled businesses in Europe are structured as enterprise foundations, it is important to emphasize that other types of nonprofits can also own and control for-profit entities. More traditional nonprofits, typically called nonprofit associations, which have a strict charitable mission, are also permitted to own and control for-profit entities. However, this is generally subject to strict legal and regulatory conditions to ensure alignment with the association's charitable mission and to prevent misuse of funds.[149] Associations must demonstrate that the for-profit's activities directly or indirectly support their nonprofit objectives, such as funding public benefit projects or advancing social goals. Thus, they are permitted to own and control only socially-oriented for-profits, rather than purely commercial operating businesses. Importantly, there is no strict requirement that the profits of the for-profit be distributed to the nonprofit association. Instead, profits may be reinvested in the for-profit subsidiary, provided the reinvestment strictly aligns with the nonprofit's charitable objectives. Given these restrictions, nonprofit-controlled for-profits are typically small and operate in areas where

---

[145] *See* Sanders & Thomsen, *supra* note 130, at 233-234 (comparing six European jurisdictions, noting that "authorities are usually limited to legal supervision and do not question business decisions").

[146] *See* Hopt et al, *supra* note 135, at 173-175 (comparing enforcement measures in Europe).

[147] *See e.g.* Jakob, *supra* note 95, at 96-99 (describing the Swiss tax rules for enterprise foundations).

[148] *See* Hopt et al, *supra* note 135, at 126-127.

[149] *See* EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP AND SMES, COMPARATIVE LEGAL ANALYSIS OF ASSOCIATIONS LAWS AND REGIMES IN THE EU – FINAL REPORT, Publications Office of the European Union (2022), https://data.europa.eu/doi/10.2873/05056 (generally describing the landscape of associations in EU member states and the national laws regulating associations); and Tymen J. van der Ploeg, Wino J. M. van Veen & Cornelia R. M. Versteegh, *Thematic Survey of Civil Society Law in Twelve European Countries*, IN CIVIL SOCIETY IN EUROPE: MINIMUM NORMS AND OPTIMUM CONDITIONS OF ITS REGULATION, (Ploeg et al eds., 2017) 75, 86-92 (describing national restrictions on associations' engagement in economic activities).

the social impact is clear, such as work-integration (e.g., workshops or retail for job training), renewable energy (e.g., wind or solar funding sustainability projects), cultural/educational enterprises (e.g., media or ticket sales), and healthcare (e.g., hospitals subsidizing low-income care).[150]

2. United Kingdom

The U.K. legal framework for charities allows them to own and control for-profit entities through two primary mechanisms: trading companies and social investments. These mechanisms provide distinct pathways for creating nonprofit control of business enterprises, with the first reflecting charities' ability to own and control income-generating for-profits, and the latter facilitating the formation of socially-oriented for-profits.

Trading companies are the most established mechanism for charities to engage in commercial activities. As discussed above, the Wellcome Trust controlled and managed one of the most successful pharmaceutical companies in the world, Wellcome PLC, until it was sold to Glaxo in 1995.[151] For-profit trading companies may be wholly or majority-owned by the charity, although other investors may also hold stakes. As such, they are functionally equivalent to enterprise foundations in continental Europe.[152] The primary purpose of trading companies is to generate profits that are transferred to the parent charity to support its charitable purposes. This transfer is most commonly achieved through Gift Aid donations, which effectively allows profits to be transferred to the charity without being taxed.[153]

Charities, in turn, have distribution duties to use income received from trading companies to advance their charitable purposes.[154] Trading companies are obligated to prioritize the transfer of profits to the charity, except where retention is necessary for operational stability or growth.[155] Trustees must carefully manage the accumulation of profits, ensuring that resources are used for public benefit and not unnecessarily retained.[156] Failure to fulfill these duties can prompt regulatory scrutiny and potentially jeopardize the

---

[150] *See* EUROPEAN COMMISSION PROPOSAL FOR A DIRECTIVE ON EUROPEAN CROSS-BORDER ASSOCIATIONS (COM(2023)516) (observing that "non-profit associations are active in sectors with a societal impact such as healthcare, social services, social inclusion, culture, sports, research and development, education and training"). The proposal has not been adopted by European Union legislators.

[151] *See supra* the text accompanying notes 72-74.

[152] *See* Fries, *supra* note 73; and Mary Synge, *Civil Society Organisations in England and Wales*, in CIVIL SOCIETY IN EUROPE: MINIMUM NORMS AND OPTIMUM CONDITIONS OF ITS REGULATION 363 (Ploeg et al eds., 2017).

[153] *See* Income and Corporation Taxes Act 1988, § 505(2).

[154] *See* Charities Act 2011, § 130.

[155] *See* Income and Corporation Taxes Act 1988, § 505(3).

[156] *See* CHARITY COMMISSION FOR ENGLAND AND WALES, CHARITY RESERVES: BUILDING RESILIENCE (14 June 2023), Section 5.2, https://www.gov.uk/government/publications/charities-and-reserves-cc19/charities-and-reserves.

charity's tax-exempt status.[157]

The Charity Commission for England and Wales oversees compliance with charity law, including the management and governance of trading companies. It ensures that trustees maintain proper oversight, appoint competent directors, and avoid conflicts of interest in the operation of trading companies.[158] The Commission has significant enforcement powers, including investigating mismanagement, imposing sanctions, removing trustees, or even deregistering the charity in cases of severe non-compliance.[159]

The introduction of the Charities (Protection and Social Investment) Act 2016 marked a significant development by establishing a formal legal framework for social investments. Social investments are defined as actions carried out with a view to both directly furthering the charity's purposes and achieving a financial return.[160] These investments enable charities to support socially-oriented for-profits that align with their mission, such as affordable housing projects, renewable energy initiatives, or businesses addressing unemployment through work-integration programs. One notable example of a social investment under the Charities Act discussed above is Better Society Capital, which is controlled by the Oversight Trust.[161]

A key motivation for the Act was that U.K. law, unlike its European counterparts, requires trustees not to unduly jeopardize the charity's assets.[162] Before the 2016 Act, trustees faced a high risk of violating their fiduciary duties if they engaged in social investments with relatively high risk and low expected returns. The 2016 Act provides clarity for trustees, allowing them to make investments that prioritize social outcomes even if they deliver sub-market financial returns, provided they demonstrably advance the charity's purposes.[163]

Social investments allow for reinvestment within the for-profit subsidiary, as long as such actions are consistent with the charity's objectives. Trustees may choose to reinvest profits within the for-profit subsidiary if such reinvestment aligns with the charity's mission and does not compromise its financial sustainability. However, trustees must justify these decisions by demonstrating that they serve the charity's purposes. Trustees are

---

[157] *See* CHARITY COMMISSION FOR ENGLAND AND WALES, CHARITIES AND INVESTMENT MATTERS: A GUIDE FOR TRUSTEES (CC14) (August 1, 2023), https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14/charities-and-investment-matters-legal-underpinning.

[158] *See* Charities Act 2011, §§ 14–15.

[159] *Id.*, §§ 76–80.

[160] *Id.*, § 292A (as amended by the Charities (Protection and Social Investment) Act 2016).

[161] *See supra* text accompanying note 79.

[162] The Charities (Protection and Social Investment) Act 2016 was based on a report by the Law Commission for England and Wales. *See* THE LAW COMMISSION, SOCIAL INVESTMENT BY CHARITIES - THE LAW COMMISSION'S RECOMMENDATIONS (Sept. 2014), https://lawcom.gov.uk/project/charity-law-social-investment-by-charities/, at 3-6 (addressing the legal concerns expressed by stakeholders during a consultation procedure, including uncertainty about social investments and their compatibility with trust law requirements regarding trustees' exercise of investment powers). Likewise, U.S. private foundations are subject to similar laws prohibiting jeopardizing investments. *See infra* note 177.

[163] *See* Charities Act 2011, § 292A; and Explanatory Notes, Commentary on provisions of the Charities (Protection and Social Investment) Act 2016, 94-100, https://www.legislation.gov.uk/ukpga/2016/4/notes/division/6/index.htm.

also responsible for managing the accumulation and reinvestment of profits, ensuring that resources are directed toward advancing the charity's objectives.[164]

3. United States

The U.S. legal framework for nonprofit organizations is distinctive in its reliance on tax law as the primary mechanism of regulation.[165] Unlike other jurisdictions where nonprofit law is broader in scope, the U.S. system focuses heavily on tax exemptions and the rules surrounding them.[166] This creates significant distinctions between different types of nonprofit organizations, particularly private foundations and other tax-exempt organizations, such as public charities. These differences shape how nonprofits may control for-profit entities.

To understand the regulatory framework governing nonprofit control of for-profits, it is critical to distinguish between private foundations and other nonprofits.[167] Under Section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt nonprofit must be established and operated for charitable, religious, educational, or similar purposes. Such organizations are prohibited from having any earnings inure to private shareholders or individuals. Within this broader category, the IRC defines private foundations as a subset of nonprofits under Section 509(a). A private foundation is generally a nonprofit that relies on one or a few substantial donors, such as private entrepreneurs, for its funding. Organizations that do not meet certain exceptions under Section 509(a)(3) — such as hospitals, universities, and public charities funded by diverse donors — are classified as private foundations.[168]

Private foundations are subject to stringent rules because of their dependence on major donors. These rules aim to prevent private benefits and conflicts of interest that might arise from donor influence. By contrast, other tax-exempt nonprofits, such as public charities, face relatively fewer restrictions.[169]

There are two main restrictions on foundations. First, private foundations are required to distribute at least 5 percent of their assets annually toward their charitable mission.[170] This rule is designed to ensure that foundations actively contribute to their exempt purposes and do not merely accumulate wealth.[171] Second, private foundations are subject to the

---

[164] *See* Charities Act 2011, § 292C; and Explanatory Notes, *Id*., at 107-108.

[165] *See* Alyssa A DiRusso, *American nonprofit law in comparative perspective*, WASH. U. GLOBAL STUD. L. REV. 10, 39, 83 (2011) (pointing out that many other countries integrate tax law as parts of their regulatory schemes on nonprofits, but giving tax law a minor role compared to the US).

[166] *See supra* Sections III.A.1-2; and Joel L. Fleishman, *Public Policy and Philanthropic Purpose–Foundation Ownership and Control of Corporations in Germany and the United States*, 372, 374-380, in FOUNDATIONS IN EUROPE: SOCIETY, MANAGEMENT AND LAW (Schlüter et al eds., 2001).

[167] *See* Eldar, *supra* note 5, at 206-212.

[168] *See* I.R.C. §509(a)(1); and I.R.C. §170(b)(1)(A).

[169] *See* Eldar, *supra* note 5, at 206-212; and Schmalbeck, *supra* note 4.

[170] *See* I.R.C. § 4942.

[171] For a critique that foundations only spend a small fraction of their assets, *see* Brian Galle, *Pay it forward? Law and the problem of restricted-spending philanthropy*, 93 WASH. U. L. REV. 1143 (2015).

excess business holdings tax.[172] This tax penalizes private foundations that own more than 20 percent of the voting stock in a for-profit corporation. The penalty is severe, with a tax rate of up to 200 percent for violations. This rule seeks to prevent private foundations from using tax-exempt funds to unduly benefit private interests. The rationale for these restrictions stems from the fear that donors might use private foundations as vehicles for making profits. For example, a donor might establish a foundation, contribute substantial funds, and use the foundation's resources to control a for-profit entity in ways that align with the donor's private financial interests rather than the foundation's charitable mission.[173]

While the excess business holdings rules are strict, there are two key exceptions that allow private foundations to hold or invest in for-profit entities: Newman's Own and program-related investments (PRIs). The first exception facilitates the formation of income-generating for-profits, whereas the latter facilitates socially-oriented ones.

The "Newman's Own" exception to the excess business holdings rule was introduced by The Philanthropic Enterprise Act of 2017. Under this exception, private foundations may own 100 percent of a business enterprise without incurring the excess business holdings tax, provided that the nonprofit owns all voting rights in the business enterprise, the business enterprise distributes all of its net operating income to the nonprofit owner, and the foundation's major donors and their family members do not control both the foundation and the business enterprise. This exception allows private foundations to operate businesses like Newman's Own, where profits are fully directed toward charitable purposes.[174] However, the exception is narrow and restrictive, especially when compared to the more flexible European enterprise foundation model, which allows co-investors and broader operational autonomy.[175]

Private foundations may also engage in program-related investments (PRIs), which are investments made primarily to advance a foundation's charitable purposes rather than to generate a financial return.[176] As in the U.K., this exception exists in part to navigate the prohibition on jeopardizing investments that foundations face.[177] PRIs allow private foundations to support socially-oriented for-profits that align with their missions.[178] Examples include low-interest loans to disadvantaged small businesses or investments in affordable housing projects. Under Section 4944, the primary purpose of a PRI must be to

---

[172] *See* I.R.C. § 4943.

[173] *See* part II.A; TREASURY REPORT, *supra* note 24, at 23-35, 40-41; and Schmalbeck, *supra* note 4 (generally discussing the rationale behind private foundation limitations such as the excess business holding rule).

[174] *See* INTERNAL REVENUE SERVICE, PROGRAM-RELATED INVESTMENTS, https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments; Eldar, *supra* note 5, at 212-213.

[175] *See supra* Section III.A.1.

[176] Notably, PRIs count toward the mandatory 5% distribution threshold required of private foundations under I.R.C. § 4942.

[177] Under I.R.C. § 4944, U.S. private foundations are prohibited from making jeopardizing investments, meaning investments that fail to meet the standard of ordinary business care and prudence in maintaining the foundation's financial stability and ability to carry out its charitable purposes.

[178] *See* Eldar, *supra* note 5, at 210-212.

accomplish one or more of the foundation's exempt purposes, with the production of income being incidental. However, PRIs come with stringent compliance requirements that can deter foundations from using this mechanism.

One of the critical requirements for PRIs is the obligation to exercise expenditure responsibility. This means that the foundation must ensure that the funds are used exclusively for the intended charitable purpose.[179] The foundation must undertake detailed monitoring of the PRI, including conducting a pre-grant inquiry to establish the recipient's ability to carry out the charitable purpose, executing a written agreement specifying the use of funds and requiring regular reporting on their use, and tracking how funds are expended while requiring detailed periodic financial and programmatic reports from the recipient. [180] Furthermore, the foundation must report the PRI on its annual IRS Form 990-PF, including information on how the investment aligns with its charitable purposes. Failure to meet these expenditure responsibility requirements can lead to penalties, including the potential loss of tax-exempt status for the foundation.[181] High compliance costs and the risk of IRS penalties often discourage foundations from pursuing PRIs, despite their potential to advance social objectives.[182]

In contrast to private foundations, other tax-exempt nonprofits, such as public charities, face few restrictions on owning or controlling for-profit enterprises. Public charities are not subject to the excess business holdings tax, nor do they face the same level of scrutiny regarding their investments.[183] This regulatory gap allows significant flexibility in structuring and managing for-profit subsidiaries. However, controlling an income-generating for-profit typically subjects the nonprofit to unrelated business income tax (UBIT) since the business is unrelated to the nonprofit's mission. However, nonprofits can avoid UBIT by using a perpetual trust, as in the Patagonia example. In this arrangement, a dual-class structure allocates voting control to a perpetual trust set up by the founder to manage the for-profit clothing company, while 98 percent of cash flow rights are allocated to a social welfare organization.[184] The tax-exempt nonprofit, which is entitled to virtually all the distributions from the for-profit subsidiary, is not subject to income tax because its income is considered passive.[185]

By contrast, if a nonprofit owns and controls a socially-oriented for-profit, it is not subject to UBIT if the for-profit's mission is related to the nonprofit's exempt purposes. A simple example is the Greyston Foundation owning the Greyston Bakery, which employs

---

[179] *See* INTERNAL REVENUE SERVICE, PROGRAM-RELATED INVESTMENTS, https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments.

[180] *See* Eldar, *supra* note 5, at 210-212.

[181] *See* I.R.C. § 4945(d)(4); Treas. Reg. § 53.4945-5(a)(2); Treas. Reg. § 53.4945-4(a)(2); and Eldar, *supra* note 5, at 210-212.

[182] *See* Eldar, *supra* note 46, at 959-960.

[183] *See e.g.* Peter Molk & Daniel D. Sokol, *The Challenges of Nonprofit Governance*, B.C.L. REV., 62, 1497, 1522-1525 (2020).

[184] *See* Eldar, *supra* note 5, at 218.

[185] *See* I.R.C. § 512(b); and INTERNAL REVENUE SERVICE, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATIONS, Publication 598, at 15, https://www.irs.gov/pub/irs-pdf/p598.pdf.

disadvantaged workers suffering from systemic unemployment.[186] The bakery's operations directly align with the foundation's mission of providing job opportunities to marginalized populations, and because the bakery's activities are mission-related, its income is not subject to unrelated business income tax (UBIT). Interestingly, however, what counts as related income is treated by business planners very expansively. The IRS generally requires that the income be substantially related to the nonprofit's tax-exempt purposes, but this standard has been interpreted broadly in practice. For instance, if the nonprofit's mission and the for-profit's operations share a connection that furthers the exempt purpose, the income may qualify as related.[187] This expansive interpretation allows organizations like OpenAI Inc., a public charity with a mission to develop artificial intelligence for public benefit, to treat income from its for-profit subsidiary's sale of AI products, such as ChatGPT, as related income under its tax-exempt mission.[188]

The primary regulatory authority for nonprofits in the U.S. is the IRS, which oversees compliance with federal tax laws. However, the IRS's ability to monitor for-profit mission alignment with nonprofit purposes is limited, as it primarily reviews whether a nonprofit's activities directly further its tax-exempt purposes.[189] Assessing whether a for-profit subsidiary's operations align with the nonprofit's mission often falls outside the IRS's practical capacity. State authorities, such as attorneys general, theoretically oversee nonprofits under state charitable trust laws, but enforcement is often weak, with limited resources and infrequent regulatory actions.[190] This lack of robust oversight affects mostly nonprofit control by organizations that do not qualify as private foundations because private foundations are subject to much clearer, stricter, bright-line rules. This allows public charities significant autonomy in structuring and managing their relationships with for-profits, which may include activities that blur the line between nonprofit and for-profit objectives.

B. A Comparative Legal Analysis of Nonprofit Control

In this section, we examine how the laws of different jurisdictions facilitate the formation of the two types of nonprofit control and how they mitigate their associated risks.

1. Income-generating For-profits and Nonprofit Mission-drift

---

[186] *See* Eldar, *supra* note 3, at 114-115 (describing the Greyston Foundation's ownership of the Greyston Bakery and the bakery's business activities).

[187] *See* Eldar, *supra* note 5, at 204 (with description of the UBIT definition and references to the statutory rules and regulations); and Aprill et al, *supra* note 13, at 291-293 (discussing the UBIT and the substantial relationship requirement in the context of OpenAI).

[188] *Id.*, *supra* note 13, at 291-293 (noting that the OpenAI ownership setup has been carefully structured to avoid several of the most common bases for revoking tax exemption).

[189] *Id.*

[190] *See* Molk & Sokol, *supra* note 183, at 1522-1525; and Lloyd Hitoshi Mayer, *"The Better Part of Valor Is Discretion": Should the IRS Change or Surrender Its Oversight of Tax Exempt Organizations?* 7 COLUM. J. TAX L. 80, 80-95 (2016) (criticizing IRS enforcement, pointing to shrinking resources and growing responsibilities).

The European system for nonprofit control, particularly for income-generating for-profits, demonstrates a strong framework for mitigating nonprofit mission-drift. Enterprise foundations, such as those controlling Novo Nordisk, Carlsberg, and IKEA, are designed to manage the dual objectives of maintaining business operations and advancing social missions. These foundations are supported by clear distribution duties that ensure income from the for-profit enterprise flows consistently to the nonprofit parent, enabling it to fund its charitable purposes.[191] The robust enforcement mechanisms in Europe play a critical role in addressing the risk of nonprofit mission-drift. Supervisory authorities actively monitor compliance with distribution requirements, intervening when foundations fail to allocate sufficient resources to their stated charitable objectives. For instance, Danish regulators have taken action against enterprise foundations that accumulated substantial surpluses without making adequate distributions.[192]

One of the distinctive features of the European model is the ease of setting up enterprise foundations and the flexibility it offers in balancing short-term income needs with long-term business sustainability. Nonprofits retain significant control over for-profit subsidiaries, ensuring that profits are directed toward charitable purposes. However, the real risk of mission-drift arises when outside investors are involved in the for-profit subsidiary. These investors may have conflicting interests with the nonprofit parent. For example, while the nonprofit may prioritize distributions to fund charitable projects, outside investors might prefer reinvesting profits to promote long-term business growth. Alternatively, the nonprofit may focus on long-term sustainability, while investors press for immediate returns. Despite this potential for conflict, the risk is mitigated by the shared goal of profitability and the strong enforcement mechanisms within the European system, which ensure that the nonprofit's objectives to secure a steady income flow remain paramount.[193]

In the U.K., the legal framework for nonprofit-controlled for-profits shares some similarities with the European model but introduces distinct mechanisms, such as trading companies. Trading companies are established by charities to generate income that is then transferred to the parent nonprofit through Gift Aid, ensuring tax-efficient distributions. Like European enterprise foundations, trading companies are subject to distribution duties that require nonprofits to use income for charitable purposes, and the for-profits to make distributions to the nonprofit subsidiary. The Charity Commission oversees compliance, with significant enforcement powers to address cases of mismanagement or noncompliance.[194] The U.K., like most European jurisdictions, except Denmark, lacks

---

[191] *See supra* text accompanying notes 139-142.

[192] *See supra* text accompanying notes 104-106 (with examples from Denmark).

[193] *See supra* text accompanying notes 143-145; and Ørberg, *supra* note 58, at 781-783 (describing the duty to distribute and the direct enforcement and intervention powers of Danish regulators, including quasi-judicial powers to remove foundation board members that are consistently neglecting their duties).

[194] For example, the Charities Act 2011 includes powers to institute inquiries (§ 46), obtain evidence (§ 47), call for documents (§ 52), search for records (§ 53), demand disclosure of information (§§ 54-58),

rules requiring nonprofit board independence, allowing founders or stakeholders to wield influence. However, the U.K. framework also does not directly ensure independence from outside investors, which could heighten the risk of mission-drift if investors exert undue influence over decision-making in for-profit subsidiaries. As in European legal systems, the public monitoring of distribution duties, which involves regular oversight by supervisory authorities to ensure compliance and prevent undue asset accumulation, helps mitigate this risk significantly.

The U.S. system for regulating nonprofit-controlled for-profits differs significantly from its European and U.K. counterparts. It places excessive focus on independence from major donors rather than founders. A foundational rule is that private foundations—nonprofits with a major donor—cannot practically control for-profits unless they satisfy the Newman's Own exception, which imposes numerous restrictions.[195] These restrictions effectively eliminate the involvement of outside investors but come at a cost, as they prevent private foundations from diversifying and increasing their sources of income. The Newman's Own exception under U.S. tax law allows private foundations to own 100 percent of a business enterprise, provided all net operating income is distributed to the nonprofit owner. While this eliminates the risk of outside investor influence, it prevents raising capital from such investors and limits the ability of nonprofits to reinvest in the business for long-term growth, which may align with the foundation's interest in ensuring a sustainable source of income. This rigidity stands in stark contrast to the European model, where enterprise foundations balance immediate distributions with reinvestment strategies. This approach not only secures a steady income flow for charitable purposes but also ensures long-term sustainability and growth, as demonstrated by Novo Nordisk's investment in GLP-1 patents, which highlights the benefits of reinvesting profits to enhance both financial and social outcomes.[196]

For nonprofits classified as public charities or social welfare organizations in the U.S., the regulatory framework is far more permissive but lacks sufficient safeguards to prevent nonprofit mission-drift. Public charities can own and control for-profits without being subject to the same distribution or monitoring requirements as private foundations. This creates significant flexibility but also increases the risk that nonprofits may prioritize the growth of their for-profit subsidiaries over their charitable missions.[197] Unlike European regulators, the IRS focuses primarily on tax compliance and does not actively monitor whether nonprofits extract sufficient income from their for-profits to fulfill their social purposes.[198] This regulatory gap is further exacerbated by the lack of strong enforcement

---

exercise cy-près powers (§ 62), remove trustees (§ 79), direct specific action to be taken (§ 84), audit (§ 144), direct compliance with certain regulations (§ 155), and implement other enforcement measures (§§ 335-339). DANISH ENTERPRISE FOUNDATION ACT (984/2019), to a large extent, contains similar provisions on regulatory enforcement and intervention powers.

[195] *See supra* text accompanying note 175.

[196] *See supra* Section I.A.

[197] *See* e.g. Aprill et al, *supra* note13, at 295.

[198] *See* Molk & Sokol, *supra* note 183, at 1525-1527 (discussing how the IRS focusses only on ensuring that assets with preferential tax treatment are not used for non-exempt purposes.)

mechanisms at the state level,[199] leaving many nonprofits to self-regulate.

The U.S. regulatory framework places disproportionate emphasis on independence from major donors.[200] Before 1969, Congress targeted mission-drift in private foundations, attributing it to donor influence. The 1965 Treasury Report, while acknowledging similar risks in other nonprofits, focused narrowly on private foundations[201] and relied on anecdotal evidence of donors' self-dealing, as robust self-dealing rules did not exist at the time.[202] This led to the blanket rules of 1969, which effectively prohibit private foundations—defined essentially as nonprofits with major donors—from controlling for-profit businesses, thereby restricting their ability to diversify and grow long-term income. This rigidity is highlighted by entities like the Patagonia Purpose Trust, which emulate private foundation structures while circumventing these strict rules. Under this structure, major donors can transfer shares of operating businesses to a public charity while retaining control through a perpetual trust and raising equity capital from outside investors, all without any rules ensuring that income is distributed to the nonprofit parent.[203]

Both the European and U.K. systems manifest the importance of robust enforcement mechanisms in addressing nonprofit mission-drift. Supervisory authorities in Europe, such as the Danish Foundation Authority, actively monitor compliance with distribution duties and intervene when for-profit subsidiaries fail to allocate adequate income to their nonprofit controllers. Similarly, the Charity Commission in the U.K. oversees trading companies to ensure profits are directed toward charitable purposes. In contrast, the U.S. system's reliance on tax law as the primary regulatory tool significantly limits the scope and effectiveness of oversight. Consequently, the IRS lacks the capacity to assess whether nonprofits exert sufficient influence over their for-profits to ensure consistent income flows. This shortfall explains why mandatory distribution requirements for private foundations are prescriptive, making them easy to monitor but inherently inflexible. However, other nonprofits face no such requirements, creating an absence of proactive monitoring that increases the risk of prioritizing business growth over social missions.

---

[199] *See Id.*; and Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating charities in the twenty-first century: An institutional choice analysis*, 85 CHI.-KENT L. REV. 479, 480-489 (2010) (highlighting that enforcement has been spotty and haphazard at best).

[200] *See* John G. Simon, *The regulation of American foundations: Looking backward at the Tax Reform Act of 1969*, 6.3 VOLUNTAS: INT'L J. OF VOLUNTARY AND NONPROFIT ORGS 243, 246-248 (1995) (criticizing the U.S. 1969 tax reform for discrimination between private foundations and other tax-exempt organizations).

[201] *See* TREASURY REPORT, *supra* note 24, at 1 ("The restriction of the Report to private foundations does not indicate any judgment upon whether or not similar or other types of problems may exist among other classes of exempt organizations."); and Troyer, *supra* note 113, at 54, (stating that Congress' reason specified for differentiating private foundations from other types of nonprofits in 1950 was that institutions such as churches, schools, publicly supported organizations, and other charities excepted from tax "are in general what might be called 'public' organizations and because of this characteristic are not believed likely to become involved in" abuses of the sort which the federal tax rules aimed to address).

[202] *See* James J. Fishman, *The Private Foundation Rules at Fifty: How Did We Get Them and Do They Meet Current Needs?*, 17.2 PITT. TAX REV. 247, 248, 261, 276, 284 (2020) (explaining in detail the legislative process that lead to the distinction between private foundations and charities, and how the evidence for the alleged abuse by foundations was overwhelmingly anecdotal).

[203] *See supra* Sections I.B and III.A.3.

A comparative analysis of these systems reveals that the European and British models offer a more balanced and effective approach to regulating income-generating for-profits. The combination of flexible distribution duties and robust enforcement mechanisms ensures that nonprofits can extract reasonable income from their for-profit subsidiaries while maintaining their focus on charitable purposes. In contrast, the U.S. system requires substantial reform to address its regulatory gaps. Greater flexibility for private foundations to reinvest in their businesses, coupled with stronger oversight mechanisms to monitor income distributions, would improve the system's effectiveness in mitigating nonprofit mission-drift. Similarly, while the U.S. system offers flexibility for public charities, it lacks the necessary oversight and enforcement mechanisms to ensure that income from for-profit businesses is used to advance the nonprofit's social mission.

2. Socially-Oriented For-Profits and For-profit Mission-drift

In the socially-oriented for-profit model, the nonprofit exercises control to ensure the for-profit fulfills a social function in alignment with the nonprofit's mission. The major risk arises when there are outside investors in the for-profit subsidiary, as these investors may pressure the for-profit business to compromise its charitable mission.[204]

European jurisdictions, as seen in the enterprise foundation model, are generally structured to support income-generating for-profits, with some room for socially-oriented for-profits. In these systems, the regulatory framework ensures that profits are channeled toward the nonprofit's charitable purposes, often through distribution duties. For example, Danish foundation authorities rigorously monitor income flows from for-profit subsidiaries to their parent nonprofits, intervening where necessary to enforce compliance.[205] However, the European system is not well-suited to incorporating socially-oriented for-profits comprehensively. In essence, the distribution duties may conflict with the social mission of the for-profit, which would typically require reinvestment of profits for growth to advance the social mission.

Thus, socially-oriented for-profits in Europe often also function as income-generating for-profits, as the categories are not mutually exclusive. Enterprise foundation laws could accommodate a firm like Patagonia, where the for-profit business serves a social mission while providing steady cash flow to nonprofit social welfare organizations pursuing charitable projects. Det Norske Veritas uses some of the profits of DNV AS to reinvest in the business to further its social mission of safeguarding life, property, and the environment, but it also distributes some of it to support charitable projects, including research, education, sustainability initiatives, and safety-focused programs.[206] Alternatively, associations may be used to control a for-profit, but such arrangements are

---

[204] *See supra* text accompanying notes 116-122.

[205] *See supra* text accompanying notes 104-106

[206] *See* STIFTELSEN DET NORSKE VERITAS, ANNUAL REPORT 2023, https://www.detnorskeveritas.com/wp-content/uploads/2024/05/DNV-Stiftelsen-Annual-Report-2023.pdf, at 4-7 (explaining the foundation's social investments and sponsorships).

limited to businesses primarily directed toward the social mission.[207] This constraint significantly narrows the range of for-profits they can manage, especially if the business operations are broad.

The U.K., by contrast, has created a more flexible pathway for socially-oriented for-profits. While its initial framework, similar to Europe, focused on ensuring income generation for charitable purposes, the introduction of social investment through the Charities (Protection and Social Investment) Act 2016 has marked a significant shift. This law allows charities to invest directly in for-profit entities that align with their mission, even when such investments prioritize financial returns alongside social outcomes. When charities make social investments, they are not subject to the requirement to make distributions but can satisfy their social objectives by reinvesting profits into the for-profit subsidiary, provided it continues to act in accordance with its social mission.[208] Two notable examples facilitated by these legal changes are Better Society Capital and Lloyd's Register, demonstrating that charities are actively leveraging the new framework.[209]

The U.K. system, along with all other jurisdictions, does not explicitly recognize the heightened risk of for-profit mission-drift when there are outside investors in the for-profit subsidiary. However, it is important to emphasize that the U.K. has a strong supervisory authority in the Charity Commission that can limit potential abuses of social investments, where the for-profit subsidiary maximizes profits at the expense of the social mission. The Charity Commission for England and Wales actively monitors the compliance of charities with their legal and social obligations. This oversight includes ensuring that socially-oriented for-profits align their operations with the parent nonprofit's mission. Trustees are held to a high standard of accountability, with the Commission possessing significant powers to investigate mismanagement, remove trustees, and enforce compliance. This level of enforcement creates a degree of transparency and accountability that mitigates for-profit mission-drift.

In contrast, the U.S. system remains highly problematic in addressing socially-oriented for-profits. The legal framework distinguishes between private foundations and other nonprofits, creating a striking contradiction in which socially-oriented for-profits controlled by private foundations are heavily regulated, and those controlled by other nonprofits are free from any oversight.[210] For private foundations, program-related investments (PRIs) offer a mechanism to support socially-oriented for-profits, but unlike the U.K.'s social investment and similar to associations in Europe, the range of for-profits that can accept PRIs is limited because the income appreciation must be an ancillary purpose of the investment.[211] Moreover, the regulatory burdens are significant. Foundations must conduct exhaustive monitoring, adhere to strict expenditure

---

[207] *See supra* text accompanying notes 149-150

[208] *See supra* text accompanying notes 160-164.

[209] *See supra* text accompanying note 79 (Better Society Capital) and text accompanying note 83 (Lloyd's Register).

[210] *See supra* Section III.A.3.

[211] *See* INTERNAL REVENUE SERVICE, PROGRAM-RELATED INVESTMENTS, https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments.

responsibility rules, and face potential tax liabilities if compliance falters. These barriers deter many private foundations from investing in socially-oriented for-profits.[212]

For other nonprofits, however, regulation is surprisingly lax. The IRS provides minimal oversight of nonprofit-controlled for-profits, creating opportunities for mission-drift. On the one hand, Greyston Bakery, a work-integration social enterprise owned by the Greyston Foundation (which, despite its name, is not a private foundation), effectively aligns its operations with the nonprofit's mission of providing employment opportunities to marginalized populations. Its open hiring practices and focus on community development exemplify how socially-oriented for-profits can thrive under nonprofit control. Greyston Bakery's lack of outside investors likely prevents conflicts between its social mission and profit-making incentives.[213]

On the other hand, the OpenAI case highlights significant risks stemming from inadequate regulation and lack of oversight. OpenAI's nonprofit parent invested donated funds into its for-profit subsidiary to develop artificial intelligence, an endeavor with questionable alignment to traditional charitable purposes. While the nonprofit's stated mission of ensuring AI benefits humanity could be interpreted as charitable, the absence of clear metrics for measuring social impact or determining public benefit created significant ambiguity. A major factor in the OpenAI saga was the presence of an outside investor, Microsoft, which essentially pressured the for-profit to prioritize its commercial interests over the nonprofit's stated mission.[214] Such investors, when positioned to influence the for-profit's direction, can exploit weak oversight and drive the enterprise away from its social objectives.

The lack of enforcement and supervision in the U.S. may provide an explanation for how OpenAI's situation unfolded as it did. While the U.K. Charity Commission closely monitors how socially-oriented for-profits operate under nonprofit control, ensuring adherence to their social missions, the U.S. system lacks a robust enforcement mechanism. The absence of rigorous oversight in the U.S. has exposed gaps in ensuring that reinvested profits or operational decisions genuinely align with charitable goals.

This lack of regulatory rigor in the U.S. underscores a broader challenge inherent to socially-oriented for-profits: defining and measuring social impact.[215] The European model, with its rigid distribution duties, may inhibit the formation of socially-oriented for-profits, but it also creates limited scope for for-profit mission-drift. The U.K. model offers a middle ground, allowing charities to pursue financial returns while using supervision and enforcement to mitigate the risk of for-profit mission-drift. However, even the U.K. faces similar difficulties, as even its more robust enforcement does not conclusively resolve the fundamental issue of how to ensure that reinvestment aligns with a clear, measurable social mission.

---

[212] *See* Eldar, *supra* note 5, at 210-212. In fact, the appears to be no available known examples where private foundations invest obtain a controlling stake in a for-profit business through PRI.

[213] *See supra* text accompanying note 78.

[214] *See supra* text accompanying notes 116-122.

[215] *See* Eldar, *supra* note 46, at 954, 965 (emphasizing that it is difficult to measure social impact with precision).

Accordingly, while the introduction of social investment has created new opportunities for charities to engage with for-profits, it also leaves room for potential mission-drift. As we discuss below, the challenges of measuring impact more broadly could partly be met by creating certification mechanisms that verify that businesses transact with disadvantaged groups, such as people that suffer from systemic unemployment or lack access to capital. Such certifications, however, do not encompass general public goods that do not accrue to identifiable beneficiaries, and for those, it may be challenging to provide a comprehensive certification. Accordingly, to the extent that tax-exempt nonprofits are permitted to control and manage for-profits that generate public goods, there seems to be no alternative to strong regulatory supervision.

IV. THE OPTIMAL REGIME FOR REGULATING NONPROFIT CONTROL

Nonprofit control of for-profit entities, while offering significant benefits,[216] also presents unique risks. To address these risks effectively, the regulatory framework must account for the fundamental differences between income-generating for-profits and socially-oriented for-profits.[217] These distinctions are crucial because the benefits, challenges, and regulatory needs of these models diverge significantly. This section outlines the key contours of an optimal legal regime that is tailored to the specific benefits and risks associated with each model of nonprofit control of business enterprises.

A. Distinguishing Income-Generating and Socially-Oriented For-Profits

It is essential to distinguish between income-generating for-profits and socially-oriented for-profits because their purposes and risks are inherently different. Income-generating for-profits exist primarily to generate stable cash flows that support the nonprofit's mission.[218] Examples include enterprise foundations in Europe, such as Novo Nordisk and Carlsberg, and U.S. examples like Newman's Own. These entities rely on robust and predictable revenue streams, often supported by strong brand recognition or patent protections, to fund charitable activities. [219] The primary regulatory focus for this model should be on ensuring that the nonprofit receives adequate financial distributions to advance its mission while allowing sufficient reinvestment to sustain long-term cash flows.

In contrast, socially-oriented for-profits directly pursue a social purpose, such as environmental sustainability or social equity. Examples range from Greyston bakery that employs disadvantaged people that suffer from systemic unemployment to OpenAI, with its mission to ensure artificial intelligence benefits humanity.[220] For this model, the primary risk is for-profit mission-drift—the potential deviation from the stated social mission in

---

[216] *See supra* Section I.
[217] *See supra* Section II.
[218] *See supra* Section I.A.
[219] *See supra* Section II.A.
[220] *See supra* Section I.B; and Aprill et al, *supra* note 13.

favor of profit maximization, especially under the influence of outside investors. Regulatory frameworks must address the unique challenges of certifying and monitoring the social impact of these businesses.[221]

Different legal frameworks across jurisdictions reflect varying levels of recognition for these distinctions. U.K. law explicitly distinguishes between income-generating trading companies and socially-oriented social investments, providing clear guidance on how each is regulated.[222] European law, in contrast, focuses primarily on income-generating models, such as enterprise foundations, and does not have a clear category for socially-oriented for-profits.[223] In the U.S., the distinction is clear but limited to private foundations, leaving other nonprofits without a consistent regulatory framework.[224] There is a need for a universal distinction between these models across all types of nonprofits to ensure tailored regulatory approaches.

B. Addressing Outside Investor Influence

A critical distinction to introduce is between for-profits wholly owned by nonprofits and those with substantial equity investment from outside investors. External investors can exert pressures that undermine the nonprofit's control and mission, particularly when their financial interests conflict with the nonprofit's objectives. This risk may occur in income-generating for-profits when there is a mismatch between the investment horizon of the nonprofit and the outside investors,[225] but it is particularly strong in socially-oriented for-profits, where the outside investor wants the socially-oriented for-profit to prioritize profits over the social mission.[226]

To mitigate these risks, nonprofits with ownership stakes in for-profit entities should be required to disclose their ownership structure, including the presence and influence of outside investors. The costs of reporting the ownership percentage seem relatively low, and this information would direct regulatory authorities to focus on instances of nonprofit control where mission-drift is more likely. Additionally, legal frameworks should require that nonprofit boards be independent from individuals or entities with financial stakes in the for-profit. Independence of the nonprofit board from outside investors would reduce the likelihood of these investors influencing the nonprofit's decisions when managing the for-profit.[227]

At present, no legal jurisdictions explicitly require disclosure or enforce this type of independence requirement. The Newman's Own exception under U.S. law is the only legal

---

[221] *See supra* Section II.B and infra Section IV.D; Eldar, *supra* note 46, at 954, 965; and Daniel G. Neely et al, *The Impact of Regulation and Monitoring on Nonprofit Organizations*, 214, in RESEARCH HANDBOOK ON NONPROFIT ACCOUNTING (Daniel Tinkelman and Linda M. Parsons eds., 2023) (examining regulatory frameworks and monitoring mechanisms).

[222] *See supra* Section III.A.2; and Charities Act 2011 §§ 292A-292C.

[223] *See supra* Section III.A.1.

[224] *See supra* Section III.A.3.

[225] *See supra* Section II.A.

[226] *See supra* text accompanying notes 121-122.

[227] *See supra* Sections II.A and II.B (discussing the risks of outside investor influence.)

provision that acknowledges the risk that outside investors pose to nonprofit control,[228] but it goes too far in prohibiting outside investors altogether, especially given that the risk of outside investors is relatively small in income-generating for-profits.[229] Introducing these requirements in all jurisdictions could be particularly beneficial in developing the landscape for socially-oriented for-profits, where the risk of mission-drift due to tensions between the nonprofit controller and outside investors is particularly large.[230]

C. Income-Generating For-Profits: A Liberal Approach with Safeguards

For income-generating for-profits, the regulatory regime should be relatively permissive. Controlling for-profit businesses may be beneficial for nonprofits because it can mitigate systematic risk and provide nonprofits with steady income streams, as seen with firms such as Novo Nordisk and Carlsberg.[231] Moreover, the risk of mission-drift is generally limited. When the for-profit is wholly owned by the nonprofit, the risk of mission-drift is minimal, provided that self-dealing and private inurement prohibitions are enforced, because the nonprofit would presumably have little incentives to use the for-profit other than to generate cash flows for the nonprofit's charitable projects.[232] Outside investors may nonetheless be necessary to scale the business, but their presence introduces potential conflicts, and there is some higher risk of mission-drift as a result.[233] To address this, flexible distribution duties should be established as in Europe and the U.K. legal system. These duties would require for-profits to balance short-term cash distributions with reinvestments for long-term growth, ensuring the nonprofit's financial stability while maintaining the for-profit's viability.[234] Regulatory authorities should oversee these duties, as seen in Europe and the U.K., where supervisory bodies enforce compliance with distribution and reinvestment standards.[235] We acknowledge that whether or not the regulatory authorities in the U.S. in its current form would be capable of administering and monitoring such flexible distribution duties is questionable given the limitation of the U.S.

---

[228] *See supra* Section III.A.3.
[229] *See supra* Sections II.A and IV.A.
[230] *See supra* Section II.B (using the conflicts in OpenAI as an example of for-profit mission-drift).
[231] *See supra* Section I.A.
[232] *See supra* Section II.A.
[233] *Id.*
[234] *See supra* text accompanying notes 139-142, 154-157.
[235] *See supra* Sections III.A.1-III.A.2.

enforcement system.[236] The European and British systems suggest that such a system can work reasonably well without major concerns about mission-drift.[237]

D. Socially-Oriented For-Profits: Certifying and Monitoring Social Impact

Socially-oriented for-profits face broader challenges in verifying their social missions, especially when making profits are not merely incidental but are also a significant aspect of the for-profit subsidiary's operations.[238] This creates a natural tension between the dual objectives of profitability and social purpose, requiring careful regulatory attention to ensure alignment with the nonprofit's overarching mission. The firms that combine profit and social purposes naturally face a tension between the two. This risk of for-profit mission-drift is particularly pronounced when there is an outside investor with a strong profit motive.[239] It may also exist when there are no outside investors as there may be incentives for entrepreneurs to source tax deductible donations and then invest them to grow a business that competes unfairly with other for-profit firms.[240] This issue is particularly acute in jurisdictions like the U.S., where nonprofits that do not qualify as private foundations operate with limited oversight when controlling socially-oriented for-profits.[241]

Certification mechanisms, such as those used for community development financial institutions (CDFIs) or work-integration social enterprises in Europe (WISEs), could help verify alignment with social objectives. These mechanisms typically require for-profit

---

[236] *See* e.g. Lloyd Hitoshi Mayer, *"The Better Part of Valour Is Discretion": Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?* 7 COLUM. J. TAX L. 7(1) 80 (2016) (examining the IRS's ongoing challenges in regulating tax-exempt entities and suggesting that, without major reforms, its supervisory role may be better handled by alternative regulators); Molk & Sokol, *supra* note 183, at 1522-1524 (discussing how a state attorney general typically has an incomplete incentive to police any of the larger nonprofits whose nonprofit activities extend outside her state's borders); Lloyd Hitoshi Mayer, *Fragmented Oversight of Nonprofits in the United States: Does it Work? Can it Work?*, 91 CHI.-KENT L. REV. 937, 956 (2016) (noting that the IRS favors a rules-based approach to reduce costs and avoid controversy, while state attorneys general may enforce a principles-based approach when they intervene); and Mayer & Wilson, *supra* note 199, (arguing that independent state-level agencies, federally funded, are best suited to oversee U.S. charity governance).

[237] *See* MARK ØRBERG, FONDSRETTEN OG DEN LEVENDE VEDTÆGT, Djøf Publishing (2022) (PhD dissertation examining the Danish foundation system and regulatory powers in the context of purpose fulfillment); Feldthusen, *supra* note 136 (examining Danish foundation law), Olsson, *supra* note 100 (analyzing Swedish legal framework on foundations); Jakob, *supra* note 95, (explaining Swiss legal framework on foundations); Susanne Kalss, *The Austrian Foundation*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023), 61 (describing Austrian foundation law), Sanders & Thomsen, *supra* note 130, at 233-236 (comparing legal frameworks on governance and supervision in European enterprise foundations); and Fries, *supra* note 73 (examining the origins, composition, and functions of the Charity Commission, highlighting its role as responsible for regulating charities within England and Wales).

[238] *See supra* text accompanying notes 123-124, 215.

[239] *See supra* Section II.B.

[240] *See supra* text accompanying notes 113-114.

[241] *See supra* Sections III.A.3 and III.B.2.

entities to meet specific criteria, such as providing financial services to underserved communities or employing individuals facing systemic barriers to employment.[242] Certification may involve audits, documentation of business practices, and periodic reviews conducted by government bodies or independent organizations to ensure ongoing compliance with social objectives. These certifications would require for-profit businesses to verify that they transact with a group of disadvantaged people, such as low-income people who lack access to capital or workers that suffer from systemic unemployment. These certifications provide assurance that for-profit firms have a stake in the development of their beneficiaries, whether it is low-income borrowers, or unemployed workers.[243] When for-profits subject themselves to a certification that is either conducted by the government, or carried out by a private organization or validated through legislative instrument, they will be treated as having satisfied the requirement to pursue social missions.

However, certification alone may not be adequate for entities providing public goods, such as environmental sustainability or the beneficial development of artificial intelligence, due to the inherent difficulty in defining and quantifying social impact for these purposes. Unlike social objectives that involve identifiable beneficiaries, such as low-income workers or borrowers, public goods often lack clear metrics and measurable outcomes, making them harder to certify effectively. For these cases, a robust disclosure system coupled with supervisory and enforcement mechanisms are necessary. The nonprofit firm should file disclosure documents that detail how the for-profit subsidiary pursues social goals.[244] Supervisory authorities should review these disclosures and, in appropriate cases, conduct investigations. When it is clear that the for-profit does not give sufficient weight to the social objectives of the nonprofit parent, these authorities should pursue sanctions.[245]

Although regulatory authorities are themselves not able to promulgate clear transparent criteria for what counts as socially desirable performance, and their monitoring is inevitably imperfect, this task is not fundamentally different from other similar regulatory functions in this space, such as determining whether income is related or not to the purpose of the nonprofit under the Unrelated Business Income Tax doctrine.[246] Moreover, the experience of the U.K. Charity Commission, highlights its effectiveness in deterring and addressing mission-drift. For instance, the commission has intervened in cases where charities misallocated funds intended for social objectives or failed to meet their stated

---

[242] *See supra* text accompanying notes 76-77.

[243] *Id*.

[244] The Charities Act 2011 § 292C, for example, imposes duties on charity trustees, including the requirement to consider certain factors before making a social investment and to review the charity's social investments periodically. When carrying out a review the charity trustees must consider whether any advice about the social investments ought to be obtained, and they must obtain and consider any advice they conclude ought to be obtained.

[245] Sanctions could include, for example, the removal of a nonprofit board that consistently refuses to use the nonprofit's voting rights to influence the socially-oriented for-profit to adequately prioritize the social objectives of the nonprofit parent. Such sanctions would, of course, be subject to judicial review.

[246] *See supra* text accompanying notes 183-188 (with discussion of the UBIT and the substantial relationship requirement in the context of OpenAI).

missions.[247] These actions have demonstrated its ability to provide oversight and enforce accountability, making it a valuable model for regulatory frameworks elsewhere. The U.S. could adopt similar supervisory frameworks, particularly as the number of socially-oriented for-profits is gradually growing.

E. Rethinking Independence from Founders and Donors

Independence requirements for nonprofits often focus on separation from founders or major donors. Most conspicuously, the U.S. system of regulating nonprofit control is based on whether or not the nonprofit has a major donor, and subjecting those that do to extensive regulation, leaving others largely untouched.[248] This approach may overlook the positive role founders play in safeguarding nonprofits' missions. For instance, founders like Bill Gates have demonstrated a commitment to their nonprofits' social objectives.[249] It would make sense for such donor-founders to want to be involved in the operation of for-profit subsidiaries. The founder of Patagonia devised a perpetual purpose trust specifically to ensure that he and his family could guarantee Patagonia's commitment to environmental sustainability in perpetuity.[250] Unless the donor is also an investor in the for-profit subsidiary, there is little concern about the donor influencing the nonprofit to misuse control for personal interests.[251]

In income-generating for-profits, founder-donors' influence is generally beneficial, as they align closely with the nonprofit's goals of finding more sources of income. Enterprise foundations in many European jurisdictions, such as Germany and Switzerland, appear to operate effectively without requiring the foundation to be independent of the founder or donor.[252] For example, the Bosch Foundation in Germany has successfully maintained its dual focus on charitable initiatives and business interests under the influence of its

---

[247] The Charity Commission publishes cases of mismanagement and misallocation of funds. *See* https://www.gov.uk/government/collections/inquiry-reports-charity-commission. In the case of The Cowesby Trust, for example, the Commission found that none of the charity's expenses had furthered its stated public benefit purpose, and a charity trustee—who had resigned from the charity—was disqualified from being a charity trustee or a trustee of a charity and/or holding an office or employment with senior management functions in charities generally for 10 years. *See* "Charity inquiry: The Cowesby Trust" 11 July 2023, https://www.gov.uk/government/publications/charity-inquiry-the-cowesby-trust/charity-inquiry-the-cowesby-trust. In another case, the Charity Commission found that Fashion for Relief had mismanaged funds by spending significant amounts on luxury travel and accommodation, with only a small proportion of its income applied to charitable purposes. *See* "Charity Inquiry: Fashion for Relief" 26 September 2024, https://www.gov.uk/government/publications/charity-inquiry-fashion-for-relief/charity-inquiry-fashion-for-relief.

[248] *See supra* Sections III.A.3 and III.B.

[249] *See* GATES FOUNDATION, BILL GATES, https://www.gatesfoundation.org/about/leadership/bill-gates ("As co-chair of the Gates Foundation, Bill Gates shapes and approves foundation strategies, advocates for the foundation's issues, and sets the organization's overall direction").

[250] *See* David Gelles, *The Climate Philanthropist*, N.Y. TIMES (Sept. 16 2022), https://www.nytimes.com/2022/09/14/climate/patagonia-climate-philanthropy-chouinard.html.

[251] *See supra* Section II.

[252] *See supra* Section III.A.1; Sanders, *supra* note 138; and Jakob, *supra* note 95.

founder's legacy,[253] demonstrating that founder influence does not necessarily impede mission alignment. Likewise, in socially-oriented for-profits, founder-donors can serve as key defenders of the mission against external pressures, as evidenced by donor opposition to Microsoft's influence over OpenAI. These benefits from founder-donor influence of course are more suspect if they also serve as investors in the for-profit business.[254] Accordingly, independence rules should ensure nonprofits are insulated from outside investors, not founders or donors who lack financial stakes in the for-profit.

V. THE PURPOSE OF CORPORATIONS

Our analysis of the anatomy of nonprofit control provides a framework for understanding its impact on the management of for-profit businesses. Recent accounts have celebrated nonprofit control as a more sustainable and purposeful form of governance compared to investor-owned corporations. Nonprofit-controlled firms are often characterized as being driven by long-term value creation and commitments to social and environmental sustainability, while investor-owned firms are portrayed as focused on short-term profits and maximizing shareholder returns. For example, a recent analysis bundles income-generating for-profits like IKEA, Rolex, and Carlsberg together with socially-oriented for-profits like OpenAI, Patagonia, and Det Norske Veritas, arguing that the purpose-driven governance of nonprofit controllers mitigates agency costs and enhances performance.[255] However, this simplistic paradigm fails to account for three critical features of nonprofit control: (1) the motivations underlying different business models of nonprofit control, (2) the risks of mission-drift associated with those motivations, and (3) the regulatory frameworks governing different types of nonprofit control.

As we argue in this article, the primary rationale for nonprofit control in income-generating for-profits is to generate a steady and reliable flow of cash for the nonprofit parent. In this context, the nonprofit form is not intended to enhance customer or public trust in the for-profit subsidiary, but rather to instill trust in donors to the nonprofit parent just as traditional nonprofit theory predicts. [256] The nonprofit parent uses its ownership of the for-profit subsidiary to maximize its own cash flow, much like other shareholders.

---

[253] *See* Allison Reaves, *Robert Bosch Stiftung GmbH*, in INTERNATIONAL ENCYCLOPEDIA OF CIVIL SOCIETY (Anheier & Toepler eds., 2010) https://doi.org/10.1007/978-0-387-93996-4_451 (describing the Bosch Foundation, its purpose, and its association with the private company Robert Bosch GmbH); and ROBERT BOSCH STIFTUNG, OUR MISSION STATEMENT, https://www.bosch-stiftung.de/en/our-mission-statement.

[254] See *supra* Section II.B.

[255] *See* Hwang & Lund, *supra* note 9.

[256] Hwang & Lund, *supra* note 9, argue that companies such as IKEA and Carlsberg challenge Hansmann's theory, which predicts that nonprofit ownership arises when product quality is difficult for consumers to verify. In contrast, the quality of IKEA's and Carlsberg's products is easily verifiable. However, nonprofit ownership is not essential for these companies to succeed or to earn customer trust. Rather, the foundations controlling IKEA and Carlsberg are organized as nonprofits so they can be trusted to use their income to further a charitable mission, as predicted by Hansmann's theory.

Nonprofit-controlled firms in this model are more akin to family firms, which must balance the tradeoff between consuming profits today and reinvesting in the business to secure future cash flows. It is therefore unsurprising that many of these firms perform just as well as investor-owned firms—or even better. In fact, it is not clear that for-profit businesses such as IKEA and Carlsberg adhere to stricter environmental or labor standards than their counterparts, such as Target or Heineken.[257]

On the other hand, when examining socially-oriented for-profits—that is, firms designed to deliver specific social benefits that profit-maximizing firms are unlikely to provide—significant challenges arise in making the model work effectively. Nonprofit control can play an instrumental role in ensuring that the for-profit subsidiary complies with defined social or environmental standards. However, when investors hold a substantial stake in the for-profit business and the organization depends on these investors for performance, the risk of for-profit mission-drift becomes significant. This risk is particularly acute when the social purpose of the for-profit firm is difficult to measure or monitor, and when regulatory oversight is weak or nonexistent. In such cases, there is potential for donor funds to be misused to fuel business growth that disproportionately benefits managers and investors rather than advancing the intended public goods.

CONCLUSION

Nonprofit control of operating businesses presents a unique and complex governance model with both economic advantages and regulatory challenges. While the structure has long been established in European enterprise foundations, its growing prominence in the U.S.—exemplified by organizations like Patagonia and OpenAI—raises important questions about the economic rationale and risks associated with nonprofit-controlled for-profits. As these hybrid structures become more prevalent, understanding their distinct economic functions and vulnerabilities is essential for policymakers and legal scholars.

This paper introduces a critical distinction between two primary models of nonprofit control: income-generating for-profits and socially-oriented for-profits. Income-generating for-profits provide nonprofits with financial stability by creating a reliable revenue stream, reducing reliance on donations, and mitigating financial risks. Socially-oriented for-profits, in contrast, allow nonprofits to ensure that businesses pursue a social mission that might

[257] For example, Glassdoor employee satisfaction scores at IKEA (3.8) and Carlsberg (3.7) are similar to those at Target (3.6) and Heineken (4.3), suggesting that nonprofit ownership does not necessarily lead to higher employee satisfaction. From an environmental perspective, IKEA has implemented ambitious sustainability goals, such as aiming to become climate positive by 2030, while Carlsberg has pledged to achieve zero carbon emissions by 2040. However, these commitments are comparable to those made by profit-oriented firms like Target and Heineken, which have similarly ambitious environmental targets. A recent paper suggests that foundation-controlled firms tend to have high ESG scores. See David Schröder & Steen Thomsen, *Foundation Ownership and Sustainability*, J. CORP. FIN. 102740 (2025). However, there is considerable debate about whether ESG scores accurately capture social and environmental goods. Critics have questioned the informativeness and consistency of ESG ratings, arguing that they often lack clear direction or standardization. See David F. Larcker et al., *ESG Ratings: A Compass without Direction*, STANFORD CLOSER LOOK SERIES (Aug. 2022).

otherwise be compromised by profit-driven incentives. However, both models are susceptible to mission drift: income-generating for-profits risk failing to distribute funds adequately for charitable purposes, while socially-oriented for-profits are vulnerable to external investor influence. Addressing these risks requires a nuanced legal and regulatory approach.

A comparative analysis of European, U.K., and U.S. legal frameworks reveals significant differences in how nonprofit control is regulated. European jurisdictions have developed enterprise foundation laws that balance financial sustainability with obligations to reinvest profits in charitable projects. The U.K. facilitates nonprofit-controlled businesses through trading companies that generate income for nonprofits and social investments that support socially-oriented for-profits. The U.S., in contrast, relies primarily on tax law, imposing strict restrictions on private foundations while allowing other nonprofits to operate with fewer constraints. These legal approaches shape the extent to which nonprofits can effectively control for-profit enterprises while maintaining their mission.

To optimize regulatory oversight, we propose a legal framework that distinguishes between these two models of nonprofit control while focusing on ensuring nonprofit independence from outside investors. Stronger distribution requirements, regulatory enforcement, and certification systems can help prevent mission drift and ensure that nonprofit-controlled for-profits achieve their intended charitable and social objectives. As these hybrid structures continue to evolve, policymakers must strike a careful balance between fostering nonprofit innovation and protecting against the risk of mission drift.

APPENDIX

TABLE 1 - LIST OF SAMPLE COMPANIES CONTROLLED BY NONPROFITS

	Income-generating For-profits	**Socially-oriented For-profits**
Europe (Enterprise foundation laws)	Carl Zeiss, Carlsberg, IKEA, Körber, Lindt & Sprüngli, Lundbeck, Mahle, Maersk, Novo Nordisk, Novozymes, Rambøll, Robert Bosch, Rolex, Victorinox	Det Norske Veritas, Triodos Bank
U.K. law **(Trust and charity law)**	Duchy Originals, Lloyd's Register, Premier Marinas, The Prince Trust Trading, Wellcome PLC (1936-1992)	Better Society Capital**,** Cafédirect, Lloyd's Register
U.S. **Private foundations**	Newman's Own	
US other nonprofits	BetterWorldBooks, Hershey's, Housing Works, Patagonia	Anthropic, BetterWorldBooks, Greyston Bakery Mozilla, OpenAI, Patagonia

1. European Income-Generating For-profits

Carl Zeiss
- *Business*: Optics, photonics, and medical technology.
- *Ownership*: 100% owned by the Carl Zeiss Foundation.
- *Social mission of nonprofit parent*: supporting research, education, and innovation.
- *Social mission of for-profit subsidiary*: None.

Carlsberg
- *Business*: Brewing and beverages.
- *Ownership*: 30% of cash flow rights and 76% of voting rights owned by the Carlsberg Foundation, with the remaining shares publicly traded.
- *Social mission of nonprofit parent*: scientific research, education, and innovation
- *Social mission of for-profit subsidiary*: None.

IKEA
- *Business*: Furniture and home goods.
- *Ownership*: The Ingka Group, which operates most IKEA stores, is controlled and wholly-owned by the Stichting Ingka Foundation (from Netherlands).
- *Social mission of nonprofit parent*: Environment, social welfare, and education.
- *Social mission of for-profit subsidiary*: None.

Körber
- *Business*: Industrial technologies, including logistics and pharmaceuticals.
- *Ownership*: 100% owned by the Körber Foundation.
- *Social mission of nonprofit parent*: Education, science, and innovation
- *Social mission of for-profit subsidiary*: None.

Lundbeck
- *Business*: Pharmaceuticals and healthcare.
- *Ownership*: *Ownership*: 70% of voting and cash flow rights owned by the Lundbeck Foundation, with the remaining shares publicly traded.
- *Social mission of nonprofit parent*: Health sciences, scientific research, public health.
- *Social mission of for-profit subsidiary*: None.

Mahle
- *Business*: Automotive parts.
- *Ownership*: Majority controlled by the Mahle Foundation, which holds 99.9% of the cash flow rights and voting rights in MAHLE GmbH. The GmbH itself owns 0.1%.
- *Social mission of nonprofit parent*: To support public health, social welfare, and education, as well as scientific research

- *Social mission of for-profit subsidiary*: None.

Maersk
- *Business*: Shipping, logistics, and energy.
- *Ownership*: A.P. Møller Foundation owns 41% of Maersk's cash flow rights and controls 51% of the voting rights, with remaining shares publicly traded.
- *Social mission of nonprofit parent*: Culture, science, education, and social causes.
- *Social mission of for-profit subsidiary*: None.

Novo Nordisk
- *Business*: Pharmaceuticals and healthcare.
- *Ownership*: 75% of voting rights and 28% of cash flow rights owned by the Novo Nordisk Foundation, with the remaining shares publicly traded.
- *Social mission of nonprofit parent*: To improve health and well-being by supporting scientific, humanitarian, and social causes.
- *Social mission of for-profit subsidiary*: None.

Novozymes
- *Business*: Biotechnology.
- *Ownership*: 70% of voting rights and 25% of cash flow rights owned by a holding that is 100% owned by the Novo Nordisk Foundation. Remaining shares are publicly traded.
- *Social mission of nonprofit parent*: Health, sustainability, and scientific research.
- *Social mission of for-profit subsidiary*: None.

Rolex
- *Business*: Luxury watches.
- *Ownership*: 100% owned by the Hans Wilsdorf Foundation.
- *Social mission of nonprofit parent*: Charitable, educational, and cultural
- *Social mission of for-profit subsidiary*: None.

Rambøll
- *Business*: Engineering, architecture, and consulting services.
- *Ownership*: Majority owned by the Rambøll Foundation, which holds approximately 97% of the shares. Employees hold the remaining 3%.
- *Social mission of nonprofit parent*: research, education, and charitable.
- *Social mission of for-profit subsidiary*: None.

Robert Bosch
- *Business*: Engineering and technology.
- *Ownership*: 92% of the cash flow rights are owned by the Robert Bosch Stiftung, with 93% of the voting rights (and 0.01% of the cash flow rights) controlled by Robert

Bosch Industrietreuhand KG. The Bosch family owns the remaining 8% of the cash flow rights and holds 7% of the voting rights.
- *Social mission of nonprofit parent*: To support public welfare through initiatives in healthcare, education, science, culture, and international relations.
- *Social mission of for-profit subsidiary*: None.

Victorinox
- *Business*: Swiss knives, watches, luggage, and household goods
- *Ownership*: 100% owned by the Victorinox Foundation.
- *Social mission of nonprofit parent*: Social and charitable initiatives.
- *Social mission of for-profit subsidiary*: None.

2. EUROPE - SOCIALLY-ORIENTED FOR-PROFITS

Norske Veritas
- *Business*: Assurance, classification, certification, and risk management services.
- *Ownership*: 100% owned by Stiftelsen Det Norske Veritas (The Norwegian Foundation), with control exercised through a wholly-owned holding company (DNV Holding AS).
- *Social mission of nonprofit parent*: To safeguard life, property, and the environment by supporting research, innovation, and sustainable practices across maritime, energy, and other industries.
- *Social mission of for-profit subsidiary*: To deliver high-quality assurance, certification, and risk management services, promoting safety, sustainability, and environmental stewardship worldwide.

Triodos Bank
- *Business*: Ethical banking and sustainable finance, providing loans and investment services to social enterprises, environmental projects, and organizations that promote social inclusion.
- *Ownership*: The nonprofit Stichting Administratiekantoor Aandelen Triodos Bank (SAAT) holds all voting shares, issuing depository receipts to investors while ensuring the bank remains mission-driven.
- *Social mission of nonprofit parent*: To safeguard Triodos Bank's commitment to ethical banking by preventing external shareholders from influencing its sustainability and social impact objectives.
- *Social mission of for-profit subsidiary*: To use finance as a force for good by supporting enterprises that contribute to environmental sustainability, social inclusion, and cultural development while maintaining financial viability.

3. U.K. - INCOME-GENERATING FOR-PROFITS

Duchy Originals
- *Business*: Organic food and beverages.
- *Ownership*: Owned 100% by The Prince's Foundation.
- *Social mission of nonprofit parent*: To promote sustainable agriculture, education, and community projects through funding raised from the profits of Duchy Originals.
- *Social mission of for-profit subsidiary*: None.

Lloyd's Register
See below under 4. U.K. - Socially-Oriented For-Profits.

Premier Marinas
- *Business*: Marina management and development.
- *Ownership*: 100% owned by the Wellcome Trust.
- *Social mission of nonprofit parent*: To generate revenue for reinvestment in global health and scientific research initiatives.
- *Social mission of for-profit subsidiary*: None.

The Prince Trust Trading
- *Business*: Fundraising and commercial partnerships for charitable initiatives.
- *Ownership*: 100% owned by The Prince's Trust, a U.K. charity.
- *Social mission of nonprofit parent*: To support young people by providing education, training, and opportunities to build better futures, particularly for disadvantaged youth.
- *Social mission of for-profit subsidiary*: None.

Wellcome PLC (1936-1992)
- *Business*: Pharmaceuticals and healthcare (later acquired by GlaxoSmithKline in 1995).
- *Ownership*: 100% of shares owned by the Wellcome Trust until 1986, and until 1992 the trust held 80% of cash flow rights and voting rights.
- *Social mission of nonprofit parent*: To fund scientific research and health initiatives aimed at improving global health and advancing medical science.
- *Social mission of for-profit subsidiary*: None.

4. U.K. - SOCIALLY-ORIENTED FOR-PROFITS

Better Society Capital
- *Business*: Social investments through investment funds.
- *Ownership*: 100% owned by The Oversight Trust (formerly The Big Society Trust).
- *Social mission of nonprofit parent*: To ensure that assets are used to support initiatives that promote social good and community benefit in the U.K.

- *Social mission of for-profit subsidiary*: To grow the U.K.'s social investment market by providing capital and expertise to help charities and social enterprises access sustainable funding.

Cafédirect
- *Business*: Fairtrade coffee, tea, and cocoa.
- *Ownership*: The nonprofit Guardian Share Company holds a golden share in Cafédirect, giving it veto power over changes that could compromise the company's social mission.
- *Social mission of nonprofit parent*: To empower smallholder farmers by reinvesting profits into producer communities and fostering sustainable development in agriculture.
- *Social mission of for-profit subsidiary*: To deliver high-quality fair trade beverages while ensuring ethical sourcing, sustainability, and improving farmer livelihoods.

Lloyd's Register
- *Business*: Assurance, risk management, and certification services.
- *Ownership*: 100% owned by the Lloyd's Register Foundation.
- *Social mission of nonprofit parent*: To enhance safety and public benefit by funding engineering research, education, and initiatives to improve safety standards in critical industries.
- *Social mission of for-profit subsidiary*: To provide assurance, certification, and risk management services globally, promoting safety, sustainability, and operational excellence in industries such as maritime, energy, and manufacturing.

5. U.S. Private Foundation - Income-Generating For-profits

Newman's Own
- *Business*: Food products.
- *Ownership*: Newman's Own Foundation (§ 4943(g)) private foundation owns 100%.
- *Social mission of nonprofit parent*: To support charitable causes, particularly those related to nutrition, education, and children's welfare.
- *Social mission of for-profit subsidiary*: None.

6. U.S. Private Foundation - Socially-Oriented For-Profits

None.

7. U.S. Public Charity - Income-Generating For-profits

BetterWorldBooks
- *Business*: Online bookselling and book recycling.

- *Ownership*: Wholly owned by Better World Libraries, a mission-aligned, not-for-profit organization affiliated with the Internet Archive.
- *Social mission of nonprofit parent*: To support global literacy, education, and access to knowledge by leveraging the resources and operations of Better World Books.
- *Social mission of for-profit subsidiary*: To operate as a for-profit social enterprise, with its mission centered on improving literacy, increasing access to books and education etc.

Hershey's
- *Business*: Confectionery and snacks.
- *Ownership*: Majority voting rights held by the Milton Hershey School Trust, a nonprofit entity under § 509(a)(3).
- *Social mission of nonprofit parent*: To fund and operate the Milton Hershey School, providing education, housing, and care for underserved children.
- *Social mission of for-profit subsidiary*: None.

Housing Works
- *Business*: Thrift stores, bookstores, and healthcare services.
- *Ownership*: Housing Works Inc., a nonprofit parent.
- *Social mission of nonprofit parent*: To end homelessness and AIDS
- *Social mission of for-profit subsidiary*: None.

Patagonia
- *Business*: Clothing.
- *Ownership*: 98% of cash flow rights owned by § 501(c)(4) tax exempt social welfare organization, 100% of voting rights held by perpetual purpose trust.
- *Social mission of nonprofit parent*: environmental sustainability
- *Social mission of for-profit subsidiary*: environmental sustainability

8. U.S. PUBLIC CHARITY - SOCIALLY-ORIENTED FOR-PROFITS

Anthropic
- *Business*: Artificial intelligence research and development.
- *Ownership*: The Long-Term Benefit Trust holds a special class of stock, Class T Common Stock, which grants it significant governance rights over board composition and major corporate actions, while the trust has limited economic interests.
- *Social mission*: To research and build AI systems that are safe, interpretable, and aligned with human values, ensuring that AI development benefits society as a whole.

BetterWorldBooks
See above under 7. U.S. Public Charity - Income-Generating For-Profits.

Greyston Bakery
- *Business*: Commercial bakery specializing in brownies and baked goods.
- *Ownership*: Wholly owned by the Greyston Foundation, a nonprofit organization.
- *Social mission of nonprofit parent*: To create job opportunities and support individuals facing barriers to employment through open hiring and community programs.
- *Social mission of for-profit subsidiary*: To produce high-quality baked goods while employing individuals through its innovative open hiring model, reinvesting profits into social impact programs.

Mozilla
- *Business*: Internet technologies, including the Firefox browser.
- *Ownership*: Wholly owned by the Mozilla Foundation, a nonprofit entity.
- *Social mission of nonprofit parent*: To promote an open, accessible, and secure internet while advocating for digital privacy and inclusion.
- *Social mission of for-profit subsidiary*: To develop and distribute open-source internet technologies and products, with profits reinvested into the foundation's mission.

OpenAI
- *Business*: Artificial intelligence research and development.
- *Ownership*: Nonprofit parent (OpenAI Inc.) is the sole partner and majority owner of for-profit subsidiary (OpenAI LP). Reportedly, Microsoft holds 49% of the equity capital in the for-profit.
- *Social mission of nonprofit parent*: To ensure artificial general intelligence (AGI) benefits all of humanity and to avoid misuse of AI technologies.
- *Social mission of for-profit subsidiary*: To develop advanced AI technologies responsibly.

Patagonia
See above under 7. U.S. Public Charity - Income-Generating For-Profits.

TABLE 2 – SUMMARY: REGULATIONS OF NONPROFIT CONTROL OF FOR-PROFIT ENTERPRISE

		Denmark	Germany	Switzerland	Austria	Sweden	European associa-tions	England		U.S. Foundations		U.S. Public Charities
								Charities	Social investments	Newman's	PRI	
Nonprofit board independence		Yes	No	No	No	Yes	No	No	No	No	No	No
Nonprofit duty to distribute income to the beneficiaries		Flexible	Flexible	Prescriptive	Flexible	Prescriptive	Flexible	Flexible	Flexible	Prescriptive	Prescriptive	No
For-profit duty to distribute income to the nonprofit		Flexible	Flexible	Flexible	Flexible	Flexible	Flexible	Flexible	Flexible	Prescriptive	No	No
The for-profit must have a charitable purpose		No	No	No	No	No	Strict	No	Flexible	No	Strict	No
Authority powers to impose sanctions if duties not satisfied	**Demand information**	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Remove board members	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	No	No
	Withhold tax benefits	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Donors' right to sue	Yes	No	No	No	No	No	No	No	No	No	No
Nonprofit taxed on profits		No	Yes	Yes	No	No	Yes	No	No	Yes	No	Maybe

This table provides a summary of the law in the U.S., U.K., and Continental Europe, specifically in countries where enterprise foundations are prevalent. For European associations, we do not reference a specific law but rather outline the typical rules that apply across European jurisdictions. For Denmark, Germany, Switzerland, Austria, and Sweden, we refer specifically to enterprise foundation law. For the U.K., we refer to nonprofit and charity laws. We distinguish between the rules that apply to trading companies controlled by nonprofits and social investments made by nonprofits. We distinguish between the rules governing U.S. private foundations and those applicable to other tax-exempt nonprofits, such as public charities and social welfare organizations. "Nonprofit board independence" means that a portion of the board must be appointed independently of the founder and their family. The duty of a nonprofit to distribute its income to beneficiaries is considered "flexible" when it is required to make reasonable distributions and "prescriptive" when the law mandates that a specific portion—or all—of its income be allocated to public purposes. Similarly, the for-profit's duty to distribute income to the nonprofit is "flexible" when the law requires it to generate a reasonable income for the nonprofit and "prescriptive" when specific minimum distribution requirements are imposed. With respect to the requirement that a for-profit serves a charitable purpose, a "strict" standard means that profit-seeking is secondary to the social mission, whereas a "flexible" standard allows the for-profit to balance profit and social objectives equally. Finally, "authority powers to impose sanctions" refer to the intervention and enforcement powers of regulators, tax authorities, or courts. These powers include the ability to demand information from the nonprofit and its auditor, remove nonprofit board members who fail to fulfill their duties, revoke tax-exempt status for nonprofits that do not uphold their charitable purpose, and grant donors the right to sue the nonprofit directly if it fails to fulfill its mission.

Sources: **DENMARK**: Rasmus Kristian Feldthusen, *The Danish law on foundations*, 20 TRUSTS & TRUSTEES 146 (2016); Søren Friis Hansen, *Nonprofit Organizations and Enterprises: The Danish Foundation Law as an Example* 770, in COMPARATIVE CORPORATE GOVERNANCE OF NONPROFIT ORGANIZATIONS (Hopt et al eds., 2010); Mark Ørberg & Troels Michael Lilja, *Legal Environment for Philanthropy in Europe 2024 – Denmark*, PHILEA COUNTRY PROFILES 2024; Mark Ørberg, FONDSRETTEN OG DEN LEVENDE VEDTÆGT, Djøf Publishing (2022); and Danish Enterprise Foundation Act. **GERMANY**: Andreas Richter & Anna Katharina Gollan, *Germany: Foundation law in Germany after its fundamental reform*, 30 TRUSTS & TRUSTEES 323 (2024); Anne Sanders, *Enterprise Foundations in Germany*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023) 45; Birgit Weitemeyer, *Governance and Regulation of Nonprofit Organisations in Germany: Insights and Suggested Reforms* 158, in GOVERNANCE AND REGULATION OF CHARITIES (Rosemary Teele Langford eds., 2023); Anja Thöm, *Legal Environment for Philanthropy in Europe 2024 – Germany*, PHILEA COUNTRY PROFILES 2024; and German Civil Code. **SWITZERLAND**: Dominique Jakob, *Swiss Enterprise Foundations: Overview and Current Challenges*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023) 83; Dominique Jakob et al, *Legal Environment for Philanthropy in Europe – Switzerland*, PHILEA COUNTRY PROFILES 2020; Dominique Jakob & Lukas Brugger, *Swiss Foundation Law: Tightrope Act Between Freedom and Regulation*, 28 TRUSTS & TRUSTEES 596 (2022); and Swiss Civil Code. **AUSTRIA**: Martin Schauer & Michael Nueber, *Austria: Private foundations in Austria—between consolidation and reform*, 30 TRUSTS & TRUSTEES 308 (2024); Susanne Kalss, *The Austrian Foundation*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023), 61; Susanne Kalss, *Legal Environment for Philanthropy in Europe 2024 – Austria*, PHILEA COUNTRY PROFILES 2024; and Austrian Federal Foundation Act. **SWEDEN**: Katarina Olsson, *Enterprise Foundations in Sweden*, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023), 103; Stefan Einarsson & Kerstin Fagerberg, *Legal Environment for Philanthropy in Europe 2024 – Sweden*, PHILEA COUNTRY PROFILES 2024; and Swedish Foundation Act. **EUROPEAN ASSOCIATIONS**: European Commission, COMPARATIVE LEGAL ANALYSIS OF ASSOCIATIONS LAWS AND REGIMES IN THE EU – FINAL REPORT, Publications Office of the European Union (2022). **U.K.**: Charity Commission for England and Wales, CHARITY COMMISSION GUIDANCE, https://www.gov.uk/guidance/charity-commission-guidance; Paul Bater, *Legal Environment for Philanthropy in Europe – England*, PHILEA COUNTRY PROFILES 2020; Richard Fries, *The Charity Commission for England and Wales*, in COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS (Klaus Hopt et al eds., 2010) 896; and Charities Act. **U.S.**: Ofer Eldar, *Are Enterprise Foundations Possible in the United States?*, 201, in ENTERPRISE FOUNDATIONS LAW IN A COMPARATIVE PERSPECTIVE (Anne Sanders & Steen Thomsen eds., 2023); Ofer Eldar, The Role of Social Enterprise and Hybrid Organizations, COLUM. BUS. L. REV., 92 (2017; and Internal Revenue Code.

european corporate governance institute

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

www.ecgi.global

european corporate governance institute

ECGI Working Paper Series in Law

Editorial Board

Editor	Amir Licht, Professor of Law, Radzyner Law School, Interdisciplinary Center Herzliya
Consulting Editors	Hse-Yu Iris Chiu, Professor of Corporate Law and Financial Regulation, University College London
	Martin Gelter, Professor of Law, Fordham University School of Law
	Geneviève Helleringer, Professor of Law, ESSEC Business School and Oxford Law Faculty
	Kathryn Judge, Professor of Law, Coumbia Law School
	Wolf-Georg Ringe, Professor of Law & Finance, University of Hamburg
Editorial Assistant	Asif Malik, ECGI Working Paper Series Manager

https://ecgi.global/content/working-papers