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Family foundation in Poland. Legislation, economic impact and historical context

Abstract

The Polish Parliament has passed the Family Foundation Act to enter into force in 2023. The need for such a regulation was reported by the environment of family businesses and organizations working on behalf of family businesses in Poland. The purpose of the article is to analyze and present the historical, legal, and economic background of the newly introduced legal instrument in Poland – family foundations. In addition, we forecast the dynamics of the creation of such entities. First, we discuss the historical context of the establishment of foundations, in particular enterprising families who decided to establish and run their foundations on the basis of a different Act on Foundations. Next, we discuss the basic assumptions of the newly introduced Family Foundation Act, focusing mainly on family governance. Finally, we outline the economic context of family foundations along with some estimates. We find that this instrument was needed by business families who have no potential successors. The act contains many restrictions limiting the risk of running it. We forecast that the total number of family foundations established in Poland will amount to approximately 2,500, with an average growth rate of 250 foundations per year.

Keywords: family foundation, legislation, Poland
JEL Classification: G32, G38

Introduction

Family businesses in Poland are facing a major challenge – the first huge wave of successions. Entrepreneurs who founded these businesses when the economy was unshackled with the fall of central planning and launched, grew, and most importantly, steered them through the minefield of the early market economy are increasingly celebrating their 25th anniversaries. Remarkably, the first registered private company was the Roleski family company, which was also the first to introduce the family constitution in 2010 [Lipiec, 2013]. This founding generation is slowly passing the reins and responsibility into the hands of their descendants.

Never since the beginning of transformation has the Polish economy undergone such a strong generational change. This is because the founders are finally, 30 years after the political system has changed, passing down their authority and property to the next generation. For years, the family business sphere has postulated that wider access to statutory instruments enhancing the possibility of accumulating capital is needed. The Family Business Institute has been involved in this work for 7 years. Studies conducted and statistics gathered show that 57% of family business owners plan to distribute their property, with the majority opting to use a family foundation for that purpose [Family Business Institute, n.d.]. From this point of view, it is worth analyzing how the new legal regulations that allow family foundations to be registered in Poland look like.

Historical context of the first generational change in free Poland

The Family Foundation Act (FFA) fully restores the possibility of building multi-generational family businesses. In inter-war Poland, many entrepreneurial families spun their dreams of longevity. In 1851, Karol Wedel opened the first confectionery with a small chocolate factory attached. The early 20th century was the golden age of E. Wedel, with the founder's grandson, Jan, introducing modern machinery and offering a package of social benefits to employees. The W. Kruk chain of jewelry stores, founded in 1840, grew strongly over succeeding generations. Before the Second World War, it had already offered Swiss watches from such prestigious brands as Omega and Longines. In 1869, Antoni Blikle bought a confectionery that 70 years later became a symbol of tradition and good taste to the inhabitants of Warsaw. The Jabłkowski brothers opened Warsaw's first department store, the largest in Poland, in 1914.

There are many more stories like these. From the late 19th century until 1939 the Polish entrepreneurial spirit flourished; Poles were not afraid to take advantage of innovative technologies which they came to know during foreign fairs and visits to partner companies. They were not short of ideas to grow their businesses, advertise and attract customers, either. They planned to perpetuate their businesses, taking care of raising and educating their successors.

The destruction of cities brought about by the Second World War and human losses caused the downfall of many Polish family-run businesses. What the war did not destroy was effaced by the communist authorities. In the 1950s, the Industry Nationalization Act made the state the owner of more than 35,000 enterprises. The state stamped out all attempts to display independence and entrepreneurship among Poles. According to the authorities, any private property was a menace to the equality of citizens. The remaining independent private entrepreneurs had to adjust to the changes. Limits on supply of raw materials, downscaled production, mandatory permits and concessions, continuous inspections and extra taxes disturbed everyday work and hindered growth. Business families faced discrimination – children of entrepreneurs could not be enrolled in universities and sons of craftsmen were compelled to do military service.

Some businesses survived the years of oppression to bounce back splendidly when the economic freedom came in 1989. Others collapsed, but even if the business did not physically exist any longer, the entrepreneurial spirit and family values persisted and reappeared elsewhere. Some owners struggled to recover lost businesses with more or less success. Others looked for new areas, trying to make the most of the free economy and delving into business initiatives with supreme passion and commitment. The 1980s and 1990s are an epoch in which new family businesses mushroomed and grew by leaps and bounds, from home garages to modern establishments and factories.

Family businesses in the Polish economy

Today the 'family spirit' begins to gain value once again. Benefits from emphasizing the family nature of a business become even more apparent. The financial crisis caused confidence in 'faceless' international corporations to be shaken. Consumers look for and trust businesses that have a 'face', they know the person in charge. Family businesses start to be perceived as trustworthy, since they focus on the long term, which makes them feel responsible for the products or services they offer. Customers look for identity and value in bygone trends and old things. They seek genuine, unique histories and feelings. Family businesses have an advantage in developing so-called 'authentic brands' that can boast their original history, continuity, and involvement of the owning family. Will this become the norm in the future? Will Polish business families be able to navigate successfully the generational change? Actually, now they are facing the succession challenge for the first time.

In Polish family businesses, in particular the first generational change is felt to be a crucial point in the history of the business that turns into a major challenge for the family's unity because it renders family members especially susceptible to escalating conflicts. That agreeing a common succession action plan in the family is not an easy matter is evidenced by the awareness that family seniors show concerning potential flashpoints during succession: conflicts within the family that "display the lack of harmony (rivalry, opposing interests, no communication) and trust (questioning competences, dishonesty, no integration)" [Lewandowska, 2015, p. 93]. Hence both seniors and successors point to "inter-family relationships, defusing tensions" as an area potentially in need of support during succession [Lewandowska, 2015]. Often, conflicts within the family arise because of the lack of clearly defined rules and joint arrangements regulating the mutual rights and obligations of family members during the succession process. Results of the *Value codes* study show that, unfortunately, a majority of Polish entrepreneurs do not make succession arrangements in a formal way: almost 47% of them offer just an oral proposal to their successor, while almost 34% of seniors do not formally nominate one at all [Lewandowska, 2015].

The lack of formal succession processes may mean that those involved in the succession fail to understand their mutual expectations. This is evidenced by another observation made when conducting the study. It appears that 38% of seniors answered the question "How did the process of searching for a successor to take over the business look like?" with "It was obvious from the start". The same answer to a similar question addressed to successors, "How much time was needed to convince you to take over the business?" was chosen by more than 51% of the respondents. The lack of a formal dialogue, therefore, leads to a situation in which something that is "obvious from the start" for some stakeholders does not necessarily have to be so for others.

The situation becomes even more complicated when the genealogical tree is sprouting more branches. Not all potential heirs who inherit rights to shares in the business will be involved. Even though both are part of the family, the roles of active and passive shareholders in a family business differ. The differences between active and passive shareholders and the resulting privileges and rights carry a huge potential to generate conflicts. Especially during the succession process, they may become a flashpoint of new conflicts or deepen the existing ones. Even if the family has agreed to hold the business in its hands over the long term, each kind of inter-family succession of property may be viewed as the first liquidity crisis. When property is transferred to one family member, others must be redeemed. This is also a crucial aspect of succession that gives rise to conflicts. Often the owners, wishing to cement family ties, wonder how to divide their property in a 'fair' way. Sometimes, however, a 'fair' distribution is not an 'equal' one.

In multi-generational business families with many members, comprising both active and passive shareholders – both those working in the business and those standing aside – unanimity is rarely achieved. Such a diverse group of family shareholders must necessarily include some whose most important objective will be receiving sizeable dividends, high financial liquidity, with a high appetite for risk and a short time horizon, while others will appreciate sustainable business development, preferring to perpetuate the family undertaking over making a quick personal profit.

Given such varied objectives, conflicts obviously must arise among family shareholders. In addition, there will be clashes between majority and minority and voting and non-voting shareholders, which may lead to an irreversible division and devaluing of both business and family property, and consequently to winding down the business [Widz, 2018].

The ability to set up a family foundation will be a quantum leap in the growth of Polish entrepreneurship. It will be important for both business owners, their families, and the entire economy by preventing the fragmentation of patrimonies. Establishing structures such as family foundation or trust that play an intermediary role between the family and business property is an effective method of preventing the disintegration of business and dissipation of property due to conflicts between shareholders belonging to the family. Family foundations are set up mainly to prevent the fragmentation of patrimony. In addition, family foundations and trusts are established to support the family financially and promote it in the long term, even decades after the death of the founder. Because a foundation allows for determining flexibly, conditionally, and freely who and under what conditions may be a beneficiary and is set up for a long time horizon, it may become an attractive legal instrument used in the succession of family businesses in Poland.

Another legal structure often encountered in both family and non-family businesses is a holding company, which allows for consolidating the entire business at the ownership level by buying the shares of its subsidiary companies. This instrument is, however, not used to manage private property and often functions on par with family foundations in elaborate family business structures [Węcławiak, 2016].

Succession for the continuity of family property

Studies of the Family Business Institute show that Poland has about 830,000 family businesses, accounting for 18% of GDP. A majority of these businesses were founded in the early 1990s and is now facing a succession challenge. A Family Business Institute study suggests that only 8.1% of successors declare their willingness to take over the business. The challenge related to succession is not peculiar to Poland.

The European Social and Economic Committee (ESEC) recorded that one out of three European businesses are family-based and will have to face succession within a decade [Opinion of the European…, 2016]. For this reason, ESEC encouraged the succession process to be promoted, adding that due to its difficulty it takes many years. Ward estimated that 30% of family businesses will be passed successfully to the second generation, with one half as much coming down to the third, and just 3% to the fourth [Ward, 1987]. Another US researcher of these topics, Astrachan, drew an ever more crucial conclusion – according to him, upon the death of the founder businesses are usually sold or wound down, and only 5% of them are able to remain going concerns [*The Economist*, 2004].

Potentially succession is a source of crisis that menaces family and business unity, because the transfer of ownership and division of family property may lead to conflicts between various kinds of shareholders. Setting up a structure, such as a family foundation or trust, that plays an intermediary role between the family and property is an effective method to ensure that the property continues undivided and to manage it so that family members are financially supported in the long term as beneficiaries under the rules stipulated in the foundation or trust bylaws. Establishing a family foundation as the business owner or entrusting family property to a trust is an advanced stage of family governance structures which are meant to ensure stability for both the business family and the business itself. As shown by studies conducted as part of the *Value codes* project, a family business "has significant emotional value and utility in the economic sense, also for the family. In other words, it is both a reason for pride and a means to safeguard the interests of the family and its members. It is a protected source of stability" [Lewandowska, 2015, p. 195].

Dealing with such a complex topic as generational change or regulation of succession will take place over many years. These years will decide the shape of the Polish economy. This is why family foundations, introduced into the Polish legislation in 2023, become so important. Their purpose is to make it easier for family entrepreneurs to manage succession. The historical context is of essential importance here. Introducing into the Polish legal system a succession mechanism for the growing family businesses that constitute one of the major pillars of the Polish economy was undoubtedly both necessary and expected. The statute does not, however, attempt to refer to the formerly prevalent structure of Polish foundations based on the Foundations Act (FA) of 1984.[1] Concerns were raised that transforming this objective – while valid and meeting the actual needs of Polish entrepreneurs – into a legal construct in the form of a foundation was not reasonable. Proposals were made to call the newly established institution a *fund*, a naming dispute that is not without importance. Considering that foundations have existed in Poland for at least 40 years and, at least in the Polish legal system, must always and in each case be tied to a specific purpose (according to Article 1 of the Foundations Act, this must be a purpose beneficial to society or the economy), calling an institution meant to ensure succession of family business a foundation obscures its essence.

In addition, it harms the social perception of 'true' foundations as well. Until now, it was not possible to set up a family foundation or private goal foundation in Poland. Since for 40 years Polish society has learnt to associate foundations with always and only achieving objectives that benefit society or the economy, and not particular objectives of individuals, should this be changed now? On the other hand, if a change is to be made, why not allow Poles to set up foundations for any legally permitted purpose? If the assumption was to open the institution of foundations to private purposes, why make an exception to this, relatively narrow compared to the whole society, group of well-to-do families running family businesses? This is not just an academic dispute about names. That the legislator chose to designate an instrument of business succession as a foundation ranks family foundations among public benefit institutions. Since their purpose is entirely private, however, this was an inappropriate classification.

[1] The Foundations Act of 6 April 1984, last published on 18 November 2020 (Dz. U. 2020, item 2167).

The Importance of family foundations

The role of the foundation in the economy, and especially issues related to (family) governance, are also important. The point of reference is looking for an optimal governance to show the methods by which family foundations in Poland may grow. After the Family Foundation Act is introduced and after such entities have operated for a few years, we will be able to verify whether they have been developed in an optimal manner or not and perhaps point out other peculiar ways in which they may act. The purpose of this is an attempt to verify legal solutions [Edie, 1999] adopted in the Polish Family Foundation Act[2] in the economic context, in particular their governance [Flather, Phillips, Whitney, 1997]. Optimizing the (family) governance allows for maximum accumulation of its wealth, hence the efforts undertaken by many companies to make their governance as best as possible. An example may be the Southern Company, which states in its report: "We also engaged an independent outside law firm to conduct a comprehensive review of our corporate governance structure and practices to assist in ensuring the optimal governance structure is in place" [Southern Company, 2022]. The article also shows the historical background against which foundations operate in Poland, in order to raise awareness that such entities have existed for a long time and played a useful role in the economy.

The economy includes non-profit enterprises with various legal forms [Salamon, Sokołowski, 2016]. Likewise, family businesses exist in all economies of the world under various guises [Bingham et al., 2011; Hall, Melin, Nordqvist, 2001], having been recognized as an effective form of activity even in the industrial era [Colli, 2006]. One of these specific forms is the family foundation, to which business families often transfer their businesses [Thomsen, 1999] but which has not been widely studied in the subject literature [Block et al., 2020]. In addition, family foundations that appeared in the 1990s in the US and Britain greatly increased in size during the twenty years of operation [Boris et al., 2015; Pharoah et al., 2016].

Reasons for moving a family business to a foundation vary, often because of a lack of successors coupled with the desire to continue as a going concern. Definitely foundations can and do conduct charity activities, or they may be set up because of tax incentives. Some countries develop legislation that allows establishing family (private) foundations to facilitate involvement in the above activities with the extra benefit of attracting family capital. The Polish legislator has decided to set up such a solution in Poland, following the numerous requests of family entities.

Family foundations may be classified as a subtype of charities [Weaver, 1967]. They are usually connected to a family business or created using other structures [Rey-García, 2012; Rey-García, Puig-Raposo, 2013]. Methods of passing donations through them may vary,

[2] https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=2798

examples include individual donations for a specific purpose, donations for organizations, including other foundations, and others [Moody et al., 2011; Remmer, 2005].

A foundation is considered a family foundation when a family or one of its members have founded or control the foundation by sitting on its supervisory board [Gersick, Feliu, 2014]. As a rule, most organizations analyzing the actions of family foundation use a definition that requires the founder/family member to sit on a foundation board (the Association for Charitable Foundation, Association of Small Foundations, National Center for Family Philanthropy). Lungeanu and Ward [2012], conducting studies on family foundations also stressed that family governance is important. According to them, these entities are distinguished by two key factors, namely successive family generations and the level of control the family exerts on the management board. They reached the conclusion that charity activities become more diverse when a new generation joins the foundation and diminish when the management is controlled. Their contribution to understanding family foundations from a governance perspective appears important, because governance rarely has a clear-cut definition [Ostrower, Stone, 2006].

As noted above, family entrepreneurship may take various forms and it is the actions of family members that decide whether this form will be active or passive. The form of activity may also be of key importance in the succession process, because the family has an opportunity to keep the business as a going concern thanks to potential legal options. Examples of such forms of activity include family offices, or a family foundation to which the property of the business can be contributed. A family foundation is an interesting legal solution that allows the family to retain the business in their hands. It exists in certain countries and this year will probably be introduced in the Polish law. It needs to be added that many Polish business families do have their own foundation, but these are based on the Foundations Act [The Foundations Act, 1984]. However, the activities of such foundations are limited, since they may be established "to achieve purposes that are beneficial to the society or the economy and compliant with the basic interests of the Republic of Poland such as healthcare, development of the economy and science, teaching and education, culture and art, social care and welfare, protection of the environment and care for monuments" [The Foundations Act, 1984, Article 1].[3] Many foundations of this kind exist in Poland, such as the Starak Family Foundation, Kulczyk Foundation, Sułkowski Foundation, Gierszewski Foundation or Józef Piłsudski Family Foundation. Even though the names of founder families appear in foundation names, such foundations do not allow for conductimg a succession process. For this reason, the Polish legislator decided to launch a legislative process to allow family businesses to set up family foundations without having to take advantage of foreign solutions for this purpose.

The Polish Family Foundation Act does not limit using this form of foundation to an existing family business, because legal regulations do not use such a notion.

3 Own translation.

Economic theories of family foundations

Economic theories point to various approaches in treating family foundations, which may explain why some of them are more effective than others and confirm that optimizing their activities is difficult. Hung [1998] compiled a synthesis of these theories and distinguished six main typologies applicable to governance: the agency theory, stewardship theory, resource dependency theory, stakeholder theory, institutional theory, and managerial hegemony theory. The first theory that can and often is referred to by researchers of this topic is the agency theory. It is used in attempts to explain the asymmetry of information in non-profit organizations and supervisory structures [Miller, 2002]. The stewardship theory assumes that the management of a business undertakes actions that bring the most effectiveness to the business [Davis, Schoorman, Donaldson, 1997; Fox, Hamilton, 1994]. It explains the logic of activities of a business or family foundation on whose bodies family members sit and hold shares. According to this theory, family members identify with the organizational objectives and display commitment to achieving them [Davis et al., 2000]. Their strong motivation is perpetuated by increasing the motivation of employees, and consequently everyone is determinedly moving forward in the same direction [Miller, Le Breton-Miller, 2005]. The resource theory assumes that organizational resources are limited and businesses must constantly complete for them, which now is especially visible in a very unstable environment that is at a disadvantage to many firms. Some resources, such as preferential commitment or support from important outside actors, may be currently difficult to satisfy [Pfeffer, Salancik, 1978]. However, when interlocking occurs, the allocation of resources may be either favourable or unfavourable to the market, when parties manipulate to gain beneficial access to resources. The stakeholder theory assumes that the composition of company bodies should include representatives of both the business and the environment, with potential conflicts resolved by mutual consent [Donaldson, Preston, 1991]. A stakeholder is an individual or group that affects or is affected by business objectives [Freeman, 1984]. In practice, family businesses invite representatives of the environment to serve on their bodies, for example non-executive directors, who in particular have exceptional knowledge and experience useful for the business. In contemporary philanthropy an evolution of this model can be observed, because governance bodies are populated by representatives of local communities whose voice is increasingly articulated and additionally taken into account in business strategy, while charity-related decisions are more transparent [Tedesco, Moody, 2022].

Philanthropy and family foundations

Finally, it is worth stressing the difference between a family foundation and a charitable foundation is already known to the Polish legal system, which may be established only for purposes beneficial to society and the economy. Supervision of this foundation is largely exercised by state authority bodies and not the founder. However, family foundations often use the charitable foundation structures because they are involved in charity activities to a larger degree than non-family companies [Węcławiak, 2016].

Decisions concerning charity may vary, with some families opting for giving local communities more room in deciding how to award grants, while others look for partners to achieve an even greater scale of impact. In the institutional theory, attention should be paid to social norms to which businesses must adjust their strategies [Ingram, Simons, 1995]. Already decades ago, Selznick stressed that stabilizing a business in the long term is possible thanks to the values by which it is guided and it institutionalizes [Selznick, 1957]. Many contemporary researchers of family entrepreneurship emphasize the role of values passed from one generation to another [Ward, Aronoff, 2001]. Assessment of whether business bodies are effective occurs in two ways, that is through the objectives achieved and adaptation of the business to the external world. The managerial hegemony theory is the least suitable to reflect the specific nature of a family business, because it is difficult to imagine that a supervisory body consisting of family members would merely approve decisions made by managers, even if they come from the family as well. Mace [1971] drew a conclusion that a board of directors does not interfere with strategic decisions, unless the business is in a tight spot. Such a principle could be used in family businesses when the young generation takes over the power, because it means that they are given a measure of trust in managing the business.

In a practical approach, foundation governance may take various forms, from the autocratic will of the founder to more democratic forms of operation in which family members and even employees are involved [Breeze, 2010; Hirt et al., 2012; Remmer, 2005]. In the latter case, the goal is to achieve family unity.

The participation of family members in the foundation is usually limited to the first and second generation, although members of the third and fourth generation also serve on ten per cent of foundation bodies [Boris et al., 2015]. In American family foundations, one fourth of persons exercising governance functions is a (related) outsider, for example a lawyer or financial advisor. For many family foundations, such a person is a guarantee of independence. Most foundations (85%) do not pay family members or others, except for covering expenses related to exercising this function. Large foundations, on the contrary, usually offer remuneration.

One of the first decisions made by an enterprising family after establishing a family foundation is setting up a family governance structure and selecting family members to serve on its bodies. The governance issues are so important that they are often reflected in the definition. Esposito [2010] defines a family foundation as "… a private foundation in which the donor and their relatives play an active role in foundation governance". Gersick [2006] distinguishes three types of family foundation governance, arguing that at the early stage foundations follow the first model (controlling trustee foundations), only to evolve into the second (collaborative family foundations) and sometimes the third (family governed staff-managed foundations). This means that with each stage of development the foundation's activities become more professional and if it is joined by the following generations, then – as observed by Lungeanu and Ward [2012] – its philanthropic activities will diversify.

As the family business grows, passing through successive stages from the founder's business to a sibling business and a business run by close relatives to the family consortium, introducing certain standards makes work in the business more ordered, facilitates exchange of information, and eliminates seeds of conflict. Elements of family governance are the following: shareholder agreements, family constitution, family council, family office, and family foundation or trust to which the family and/or business property is entrusted.

Purpose of the foundation

According to the new Polish statute, "a family foundation is a legal person established in order to amass property, manage it in the interest of beneficiaries, and provide them with benefits" [FFA, 2023]. The legislator assumes that the purpose of a family foundation will be amassing property, managing it in the interest of beneficiaries, and providing them with benefits. A more precise delineation of the purposes of a family foundation was left to the founder, noting in Article 3, item 1, second sentence of the FFA that it is the founder who defines the specific purpose of a family foundation in its bylaws. Allowing the founder to set the detailed purpose of the foundation in bylaws does not mean that any private purpose is allowed, but only those that support amassing property and providing benefits to beneficiaries. With purposes like these, doubts arise whether this construct is really a foundation, or rather a managing trust or fund. The purpose of a family foundation cannot be any private or legally permitted purpose. It should not be stressed that the above critical remarks to the new act are primarily the result of the choice of the legislator who, deciding to extend the institution of a foundation, limited itself to using it as a legal instrument to manage the succession of family property instead of just allowing Poles to set up private foundations for any legally permitted purpose.

Role of the founder

The founder of a family foundation must be a natural person having full capacity for legal transactions. A statement establishing a foundation may be made in a founding deed or in a will. The legislator's use of the singular with respect to the person of the founder applies to foundations established by a will, because the Polish law does not provide for wills made collectively by more than one person (even a married couple); pursuant to Article 942 of the Civil Code, a will may contain the dispositions of a single testator only. On the other hand, if the foundation is established by means of a founding deed, there can be more than one donor – since a family foundation is considered, the donors will usually be a married couple or siblings. “The founder defines a detailed purpose of family foundation in bylaws.” The key feature is the possibility of amassing property that can be bequeathed to successive generations, as well as paying benefits to beneficiaries. Perhaps, as in the case of similar foreign foundations, a practice of covering the costs of maintenance or education of successors will arise.

That acting as the founder is limited to natural persons distinguishes a family foundation from typical foundations acting on the basis of the Foundations Act of 1984, according to which foundations can be established with equal rights by both natural and legal persons. Therefore, a family foundation is limited both by the person of the founder and the purpose, while a regular foundation is limited by its purpose, although in an entirely different way. In a family foundation this is a narrow private purpose and in the regular foundation this must be a non-individual purpose that benefits society or the economy; economic activities conducted by a foundation are not recognized as a purpose that benefits the economy.

Definition of the beneficiary

The Act does not contain the definition of the beneficiary, however, Article 30 expressly notes two groups of entities that might be the beneficiaries of family foundations: natural persons and non-profit organizations. Therefore, the founder is free to select one or more beneficiary only from among natural persons. If a legal person or organizational unit without legal personality but with legal capacity is to be selected, it must be a non-profit organization.[4] If the founder wishes to retain discretion in choosing a beneficiary other than a natural person, they may use a regular foundation.

The founder themselves may be the beneficiary of their own foundation. This is an appropriate method of gradually transitioning the power and property to a younger generation without threatening the financial stability of the family seniors who in Poland have often laid the foundations of family wealth.

Each beneficiary is mentioned in the list of beneficiaries. In addition to rights, a beneficiary has certain obligations. First and foremost, they must provide the foundation with their personal data to obtain the benefits reserved for them. In addition, the family foundation may demand documenting such data of beneficiaries as are necessary to provide benefits on their behalf. This means in particular a bank account number or address. In practice, the foundation will know its beneficiaries, since they are family members, although more distant relatives or children born out of wedlock cannot be ruled out.

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[4] A non-governmental organisation referred to in Article 3, item 2 of the Public Benefit Activities and Volunteering Act of 9 June 2022 (Dz. U. 2022, item 1327), conducting public benefit activities in the meaning of Article 3, item 1 of the act.

Rights of the beneficiary

The founder is limited when choosing the beneficiaries, however, they remain free to define the rights of each beneficiary and the benefits to be made on their behalf by the foundation.

Beneficiaries may be entitled to pecuniary or non-pecuniary benefits as well as assets remaining when the foundation is wound up. Such benefits, according to the will of the founder, may consist in particular in financing education, granting financial assistance in justified cases (for example costs of medical treatment), granting loans to beneficiaries, paying their liabilities, or providing services through the family office. The benefits rendered to the beneficiary by the family foundation may also include paying the founder's alimony to the beneficiary.

Property of the family foundation

The property transferred to a family foundation cannot be worth less than PLN 100,000.[5] If assets belonging to the joint property of the spouses are to be contributed to the family foundation, either of two solutions is possible. The first solution is that both spouses are the founders, jointly transferring specific assets to the family foundation. If, however, only one of the spouses is to be the founder, then pursuant to Article 37 of the Polish Family and Guardianship Code [1964], to transfer the jointly held individual assets mentioned therein (mostly real estate and businesses) the consent of the other spouse is necessary. According to that provision, consent of the other spouse is necessary to make: 1) a legal transaction leading to disposal, encumbrance or acquisition for a fee or real estate or perpetual usufruct, as well as a transaction leading to handing over real estate for use or deriving benefits from it; 2) a legal transaction leading to disposal, encumbrance or acquisition for a fee of a property rights whose object is a building or residential premises; 3) a legal transaction leading to disposal, encumbrance, acquisition for a fee and lease of an agricultural farm or business; 4) donations from joint property, except for customary minor gifts. Especially when points 1 to 3 are concerned, the requirement of consent to the transfer of real estate, building/premises, or business may seriously restrict the freedom of the founding spouse to transfer specific individual assets to the foundation. This does not, however, alter the fact that the property contributed to the foundation during the course of marriage ceases to be matrimonial property and becomes the property of another new entity with its own legal personality, namely the family foundation. Following divorce, this property is not subject to division. This may be a serious problem for the spouse who agreed in good will to have certain individual assets transferred to the family foundation, but also for the spouse who was the co-founder of a family foundation but does

[5] Approximately USD 23,300 according to the exchange rate of the National Bank of Poland.

not sit on the foundation's management board or has no power to decide on another basis (for example the bylaws) what the foundation is doing with their property.

Transferring property to a foundation will not allow for evading one's liabilities. Pursuant to Article 9 of the FFA, a family foundation is liable jointly and severally with the founder for its liabilities, including alimony liabilities arising before the establishment of the foundation. Such a liability cannot be excluded or limited without the consent of the creditor. Transferring property to a foundation will also not prevent the closest relatives who are passed over in a will from demanding their legitimate portion of inheritance. According to the relevant changes introduced in provisions of the legitimate portion, if the person entitled to the legitimate portion did not receive it either in the form of a donation made by the testator, by being called to inheritance, in the form of benefit from the family foundation or property when the family foundation is would up, they are entitled to a claim against the heir(s) for payment of a sum of money required to cover or supplement the legitimate portion. The initial funds of a family foundation are in turn included in the estate used as a basis to calculate the legitimate portion only if the foundation is established less than ten years before opening the inheritance.

The lawmakers were careful to prevent a family foundation from becoming a tax evasion or even a tax optimization vehicle. The manner of taxing a family foundation has caused work on the bill to be prolonged by almost one year. It should be added that attractive taxation of family foundations in Poland might attract family foundations (and their capital) from elsewhere. However, just as in case of regular foundations, only the establishment of a family foundation and contribution of property thereto is free from tax. A family foundation will pay corporate income tax (CIT) at a rate of 15% but, importantly, only when passing funds to its beneficiaries. A family foundation has also been deprived of the possibility of deducting tax-deductible expenses and write-offs (a provision that appears contrary to the Constitution), because in this respect a family foundation is treated differently from other legal persons. Beneficiaries who are natural persons, as payers of the personal income tax (PIT), will be exempt from taxation if they are the founder, their spouse, descendant, sibling, step-child or step-parent (the closest family members). Others will have to pay a PIT of 15%. In turn, beneficiaries who are non-governmental organizations will pay CIT on benefits granted to them by the family foundation as before.

As regards a family foundation's ability to procure means to conduct its activities independently, it is limited considerably. A foundation may not run a business under its own name, but only join companies, investment funds, cooperatives, and entities of a similar nature. It may also run a business as an agricultural farm. In addition, a family foundation may conduct only activities expressly enumerated in Article 6 of the FA, consisting in disposing of property, provided that such property has not been acquired solely for the purpose of further disposal; renting, leasing, or making the property available for use on another basis; purchase and sale of securities, derivative instruments, and rights of a similar nature; granting loans to entities listed in the provision; trading in foreign tender belonging to the family foundation in order to make payments related to activities of the family foundation.

Governing bodies of a family foundation

The bodies of a family foundation include the management board, supervisory board, and meeting of beneficiaries. Traditionally, it is the management board that represents the foundation versus third parties and manages its affairs. Because the main purpose of the foundation is to provide benefits to its beneficiaries, it is the management board that is responsible for drafting and updating the list of beneficiaries, notifying them about the benefits they are entitled to, and providing such benefits. Management board members may be selected from any natural persons having full capacity for legal transactions, including beneficiaries of the foundation.

A family foundation may, but does not need to, be subject to the internal supervision of a supervisory board. Appointing a supervisory board obviously depends on a decision of the founder. If a board is appointed, it will represent the founder in its relations with the management. If not, the foundation is represented by an attorney appointed by the meeting of beneficiaries.

A supervisory board must be appointed if the number of beneficiaries exceeds twenty-five. A similar provision is found in the Polish Code of Commercial Companies with respect to limited liability companies, but with an additional condition that the share capital of such a company must be at least PLN 500,000[6] (Article 213, item 2 of the CCH). A supervisory board exercises supervision over the management as to compliance with law and provisions of the bylaws. The bylaws of a family foundation may extend the powers of the supervisory board, in particular providing that the management is obliged to obtain the consent of the supervisory board before undertaking specific activities. Both the management board and the supervisory board may consist of one or more persons.

Members of the management board and supervisory board as well as liquidators are liable towards the family foundation for any damage caused by their act or omission against the law or the provisions of the bylaws, unless no fault can be ascribed to them. Therefore, it is the members of bodies who bear the burden of proving that they acted without fault if allegations of acting to the detriment of the foundations are made.

Like the management board, and unlike the supervisory board, a family foundation must have a meeting of beneficiaries. The meeting is attended by all the beneficiaries. It is this body that has to ensure the necessary impact of the family on the most important directions of foundation activity, also in the longer term. Issues that the beneficiaries must approve by means of a resolution are the same issues that require a resolution of the annual general meeting of shareholders in companies, that is:

1) examining and approving the financial statements of the family foundation for the previous fiscal year;

[6] Approximately USD 116,500 according to the exchange rate of the National Bank of Poland.

2) discharging family foundation management members from their duties;
3) division or coverage of the net financial results;
4) choice of the audit firm, in cases where the financial statements are subject to audit pursuant of the Account Act of 29 September 1994 (Dz. U. 2021, items 217, 2015 and 2016 and 2022, item 1488);
5) other matters listed in the act or mentioned by the founder in the bylaws.

Therefore, the meeting of beneficiaries, like the annual general meeting of shareholders, is a body that exercises general control over the activities of a family foundation, but may also make decisions, if the founder so decided in the bylaws.

Summary

Introducing a family foundation was a necessity in the Polish legal system, but more for enterprises than for the foundations themselves. From the viewpoint of the former 'regular foundation', the most regrettable decision was that the purposes for which a foundation may be set up were extended only in a single wide scope, that of the private interest of families. Unfortunately, the possibility of establishing foundations for any legally permitted purpose was not granted. This, however, results primarily from the fact that the initiative of establishing a new group of foundations came from family businesses, and not foundations, and its overarching objective was to facilitate succession in family businesses and not extending the list of permitted purposes for which foundations may be established. The legal form of a foundation was simply chosen to achieve the objective of creating a succession mechanism for family businesses.

Undoubtedly, this objective was achieved more completely than it would have been the case on the basis of inheritance law provisions by complying with the will of the founder as to the fate of their property, including their business, after they die, and planning the division of such a property not only in the next generation. In the case of regular inheritance, the testator may only name the persons to whom they bequeath their property but cannot affect any further decisions such persons may take. A family foundation really allows for safeguarding the integrity of family wealth by eliminating the risk of loss or considerable devaluing due to succession or undesirable actions of successors, especially because the rights of beneficiaries are inalienable. If the founder wills so, the property will remain in the hands of and be protected by a single entity (the foundation). The rules of granting benefits to beneficiaries in family foundations are very flexible and they or their amount can be made dependent on fulfilling specific conditions. Likewise, the decision-making rules are very adaptable and help to resolve the dilemma of how not to discriminate the children who do not wish to or should not be involved in running the business even as shareholders. In addition, establishing a family foundation allows the founding business owner to step back from actively running the business without any loss of income and to safeguard themselves and their family members financially. It also allows for keeping business and family matters separate.

However, a family foundation is limited in many aspects. First and foremost, there are restrictions as to its purpose – unlike previously, private purposes are allowed, but not all private purposes, because the foundation is obliged to amass property, manage it in the interest of beneficiaries, and provide them with benefits. Only one or more natural persons may be the founder, with the additional limitation to a single person if the foundation is established in a will. The circle of potential beneficiaries is also limited to natural persons and public benefit organizations.

The lack of successors and persons wishing to take over family businesses may mean that interest in the new solution will be considerable. It is worth estimating it based on foundation statistics collected in Poland for many years and then comparing it with the experiences of other countries in which family or private foundations operate.

The largest number of such foundations has been registered in Germany (almost 25,000), Sweden (18,000), Switzerland (17,100), Spain (14,100), and Great Britain (12,400) [Jevakhoff, Cavaillolès, 2017] (Table 1).

Table 1. Estimates of the quantity of foundations

Country	No. of foundations	Assets (in bn €)
Germany	24,772	≃100
Denmark	13,850	44
Spain	8,866	22
France	4,071	22
Italy	6,220	85
Netherlands	≃200,000	n.a.
United Kingdom	12,400	70
Sweden	18,000	50
Switzerland	17,170	65

Source: Jevakhoff, Cavaillolès, 2017, p. 14.

Usually, they account for 12.4 to 20 per cent of all the foundations. In the same period, Poland had 14,500 foundations registered, 10.66% more than in the previous year. Based on these data, it can be predicted that the total number of family foundations established in Poland will be about 2,500, with an average growth dynamic of 250 foundations per year.

The accuracy of the above projection will be affected by the shape family governance will take. Research shows that governance is one of the factors that contributes the most to the multi-generational nature of family businesses [Elstrodt, 2003]. In addition, family governance strengthens business families as managing teams and positively affects financial results [Berent-Braun, Uhlaner, 2012]. Bodolica et al. [2015] noted that a management strategy that accounts for family business limitations allows for preserving the optimal governance configuration and achieving business success. In addition, the goals accepted by managers will affect effectiveness. It should be noted that shareholders are not present in this legal form, and, therefore, looking for the optimal form of governance is a bigger challenge than in other entities [Schurr, 2015].

It is difficult to note the optimum shape of (family) governance towards which a family foundation should strive to achieve the best economic and charity effects. There are multiple theories that explain the functioning of governance and justifying the objectives a business family wishes to achieve. The practices may vary as well. The optimal governance of a family business cannot be given, although a range of potential directions of development can be offered. When the Polish act has entered into force and the practice of establishing family foundations has arisen, the direction to be taken will be known. It will match one of the theories or practices outlined above but evolve in a peculiar direction on its own. The last scenario may be very probable because of the very turbulent times that the Polish economy is going through.

To summarize, granting family businesses a new succession model that is adapted to their needs should be assessed positively. A negative aspect is the legislator's decision not to introduce a dual division together with extending the understanding of foundations in the Polish law. For example, foundations with public purposes, called public foundations, and with private purposes might exist. The latter could be established for any legally permitted purpose, including but not limited to the preservation, protection, and seamless succession of family and other property.

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