

FAMILY FOUNDATIONS – the legislature’s response to family-run businesses

On 22 May 2023, entered into force the Act on family foundations (further, the “Act”). It introduces the institution of a so-called family foundation into the Polish legal order, which is intended to allow for the efficient and effective intergenerational succession of family businesses. The use of family foundations will prevent the excessive partition of family assets or the need to liquidate them after the founder’s death.

Entrepreneurs will be equipped with tools allowing them to maintain the cohesion of family assets regardless of the number of potential heirs, which should prevent disputes within a family about the continued operation of a family business. Thus, family foundations are intended to be the main succession mechanism for family businesses.

The Act is intended to fill gaps in Polish law caused by insufficient means of ensuring the effective protection of an estate’s assets from excessive partitioning, while also seeking to guarantee the family-run nature of a business.

FAMILY FOUNDATIONS – WHAT ARE THEY?

According to the Act’s provisions, a family foundation is a **legal person, established to hold property, manage the such property to the benefit of its beneficiaries, and to make distributions to the beneficiaries**. The Act’s provisions thus clarify the purpose which foundations are intended to perform: to consolidate the assets of the founder’s family and protect them partition, to manage the assets contributed to the foundation, and to provide support to the founder’s family.

Family foundations are entitled to **hold property in their own name** in order to achieve these goals. A foundation’s assets consist of an initial contribution of property from the founder, which must have a value of at least PLN 100,000, as well as any assets acquired by the foundation itself following its establishment. The majority of a foundation’s resources originate from additional contributions made in the form of donations and inheritances and from profits achieved by the foundation an account of its activities. A foundation’s assets should make it possible to secure the accumulation and protection of a family’s capital (for example, shareholder rights in a family-run parent company holding an interest in operational subsidiaries contributed to the foundation) while also making distributions in favour of beneficiaries identified by the founder.

ESTABLISHING A FAMILY FOUNDATION

Family foundations are to be established on the basis of a **founding deed** executed by the founder (or several founders) or a **will** (in which case, there can only be one founder). Once a founding deed is executed, or the will is read, a family foundation in organisation (*w organizacji*) will come into existence. The establishment of a foundation also requires that the text of its statute be determined, its bodies appointed, and a contribution of assets made. Family foundations will acquire separate legal personality upon their entry in the register of family foundations.

The key governing document of a family foundation, laying out its purpose and characteristics, is its **statute**, executed by the founder in the form of a notarial deed. In this document, the founder specifies the foundation’s basic information, including its business name (with the mandatory indication of its legal form, “*Fundacja Rodzinna*” or “*F.R.*”), purpose, the manner in which beneficiaries are identified and the extent of their entitlements, rules for the appointment

and dismissal of the foundation's bodies, rules for the statute's amendment, and how the foundation's assets should be distributed following its liquidation. A separate document - list of beneficiaries – indicates the foundation's first beneficiaries. A family foundation's management board will update this list in accordance with the terms of its statute.

BENEFICIARIES OF A FAMILY FOUNDATION AND ITS MANAGEMENT

Both **natural persons and public benefit organisations** can be beneficiaries of a family foundation. In its statute, the founder should specify, in detail, the types and extent of distributions which the foundation can make towards particular beneficiaries. Distributions can be addressed to specific beneficiaries and can take the form of one-time cash distributions, periodic pensions, or even other property-related distributions.

Certain beneficiaries may be granted the right to participate in the **beneficiaries' assembly** (the founder must nominate at least one beneficiary to hold this right). The beneficiaries' assembly will have the authority to consent to certain actions taken by the family foundation (enumerated in its statute) as well as having those powers typical of corporate governing bodies, such as approving the family foundation's annual financial statements, granting members of the management board a discharge of their duties, or the division or coverage of net financial results.

The beneficiaries' assembly shall also have the power to appoint an auditor to audit the management of the family foundation's assets and whether the liabilities incurred and satisfied by the foundation were appropriate, accurate, and legal. Such an audit must be performed at least once for every four years (for family foundations whose financial statements are not required to be audited, in accordance with the Act of 29 September 1994 on accounting) or annually before the approval of the family foundation's financial statements (for family foundations whose financial statements are required to be audited, in accordance with the Act of 29 September 1994 on accounting).

Family foundations shall also have the following bodies:

- **a management board** – the family foundation's managing body, which is authorised to manage the foundation's affairs and represent it; members are appointed and dismissed by the founder or, after their death, the supervisory board, if established (unless the statute provides otherwise). In the event of the death of the founder and the absence of a supervisory board, the board is appointed by the beneficiaries' assembly,
- **a supervisory board** – supervises the management board's actions in respect of their compliance with the law and the statute; this body is only mandatory in foundations with more than 25 beneficiaries (unless the statute provides otherwise members of the supervisory board are appointed and dismissed by the founder or, after their death, the beneficiaries' assembly).

The rules applicable to family foundation management boards and supervisory boards are similar to those for the respective bodies in commercial companies (among others, their members' term of office, their members' duty of loyalty and due care, that decisions are made by the adoption of resolutions at meetings or by means of direct distance communication).

The Act also grants founders, beneficiaries, and members of a foundation's bodies to file motions with the court to annul a resolution contrary to the foundation's statute or purposes, and to determine that a resolution is contrary to the Act.

LIABILITY RULES

In order to protect the interests of the founder's creditors, a family foundation and its founder are jointly and severally liable for the founder's obligations which arose prior to its establishment, including tax liabilities, up to the value of the assets contributed by the founder, as at their purchase and based on their price when the creditor is satisfied.

The Act also grants protections to persons in respect of whom the founder has alimony obligations. In this regard, the foundation will bear subsidiary liability for the performance of the founder's alimony obligations which arose prior to its establishment.

PERMITTED BUSINESS ACTIVITIES OF A FOUNDATION

Due to the risks that engaging in business activities could pose to the interests of a family foundation and its beneficiaries, the Act limits the scope of activities in which foundations can engage in. As a rule, foundations will only be permitted to dispose of their property (among others by way of its sale, rent or lease, or granting loans), or make investments in entities in which it holds shares or stock. Thus, family foundations are intended to act mostly as passive investors which generate income by means of the assets they hold, subject to their duty to ensure its continuity.

TAXATION OF FAMILY FOUNDATIONS

The founder's contribution of assets to a family foundation as well as any income achieved by the foundation from its activities prescribed by the Act are exempt from CIT. However, if the family foundation engages in activities beyond those permitted by the Act, such activities will be subject to CIT at a rate of 25%.

When a family foundation makes distributions to the founder and the beneficiaries of the foundation, it is subject to CIT at a rate of 15%.

In the case of natural persons, the PIT exemption covers distributions for the founder and his/her immediate family members (e.g.: children, parents, siblings, spouse), corresponding to the proportion of the contributed property by the founder to the total property of the foundation.

Distributions paid by the foundation to other family members are taxed at the rate of 10% of the income, in the part corresponding to the proportion of the founder's contributed property to the foundation's total property. In contrast, the value of the potential surplus, as well as distributions paid to beneficiaries other than those named above, are taxed at 15% of the income.

RIGHT TO RECEIVE A RESERVED SHARE

The Act also amends certain material aspects of inheritance law.

First, the legislature provided that in the event that the foundation was not established in the will, the founding capital of a family foundation contributed by the testator within 10 years preceding the opening of the inheritance should be added to the inheritance when calculating the reserved portion, unless the family foundation itself is the heir. In such a case, the foundation shall be one of entities obliged to pay the reserved portion. As an exception to the general rule, the founding capital is not added to the estate in favour of the testator's spouse or descendants, if its contribution was made prior to the testator's marriage to the said spouse or when the testator had no descendants respectively. However, if a person entitled to receive a reserved portion of the estate received benefits in the form of distributions made by the

foundation or assets received in connection with the family foundation's liquidation, then the value of the reserved portion they are entitled to be proportionally decreased.

In order to limit the negative consequences to a foundation's liquidity which could result from the duty to promptly pay out a reserved portion as a one-time payment, the Act allows a foundation to delay the payment date of a reserved portion (for no more than 5 years), pay the reserved portion in instalments (the deadlines for their payment must also not exceed 5 years in total), and, in exceptional circumstances, reduce the reserved portion's amount. In such cases, it is necessary to take the personal and financial circumstances of both the person entitled to the reserved portion and the person obliged to satisfy claims for the payment of the reserved portion into account. The court, at the obliged party's request, may delay the payment date of instalments already due, or extend it, where the amended due date can be no more than 10 years after the original due date.

The Act would also allow persons entitled to receive a reserved portion to waive their rights. Thus, it will be possible for such persons to enter into a contract waiving their right to receive a reserved portion during the testator's life, thereby limiting the risks described above regarding the foundation's loss of liquidity. Furthermore, the Act will amend the provisions of the Polish Civil Code to allow an entitled person to transfer their entitlement to a reserved portion to another person entitled to inherit, for example, by way of an understanding with another family member concerning the business's future form and nature. By allowing persons to waive their right to receive a reserved portion only, the person waiving their right will not need to be taken into account when calculating the basis of the reserved portions, consequently increasing the reserved portion due to other heirs.

LIQUIDATION OF A FAMILY FOUNDATION

The Act specifies the circumstances which will result in a family foundation's liquidation and dissolution (among others, the occurrence of circumstances stipulated in its statute, the expiry of the term for which the foundation was established, and the performance of the foundation's goals). The registry court may, at the beneficiaries' request or *ex officio*, also order that a family foundation be dissolved, among others where the foundation is managed in a manner obviously contrary to its goals or the beneficiaries' interests.

A family foundation will be dissolved only after the liquidation of its assets. The members of the management board, or persons appointed by the registry court, will act as a family foundation's liquidators. Their principal task will be to satisfy the foundation's creditors and only then dividing the remaining assets among those persons entitled to receive them. Assets remaining after a foundation's liquidation will revert to the founder if the family foundation is liquidated during their lifetime (unless the statute provides otherwise). In all other cases, any remaining assets following the foundation's liquidation will be disposed of in accordance with its statute.

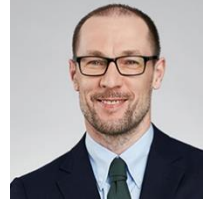
If you have any questions related to any of the topics above, please contact the lawyers in our Company Law & Corporate Governance and Tax teams:



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