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Family foundations in Poland. Part II

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Abstract

Polish entrepreneurs have been waiting for a legal act for at least a dozen years will facilitate the succession process understood as taking over responsibility for management by subsequent generations, respecting the assumption that not every successor will be interested in this solution. Such a legal act is the Act of January 26, 2023 on family foundations, which entered into force on May 22, 2023.

The issue of introducing into the Polish legal system regulations allowing the creation of private foundations in the form of family foundations was the subject of a lively discussion, mainly in the family business sector, including on the forum of non-governmental organizations representing them in the last dozen or so years. The above-mentioned enterprises and the non-governmental organizations representing them drew attention to the lack of legal regulations in the Polish legal system that would effectively support the initiation and implementation of the succession process, including the formula of establishing the family foundation

Keywords: family foundations in Poland, foundations, family funds, new foundations in Poland, family assets, public foundations, private foundations, second sector, third sector

Introduction

Polish entrepreneurs have been waiting for a legal act for at least a dozen years will facilitate the succession process understood as taking over responsibility for management by subsequent generations, respecting the assumption that not every successor

will be interested in this solution. Such a legal act is the Act of January 26, 2023 on family foundations, which entered into force on May 22, 2023.

The issue of introducing into the Polish legal system regulations allowing the creation of private foundations in the form of family foundations was the subject of a lively discussion, mainly in the family business sector, including on the forum of non-governmental organizations representing them in the last dozen or so years¹. The above-mentioned enterprises and the non-governmental organizations representing them drew attention to the lack of legal regulations in the Polish legal system that would effectively support the initiation and implementation of the succession process, including the formula of establishing a foundation². Moreover, the doctrine clearly emphasizes that the essence of the functioning of family foundations is to ensure succession in family enterprises³, and the family foundation is considered a legal instrument serving to solve problems related to (legal) succession of an entrepreneur⁴. According to other views, a family foundation is to be a protective umbrella for family businesses⁵; a kind of family treasury that provides financial resources, and at the same time implements the founder's vision and cares for the values adopted by him in business⁶, or are referred to as "economy stabilizers" due to the fact that they have established a business model that is characterized by a long-term perspective⁷. Therefore, in order to determine the essence of family foundations, it is necessary to derive a definition of a family enterprise and succession, as well as reference to legislative materials and the content of the Act of January 26 2023 on family foundations to define the concept of family foundations.

The first legal problem is the lack of definition of a family business⁸, therefore, we should refer to the views of representatives of economic sciences who emphasize that the definition of the concept of a family business is not uniform and changes under the influence of economic and social factors in countries with a developed market economy⁹.

Noteworthy is the attempt to define the concept of an enterprise/family business undertaken as part of the "Polish Family Businesses" Program, according to which a family business is a sole proprietorship business, where its owner and at least one person associated with the company are members of the same

family; civil law company at least three partners, with family members having a majority at the shareholders' meeting; a civil law partnership with exactly two partners, where one of the partners and at least one person associated with the company are members the same family¹⁰. According to another view, a characteristic feature of a family business is also paying special attention to the norms and values of conduct that are to ensure the achievement of the main goal of operation, i.e. survival on the market and development and coping with competition¹¹.

Family businesses are particularly present in the small and medium-sized enterprise sector¹². The economic potential of family businesses can be proven by the fact that according to economic data, the world's largest family businesses generated USD 8.02 trillion in revenues in 2022, 10 percent more than in 2021 with a growth rate faster than the global economy, and if the 500 largest family businesses were a national economy, they would constitute the world's third largest economy, behind only the United States and China¹³. According to available data, there are over 830,000 companies operating in Poland¹⁴ family businesses that generate as much as 18% of Polish GDP, and in the coming years approximately 57% of them will decide on further succession, but only 8% of successors want to take over in the future, a family business after the parents¹⁵. The most famous family companies in Poland include: Cyfrowy Polsat S.A.; Inter Cars S.A., Euro Net Sp. z o. o. or Adamed Pharma S.A¹⁶. Most family businesses, regardless of the legal form adopted, were established after 1989 and after 30 years the succession process seems natural¹⁷. One The family foundation model is to be one of the legal tools supporting the succession process.

Another key issue aimed at defining the essence of a family foundation is the issue of succession, aimed not only at limiting it to inheritance within the meaning of the provisions of the Civil Code, but understood as a process intended to pass on business management activities to subsequent generations, including his assets, focusing on issues related to law, economics, psychology and finance. Therefore, by the succession process we mean the

¹ <https://firmyrodzinne.pl/jak-powstawa-fundacja-rodzinna/> (dostęp: 22.11.2024).

² Ibidem

³ M. Bieniak, *Fundacja rodzinna – organizacja i funkcjonowanie*, Palestra, 2023, nr 3, s. 48

⁴ P. Wiórek, „Ciemna strona” fundacji rodzinnej? Uwagi z perspektywy prawa niemieckiego, *Przegląd Ustawodawstwa Gospodarczego*, 2021, nr 11, s. 8.

⁵ Raport_z_badania_polskich_firm_rodzinnych_2023_PwC, s. 9.

⁶ <https://www.biznes.gov.pl/pl/portal/004436> (dostęp: 22.11.2024).

⁷ A. Lewandowska, M. Kłosowiak, J. Lipiec, *Fundacja rodzinna. Aspekty ekonomiczne i prawno-podatkowe, co do zasady. studia i analizy prawne*, 2021, nr 1, s. 101.

⁸ H. Kałuża, *Firmy rodzinne w XXI wieku – specyfika i sukcesja*, Zeszyty Naukowe SGGW - Ekonomika i Organizacja Gospodarki Żywnościowej, 2009, nr 75, s. 50

⁹ E. Stawicka, *Firmy rodzinne jako przykład przedsiębiorstw zarządzanych przez wartości, ich sens i znaczenie*, Zeszyty Naukowe SGGW w Warszawie. Problemy Rolnictwa Światowego, 2010, nr 2, s. 111

¹⁰ E. Stawicka, *Firmy rodzinne...*op.cit., nr 2, s. 111.

¹¹ M. Dźwigoł-Bargosz, *Specyfika przedsiębiorstw rodzinnych w Polsce*, *Studia i Prace WNEiZ US*, 2018, nr 52, s. 37.

¹² K. Kuta, M. Matejun, P. Miksa, *Długowieczność firm rodzinnych*, *Przegląd Nauk Ekonomicznych*, 2017, nr 26, s. 91.

¹³ https://www.ey.com/pl_pl/news/2023/02/indeks-firm-rodzinnych-2023 (dostęp: 22.11.2024).

¹⁴ Raport_z_badania_polskich_firm_rodzinnych_2023_PwC, s. 8 (dostęp: 22.11.2024).

¹⁵ <https://ceo.com.pl/co-dalej-z-polskimi-fundacjami-rodzinnymi-74529> (dostęp: 22.11.2024).

<https://www.bankier.pl/wiadomosc/Firmy-rodzinne-generuja-18-proc-PKB-Nowe-przepisy-maja-ulatwic-ich-sukcesje-8089749.html> (dostęp: 22.11.2024); Fundacja rodzinna. Zielona księga, Warszawa 2019 r., s. 4 (dostęp: 22.11.2024).

¹⁶ <https://www.forbes.pl/forum-firm-rodzinnych/2022/artykuly/ranking-najcenniejszych-firm-rodzinnych-2022-województwo-mazowieckie/r9gvdd4> (dostęp: 22.11.2024).

¹⁷ Raport_z_badania_polskich_firm_rodzinnych_2023_PwC, s. 10.

transfer of all rights and obligations to the business to legal successors¹⁸, which is not only a legally complicated process, but also extremely time-consuming. Noteworthy is the model approach to the succession process in a family business proposed by A. Pawlak¹⁹, which assumes following the following principles in the succession process: putting the company's interests above family arrangements, which contributes to the maximization of income that supports the family; planning succession in advance - the succession process takes several years, and one of the most important issues is the date of commencement of activities of a successive nature; allowing an outside person to manage the succession process, i.e. an external manager not employed in the family enterprise who will support succession activities; the use of evolutionary inheritance, i.e. gradual initiation of the successor by the person managing the enterprise; planning the tasks of the company owner after the succession, so as to be able to use his knowledge and experience after the completion of the succession process (of course, if such a will is expressed); obtaining appropriate education by the successor, which should also bring positive benefits for the company subject to succession, as well as gaining experience and gaining the respect of the family and employees, assuming that a properly prepared successor is a person prepared to perform the function and cares about a good atmosphere and commands respect among employees (more detailed discussion individual rules are beyond the scope of this article). Due to the above, we should share the view that properly conducted succession in family businesses enables not only its continued legal existence, but also the development of future generations who can bring new quality and innovative ideas, which may translate into achieving additional profits²⁰. Psychological issues also play a significant role in the succession process, especially when the senior entrepreneur is strongly emotionally attached to the company, which may become a significant limitation for the involvement of potential successors - family members²¹.

Already at the beginning of the legislative process, there was a discussion whether it was possible to name the foundation supporting the succession process with the adjective "family". The draft act on family foundations had the nature of a government bill and was dated November 23, 2022²². Importantly, legislative work on the Act on Family Foundations began several years earlier with the issuance of the Green Paper in September 2019 and was the

¹⁸ P. Zdanowicz-Pastuszek, *Sposoby przeprowadzenia sukcesji przedsiębiorstw rodzinnych, Administracyjno-finansowe konteksty zarządzania*, Warszawa 2021, s. 99

¹⁹ A. Pawlak, *Sukcesja w polskich przedsiębiorstwach rodzinnych*, *Przedsiębiorczość i Zarządzanie*, Tom XV, Zeszyt 7, Część I, s. 59-61

²⁰ E. Racek, A. Zywert, A. Dewicka, *Planowanie sukcesji w firmach rodzinnych, Przedsiębiorczość i zarządzanie*, 2017, Tom XVIII - Zeszyt 6, s. 38.

²¹ I. Koładkiewicz, M. Wojtyra, *Sukcesja zewnętrzna w firmie rodzinnej. Ważne wyzwania dla współczesnych gospodarek*, *Przedsiębiorczość i zarządzanie*, Tom XVI, Zeszyt 7, s. 28.

²² Rządowy projekt ustawy o fundacji rodzinnej, druk 2798, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/17118C9A9F6DE247C125890500329D3E/%24File/2798.pdf> (dostęp: 31.07.2023).

subject of a lively discussion²³. According to the justification for the draft act, the purpose of its introduction was to "comprehensively strengthen the legal tools for carrying out succession processes by adding to the system the rights of an institution used to accumulate family wealth, allowing the retention of capital in the country for many generations and increasing the potential of domestic investments. The family foundation is intended to minimize the risk of unsuccessful succession and guarantee the continuation of business activities. Transferring property, including a family business, to a family foundation is intended to protect it against division, enable its multiplication, and therefore also derive benefits from it, which can be used to cover the maintenance costs of persons indicated by the founder. It is crucial to ensure the continuity of a private enterprise, in particular for the purpose of securing the family. It is important that the family foundation is able to meet the needs of the beneficiaries, who will generally be family members. However, they can also be other people²⁴. Some people may not be able to continue the business, so it may be necessary to involve other people to maintain its continuity. The idea of family foundations was taken from other legal systems, e.g. Swiss, Danish or German. It is also worth noting that during the public consultation process²⁵, 49 entities out of 440 invited submitted comments on the project to participate in consultations, which indicated moderate interest in the draft act on the part of the invited social stakeholders.

The above statements regarding the idea of family foundations should be correlated with the content of Art. 2 section 1 of the Act on Family Foundations, according to which a family foundation is a legal person established for the purpose of collecting property, managing it in the interest of the beneficiaries and providing benefits to the beneficiaries.

To sum up, the essence of a family foundation comes down to introducing a private law instrument into the Polish legal system, using the phrase "family foundation", supporting the succession process of family enterprises by allocating specific capital with the possibility of allocating this capital or the benefits obtained from its management to the foundation's beneficiaries. , which may be natural persons or non-governmental organizations referred to in Art. 3 section 2 of the Act on public benefit activities and volunteering²⁶, conducting public benefit activities within the

²³ Fundacja rodzinna. Zielona księga, Warszawa 2019 r., (dostęp: 22.11.2024); <https://publicystyka.ngo.pl/wracaja-fundacje-rodzinne-dla-biznesu-przypominamy-obawy-organizacji-spoecznych> (dostęp: 22.11.2024); <https://publicystyka.ngo.pl/fundacje-rodzinne-wspieramy-rozwiazanie-jestesmy-krytyczni-wobec-nazwy> (dostęp: 22.11.2024); <https://publicystyka.ngo.pl/czy-bedzie-nowy-rodzaj-fundacji-sa-watpliwosci-natury-konstytucyjnej> (dostęp: 22.11.2024); <https://publicystyka.ngo.pl/czy-bedzie-nowy-rodzaj-fundacji-kolejna-walka-o-zachowanie-tozsamosci> (dostęp: 22.11.2024); <https://publicystyka.ngo.pl/czy-bedzie-nowy-rodzaj-fundacji-intencja-dobra-rozwiazanie-zle> (dostęp: 22.11.2024).

²⁴ Rządowy projekt ustawy o fundacji rodzinnej, druk 2798, s. 53-54 <https://orka.sejm.gov.pl/Druki9ka.nsf/0/17118C9A9F6DE247C125890500329D3E/%24File/2798.pdf> (dostęp: 22.11.2024).

²⁵ Ibidem, s. 130-136

²⁶ Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i o wolontariacie (tj. Dz. U. z 2024 r., poz. 1491).

meaning of Art. 3 section 1 of this Act, which raises a legitimate question whether, taking into account the social activity of democratic countries, we will classify family foundations as II or 3rd sector?

Family foundations – legal characteristics

From the point of view of the Polish legal system, it is important to answer the question of what its role in society is and whether in any way a family foundation can be included in the so-called 3rd sector. In modern socio-economic systems of democratic countries, a division has developed into the so-called III sectors. The first sector consists of all types of state institutions, i.e. primarily government and local government administration bodies, combined and independent administration. The second sector consists of economic entities conducting business activities within the meaning of Art. 3 of the Entrepreneurs' Law²⁷, i.e. commercial activities carried out in an organized and continuous manner, i.e. for profit. The third sector consists of entities that are not included in the first and second sectors, which do not operate in order to make a profit (non-for-profit), which does not exclude running a business, however, the income from this activity serves to achieve statutory goals and this meaning are non-governmental organizations. Civil society is a society engaged in the implementation of public tasks and participating in the exercise of public power. In the definition of civil society proposed by H. Sasinowski²⁸, the characteristic features of civil society are: the operation of power on the basis of established law; the role of the nation - a sovereign exercising power through elected representatives; the existence of a system of protection of citizens' rights and freedoms guaranteed in the legal order and guaranteeing the possibility of citizens' participation in social life. In the model approach, non-governmental organizations are to support government and local government administration bodies, enterprises and take action, in particular, for social groups at risk of marginalization or social exclusion²⁹. The legal definition of a non-governmental organization is contained in Art. 3 section 2 of the Act on public benefit activities and volunteering, according to which non-governmental organizations are:

1. which are not units of the public finance sector within the meaning of the Act of 27 August 2009 on public finances or enterprises, research institutes, banks and commercial law companies that are state or local government legal entities,
2. not operating for profit- legal persons or organizational units without legal personality that are granted legal capacity by a separate act, including foundations and associations, subject to section 4.

In an attempt to answer the question whether family foundations are included for the 2nd or 3rd sector, the author used legislative materials and positions of entities or representatives of non-governmental organizations, expressed as part of the legislative process or in expert discussions. In the authors' opinion, due to the

²⁷ Ustawa z dnia 6 marca 2018 r. Prawo przedsiębiorców (tj. Dz. U. z 2024 r., poz. 236 z późn. zm.).

²⁸ H. Sasinowski, *Spoleczeństwo obywatelskie i jego rola w budowie demokracji*, *Ekonomia i Zarządzanie*, 2012, Tom 4, s. 33.

²⁹ A. Lada, *Wybrane organizacje III sektora jako przykład dobrych praktyk i pracy na rzecz przeciwdziałania wykluczeniu społecznemu*, *Roczniki Teologiczne*, Tom LXIX, zeszyt 10, s. 82.

essence of family foundations, which assumes the model of a legal person - a private foundation, established to collect property, manage it in the interests of beneficiaries and provide benefits to beneficiaries (Article 2(1) of the Act on Family Foundations), which may conduct business economic in the dimensions resulting from Art. 5 of the Act, the profit of which will be allocated to the beneficiaries, and therefore de facto of a for-profit nature, and the regulation of which is excluded from the jurisdiction of the Act of April 6, 1984. on foundations, cannot in any way be included in the third sector, nor can it be included among non-governmental organizations within the meaning of Art. 3 section 2 of the Act on public benefit activities and volunteering. In journalistic discussions, arguments appeared that due to the construction of Art. 2 section 3 of the Act on Family Foundations, according to which the beneficiary of a family foundation may be a non-governmental organization referred to in Art. 3 section 2 of the Act on public benefit activities and volunteering, conducting public benefit activities, the model of the Polish family foundation is to be similar with the way foreign foundations operate, which do not seek funds but distribute them to socially active entities³⁰. Due to the above, the Act on Family Foundations contains gates through which these foundations can get to the third sector, thanks to which they can operate socially. In the authors' opinion, the statutory possibility for non-governmental organizations, including foundations and associations, to obtain the status of a beneficiary, and therefore the possibility of allocating funds for their public benefit activities, does not change the legal status and systemic position of family foundations, and is only a legislative possibility family foundations taking actions that have the hallmarks of corporate social responsibility, of which it is not known to what extent they will benefit. The conclusion of the above research is the recognition that family foundations, due to their legal nature, are classified as so-called II sector.

In the author's opinion, it was also important to examine whether the family foundation as a legal institution had gained recognition among potential funders. The author came forward for this purpose for disclosure of data to the Court that keeps a register of family foundations, which is the District Court in Piotrków Trybunalski. To sum up, the entry into force of the Act on Family Foundations due to the interest in this institution - 2,432 applications for entry and 1,432 entries in the register of family foundations should be assessed positively, but there are voices that the Act should take into account further preferences in the field of tax law for the founders of the foundation, its beneficiaries and the foundation itself. Currently, due to emerging tax doubts, founders are forced to apply for individual tax interpretations even before establishing a family foundation, which may be a factor limiting the popularity of this institution. Regardless of the above, we have to wait a few more years to assess the impact of the family foundation on the intergenerational succession process in Poland.

³⁰ <https://publicystyka.ngo.pl/weszla-w-zycie-ustawa-o-fundacji-rodzinnej> (dostęp: 22.11.2024).