

The Polish legal system has long lacked a solution resembling a trust (in Common Law countries), or a foundation designed for asset protection (in European jurisdictions), whereby high-net-worth-individuals (HNWIs) could contribute and invest their assets to maximize their value.

While it is true that regulated or supervised investment funds, and alternative investment funds have been permitted under the Polish law, and that such entities have enjoyed certain tax benefits (depending on the type of entity), they have been falling short of the expected goals for wealth preservation. Investment funds have proved complicated to operate for regulatory reasons, as well as quite costly. Alternative investment funds are much more cost-effective and far less regulated, but they are for investment purposes only and, therefore, cannot benefit from full income tax exemption. Furthermore, establishing an investment fund or an alternative investment fund is time- and work-intensive. Therefore, lacking a proper solution at home, Polish HNWI's have been relocating their assets to foundations in other jurisdictions, such as the Netherlands, Luxembourg and Liechtenstein.

The 2023 Family Foundations Act filled that legislative gap by adding a new type of vehicle – the eponymous family foundation. It was signed into law on 22 May 2023, with the underlying objective to encourage Polish HNWI's to keep their assets in Poland, and to stimulate Polish family offices' investment activity.

The new vehicle draws on the well-established (and only slightly modified) concept of a foundation, the benefit being that existing jurisprudence and case law on foundations may now be applied to family foundations. A family foundation is a legal entity ring-fenced from its founders and beneficiaries, thus safeguarding them from liability for its debts. This also means that the foundation holds (in its own name), and fully owns and controls the assets contributed by the founders. The foundation's purpose is to accumulate assets, manage them to its beneficiaries' advantage and extend them the benefits as set forth in its statute. As a legal entity, the foundation should benefit from existing double taxation treaties (DTTs) that Poland is party to.

The family foundation may be established only by individuals (and not companies or partnerships). Establishing a family foundation is rather straightforward – the founder (or founders) first must have the statute notarized and then filed for court registration. Only one court in Poland processes foundation registrations, which has caused bottlenecks, however, the newly established foundation may start operating once the statute has been duly executed before the notary, even before the court registration process is complete.

The foundation must operate within the confines of the law. Among the key types of permitted business operations are (i) disposing of real property, (ii) trading in securities, derivative instruments and similar rights, (iii) joining commercial companies, investment funds, cooperatives and similar entities, as well as (iv) trading in foreign currencies. They focus chiefly on investing or earning passive income from the assets held.

The foundation is not a commercial company; hence it will survive its founders. It is managed by the management board appointed by the founder(s) or the beneficiaries. The latter will have a say after the founders' passing. The foundation statute should provide for a beneficiaries' meeting with the authority to appoint and recall the management board.

Apart from accumulating and protecting the assets, the foundation's purpose is also to manage the accumulated wealth to the beneficiaries' advantage by disbursing cash or making the assets available to the beneficiaries. The beneficiaries circle may include the founder(s), their families and any other designated third-parties.

The family foundation enjoys an exemption from the Polish corporate income tax (19% on both the business operations income and capital gains) with respect to any income earned from permitted operations. This means that the foundation's share sales, dividends or interest revenue will be free from corporate income tax. Furthermore, the assets contributed to the foundation by its founder(s) will be exempt from transfer tax. However, the beneficiaries' entitlements are subject to a 15% corporate income tax, still below the 19% threshold. However, these benefits are free from personal income tax if the funds are made available to the founder or other beneficiaries (as long as they are close members of the founder's family). This is a material tax benefit.

Family foundations have caught on very quickly; In 2023 alone, more than 450 such entities were registered. As of 31 July 2024, there were more than 1,200 family foundations registered, with 2,000 more applications pending.

Every sweet has its sour, though. The tax exemptions had been designed with a view to streamlining and fostering wealth accumulation and investment activity. However, the foundations were often used for tax optimization, including in M&A deals. According to the Polish authorities, the founders would establish the foundation, contribute the assets (chiefly shares in their companies) and have the foundation sell those assets to the investor immediately thereafter. This qualified as tax optimization, as the foundation paid no income tax on the share sale. The authorities considered this inadmissible tax optimization. The allegations sparked discussions whether to institute a mandatory holding period for the contributed assets (ranging between five and 15 years) for the tax exemption to trigger. Consensus has yet to materialize.

Nevertheless, the new vehicle may be a very useful tool for asset protection and wealth accumulation in Poland. It is easy to incorporate and operate, while offering a wide range of tax exemptions.

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