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THE ELUSIVE SHAREHOLDER - LEVERAGING FAMILY FOUNDATIONS FOR CORPORATE CONTROL UNDER POLISH LAW

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ABSTRACT

The Polish Family Foundation Act introduced a new legal vehicle aimed at facilitating succession planning and wealth management. This paper examines the Polish family foundation in the broader context of private foundations and trust-like entities, assessing its viability as a tool for corporate control. While private foundations in jurisdictions like Liechtenstein and the Netherlands provide robust frameworks for flexibility and elusiveness in controlling structures, the Polish model imposes constraints by granting beneficiaries significant governance rights and aligning its structure with traditional corporate forms. These features undermine its attractiveness for controlling companies, particularly when compared to foreign alternatives. However, the Act's strong emphasis on founder dominance over assets offers some utility, albeit limited. The study highlights gaps in the Act's design, emphasizing the need for legislative refinement to align with global trends. The paper concludes that while the Polish family foundation introduces preferential taxation, its restrictive governance framework and quasi-company nature limit its capacity to attract investors or establish itself as a competitive trust-like vehicle.

Key words: *private foundations, family foundations, trusts, wealth management, corporate control.*

1. INTRODUCTION

Private foundations are widely used tools for succession planning and wealth management. Especially in jurisdictions without a tradition of trusts or trust-like vehicles, a growing legislative trend aims to create new legal structures offering enhanced capabilities and flexibility for these purposes. This trend is

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particularly visible in Central and Eastern Europe, where over the last decade, private foundations and trust regulations have been introduced or significantly revised, as seen in the Czech Republic and Hungary.[1] In 2023, this trend reached Poland, the largest economy in the CEE region with the enactment of the Family Foundation Act on the 23 May 2023.[2]

Over the past 30 years, Poland has made an impressive economic leap, often compared to the development trajectories of Singapore and South Korea.[3] During this period, Poland has risen to become the fifth-largest economy in the EU, one of few countries in Europe to experience continuous growth. This development has naturally led to the growth of family wealth and the expansion of family businesses, which have played a key role in Poland's transformation. Today, some of these businesses are even listed on the Warsaw Stock Exchange. Consequently, there is a recognised need, according to lawmakers, for legal solutions that would enable efficient succession planning and family wealth management.

In academic discussions about this new Polish vehicle, the main focus has been on succession planning. The legal name of this foundation type - "family foundation" - appears to have steered the debate toward family business-related topics.[4] However, the new Polish legal framework is not exclusively for family use. The Family Foundation Act does not require beneficiaries to be related to the founder or to maintain any special relationship with them. Given this broader scope, the Polish family foundation should be examined more comprehensively as a private foundation or trust-like vehicle. These vehicles are used for purposes far beyond family-oriented goals. Jurisdictions such as

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[1] Both in the Czech Republic and Hungary, major amendments to the Civil Codes took place in 2014, as a result of which both private foundations and trusts were introduced into their legal systems. The only Visegrad country where similar legal vehicles have not been introduced to this day is Slovakia. Read more: Menyhei, A.: The new Hungarian asset management foundation, *Trusts & Trustees*, 25(6) 2019, pp. 599-610; Csach, K., Havel, B.: Slovakia: Private foundations and trust-like institutes in Slovakia, *Trusts & Trustees*, 30(6) 2024, pp. 373-376; Ronovska, K., Pihera, V.: Private foundations in the Czech Republic: 10 years on the road, *Trusts & Trustees*, 28(6) 2022, pp. 528-534.

[2] Kancelaria Sejmu: *USTAWA z dnia 26 stycznia 2023 r. o fundacji rodzinnej* (eng. Family Foundation Act), Dz. U. z 2023 r. poz. 326, 23.02.2023.

[3] Piątkowski, M.: *Europe's Growth Champion. Insights from the Economic Rise of Poland*, Oxford: Oxford University Press, 2018.

[4] Bieniak, M.: Dziedziczenie praw udziałowych na przykładzie dziedziczenia przez fundację rodzinną, *Przegląd Prawa Handlowego*, (9) 2024, pp. 36-41; Kappes, A.: Uwagi o następstwie prawnym fundacji rodzinnej, *Przegląd Prawa Handlowego*, (9) 2024, pp. 56-58.; Wiórek, M.: „Ciemna strona" fundacji rodzinnej? Uwagi z perspektywy prawa niemieckiego, *Przegląd Ustawodawstwa Gospodarczego*, (11) 2021, pp. 8-15.

Liechtenstein, Austria, and the Netherlands, with well-established traditions of private foundations, actively attract foreign investors by positioning private foundations as tools for shareholding intermediation and corporate control. This paper explores whether the Polish family foundation has the potential to serve as a corporate control tool.

2. WHAT DOES IT MEAN TO CONTROL A COMPANY?

Before analysing the Polish family foundation regulation and its relevance for corporate control, it is essential to clarify what "controlling a company" entails. A person or entity controls a company when they are a shareholder or a group of shareholders with effective voting control. Effective voting control depends on the shareholding structure.[5] In companies with fragmented ownership, it is easier to achieve voting control with a smaller share percentage. Traditionally, voting control is achieved by holding a majority of a company's shares. However, companies with dual-class shares allow minority shareholders to maintain voting control. This separation of control and cash flow rights must comply with the company's articles of association and be disclosed in its registry, as it involves issuing shares with superior voting rights.[6] Beyond these traditional methods, corporate practice has developed alternative mechanisms to achieve effective control, such as pyramid structures.[7] A pyramid structure relies on indirect ownership, where a controlling-minority shareholder holds a controlling stake in a holding company which, in turn, holds a controlling stake in an operating company. In such cases, an ultimate beneficiary directly owning 50% of one company, which itself owns 50% of another, can control the latter with just a 25% aggregated cash flow stake. Adding more layers to the pyramid further separates voting control from cash flow stakes.[8]

Different approaches to achieving effective control depend on individual preferences and systemic factors. Scholars highlight that direct control is more common in jurisdictions where minority shareholders lack protection against

5 La Porta, R., Lopez-de-Silanes, F., Shleifer, A.: Corporate Ownership Around the World, *The Journal of Finance*, 54(2) 1999, pp. 472-473.

6 Although issue of dual-class shares is subject to specific conditions that vary across jurisdictions, existence of different voting rights has to be always disclosed to other company members as well as the public.

7 Bebchuk, L., Kraakman, R., Triantis, G.: *Stock Pyramids, Cross-Ownership, and the Dual Class Equity: The Creation and Agency Costs of Seperating Control from Cash Flow Rights*, *NBER Working Paper Series*, February 1999, pp. 6955-6956.

8 Almeida, H., Wolfenzon, D.: A Theory of Pyramidal Ownership and Family Business Groups, *The Journal of Finance*, 61(6) 2006, p. 2638.

dominant shareholders' private benefits.[9] In these jurisdictions, majority shareholders are incentivised to avoid dilution at all costs, as this could expose them to exploitation by others gaining effective control. This dynamic often leads to underperforming equity markets, excessive liquidity locked in control blocks, and significant value disparities between the controlling stake and minority shares.[10]

Trusts and private foundations effectively support direct control and pyramid structures. These vehicles enable voting control for both large blockholders and minority holders in extended chains of ownership. Quantitative studies confirm that trusts and family foundations rank among the most common legal entities for corporate control.[11] The next section examines the features that make these vehicles so prevalent in controlling structures.

3. WHY ARE TRUST AND FOUNDATION VEHICLES SUCCESSFUL IN CONTROLLING COMPANIES?

Trust and foundation owned companies outperform those owned directly by investors or families in profitability, growth, stock market valuation, share price appreciation, and other measures.[12] The widespread use of trusts and trust-like private foundations stems from several key advantages, including tax planning, privacy, and flexibility. These factors allow one to become an elusive shareholder. Structures with trusts and private foundations are typically designed to shield wealth from public scrutiny. Wealthy individuals and multi-generational families often spread shareholdings across multiple trusts and foundations, each with unique, unrelated names.[13] As a result, numerous shareholders may collectively meet or surpass the threshold for company control, all while concealing their involvement from public records.

Regarding the transfer of company stock, a trust allows its creator (or grantor) to allocate the associated rights of the stock among three distinct groups:

[9] Gilson, R.: Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy, *Harvard Law Review*, 119(6) 2006, p. 1644.

[10] Ibidem.

[11] Hansmann, H., Thomesn, S.: The Governance of Foundation-Owned Firms, *Journal of Legal Analysis*, 13(1) 2021, pp. 172-174.

[12] Thomsen, S.: Foundation Ownership and Firm Performance. A review of international evidence, in: Driver, C., Thompson, G. (eds.): *Corporate Governance in Contention*, Oxford: Oxford Academic, 2018, pp. 66-85.

[13] Gadhoum, Y., Lang, L. H., Young, L.: Who Controls US?, *European Financial Management: The Journal of the European Financial Management Association*, 11(3) 2005, p. 350.

trustees, income beneficiaries, and remainderpersons. Trustees generally hold management rights, meaning they are the official owners of the stock (as trustees) and have the authority to vote on it, decide whether to sell it, and reinvest the proceeds. Income beneficiaries are entitled to receive all or part of the income generated by the stock, as outlined in the trust agreement. Remainderpersons, on the other hand, are entitled to any remaining assets in the trust when it is dissolved.[14]

A private foundation is typically established by a founder who donates assets, such as shares of stock, to the foundation, which is then governed by a set of rules outlined in its founding documents. The founder usually appoints a board of directors to manage the foundation and oversee its operations. The foundation holds the donated shares, and the board of directors is responsible for making decisions about how to manage, sell, or reinvest the shares to fulfil the foundation's purpose. Income or proceeds generated from the shares are used to support the foundation's activities or are paid to the beneficiaries.[15]

It should be also highlighted that despite the fact that trusts and private foundations support similar activities, and in many jurisdictions without trust traditions, private foundations can be viewed as a substitute to the Anglo-Saxon vehicle, there are constructional differences between the two above mentioned. Firstly, a foundation has a separate legal personality, allowing it to hold full ownership of its assets. In contrast, a trust is not a separate legal entity. All assets in a trust are owned by trustees but do not form part of their personal estate. Instead, they must be maintained as a separate fund for the benefit of beneficiaries or other lawful purposes. Secondly, as a separate legal person, a foundation can sue or be sued in its own name, and creditors may levy execution against it. In contrast, since a trust does not have separate legal personality, it is the trustees who have the legal capacity to sue or be sued, acting on behalf of the trust and its beneficiaries.[16]

This paper does not focus on tax regulation, but for a broader perspective, it is necessary to briefly highlight the tax efficiencies these vehicles may offer, while noting that specific provisions differ by jurisdiction. Both trusts and foundations can reduce inheritance tax by removing assets from the settlor's or founder's estate. Assets, including shares placed in a trust or foundation are

[14] Villalonga, B., Amit, R.: *How Are U.S. Family Firms Controlled?*, *The Review of Financial Studies*, 22(8) 2009, pp. 3047-3091.

[15] Panico, P.: Beyond "legal personality": private foundations as "tax subjects", *Trusts & Trustees*, 18(6) 2012, pp. 471-477.

[16] Schurr, F.: Wealth preservation by using trusts or private foundations in a civil law environment, *Trusts & Trustees*, 25(6) 2019, pp. 587-593.

not subject to inheritance tax upon the death of the settlor or founder. Furthermore, trusts and foundations are designed to prevent the taxation of the same income or asset multiple times. Unlike corporations, trusts and foundations generally avoid double taxation, as income is typically only taxed at the beneficiary or recipient level, not at the entity level. Additionally, foundations and trusts can often avoid capital gains tax on long-term investments, depending on their structure and how the gains are used.[17]

Trusts and foundations are not solely used to conceal beneficiary ownership or evade taxes. In fact, the literature highlights various arguments about the positive economic benefits of these types of vehicles. It is claimed that foundations reduce or even eliminate short-term market pressures, bringing stability to the company's ownership structure.[18] Studies indicate that foundation-owned companies demonstrated greater resilience during the global financial crisis. Another study shows that foundation-owned companies have higher reputation for corporate social responsibility.[19] These arguments, especially those supported by quantitative market data analysis, are undeniably relevant in understanding why these structures are particularly attractive tools for corporate control.

The motives for the deployment of these vehicles in the ownership structures can be commendable or contemptible. Likewise, the impact of this kind of deployment on the macroeconomy and wider stakeholders can be positive or negative. It is symptomatic that researchers investigating trusts and foundations tend to excessively focus on either the positive or negative aspects of externalities, without acknowledging the complexity of these structures or providing a balanced perspective. After all, it is possible to establish a legal entity with the objective of secrecy, while also supporting corporate social responsibility actions. Hiding ownership is not necessarily bad or suspicious *per se*. There are cases, where there is a risk of fraud, harassment or extortion and where it might even be advisable.[20] There is no evidence that the financial crises and

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[17] Hopkins, B., Blazek, J.: *The Tax Law of Private Foundations,* Hoboken: John Wiley & Sons, 2020, p. 35.

[18] Thomsen, S. et al.: Industrial foundations as long-term owners, *Corporate Governance: An International Review*, 26(3) 2018, pp. 180–196.

[19] Børsting, C., Thomsen, S.: Foundation ownership, reputation, and labour, *Oxford Review of Economic Policy*, 33(2) 2017, pp. 317–338.

[20] For instance in the Case C-37/20 that the European Court of Justice received for the preliminary ruling from the Luxembourg District Court, beneficial owner didn't want to reveal their name raising that membership and involvement in a number of commercial companies requires them to frequently travel to countries whose political regime is unstable and where there is a high level of crime, which creates a significant risk of them being kidnapped, abducted subjected to violence or even killed.

shocks resilient foundation-owned companies haven't achieved this superior endurance due to more favourable tax treatment or even evasion. Trusts and foundations offer a degree of elusiveness that may be used in various ways. The popularity of these vehicles as tools to control companies doesn't stem from the particularly benevolent or contemptible nature of these vehicles. The main attribute of these vehicles that enables the full spectrum of controlling variants is elusiveness, which traditional corporate structures cannot guarantee to the same extent. The moral purpose is not what distinguishes trusts and foundations from other legal entities. Purpose, aims, applications – all those aspects depend on the will of the founder, settlor, trustee and beneficiaries. The law may sometimes incentivize or discourage certain activities by providing excessive leniency or insufficient protection. In the context of trusts and foundations, lawmakers face the dilemma of providing regulation that protects other market participants and prevents money laundering, while also ensuring that it does not undermine key attributes of these vehicles, such as flexibility and elusiveness. Another dilemma concerns the empowerment of certain stakeholders of trusts and foundations. In some regulations, the founder wields the most significant powers arbitrarily, while in others, the recognition and protection of the beneficiaries' legal interests are front and centre. Both trusts and foundations are not entities where the balance of power is typically sought. Due to their non-membership nature, these vehicles allow for a highly flexible and potentially arbitrary distribution of power. However, it is important to remember that the distribution of power will ultimately determine how and by whom these legal vehicles are used.

Given the above aspects, it is worth considering whether certain vehicles within the framework of trusts and private foundations are more suited for controlling companies. The main point of consideration is the linkage of purpose of the vehicle with its beneficiaries. Traditionally, both foundations and trusts could not exist with the self-serving (and not beneficiary serving) purpose.[21] That means that a foundation that was established with the solely purpose of investing in and managing assets of all kinds could be denied legal personality by the courts. Traditionally, both foundations and trusts should have a purpose that can be translated into a benefit for specified beneficiaries or for a defined, though possibly open-ended, class of persons. However, the deployment of

[Read] more: Court of Justice of the European Union: Judgment of the Court (Grand Chamber) of 22 November 2022 (requests for a preliminary ruling from the Tribunal d'arrondissement de Luxembourg – Luxembourg) – WM (C-37/20), Sovim SA (C-601/20) v Luxembourg Business Registers (Joined Cases C-37/20 and C-601/20), 22.11.2022.

21 Panico, P.: Private foundations and trusts: just the same but different?, *Trusts & Trustees*, 22(1) 2016, p. 542.

trusts and foundations in financial markets, including building complex structures to control companies, would benefit from self-serving purpose of holding shares without the need to appoint beneficiaries. In response to these needs, some jurisdictions started allowing self-serving purpose trust-like vehicles. In Europe, this type of arrangement is possible under the Dutch and Maltese law, where foundation regulations deviate from the continental model entrenched in Lichtenstein and Austria.[22] The Dutch model is unique because it allows the creation of an orphan structure with the sole purpose of controlling a company. The self-serving nature of Dutch foundations is reinforced by the fact that the founder has no entitlements to the foundation's assets or income. There is no default power to revoke or amend the foundation, nor is there a fiduciary relationship with the foundation's management.[23] It is claimed that the perpetual nature of the Dutch model makes it particularly suitable for controlling assets, including shares.[24]

Globally, a growing trend has emerged in offshore financial centres, characterised by the creation of a new generation of foundations. Regulations in these offshore centres not only permit self-serving purposes but, in some cases – such as in Jersey or St. Kitts – explicitly specify that holding and managing shares can be the sole lawful purpose of a foundation.[25] The Bahamas took a further step by introducing the "executive entity", a new legal vehicle, in a jurisdiction where trusts and foundations were already subject to flexible regulation.[26] An executive entity is a foundation with the specific purpose of carrying out executive functions, such as serving as a shareholder, director, or trustee, and is funded with the assets necessary for its ongoing operations.

These changes in the lawmakers' approach to the purpose of various legal vehicles are a response to global business demands and jurisdictional competition for foreign investment. It is questionable if these market pressures lead to distortion of the concepts behind particular legal structures. It may seem that beneficiaries are inevitably inscribed in the concept of trusts or foundations. They are the primary group for whom these vehicles were originally designed. Recent legislative developments around the world challenge those original as-

[22] Ibidem.

[23] Koele, I.: The Dutch private foundation in comparison with trusts: for the same purpose but rather different, *Trusts & Trustees*, 22(1) 2016, pp. 140-145.

[24] Ibidem.

[25] Panico, P.: Private purpose foundations: from a classic "beneficiary principle" to modern legislative creativity?, *Trusts & Trustees*, 19(6) 2013, pp. 546-547.

[26] Thompson, H., Jupp., C. A.: The Bahamas: the Bahamian foundation and the Executive Entity - an innovative approach to wealth structuring in The Bahamas, *Trusts & Trustees*, 17(6) 2011, pp. 499–507.

sumptions. However, statistics show that in Europe, the most popular vehicle among trust-like entities is the Liechtenstein foundation that does not allow a self-serving purpose.[27] The certainty and stability of a legal system, combined with favourable tax regulations and flexibility, is enough to attract investors. It is still possible to build a controlling structure around beneficiaries. Choosing a jurisdiction that is too lax and designated as non-cooperative by other countries may inevitably raise suspicions and attract increased scrutiny from authorities, market stakeholders, or watchdogs. The self-serving purpose, without any members involved, might be treated as a simplifier for building elusive and flexible controlling structures that few legal entities can offer. Jurisdictions such as the Netherlands leverage self-serving foundations within a stable and internationally recognized legal system, offering investors significant flexibility in structuring holdings. However, this is not the sole determining factor in assessing the practicality of using a foundation or trust for corporate control.

4. CHARACTERISTICS OF POLISH FAMILY FOUNDATIONS

It is often claimed that the legal nature of a private foundation is that it has a corporate structure but operates like a trust.[28] "In the case of the Polish family foundation, the first part of that statement holds true, as the Family Foundation Act appears to be heavily inspired by the Commercial Companies Code (KSH) regulation of limited liability companies.[29] In fact, some articles of the Family Foundation Act appear to be directly taken from the regulations governing limited liability companies without any deeper reflection. The Family Foundation Act consists of 145 articles, which appear to be highly detailed and overly specific. As many as half of the articles are, in some form, borrowed from the Commercial Companies Code. Some scholars argue that establishing the foundation based on familiar legal concepts and institutions is beneficial, as it allows for the avoidance of significant ambiguities or legal gaps.[30] These arguments are flawed for numerous reasons. Firstly, foundations are not corporations. A corporation denotes an association of individuals formed for some common purpose. The ownership is divided into shares, and the members of the company typically elect a board of directors to oversee the company's op-

[27] von und zu Liechtenstein, P. M.: Liechtenstein: a hub for wealth preservation, *Trusts & Trustees*, 22(6) 2016, pp. 681-684.

[28] Panico, P.: Private foundations and trusts: just the same but different?, *Trusts & Trustees*, 22(1) 2016, pp. 132-139.

[29] Commercial Companies Code 2000, (Dz. U. z 2024 r. poz. 18, 96), 26.11.2024.

[30] Moszyńska, A.: New regulation of family foundations in Poland and their usefulness in intergenerational estate planning, *Trusts & Trustees*, 30(3) 2024, p. 124.

erations. Unlike corporations, foundations are legal vehicles without members or shares; therefore, the traditional concept of entity ownership does not exist. A foundation is an entity to hold and manage assets for the benefit of a specific group that is not formally the owner of those assets. This raises the question of how interpretative uncertainties regarding certain legal institutions within foundations could be resolved interpretation *per analogiam* with institutions that share superficially similar terminology but operate within entirely different legal frameworks based on contrasting concepts and disparate stakeholders. Secondly, if lawmakers decide to copy the main concepts from one legal vehicle, which is by far the most popular registered legal form in Poland, to create a new legal vehicle that would be way more preferably taxed, two questions arise. First, does the regulation have such a striking resemblance to that of an existing legal entity? Second, what is the justification of such significant discrepancies in tax burdens imposed on those two very similar legal vehicles? To further understand those issues, the paper will examine the specifics of the regulation in greater detail.

Art. 2 of the Family Foundation Act states that "a family foundation is a legal person established to collect property, manage it in the interest of beneficiaries and provide benefits to beneficiaries. The founder defines the detailed purpose of the family foundation in the statute". The first sentence of this legal definition determines the restriction of self-serving purpose of the foundation. Although self-serving purpose might be useful in building controlling structures, the restriction is quite common among European jurisdictions which may be entrenched in the classic view on the foundation as a vehicle created in the interest of beneficiaries.

The family foundation has a legal personality that separates it from the founder.[31] According to Polish law only a natural person can be the founder, which differs from many other jurisdictions, such as Lichtenstein, where legal persons can also establish a private foundation.[32] A founding capital requirement of 100 000 zloty (approximately 25 000 euros) applies.[33] The founding capital is an equivalent of share capital in companies. It should be highlighted that, as with companies, the foundation's capital does not necessarily need to be composed of cash. The founder can contribute chattel, rights and fixtures. In the context of Polish company law's capital requirements, the founding capital is relatively high in comparison with simple joint-stock companies where the minimum is just 1 zloty (approx. 25 cents) and limited liability companies with the share capital minimum of 5000 zloty (approx. 1250 euros). The only

31 Art. 2, Family Foundation Act.

32 Art. 11, Family Foundation Act.

33 Art. 17, Family Foundation Act.

company with the same minimum capital threshold is a joint-stock company.[34] In literature, it is usually claimed that share capital in companies has three main functions: 1) creditors' protection; 2) source of initial assets necessary to start operations; 3) so called "seriousness verification".[35] The relevance of those functions is often questioned.[36] It is pointed out that share capital is in fact just an accounting ledger without real impact on creditors protection nor evaluation of "seriousness" of the venture. That is why in many jurisdictions postulates have emerged to liberalise or even abolish this legal institution.[37] Those postulates were reflected by the Polish legislator enacting regulation of a simple joint-stock company in 2019, first new legal vehicle in the Commercial Companies Code since the Code had come into force in 2000, in which the capital minimum was lowered to just symbolic 1 zloty. The legislator decided to deviate from capital requirements that has rather abstract dimension in favour of actual balance sheet and cash flow state of affairs by introducing liquidity and solvency tests. This was a legislative manifestation of the modernising approach to the company law. Nevertheless, four years later when the Polish legislator decided to introduce another new vehicle with a separate legal personality – the family foundation – the capital requirements were set unusually high for the Polish law. The reason for this lies in the nature of foundations. Although share capital and founding capital serve similar functions, namely to provide those entities with initial assets, they do so in legal vehicles of a different nature. While a company, as a corporation, is an association of individuals, a foundation is a structure without members, based solely on what has been contributed to it. A company without capital still has its members, whereas a foundation without capital is "empty". That is why, in other jurisdictions, capital requirements have also been kept at relatively high thresholds (higher than in Poland). For example, in Austria, the requirement is 70 000 euros[38], and in Liechtenstein, it is 30 000 euros.[39] However, some jurisdictions take a more liberal approach to capital requirements, such as the Netherlands, where the law does not require a minimum capital.[40]

34 Bilewska, K., Chlopecki, A.: *Prawo handlowe*, Warsaw: C.H Beck, 2024.

35 Ibidem.

36 Romanowski M.: Kapitał zakładowy - ani to Graal, ani święty, *Monitor Prawa Handlowego*, (3) 2014, pp. 40-44.

37 Ibidem.

38 Petritz, M., Kampitsch, A.: Austria: The Austrian Private Foundation, *Trusts & Trustees*, 20(6) 2014, p. 543.

39 Amt Für Justiz Fürstentum Liechtenstein: Factsheet concerning the foundation (Art. 552 to Art. 41 of the Liechtenstein Persons and Companies Act ("PGR"), 2022, p. 4.

40 Langereis, C., Düzgün, O.: The Netherlands: the Dutch foundation--a vehicle for effective business solutions, *Trusts & Trustees*, 17(6) 2014, pp. 577-580.

The family foundation may have three bodies in its governance structure. The first is the mandatory management board, which is tasked with running and representing the family foundation.[41] This body may consist of either a single member or multiple members and may include both the founder and the beneficiaries.[42] The main duty of the management board is to ensure that the foundation's activities align with its purpose. Additionally, the board is responsible for maintaining both the liquidity and solvency of the foundation. Issues related to liquidity and solvency include, among other things, the foundation's liability for its obligations. It should be emphasized that a family foundation is jointly and severally liable for fulfilling the founder's maintenance obligations, including debts incurred by the founder prior to the foundation's establishment. Consequently, the transfer of assets to a family foundation must not worsen the financial position of the founder's creditors. However, the founder is exempt from liability for the foundation's obligations.[43]

The second mandatory body in the family foundation structure is the assembly of beneficiaries. The authority to appoint members of the assembly lies with the founder.[44] Depending on the provisions of the statutes and the founder's intentions, the assembly may include certain beneficiaries or all of them. Individuals outside the group of beneficiaries cannot be appointed to this body. The assembly is responsible for adopting significant resolutions regarding the foundation's operations, such as: 1) approving the financial statements of the family foundation for the previous financial year; 2) granting discharge to the members of the management board for their performance of duties; 3) deciding on the distribution or coverage of the net financial result.[45]

It is worth noting that in limited liability companies, resolutions on these same key issues are reserved for the general meeting, which serves as a membership and ownership body of the company.[46] In such companies, shareholders hold these rights due to their capital participation in the company and the associated risks they bear. Shareholders voluntarily join the company in order to pursue its objectives. In contrast, foundations are created by the founder, not the beneficiaries. Beneficiaries do not join foundations voluntarily but are appointed by the founder. For this reason, there is no justification for beneficiaries to have default authority to pass resolutions on key aspects of the foundation's opera-

41 Art. 54, Family Foundation Act.

42 Art. 56, Family Foundation Act.

43 Art. 16, Family Foundation Act.

44 Art. 70, Family Foundation Act.

45 Art. 72, Family Foundation Act.

46 Art. 231, Commercial Companies Code 2000.

tions. While the founder should have the discretion to allocate such powers to beneficiaries when deemed appropriate or necessary, the law should not grant these powers by default. Principally, the mandatory status of the assembly of beneficiaries should be reconsidered. The most successful European private foundation regulations do not require beneficiary bodies by law; instead, they are established only if the founder chooses to include them.

The third body listed in the Family Foundation Act is the supervisory board. Unlike the first two bodies, the supervisory board is optional unless the foundation has more than 25 beneficiaries.[47] As a general rule, the supervisory board is intended to oversee the management board.[48] However, the founder may enhance its powers by including specific provisions in the statute, such as requiring the supervisory board's prior consent for certain management board actions. In principle, a supervisory body can be a valuable element in a foundation's governance structure. However, the Polish implementation of the supervisory board seems to have been directly copied from limited liability company regulations without much thought. The distinction between when the supervisory board is optional and when it is mandatory mirrors that of limited liability companies.[49] The Commercial Companies Code uses the arbitrary threshold of 25 members to distinguish closely held companies from more widely held ones. While this distinction is reasonable in the context of limited liability companies, which can be either closely or widely held, it is less relevant for foundations. Foundations cannot be evaluated based on how they are "held" by beneficiaries, as beneficiaries do not "own" the foundation.

Polish law grants founders a dominant position in the governance of a foundation. Founders have the authority to establish the foundation's governing rules through its statutes and may simultaneously act as beneficiaries, members of its governing bodies, and even the sole member of its board. In such cases, they can unilaterally decide to dissolve the foundation.[50] Founders also retain the discretion to amend the statutes, as they determine the terms for any changes within the statutes themselves. In the event of a family foundation's dissolution during the founder's lifetime, the founder is exclusively entitled to the foundation's assets, unless otherwise stipulated in the statutes.[51]

With regard to beneficiaries, their rights are determined by the founder in the foundation's statutes. In addition to these rights, the law guarantees beneficia-

[47] Art. 64, Family Foundation Act.

[48] Art. 65, Family Foundation Act.

[49] Art. 213, Commercial Companies Code.

[50] Art. 87, Family Foundation Act.

[51] Art. 103, Family Foundation Act.

ries the right to access information about the family foundation's operations, either personally or through a designated representative. Specifically, beneficiaries have the right to: 1) inspect the foundation's documents, including its statutes, financial statements, and accounts, and to make copies or notes from these documents; 2) request explanations from the management board.[52]

This right to information is modelled after the right of shareholders in a limited liability company.[53] However, transplanting a legal mechanism designed for a member-based entity into a non-member structure like a foundation is fundamentally flawed. This is not to say that beneficiaries should lack any means to acquire information about the foundation's operations, especially if the legal system recognizes their interest in the foundation's assets. However, the mechanisms for providing such information should be proportional to the relationship between the foundation and the beneficiaries. Beneficiaries are not members of the foundation and can, at any time during the founder's lifetime, be deprived of their interest in the foundation through a discretionary decision by the founder. This makes their position fundamentally different from that of limited liability shareholders, who cannot lose their membership unless narrowly defined legal conditions are met.

Finally, even if this paper does not aim to provide a detailed analysis of tax regulations, the main advantages of tax regulation should be highlighted. Contributing assets to a family foundation does not trigger taxes or generate income for the founder under personal income tax. Although a family foundation is technically subject to corporate income tax (CIT), it enjoys an exemption from income tax due to its special tax status. As long as the foundation does not distribute benefits to its beneficiaries, it will not be subject to CIT. Additionally, any dividends received from companies in which the foundation holds shares are not taxed. Only when benefits are paid to beneficiaries or the foundation is dissolved will CIT be applicable at a rate of 15%. However, beneficiaries who are part of the founder's immediate family are exempt from PIT, while those from the extended family face a reduced tax rate of 10%.[54]

It seems unjustifiable to tax family foundations and limited liability companies so differently, especially considering that the detailed regulatory provisions governing these entities are so similar. It appears that the Polish family foundation was established primarily to offer various tax advantages, without providing a clear rationale for this distinction.

[52] Art. 42, Family Foundation Act.

[53] Art. 212, Commercial Companies Code.

[54] Moszyńska, A.: New regulation of family foundations in Poland and their usefulness in intergenerational estate planning, *Trusts & Trustees*, 30(3) 2024, p. 123.

In the first year of the new law's implementation, nearly 2,000 foundations were registered, including even a few to which families contributed controlling blocks of shares listed on the Warsaw Stock Exchange.[55] These statistics allow for the assumption that the law gained considerable interest. However, in recent months, the Ministry of Finance proposed changes to the taxation of the family foundation that aim to tax the sale of assets by the foundation. The Ministry claims to have observed a phenomenon where assets are transferred to a foundation and subsequently quickly sold.[56] This may suggest that individuals are transferring assets into foundations solely to facilitate their tax-free sale. The proceeds from such transactions are then used, for example, to acquire a company or its shares, thereby achieving two objectives. First, the individual avoids taxes that would apply if the transaction were conducted outside the foundation. Second, the individual acquires a company, the dividends from which – when held within the foundation – remain tax-exempt. The Ministry's proposal envisage that the sale of assets contributed to the foundation by the founder, beneficiaries, or related entities should be subject to a 19% tax.[57]

Statements and plans from the Ministry suggest that family foundations gained significant popularity in Poland during the first year of the law's implementation. However, this popularity may not stem from the foundation's unique legal nature, which filled a gap in Polish law where no trust-like entity previously existed. Instead, it likely arises from the tax benefits associated with family foundations – though not necessarily the long-term advantages typically linked to foundations and trusts. Rather, the appeal seems to be more transactional in nature.

5. DOES THE POLISH FAMILY FOUNDATION HAVE A CHANCE TO BECOME AN ELUSIVE SHAREHOLDER?

In light of the above analysis, the Polish foundation does not appear to be a particularly attractive legal vehicle for use in controlling structures when compared to more established equivalents in other jurisdictions. The Polish foundation was designed by the legislator to resemble a company, treating ben-

[55] Zalewski, L.: Ministerstwo chce mocniej opodatkować fundacje rodzinne. I to już po roku od ich powstania, *Business Insider*, 14.07.2024, <https://businessinsider.com.pl/prawo/podatki/ministerstwo-finansow-planuje-zmiany-w-opodatkowaniu-fundacji-rodzinnej/6yq3w6k>, last accessed on 01/12/2024.

[56] Zalewski, L.: Ministerstwo uderzy podatkami w fundację rodzinną? Są konkrety, *Business Insider*, 21.07.2024, <https://businessinsider.com.pl/prawo/podatki/fundacja-rodzinna-sa-konkretne-plany-mocniejszego-opodatkowania/7rx9xmf>, last accessed on 01/12/2024.

[57] Ibidem.

eficiaries almost as if they were owners of the foundation. In doing so, the legislator introduced a robust two-tier governance model, further reinforcing its similarity to a limited liability company. One could argue that, aside from its preferential tax treatment, the family foundation offers little beyond what is already provided by the Commercial Companies Code. The Polish family foundation should thus be considered more of a *quasi*-company than a trust-like organization.

A *quasi*-company lacks the key attributes that make trusts and trust-like foundations so attractive for building controlling structures. It is neither elusive nor flexible. Instead, it is structured and operates like a company. As a result, one might as well rely on a traditional company rather than resort to this untested legislative innovation.

Does this mean that the Polish foundation has nothing to offer to foreign investors building controlling structures? From the perspective of gaining control over a company, the exceptionally strong position of the founder may warrant some positive recognition. For instance, in Liechtenstein, founders can retain certain rights, such as appointing or dismissing beneficiaries, amending the foundation documents, or even revoking the foundation. Founders can use bylaws to regulate key matters like the list of beneficiaries and the distribution of assets. These bylaws are not publicly accessible, unlike the foundation charter.[58]

By contrast, in the Netherlands, the position of the founder is very weak. The founder does not hold any special or reserved rights regarding the constitution or governance of the foundation. Under Dutch law, a foundation is not viewed as the 'institutionalisation' of the founder's intentions.[59] The founder has no rights related to the foundation's validity and possesses no inherent power to revoke or amend the foundation. Proponents of the Dutch model argue that this weak position of the founder enables the creation of a truly "orphan" structure, one that completely separates assets from the legal interests of any individuals apart from the foundation itself.[60] However, in practice, the strong powers granted to founders in other systems tend to enhance operational efficiency, particularly in complex controlling structures. In the Polish model, the founder does not relinquish control over the assets held within the foundation at any point. This enables the founder to respond quickly and adapt the foundation to

[58] Amt Für Justiz Fürstentum Liechtenstein: Factsheet concerning the foundation (Art. 552 to Art. 41 of the Liechtenstein Persons and Companies Act ("PGR"), 2022, p. 3.

[59] Koele, I.: The Dutch private foundation in comparison with trusts: for the same purpose but rather different, *Trusts & Trustees*, 22(1) 2016, p. 141.

[60] Ibidem.

current needs. However, under Polish regulations, these significant powers have been unnecessarily curtailed by granting beneficiaries overly extensive rights, effectively positioning them within the foundation as if they were co-owners.

6. CONCLUSION

The new Polish family foundation is unlikely to attract foreign investors as an alternative to the well-established foundations in Europe, such as those in Liechtenstein or the Netherlands, let alone the vehicles offered by offshore jurisdictions. Some may argue that the Polish legislator never intended to compete with these well-established private foundation jurisdictions but rather sought to provide a convenient tool for Polish families' succession planning. That might be true. However, it is worth remembering that even Polish families considering wealth management and succession planning may opt for international legal vehicles over the domestic alternative.

The Family Foundation Act appears to be a hastily drafted piece of legislation incorporating ill-considered legal mechanisms directly borrowed from company law. As a result, it fails to reflect the fundamental nature and advantages of trust-like entities. It could be argued that the family foundation introduces no novel elements to the Polish legal system that investors could not already utilise. As such, it may be viewed as an unnecessary duplication of the existing regulations governing limited liability companies.

Favourable taxation alone may not be sufficient to justify its relevance to the Polish legal system. Time will tell whether Polish families or even foreign investors discover in the family foundation the qualities of an elusive shareholder. At present, those qualities remain imperceptible.

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