



FOUNDATIONS AS A KEY TO SUCCESSFUL SUCCESSION PLANNING: OPPORTUNITIES, RISKS AND LEGAL ASPECTS

The foundation is increasingly a central element in succession planning, particularly in the organisation of corporate groups and the transfer of assets. Not only can it play a key role in securing the inheritance and the company structure, but also in risk minimisation and tax optimisation.

The foundation is said to have miraculous effects in the organisation of corporate groups, especially when they are owner-managed. However, without the judgment of professional advice, a promising project can quickly end in a fiasco.

In this article, we answer the most important questions about foundations and provide a legal overview from some of our alliance countries to give you a sound understanding of the various aspects and challenges.

I. WHAT IS THE FOUNDATION'S IMPORTANCE FOR SUCCESSION PLANNING?

Germany & Austria

In fact, the establishment of a foundation is becoming increasingly common in multi-tier corporate structures, i.e., those consisting of a large number of individual companies. The establishment of a foundation is also a good option for the transfer of significant assets to individuals. There are many reasons for choosing a structure with a foundation. On the one hand, the founder may be interested in preserving his assets or his life's work in a certain form, which he may not consider to be guaranteed in view of the usual inheritance process with his heirs. However, the foundation is also

a suitable instrument for mitigating liability risks. However, tax considerations also play a very important role and can have a very positive effect on the preservation of the foundation's assets and its income. The latter issue in particular is perceived as a main driver for the establishment of a foundation.

Poland

As regards the issue of foundations, until the introduction of the family foundation (2023), the foundation in Poland was not an institution serving succession planning or asset protection along the lines of, for example, Austrian private foundations. A foundation in Poland is a non-profit organisation that usually pursues charitable purposes.

In the following, reference is therefore made exclusively to the family foundation, as this is the only one that is relevant in the context of the Polish legal situation.

A family foundation makes it possible to separate family assets from those of individual family members. This protects the assets from being divided as a result of, for example, disputes. It ensures that the assets remain in the family and are managed according to the wishes of the founder. With a family foundation, it is possible to precisely define the rules for inheritance and the administration of assets after the death of the founder. This minimises the risk of conflicts between heirs. The foundation can hold shares in the family business, which enables stable company management even if subsequent generations are not directly involved in the operational business. A family foundation is a permanent establishment.



Slovakia

Foundations generally play an important role in succession planning, particularly with regard to protecting and passing on family wealth across generations. Transferring assets to a foundation ensures that the assets are managed in accordance with the specified objectives and protected from potential external claims. This provides stability and continuity for family businesses and facilitates an orderly transfer of assets to descendants. However, foundations in the above-mentioned sense (private foundations) do not yet have a legal basis in Slovakia and therefore no tradition.

Czech Republic

In the Czech Republic, succession planning is becoming increasingly important, especially for family businesses that were founded in the 1990s and are now facing a generational change. An effective instrument for this can be the establishment of a foundation, which as a legal entity consists of assets dedicated to a specific purpose. Czech law distinguishes between foundations with endowment capital that ensures their long-term sustainability and foundation funds that do not require such capital. Using a foundation can ensure the continuity of the family business, protect assets from risks and fulfil specific goals of the founder.

Turkey

Under Turkish law, foundations are primarily intended for charitable or cultural purposes, but can also be used for family purposes. Since a foundation is created by transferring a certain amount of assets from the founder to the foundation, assets, ranging from company shares to real estate, are protected from fragmentation or sale and managed according to the wishes of the founder. In order to avoid family conflicts and not to fragment the inheritance, a foundation can be chosen; the statutes regulate the purpose for which the assets must be used. At the same time, family businesses or other assets can take advantage of possible tax benefits (e.g., income tax, corporate tax, inheritance tax). The extent depends on the purpose and status of the foundation.

II. WHAT STEPS MUST BE TAKEN WHEN SETTING UP A FOUNDATION?

Germany

The establishment of a foundation requires very precise planning, which often proves to be challenging on the part of the founder together with the consultant. The formal costs of establishing a company are significantly higher than is the case with the constitution of a GmbH (under normal circumstances) or any other legally regulated company. When planning a foundation solution, the main decisions to be made include whether the foundation should be a legal entity or a non-legal entity, whether the foundation should be non-profit or related to particular (family) interests, and where the foundation should be based. The latter follows from the fact that the legal basis for the foundation is anchored in the laws of the states of the Federal Republic of Germany and its regulation is carried out by the responsible state authorities. For this reason, foundations are treated differently regionally.

Austria

The establishment of a foundation requires a declaration of foundation by one or more founders (natural or legal persons). The declaration of foundation can either consist of the foundation deed alone or also of a supplementary foundation deed, which must be drawn up in the form of a notarial deed. The foundation deed must contain a minimum content specified by law. In the event that the declaration of foundation consists of a foundation deed and a supplementary foundation deed, a corresponding reference must be included in the foundation deed. Only the additional document is publicly accessible in the company register. The private foundation must have assets of at least EUR 70,000.00. The foundation is created upon its entry in the commercial register.

Poland

The basic document in establishing a foundation is the statute, which is written by the founder. As soon as the final wording of the statutes has been determined, the founder es-



establishes the foundation by means of a notarial deed, which also specifies the circle of beneficiaries of the foundation. From the moment of its establishment, the foundation is in the “in formation” stage, which means that it can enter into obligations, sue and be sued. A foundation acquires full legal personality when it is entered in the register of family foundations. Each foundation must have its own registered office, a NIP, REGON number, bank details and be registered in the Central Register of Beneficial Owners.

Slovakia

In Slovakia, a “foundation” means a community of property that serves to support a charitable purpose. A statutory regulation of private foundations is still lacking. Establishing a foundation in Slovakia involves drawing up a foundation charter, which contains the name and registered office of the foundation, the charitable purpose, the identification of the founders, the value of the foundation capital (at least 6,638 euros) and other information. The value of each donor’s capital contribution must be at least 663 euros. The foundation’s bodies are then appointed. The foundation is registered in the foundation register.

Czech Republic

Establishing a foundation in the Czech Republic requires the creation of a public foundation charter containing information on the name, registered office, purpose, founder, amount of contributions (at least CZK 500,000), bodies and conditions for granting foundation contributions. The founder must contribute assets worth at least CZK 500,000, which can consist of either cash or material assets, provided that they are profitable and not legally encumbered. A board of directors consisting of at least three members and a supervisory board or auditor must be appointed. Finally, the foundation is entered into the foundation register maintained by the registry court.

Turkey

The founder determines the purpose, assets and organisational structure (e.g., board of directors, board of trustees, control bodies) of the

foundation; the details are regulated in the statutes. In Turkey, the articles of association must be notarised, registered with the court and registered with the General Directorate of Foundations. Only upon registration does the foundation acquire legal personality and the assets are transferred to the foundation. This is often no more complicated than starting a business, but it does require careful planning. By law, minimum assets and purpose requirements apply; anyone wishing to become a non-profit organisation must comply with the requirements of the General Directorate for Foundations and other authorities.

III. WHY IS THE IRREVERSIBILITY OF WEALTH ALLOCATION SO CRUCIAL?

Germany & Austria

When establishing a foundation, one must be aware of the nature of a foundation right from the start. The foundation becomes independent with the assets currently and in the future allocated to it from the founder and his family. The assets contributed must serve the purpose of the foundation and cannot simply be reclaimed by the founder or his family. On this basis, the statutes can no longer be changed in principle after the foundation has been established. It is by no means the case, as with a GmbH or any other form of company, that the founder controls the foundation and, from a corresponding position of power, can change its articles of association or statutes at any time in order to adapt them to changed needs on a factual or personal level. Inadequate planning when establishing a foundation can therefore have disastrous consequences.

Poland

The irreversibility of the allocation of assets is crucial for several reasons arising from the nature and objectives of a family foundation. The assets transferred to the family foundation are no longer the property of the founder, which means that they cannot be the subject of claims arising from the founder's personal obligations. This enables the foundation to operate independently of the founder's financial



circumstances, ensuring the stability of its activities and the protection of its assets from potential creditors. The irreversibility of the asset allocation eliminates the risk that the founder changes his mind and withdraws the assets, which could jeopardise implementation of the foundation's objectives.

Slovakia

The irreversibility of the transfer of assets is crucial in the Slovak legal system as it ensures that after the transfer, the assets cannot be arbitrarily returned or used in a manner other than originally agreed. This ensures legal certainty for the purchaser and the stability of the ownership structure. For example, according to Act No. 92/1991 Coll. on the conditions for transferring state assets to other persons, the transfer is invalid if the transferee does not comply with the established procedures for dealing with the transferred assets.

Czech Republic

The irreversibility of the asset allocation is of crucial importance in Czech law, as it ensures the permanent separation of the assets from the founder and their protection against future claims or changes. This irreversibility strengthens the credibility of the foundation, as donors and supporters can be sure that the assets will be used exclusively for the specified purpose. In addition, irreversibility prevents possible manipulation or misuse of the assets and ensures the integrity and stability of the foundation. It is therefore essential to carefully consider all relevant aspects when establishing a foundation and transferring assets under Czech law in order to ensure sustainable and effective management.

Turkey

Unlike corporate forms such as the GmbH, the assets contributed to the foundation are ultimately transferred to the foundation and therefore no longer belong to the founder. Recovery is usually excluded. This irreversibility protects the foundation capital from access by individual family members and the founder's wishes, as set out in the statutes and in the foundation register, are safeguarded in the long

term. The irrevocable transfer of assets also strengthens trust in the foundation. Since the foundation's assets do not become part of the estate after the death of the founder, inheritance disputes or compulsory share claims can largely be avoided.

IV. WHAT ARE THE TAX BENEFITS AND RISKS OF A FOUNDATION?

Germany

On the other hand, the foundation's opportunities, at least in individual cases, lie in a substantially improved preservation of the assets contributed to the foundation. By transferring his assets to a foundation, the founder can avoid the dissolution of his assets by his heirs after his death or, in the case of anticipated inheritance, during his lifetime. In this way, disputes between the heirs can also be avoided. Significant tax advantages for the assets contributed to the foundation are also among the opportunities associated with establishing a foundation. However, there are a number of misunderstandings at this point, including the misconception that the establishment of a foundation would eliminate all tax burdens on the assets contributed.

Austria

Foundations still offer certain tax advantages. The taxation of private foundations in Austria comprises three levels: Donations to the foundation are subject to the foundation entry tax of 2.5%, which puts it at a disadvantage in tax terms than other legal forms. The ongoing taxation is similar to that of a GmbH, whereby profit distributions are tax-free, but income is subject to corporation tax. A tax advantage is the transfer of hidden reserves from the sale of investments to new investments. Distributions to beneficiaries are charged 27.5% capital gains tax.

Poland

A characteristic feature of family foundations is that the obligation to tax the income is only shifted at the time it is paid out to the benefi-



ciaries. As long as the foundations' income is at their disposal, they are practically tax-free. However, it should be noted that a family foundation may not maintain every commercial business operation. The list of permitted business activities is very limited and any deviation from this list results in this income being taxed at a penalty rate of 25%.

Slovakia

Foundations can take advantage of several tax benefits in Slovakia. Income from gifts, inheritances or the share of taxes paid are not subject to income tax. In addition, income from the activities for which they were founded is tax-free, unless it is income from the sale of assets, rental income, advertising or membership fees. On the other hand, foundations also face tax risks. If they generate income from business activities, this is subject to taxation. The foundation is obliged to keep accounts and file a tax return, strictly separating income from its main activity from income from business operations.

Czech Republic

Foundations in the Czech Republic can benefit from tax advantages, such as exemption from income tax on certain income, such as income from donations or inheritances. In addition, donors can tax-deduct the contributions they make to foundations. On the other hand, foundations are subject to taxation on income from business activities or rental income, unless these are tax-exempt. Risks include the possible misuse of tax advantages, which can lead to tax audits and sanctions. It is therefore essential to consistently comply with legal regulations and ensure transparent accounting.

Turkey

Charitable foundations can be tax-exempt under certain conditions. Income (rents, dividends, donations, etc.) is taxed differently depending on the purpose; donations often offer additional benefits. For purely private or family-oriented foundations, however, regular tax rates usually apply. Unclear statutory provisions lead to problems with the tax authorities, and if the purpose is not met, the company may

be dissolved or reassigned. Therefore, foundations are strictly controlled.

V. WHAT ARE THE SPECIAL FEATURES OF A FAMILY FOUNDATION?

Germany

This is in contrast to the so-called family foundation, which does not pursue a charitable purpose. In principle, this family foundation must be treated like an external third party with regard to transfer transactions under inheritance and gift law. The assumption that the transfer of assets to the family foundation is tax-free is a mistake. However, there are also tax privileges that can make the implementation of a family foundation in a corporate conglomerate appear attractive from a tax perspective.

Austria

A characteristic feature of a family foundation is that it is fundamentally designed to span generations. Family foundations are primarily intended to support and provide for family members, as well as to preserve family assets (protecting assets from being destroyed by divorce, inheritance or creditors). They are therefore often referred to as "self-serving" foundations. Family foundations therefore do not pursue a charitable purpose. The family foundation is often chosen as an instrument for company succession. The founder(s) determine specifically who should receive benefits. Sub-foundations can also be established to separate beneficiary spheres or groups.

Poland

The primary purpose of a family foundation is to protect family assets and to ensure their growth and long-term management. It may also pursue other objectives, such as supporting specific family, educational or charitable initiatives. In principle, a family foundation does not conduct any commercial business operations. An exception is asset management, e.g., real estate rental, shares in companies,



securities trading or investing financial surpluses. The assets contributed to a family foundation become its property. This is important in connection with the protection against a division of assets, e.g., as the result of a divorce.

Slovakia

Since there is no separate legal regulation for family foundations in Slovakia, interested parties often seek to protect their family assets abroad. Due to the proximity of the Slovak and Czech Republics (similar legal environment, minimal language barrier, frequent investments of Slovaks in the Czech Republic, etc.), Slovak entities often use the Czech solution of foundation and trust funds.

Czech Republic

In Czech law, a family foundation is a foundation or endowment fund that serves to support the founder or persons close to him. In contrast to charitable foundations, it pursues a private purpose, which influences its tax status. The assets are separated from the founder's property and managed by the foundation, thus protecting them from fragmentation or unwanted interference. The foundation is managed by a board of directors, which often consists of the founder himself or persons appointed by him. When establishing a family foundation, it is important to carefully consider legal, economic and tax aspects to ensure efficient management of family assets.

Turkey

Instead of the common good, the foundation can also primarily pursue family interests; in this case, different tax rules apply than for non-profit foundations. A family foundation serves to support family members with regard to their upbringing and education, their equipment and other financial support and is intended to secure assets for relatives (e.g., children, grandchildren) in the long term. The articles of association can include provisions regarding dividends, scholarships or educational support. Purely family purposes exclude some tax exemptions, but certain tax planning can be car-

ried out by transferring the assets to the foundation.

VI. WHAT ARE THE CHALLENGES OF CROSS-BORDER FOUNDATIONS?

Germany

Another special topic is the establishment of a foundation abroad to which assets located (primarily) in the country are transferred. Such an arrangement can prove to be quite attractive if the foundation located abroad is treated even more favourably in terms of taxation than its counterpart based in Germany, for example with regard to the income to which it is entitled as a shareholder. However, concepts of this kind are particularly challenging because an international or EU harmonisation of the tax and legal treatment of foundations would be urgently required.

Austria

The primary challenge for a cross-border foundation is the recognition of the foundation's legal personality abroad. Different countries have different legal requirements for foundations. In some EU member states, foundations must be e.g., community-oriented. Family foundations would therefore be prohibited in these countries. Many countries impose additional requirements for a foundation that has been validly established (domestically) to be able to operate abroad. Furthermore, due to the cross-border activities of a foundation, it may be supervised by several states, which may result in different obligations for the foundation. Ultimately, tax law challenges can also arise.

Poland

Cross-border foundations face many challenges related to cultural, legal, organisational and financial differences. Each country has its own regulations governing foundation activities, including registration, tax and accounting requirements. In practice, the harmonisation of these rules for cross-border activities is very difficult. For foundations managed across bor-



ders, it may be difficult to determine their country of actual residence if the foundation's board of directors is resident in a country other than the country in which they were established. Then it may turn out that the foundation loses its status of Polish tax residence and its transparency is assessed under foreign law.

Slovakia

Establishing and managing a cross-border foundation presents challenges such as aligning different legal frameworks, complying with tax regulations in multiple countries and meeting administrative requirements. Therefore, careful planning and advice from experts in international law and tax are essential.

Czech Republic

Cross-border foundations face several challenges under Czech law. Legal differences between countries can make the recognition and regulation of such foundations difficult, which affects their functioning. Tax hurdles arise from different national tax regulations, which can affect tax relief for donors and the taxation of foundation income. The administrative burden increases due to different reporting and administration requirements in each country. In addition, cultural differences and language barriers can make cross-border cooperation difficult. These factors can significantly affect the efficiency and effectiveness of cross-border foundations.

Turkey

If a Turkish citizen establishes a foundation abroad or transfers assets located in Turkey to a foreign foundation, both Turkish law and the law of the founding state apply. Double taxation agreements and international standards must be observed. When transferring, for example, real estate or shares in companies abroad, Turkish tax and foreign exchange regulations apply. Foreign foundations may be

subject to control by the Director General of Foundations, the financial authorities or other authorities, and cross-border audits are often very complex.

CONTACT

Austria:

Michaela Nill
M.Nill@saxinger.com

Germany (Düsseldorf):

Johannes Thoma
Johannes.Thoma@schindhelm.com

Germany (Hanover):

Siegrid Lustig
Siegrid.Lustig@schindhelm.com

Germany (Osnabrück):

Christian Reichmann
Christian.Reichmann@schindhelm.com

Poland:

Marcin Śledzikowski
Marcin.Sledzikowski@sdzlegal.pl

Slovakia

Gabriela Janíková
Janikova@saxinger.com

Czech Republic:

Monika Wetzlerova
Wetzlerova@saxinger.com

Turkey:

Gürkan Erdebil
gurkan.erdebil@schindhelm.com