

ASEJ

Scientific Journal

Bielsko-Biala School of Finance and Law

Volume 26 | Number 4 | December 2022

ISSN2543-9103
eISSN2543-411X
www.asej.eu



Bielsko-Biala

Bielsko-Biala School of Finance and Law
Wyższa Szkoła Finansów i Prawa w Bielsku-Białej

Scientific Journal
Zeszyty Naukowe

Academic Quarterly Publication
Vol 26, No 4 (2022)

Bielsko-Biala 2022

Scientific Journal of Bielsko-Biala School of Finance and Law

The Journal is published by Bielsko-Biala School of Finance and Law; ISSN 2543-9103, eISSN 2543-411X.

The Journal is a quarterly publication with the scoring of 70 assigned by the Polish Ministry of Education and Science, prompting quality scientific work with local and global impacts, conducting a peer-review evaluation process and providing immediate open access to its content. The publication features original research papers as well as review articles in all areas of science, with particular emphasis on social sciences (including Finance, Economics, Business, Law, Internal Security) and technical sciences (especially IT).

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Bielsko-Biala School of Finance and Law University Press
ul. Tańskiego 5, 43-382 Bielsko-Biała;
tel. +48 33 829 72 42, fax. +48 33 829 72 21; <http://www.wsfip.edu.pl>; <http://asej.eu>

ISSN 2543 – 9103 eISSN 2543-411X

December – 2022

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Editorial Words

Dear esteemed readers,

It is my great pleasure to welcome you to the latest edition of ASEJ, the academic journal that brings you the latest research in the fields of law, economics, logistics, finance, psychology, criminology, computer science, and security. This issue features a diverse range of articles from leading experts in these fields, showcasing their latest research and insights into current trends and challenges.

As we continue to face unprecedented challenges and rapidly evolving technological advancements, it is more important than ever to stay up-to-date with the latest research and trends in these fields. This issue of ASEJ offers valuable insights and perspectives that are essential for anyone seeking to stay at the forefront of their respective disciplines.

We would like to take this opportunity to express our sincere gratitude to the authors for their hard work and contributions to the advancement of knowledge. We would also like to acknowledge the invaluable support of the Bielsko-Biala School of Finance and Law for their continued commitment to publishing this journal, which serves as a platform for the exchange of the latest knowledge and insights.

Virtual reality (VR) technology has been advancing at a rapid pace, and with its growth come a range of challenges in various fields, including economics, law, security, and computer science. In the realm of economics, one challenge is determining how to integrate VR technology into existing business models. VR has the potential to revolutionize the way companies conduct business, but it also requires significant investment and infrastructure to do so. Additionally, there are concerns about how VR will impact the job market, as it could potentially eliminate the need for certain types of jobs while creating new ones in the VR industry.

In this issue, we also explore the growing significance of virtual reality in law, economics, finance, and security. As VR technology continues to evolve, it presents both opportunities and challenges in these fields. For example, in economics, VR has the potential to revolutionize the way businesses operate, but it also requires significant investment and infrastructure. In law, the use of VR raises important questions around data protection, privacy, and intellectual property rights. In finance, VR can be used to enhance customer experiences and provide new insights into investment opportunities. In security, VR presents new risks and challenges, such as ensuring the safety of users and protecting sensitive data from cyber threats.

We hope that this issue of ASEJ will prove insightful and informative for our readers, and we look forward to your feedback and contributions in future editions.

Sincerely,

Dr Muhammad Jammal
Editor of the ASEJ, Issue 4, Volume 26, 2022

"Family office" development in Poland - true or fiction? Legal analysis

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Abstract— The article is a brief analysis of the legal understanding and functioning of the concept of "family office" at the present time. In the work, the author starts from the definition - what is a "family office", gives statistical data on the organizational forms operating in this way, discusses the specifics of the "family office", the identification of the "family office" against the background of the Polish Law on Foundations and the Law on Investment Funds and Management of Alternative Investment Funds, and addresses the issue of conflicts of interest of the "family office" arising from the Law on Investment Funds and Management of Alternative Investment Funds. The work answers the question - whether in Poland it is possible to create "family office" entities by wealthy families similar to such entities in Western countries.

Keywords— family office, legal analysis, investment funds, statistics, regulations.

I. INTRODUCTION

Both in Polish, foreign and European legislation there is no legal definition of "family office" despite the fact that the term is not new, has become extremely popular and encompasses many meanings. In foreign professional studies, some authors indicate that the term "family office" includes all forms of organizations and services involved in the management of greater private wealth (Truelove, 2014). Some authors indicate that the term "family office" usually refers to employees (managers or administrators) of very wealthy families, employed to manage family assets (Truelove, 2014). In Poland, "family office" is defined as a combination of management services and investment product offerings with tax and legal advice, directed at building safe and efficient investment structures and intergenerational wealth transfer (Forbes, 2013), or as a concept of cooperation based on close relationships,

which involves representing the interests of the client and his or her family on financial and peripheral (legal, tax, business) levels (Lorek, Pawlak, 2017), or as a service aimed at sorting out assets, dealing with investments and taxes and ultimately making the client feel confident that everything is under his or her control, with full discretion. One can also come across defining "family office" in a general way as the overall handling and administration of private assets.

The purpose of the "family office" is primarily the effective management of family wealth by specialists in many fields, through the creation of an appropriate structure most often separating family business from family or additional wealth, tailoring investment policies appropriately to the needs of family members, which is to maximize returns on all types of investments without risking depletion of family wealth to provide comfort to future generations. This is achieved by concentrating, coordinating and comprehensively providing various advisory services, including those of investment advisors, securities brokers, law and tax firms and accounting firms, while leaving decision-making to the family. It is worth adding that, in contrast to traditional private banking, in which private wealth managers are geared toward selling a high-margin, often mismatched product (with the goal of making their own profits in the form of sales commissions), family office ventures focus on long-term client satisfaction by building a wealth and capital structure for generations, combined with profitable but safe investing (Forbes, 2013; Dybul, 2016).

As individual "family office" services are tailored to specific clients and are at the same time costly, the total value of assets under management within a single "family office" in Western countries is at the level of at least \$100 million (Vasan, 2017, Credit-Suisse, 2017; EY, 2017). In Poland, there is no market-



determined lower threshold for joining or starting to use "family office" services, and services are offered in exchange for a success fee.

II. DEVELOPMENT OF SERVICES AND VENTURES, SUCH AS "FAMILY OFFICE"

Foreign professional studies indicate that family office entities are currently the fastest-growing investment vehicle in the world, as families with significant assets see the good benefits of establishing or using family office services. It is difficult to estimate the number of such entities in the world given the diversity of definitions of what constitutes a "family office" but, as some authors point out, globally there are 3,000 single-family entities and at least half of them have been established in the last two decades (VASAN, 2017)

According to Polish magazine Forbes, according to a report by research center WealtInsight, there are about 17 million people counted among the wealthiest, the so-called High Net Worth Individuals. Their wealth at the end of 2012 was estimated at \$66 trillion. The assets they entrusted to specialized wealth management investment companies for management reached \$19 trillion. The above report indicates otherwise, that at the end of 2012 there were about 5,000 family office providers worldwide, including nearly 3,000 operating in the United States (Forbes, 2013).

From research conducted by Poland's KPMG and published in reports titled: "Rynek dóbr luksusowych w Polsce. Polskie marki premium i luksusowe" (Luxury goods market in Poland. Polish premium and luxury brands) it is concluded that the number of wealthy people in Poland continues to grow from year to year, and the multitude of Poles with assets greater than \$1 million already concentrates 46,000 people (Dybul, 2016; Marczak, Wiśniewski, 2016). However, as Businessman.pl magazine points out, most of the capital of wealthy people in Poland comes from the profits earned from their business activities, rather than from inherited assets, and this is especially true for entrepreneurs who started their business activities after 1989. For the time being, this situation is changing, and consequently, the needs of wealthy Poles are becoming more and more similar to those of wealthy people in the West. Among these needs, it is undoubtedly necessary to distinguish the securing of family assets in their possession, as well as stable and secure capital growth, resulting from the skillful use of investment solutions (Dybul, 2016).

The Polish economic press emphasizes that the Polish "family office" market is gaining momentum, developing (Bednorz, 2014; Forbes, 2013; Gabaszewicz, 2013, Dybul, 2016). It is likely that the thesis posited is due to the fact that since 2015, at least a dozen companies offering services specific to the "family office" or at least part of such services has been established in the country, and the overall number of such companies is steadily growing. Foreign professional studies have also pointed out that the growth of wealth is being observed especially in descending markets, thus there is no doubt that "family office" type entities will play an even greater role in the management of sizable estates over the next few

years (Vasan, 2017).

III. SPECIFICS OF „FAMILY OFFICE”

According to foreign professional studies, "family office" type entities can be established in the form of commercial companies or in the form of foundations, which are purely "family" in nature, and in which all the family's assets are concentrated, or as commercial companies established by financial institutions to provide services characteristic of a "family office." It is essential that the sole and ultimate beneficiaries of the established "family office" be family members, by which is meant persons closely related to the person coming up with the initiative to establish the "family office", i.e. the spouse, persons who are continuously and permanently in a close relationship, in a common household, relatives in the direct line, siblings, uncles/uncles, aunts, first-degree cousins/cousins and dependents of the person.

The object of the "family office" is broadly understood financial consulting, which can be divided into four types of services. The main and predominant type of these services is financial planning, which primarily includes investment advice related to the management of family assets, including the allocation of assets according to the investment policy adopted by the family (as is evident from professional studies, it is usually highly flexible and not subject to restrictions). Financial planning services also include the management of the family's philanthropic activities and the private expenditures of individual family members. Another type of "family office" service is strategic consulting, which includes educating and preparing the next generation in the family to take over the family business and manage it and the family assets, as well as estate succession planning. The next type of service is administrative management. This service includes a wide range of activities, of which can be distinguished the handling of individual legal and tax matters of family members, representing them in public or before contractors, reporting on the status of investments, family assets, making analysis of markets, managing records, organizing hard-to-get tickets, entrance fees, invitations, travel, etc. The fourth and final type of services are individual advisory services provided on a continuous basis to the established family entity, including legal, tax and risk management advice. These services consist of exercising a system of internal control in the "family office" to avoid - in the conduct of business - non-compliance with the law and internal acts (bylaws, policies), and to diversify risks and safeguard the family assets brought into the "family office."

There are three types of "family office" entities. The first is the "single family office" (hereinafter: SFO), which is an entity that brings together members of a single family, who are its owners (partners or founders) and use the services of the entity exclusively for their own needs and purpose. The management of an SFO generally boils down to the management of the financial affairs of a particular family, including the planning and management of all or most of the investments financed from the family's personal assets, as well as the concierge function (administrative services). As a rule, an SFO is

established by members of a particular family, which then hires qualified personnel to manage the assets brought into the established entity. This often entails high operating costs. To avoid such costs, fully organized SFOs often choose to offer their "family office" services to other wealthy families. Once a "family office" begins to provide services to several families it becomes a multi-family entity, referred to as a "multi-family office" (hereinafter: MFO). An MFO conducts business like an SFO while providing services to a group of families that do not have to be related in person or by capital. MFOs may be closed and established for selected families only, or they may be open and established for any family that meets certain requirements, is able to make an appropriate contribution to the MFO and accept the MFO's existing investment policy. When a new family joins an MFO, there may be a risk for that family in that it will not receive the personalized advice it would receive if it were to establish its own SFO. Often, as a result of the success of an SFO, it is changed into an MFO, because the success encourages other families to use the services of the changed SFO, and the family that created the SFO reduces the operating costs of its "family office." The third type of "family office" is the "virtual family office" (hereinafter: VFO). A VFO is usually set up by financial institutions and dedicated to families who want to gain the benefits of "family office" services for financial and other matters, but who do not want to set up an SFO for this purpose. A VFO can be dedicated to one or several families. The purpose of the VFO can be realized by outsourcing all or part of the services. In Poland, existing "family office" service providers are mostly established based on this construction.

IV. IDENTIFICATION OF "FAMILY OFFICE" AGAINST THE BACKGROUND OF THE POLISH LAW ON FOUNDATIONS AND THE LAW ON INVESTMENT FUNDS AND MANAGEMENT OF ALTERNATIVE INVESTMENT FUNDS

First of all, it should be pointed out that a "family office" in Poland cannot be established and operate in the form of a foundation. According to Article 1 of the Law on Foundations, a foundation may be established for the realization of socially or economically useful purposes consistent with the fundamental interests of the Republic of Poland such as health care, development of the economy and science, education and upbringing, culture and art, welfare and social assistance, environmental protection and care for historical monuments. Foundations in Poland are not established to transfer their assets to the founders, members of their bodies, employees or persons close to them. The impossibility of establishing foundations in Poland for private purposes contradicts the whole idea of a "family office." In Western countries, foreign legislators provide for the possibility of establishing so-called "family" foundations, which are established for the realization of private purposes of a specific group of individuals (Cioch, Kidyba, 2007; Kidyba, 1997; Gura, 2009). Foundations in Poland in the framework of "family office" services for the time being can only serve as a tool for the succession of family assets or as a tool to achieve philanthropic goals.

However, analyzing the provisions of the Law on Investment

Funds and Management of Alternative Investment Funds (hereinafter: u.f.i.z.a.f.i.), at first glance, a "family office" can be identified as an alternative investment fund (hereinafter: AIF) as defined in Article 2 para. 10(a), i.e., a mutual investment institution whose object, including within the framework of a segregated sub-fund, is to collect assets from a number of investors for the purpose of investing them in the interests of those investors in accordance with a specific investment policy, which is not a fund operating in accordance with Community law governing collective investment in securities (i.e., not an open-ended investment fund for the establishment and operation of which the authorization referred to in Art. 5 of Directive 2009/65/EC of the European Parliament and of the Council of July 13, 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)). According to the AIF Act, the category of AIFs includes closed-end investment funds (hereinafter: FIZ), specialized open-end investment funds (hereinafter: SFIO) and alternative investment companies (hereinafter: AIFs). According to Article 8a (1) of the AIF Act, an AIF is an alternative investment fund, other than FIZs and SFIOs, which may operate in the form of a corporation, including a European corporation, a limited partnership, or a limited joint-stock partnership in which the sole general partner is a corporation, including a European corporation (Article 8a (2) of the AIF Act). Thus, an ASI is not an investment fund within the meaning of the Act (Position of the Office of the Financial Supervisory Commission, 2017). The exclusive object of an ASI, subject to the exceptions set forth in the Act, is to collect assets from a number of investors in order to invest them in the interests of those investors in accordance with a specific investment policy (Article 8a (3) u.f.i.z.a.f.i.). On the other hand, with regard to the issue of management of an AIF, according to Article 8b (1) of the u.f.i.z.a.f.i., it includes, at a minimum, management of that company's investment portfolio and risks, and is carried out by the AIF manager, who is also required to market AIFs (including AIFs) (Article 70e (1) of the u.f.i.z.a.f.i.). Significantly, according to the justification of the amendment to the law introducing ASIs into the Polish legal system (Explanatory Memorandum of the draft law, 2016), implementing the AIF Managers Directive (Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers), hereinafter: AIFMD, was to regulate the activities of commercial companies that raise capital from a number of investors in a manner other than in the form of an investment fund with a view to investing it in accordance with a certain investment policy for the benefit of those investors.

Given that the services of "family office" entities cover a broader scope than an investment fund as defined in Article 3 of the u.f.i.z.a.f.i. (i.e., exclusively the investment of funds collected through a public or non-public offer to purchase units or investment certificates, in securities, money market instruments and other property rights specified in the law) and the idea of a "family office" is to make all investments for the benefit of family members who are the owners (partners) of the

entity, it should be considered that the creation of "family office" entities in the form of SFIOs or FIZs completely misses the point ("family office" in the form of SFIOs or FIZs would suffer restrictions arising from, among other things, *inter alia*, under the provisions of Article 112 *et seq.* and Article 145 *et seq.* of the u.f.i.z.a.f.i.).

Having the above in mind, the "family office" and the SFO, MFO and Western VFO model should be qualified as ASI. The prerequisites for qualifying the title entities as ASI are their legal form (a commercial company), raising capital from multiple investors (the u.f.i.z.a.f.i. does not define the term "multiple investors" so one should refer to the European Securities and Markets Authority's guidelines of August 13, 2013. (ESMA/2013/611), which shows that a company that is not prohibited by national law, regulations, articles of incorporation or any other provisions or arrangements with binding legal effect from raising capital from more than one investor should be treated as raising capital from multiple investors in accordance with Article 4(1)(a)(i) of the AIFMD. This should be the case even if it actually has only one investor), family members, in order to invest it in accordance with a specific investment policy (according to the ESMA/2013/611 guidelines, a company that has a policy on how pooled capital in the company is to be managed in order to generate a pooled return for the investors from whom it was raised should be considered to have a specific investment policy in accordance with Article 4(1)(a)(i) of the AIFMD. A sufficient factor that would indicate the existence of an investment policy is such a policy, defined and established, at the latest by the time investors' obligations to the company become binding on them. Thus, once the family members have defined their investment objectives within the framework of financial planning ("family office" services), it can be concluded that an investment policy in the enterprise already exists (approved by the family members, making decisions as an overarching body, such as a shareholders' meeting), in the interests of these investors (family members), and the possibility of managing the financial affairs of family members more broadly than just the investment portfolio or risks within the framework of the established "family office".

V. THE "FAMILY OFFICE" CONFLICT OF INTEREST UNDER THE LAW ON INVESTMENT FUNDS AND MANAGEMENT OF ALTERNATIVE INVESTMENT FUNDS

An ASI may operate in the legal forms provided for in the a.f.i.z.a.f.i., and is subject to all the requirements (strictures) provided for in that law (due to the limited framework of this paper, discussion of the requirements to be met by an ASI has been omitted), and moreover to supervision by the Financial Supervision Commission. It should be emphasized that the offer to join an ASI may be addressed to investors who are professional clients (Article 2(13a) of the AIF Act) or retail clients (Article 2(13b) of the AIF Act). Importantly, the performance of activities by an ASI manager without a license or without prior registration in the register of ASI managers is subject to criminal liability. Pursuant to Article 287(1) of the

a.f.i.z.a.f.i., whoever, without the required authorization or in violation of the conditions set forth in the law, carries out the activity of investing in securities, money market instruments or other property rights, the assets of natural persons, legal persons or organizational units without legal personality, collected by means of a proposal to conclude an agreement the subject of which is participation in this undertaking shall be subject to a fine of up to PLN 10 million and imprisonment for up to 5 years. In addition, according to Article 295 u.f.i.z.a.f.i., whoever, without the required authorization or entry in the register, performs the activity referred to, *inter alia*, in Article 70e (1) of the Act (concerns the management of ASI), shall be subject to a fine of up to PLN 5 million or imprisonment for up to 5 years, or to both these penalties jointly.

Thus, the operation in Poland of a "family office" corresponding in its nature to such entities in Western countries, consisting in full comprehensive handling of the financial affairs of a given family is fully regulated by the provisions of the AIF. It should be noted that the "reverse order" of marketing ASI, i.e., that the "family office" is, as a rule, created first by family members and not by a specialized entity which then offers its services to a given family (applies to SFO and MFO), is of no significance here. that the "family office" is, as a rule, first created by family members, and not a specialized entity, which then offers its services to the family in question (this applies to SFO and MFO), and the fact that the initiative for the creation of such an entity came from a member or even several members of the family in question, since the placement of family assets will *nomen omen* occur as a result of a proposal to conclude a contract between family members, made by one of them. It is also irrelevant that an inalienable right or the provision of services or labor would be contributed to an ASI operating, for example, in the form of a limited partnership, or that the partnership would have more than one general partner, including an individual, or a situation in which the ASI would also carry out other, expanded activities (such as trading and distribution of certain goods). In addition, it would not be relevant to establish a "family office" in the form of, for example, a general partnership. The establishment in Poland of an SFO, MFO or VFO structured on the basis of the Western model, taking into account the above issues, would, in the author's opinion, constitute a circumvention of the provisions of the u.f.i.z.a.f.i.

Significantly, paragraph 7 of the preamble to the AIFMD explicitly indicates that investment ventures, such as family office entities, which invest investors' private assets without raising capital from outside, should not be considered AIFs within the meaning of the AIFMD. Similarly, the ESMA/2013/611 guidelines stipulate that the prerequisite for an entity to be considered an AIFMD of "asset gathering" (raising capital) is not met if the capital is invested in an enterprise by a member of a pre-existing group (according to the ESMA/2013/611 guidelines, a "pre-existing group" is a group of family members, regardless of the type of legal structure they may have formed to invest in an enterprise, and provided that the only ultimate beneficiaries of such a structure are family members, where the existence of the group precedes the

establishment of the enterprise. This does not apply to family members who join the group after the establishment of the enterprise. For the purposes of this definition, "family members" means a person's spouse, a person who is permanently and continuously in a close relationship, in a common household, relatives in the direct line, siblings, uncles/aunts, aunts, cousins/cousins of the 1st degree and dependents of that person), for the investment of the personal property of which the enterprise was exclusively established. The Polish legislator, when implementing the provisions of this directive into the Polish legal order, seems to have completely disregarded this general assumption set forth in the AIFMD, as the AIFMD lacks relevant exemptions in this regard. Thus, the Polish legislator has made it impossible in Poland - without exposing itself to criminal liability - to create a true "family office", i.e. one that consists of full comprehensive handling of the financial affairs of a given family, with full discretion.

While the qualification as ASI of "family office" entities operating in the form of MFOs or VFOs providing services to multiple families seems partly justified, the qualification as ASI of single-family SFOs or VFOs - no longer. MFOs and VFOs providing services to multiple families meet the criteria for qualification as ASI, as they raise capital from multiple unrelated investors for the purpose of investing it in accordance with a certain investment policy, in the interest of all of them. However, it is doubtful that all these investors meet the criteria of a professional client within the meaning of the u.f.i.z.a.f.i. For the time being, it is practically impossible that every member of a Polish family will be a professional client. In the event that - most likely - most members of such a family are recognized as retail clients, there is a risk that in the marketing of an ASI (created on a planned basis as an SFO, MFO or VFO providing services to multiple families), participation rights in that ASI will be acquired by third parties vis-à-vis family members (Article 70f (1) and (2) of the u.f.i.z.a.f.i.). Thus, in order to establish a non-dependent third-party "family office" in Poland, a family (in the case of a single-family SFO and VFO) or families (in the case of an MFO and VFO providing services to multiple families) would have to first establish a "family" commercial company that would meet at least two of the following three requirements:

- the balance sheet total of this company would be at least the PLN equivalent of EUR 20 million;
- the company's sales revenue would be at least the PLN equivalent of EUR 40 million;
- the company's equity or own fund would amount to at least the PLN equivalent of EUR 2 million (the PLN equivalent of the amounts indicated in Euros in the above points is calculated using the average Euro exchange rate announced by the National Bank of Poland as of the date of preparation of financial statements by a given entrepreneur)

As an aside, it can be added that relatively family-owned companies, operating in the form of commercial companies, wishing to create an SFO - in the author's opinion - could hire appropriate personnel to manage the assets and, on the basis of the reserve capital created in the company (to which profits, surpluses arising from the acquisition of shares or stocks, and/or

surcharges are transferred. In a joint-stock company, the existence of a reserve capital is mandatory), make investments from the company's profit earned and transferred to this capital, and carry out the individual objectives of the "family office". This structure, however, does not allow for the separation of the family business from the private assets of family members.

The above-mentioned solutions contradict the idea and basic premises of creating and operating a "family office".

VI. CONCLUSIONS

Summing up, it should be stated that in connection with the implementation of the AIFMD into the Polish legal order, the Polish legislator has blocked the possibility for wealthy families in Poland to establish "family office" entities similar to those entities in Western countries, and in particular prevented the implementation of such ventures without meeting the requirements set forth in the u.f.i.z.a.f.i., while maintaining full discretion, independence from third parties and the Financial Supervision Authority. Due to the failure of the u.f.i.z.a.f.i. to include the guideline from the AIFMD regarding the exclusion of "family office" entities as AIFs, the Polish legislator has created a conflict of interest in the law that affects families with relevant needs who wish to take advantage of Western solutions (Suwaj, 2009).

Thus, in Poland, the existing entities offering "family office" services mostly have nothing in common with SFOs, MFOs or some of the VFOs existing in the United States. Polish "family office" entities - now - in the likeness of Western VFOs provide individual and selected services typical of Western "family offices" to companies in which the family business is conducted or to individual family members (individuals), without creating a separate commercial company for the family to which the private assets of the individuals are contributed.

In view of the above, it is impossible to agree with the statement that the "family office" market in Poland is developing or "gaining momentum." There is certainly a growing awareness and demand for family office services in Poland, but without an appropriate amendment to the u.f.i.z.a.f.i. or even a comprehensive stance by the Financial Supervision Authority, the Polish "family office" market will not develop and will even regress. The status quo in this regard may lead to the fact that as the demand among wealthy Polish families for "family office" services increases, they will use such services in Western countries.

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