

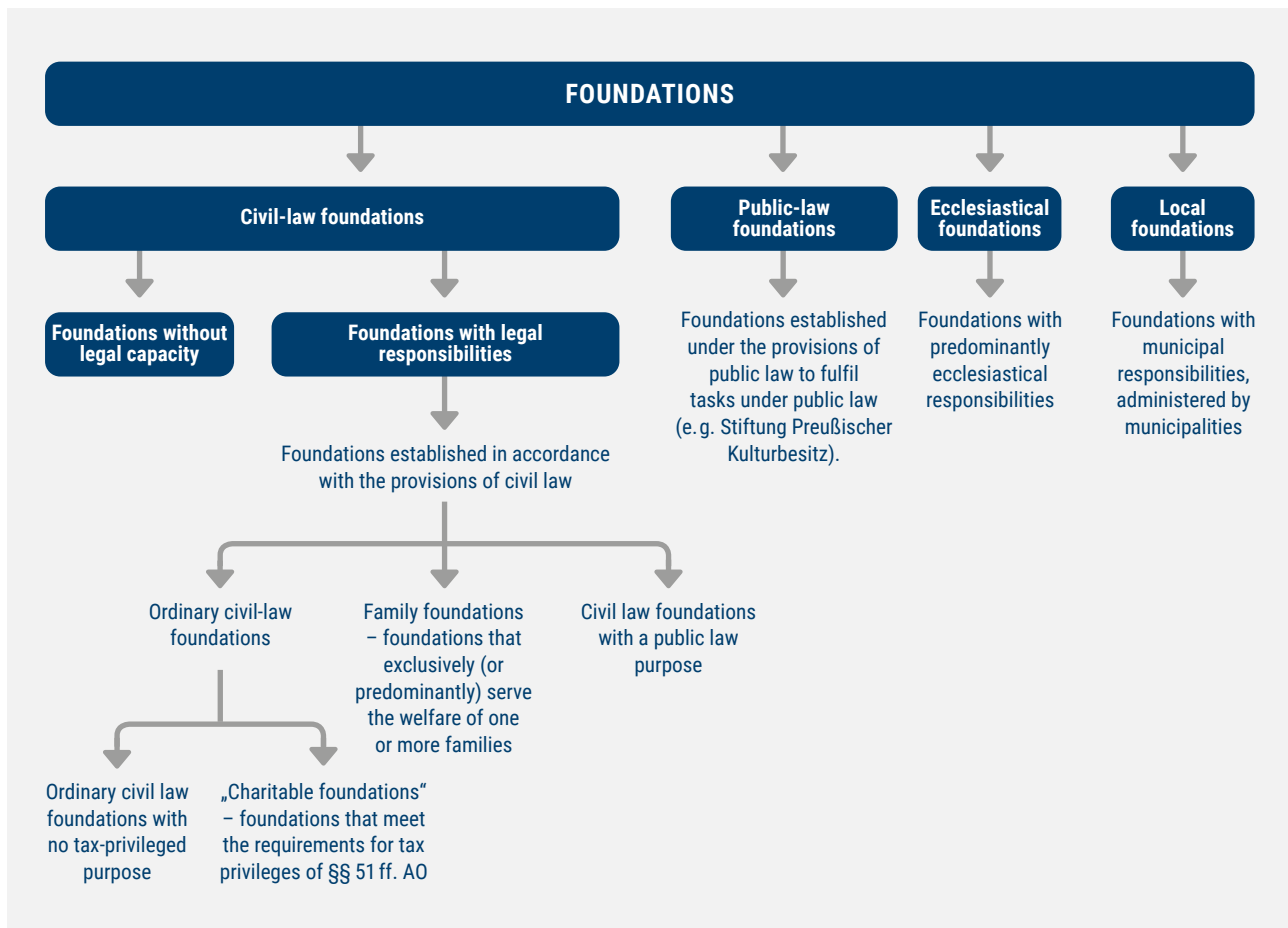


WIFU_compact_14: What is a Foundation?

The foundation is possibly the most colourful construct within German law, associated with charity, family foundations and public foundations – but also tax evasion. However, it is important to define the idea of foundations rationally: a foundation is an institution *without shareholders* and without members that uses *independent assets* to pursue a *certain function* determined by *the founder*. Thus, the foundation is the only legal instrument within German law by which an individual can specify their will after their demise in a way legally binding for future generations. (In contrast, the ongoing execution of a will is usually terminated after 30 years.)

Is it complicated to form a foundation?

Any person can create a foundation for any legal reason. In Germany, the applicable provisions can be found in §80ff. BGB and, additionally, in the individual foundation laws of the federal states. As state laws, foundation laws vary by federal state. Further, German foundation law differentiates between a “foundation among the living” and a “foundation due to demise” as well as endowment foundations, terminated foundations and permanent foundations.



Overview: Foundation types

What is a foundation “without legal capacity”?

A foundation *without legal capacity* (fiduciary) means that another person (with legal capacity) becomes liable to the founder either through a fiduciary contract or a so-called *gift under condition*. To enable this, the founder transfers their foundation assets to the fiduciary or gifted individual who will manage them separately from their own assets. One of the advantages of this non-independent foundation is that it falls outside the supervision of any regulatory organisation for foundations; it is also well suited to smaller foundation assets as their management remains favourably priced and independent foundation organisation is unnecessary.



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So, a foundation without legal capacity is not suitable for larger assets?

No. In this case, a *legally responsible* foundation may be considered, to be implemented in practical terms in one of three ways:

- an ordinary foundation under civil law
- a family foundation or
- a tax-privileged (charitable) foundation.

Why should an entrepreneur create a foundation?

The establishment of a foundation under *private law* (a “civil-law foundation”) to become an “immortal family member” can prove to be a sensible step for an entrepreneur, especially in the following situations.

- The entrepreneur has no children, or their children will be unable to succeed to the business or shares because of disability, serious illness or other reasons.
- There are no offspring in the business family suitable to take over the succession, whether for lack of skills or interest. (Here, there is a need to differentiate between the succession of shareholders and managing succession.)
- There is a desire to prevent a fragmentation of shares or the risk of individuals selling their shares, to avoid harm to other family shareholders.
- Lastly, a foundation can be used to structure a charitable commitment for the public good. This may strengthen the embeddedness of family members in their family community.

An entrepreneur who transfers business shares to a foundation gives away part (or all) of their firm. Strictly speaking, they expropriate themselves and their descendants. On the other hand, the assets of the business family are thus secured for generations and protected from individual error and confusion.

Should every family entrepreneur create a foundation?

It may sound tempting: “Well, then I’ll create a foundation...” perhaps ending the sentence in their mind with “... then, questions of succession, asset preservation and charity will all be settled straight away”. However, a foundation is a very specific legal institution that only really fits in a few cases; it is not an all-purpose tool.

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