

On 9 February 2022, the lower house of the Polish parliament amended the Commercial Companies Code, introducing a parent company's liability for any damage caused to a holding subsidiary. The amendment has also introduced a binding instruction as to the parent's handling of the subsidiary's affairs if the holding's interest so dictates. The parent must follow certain formalities when issuing the binding instruction, as will the subsidiary when accepting it, and cooperation between both companies' officers will be required.

Parent's Binding Instruction

According to the amendment, the parent may issue a binding instruction to its holding subsidiary – justified by the holding's interest. The binding instruction should indicate:

- The behaviour that the parent expects of the subsidiary in compliance with the instruction
- The holding's interest justifying the subsidiary's compliance with the instruction
- The potential benefits or detriments for the subsidiary as a consequence of compliance with the instruction
- The anticipated manner and date of rectifying the damage suffered by the subsidiary following compliance with the instruction

The holding subsidiary, other than a single-shareholder company, may refuse to comply with the binding instruction if the instruction contradicts the subsidiary's interest and may cause damage that will not be rectified by the parent, or by any other holding subsidiary, within two years as of the date of the event causing such damage.

Other holding subsidiaries may refuse to comply with the binding instruction if doing so would lead to or threaten insolvency. The holding subsidiary's articles of association may also include additional prerequisites for refusing to comply with the binding instruction. If the subsidiary's shareholders wish to introduce additional compliance refusal prerequisites, the effectiveness of the resolution amending the subsidiary's articles of association would be contingent upon the parent purchasing the shares held by the subsidiary's dissenting shareholders.

Exemption of Liability of the Subsidiary's Officers for Any Damage Caused in Compliance With the Binding Instruction

According to current Polish laws, a management board member is liable for any damage caused to the company by her/his actions or inactions contradicting the laws or the articles of association, if she/he has not been at fault. The legislator presumes the management board member's guilt, making it easier for the company to pursue its claims. Therefore, it is up to the management board member to demonstrate they are in the clear. Case law, in turn, defines damage suffered by the company as the difference between its current assets and what the assets would have been if the event causing the damage had not occurred.

Once the amendment has taken effect and the holding has been disclosed in the register of entrepreneurs, management and supervisory board members, audit committee members and liquidators of the subsidiary will not be held liable for any damage caused in compliance with the binding instruction, including under Article 293 of the Commercial Companies Code, i.e. for any damage caused by action or inaction contradicting the laws or the articles of association. Similarly, management and supervisory board members, audit committee members and liquidators of the parent, acting in the holding's interest, will not be held liable for any damage caused to the parent. The amendment does not expressly waive corporate officers' criminal liability for mismanagement under Article 296 of the Criminal Code. However, it follows from its rationale that an individual complying with the binding instruction may not be deemed as exceeding their mandate or failing to perform.

Parent's Liability for the Damage

The parent will be liable to the holding subsidiary for any damage caused in compliance with the binding instruction and not timely rectified, if it has not been at fault. If the parent causes damage to its single-shareholder subsidiary, it is liable only if compliance with the binding instruction has led to the subsidiary's insolvency.

A parent that – as at the issuing of the binding instruction to the holding subsidiary – indirectly or directly holds a majority stake enabling it to adopt a resolution on the subsidiary participating in the holding, or on amending such subsidiary's articles of association or charter, is liable to such subsidiary's shareholders for reducing the value of its share entitlement if such reduction has resulted from the subsidiary's compliance with the binding instruction.

If enforcement against the holding subsidiary fails, the parent is liable for the damage suffered by the subsidiary's creditor, if it has not been at fault or unless the damage has resulted from the subsidiary's compliance with the binding instruction.

The holding subsidiaries amendment does not apply to public companies, companies in liquidation that have started dividing their assets, companies in bankruptcy proceedings and companies under financial market supervision as provided for in Article 1(2) of the 21 July 2006 Financial Market Supervision Act (O.J.2020.2059 and O.J.2021.680, 815, 1598 and 2140).

Holding Financing

Recent months have seen the Polish Monetary Policy Council (RPP) raise the Polish Central Bank's reference rates several times, which may increase the costs of business financing and hinder the ability to obtain bank financing. Enacting the new holding law in Poland amid escalating financing costs may encourage Polish subsidiaries, and their management, to consider acceding to cross-border holding financings.

However, this does not mean that if the subsidiary participates in holding financing, its officers will no longer be obliged to duly assess the risk of such transactions. Within the new legal framework, though, it will be up to them to decide whether – with both the company's and the holding's interest as guidance – to participate in a formalised holding (under which they will not be liable for damage if they have complied with the parent's binding instruction) or to seek to finance the subsidiary's operations outside such holding, as previously, with only their company's interest in mind.

Both the option for the parent to exercise its new right to give the subsidiary binding instructions and the option for the holding subsidiary's management board member to quote acting in the holding's interest will be triggered only once participation in the holding has been disclosed in the register of entrepreneurs. Therefore, if the Polish subsidiary is planning to participate in holding financing under the new Polish holding law, and subject to the parent's binding instruction regime, one must consider the time necessary to agree on the company's participation in the holding and to register it with the Polish register of entrepreneurs.

In addition, for the sake of risk management, banks impose certain obligations and restrictions on the operations of entities seeking financing, including on changing their corporate structures. This is why, before deciding to participate in the holding or to amend the subsidiary's articles of association by setting forth the prerequisites for agreeing or refusing to comply with the binding instruction, it is always important to review the financing documentation binding the potential holding participants in order to avoid breaching any obligations toward the banks.

Since the amendment does not modify the Polish banking law as regards the banks' assessment of the financed entities' credit standing, it is unlikely to affect any debt repayment collateral that banks require of borrowers.

Time will tell whether the new Polish holding law shares the fate of the previously enacted 2010 partial holding law (set forth in Article 7 of the Polish Commercial Companies Code), which has become dead letter. However, Polish companies operating within international structures may be interested in reviewing their organisational and transactional frameworks once the new Polish holding law has taken effect. Formalising the *de facto* decision-making mechanisms within holdings, in order to waive liability of the Polish subsidiaries' officers in transactions in pursuit of their holding's interest, may prove a particularly attractive option.

Once the amendment has been adopted by the upper house of the Polish parliament, signed by the President and published in the Journal of Laws, it will come into effect within six months.

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