The 2022 amendments to the Commercial Companies Code – holding law #3

LEGAL ALERT

On 13 October 2022, the Amendment to the Commercial Companies Code[1] will enter into force, which in addition to introducing certain changes to the rules concerning the exercise of corporate governance, introduces new provisions governing the holding law into the Commercial Companies Code. The Amendment to the Commercial Companies Code aims to regulate holdings (both de facto and contractual), which currently do not have any transparent rules of operation. This legal form is optional – choosing this operating structure will be a right and not an obligation of related businesses.

Below please find the most important – from the practical perspective – assumptions behind the incorporation of the holding law into the Commercial Companies Code (Polish: prawo holdingowe).

1. The concept and the manner of formation (termination) of a holding

A holding (corporate group, a group of companies, consortium) is a collection of parent and subsidiary entities which, directed by one of them (the parent company), pursues a common economic objective (pursuant to a qualified relationship of dominance and dependence). These entities follow a common strategy and operate on the basis of a common interest (see below). The leading role in a holding is taken by a parent company, which exercises control over subsidiaries and affiliates (in the case of affiliates, only if the articles of association of the given affiliate permit such control).

In accordance with the provisions of the holding law, in order to participate in a holding, the meeting of the shareholders or a general meeting of a subsidiary company must adopt a relevant resolution.

A resolution on participation in a holding, with an indication of the parent company, requires a three-fourths majority of votes. In order to operate a holding, it is required to disclose participation in such holding by way of a relevant entry in the Register of Business Entities (the National Court Register) – both by the parent company and the subsidiary. If, however, a parent company is not a Polish resident, it is sufficient to disclose the participation of the subsidiary.

Pursuant to the holding law, a subsidiary ceases to participate in a holding by virtue of the adoption of a resolution of the meeting of the shareholders or the general meeting of the subsidiary adopted by a three-fourths majority of votes or by the making of a representation by the parent to the subsidiary company on the cessation of its participation in the holding.

1. The Act of 9 February 2022 on amending the Commercial Companies Code and certain other acts. (the "Amendment to the Commercial Companies Code").

2. Interests of a holding

Both a parent company and its subsidiaries are required to respect (in addition to the fact that each company participating in the holding should respect its own interests) the interests of the holding in which they participate. Nevertheless, the subsidiaries cannot act to the detriment of their creditors or the minority shareholders of a subsidiary. The interests of a holding are separate from the particular interests of the companies (including the parent company) participating in the holding. Consequently, focusing on the interests of the holding could be detrimental to an individual company.

The parent company authorises its supervisory board (or the management board if there is no supervisory board) to ensure the proper protection of the interests of the holding by its subsidiaries, unless the articles of association of the parent company or the subsidiary provide otherwise. The governing bodies of the parent company also have the right to request an inspection of the subsidiary's books and documents and to be provided with the required information. If the subsidiary refuses to comply with a binding instruction, the parent company may file a motion with the registry court asking the court to order the subsidiary to comply with its obligation. The management board of the subsidiary will be required to prepare and present at the meeting of the shareholders or the general meeting a report on contractual links with the parent company during the last financial year. The report can be included in the management board report on the operations of the company or in the financial statements for the financial year concerned.

3. Parent's binding instructions

The holding law grants a parent company the right to issue binding instructions to subsidiaries. Binding instructions may concern the management of the company's business and may be issued provided that such instructions are justified by the interests of the holding and they are not prohibited by law. Binding instructions must be given in written or electronic form.

A binding instruction must indicate:

1. the actions that the parent expects the subsidiary to undertake;
2. the interests of the group that justify the subsidiary's compliance with the instructions;
3. the expected benefits or detriments for the subsidiary as a consequence of compliance with the instructions; and
4. the anticipated manner and date of rectifying damage suffered by the subsidiary following compliance with the instructions.

Compliance with a binding instruction will additionally require a relevant resolution of the subsidiary's management board. A resolution on whether or not to comply with a binding instruction must at least address the aforementioned elements of the binding instruction. Compliance with certain binding instructions of the parent may not be permissible by law. In such case, a subsidiary will be required to resolve to refuse to comply if it could lead to or threaten it with insolvency. A subsidiary, other than a single-shareholder company, will also be required to refuse to comply with a binding instruction if a reasonable concern exists that a binding instruction is contrary to the subsidiary's interests and may cause damage that will not be rectified by the parent, or by any other holding subsidiary, within two years of the date of the event causing such damage.

It must be emphasised that the articles of association of a subsidiary may include additional reasons for refusing to comply with a binding instruction. However, a resolution to amend the articles of association of the subsidiary so as to include additional reasons will only become binding if the parent company purchases the shares of the shareholders that oppose the proposed changes.

A subsidiary is required to notify the parent company that the shareholders have adopted a resolution authorising compliance or non-compliance with a given binding instruction (and provide a statement including the reasons therefor).

4. Liability for the performance of a binding instruction

An extension of the aforementioned regulations are the provisions of the holding law that introduce liability on the part of a parent company's for damage caused to a subsidiary due to compliance with a binding instruction. The parent company may be held liable for damage caused to three categories of entities: the subsidiary itself, as well as its creditors and shareholders.

The parent company is liable to its subsidiaries for damage caused by their compliance with a binding instruction issued by the parent company if such damage is not remedied within the deadline specified in the binding instruction. The liability of the parent company is excluded if the damage was caused through no fault on its part. The parent company is liable for damage caused to a one-person subsidiary only in the event that, as a result of compliance with the binding instruction, the subsidiary became insolvent.

Under the holding law, a parent company bears subsidiary liability for damage suffered by its subsidiary's creditors in connection with compliance with a binding instruction.

This means that if enforcement against the subsidiary proves ineffective, the parent company shall be liable for damage caused to the subsidiary's creditor. Such liability will be excluded if the parent company is not at fault or no damage has arisen as a result of the subsidiary's compliance with the binding instruction.

Finally, if the parent company at the time of issuance of a binding instruction to its subsidiary holds, directly or indirectly, a majority of votes permitting the adoption of a resolution on participation in a holding or an amendment to the articles of association of the subsidiary, it will be liable towards the shareholder of that company for a reduction in its shareholding if such reduction results from compliance with a binding instruction from the subsidiary.

5. Sell-out and squeeze-out

The aforementioned regulations of the holding law have been supplemented by sell-out and squeeze-out provisions with respect to shares held by minority shareholders (irrespective of their legal form).

Shareholders representing no more than 10% of the share capital of a subsidiary may demand the inclusion on the agenda of the subsidiary's forthcoming meeting of the shareholders or its next general meeting of a proposed resolution on buyout of their shares by the parent company, provided such parent company holds, directly, indirectly or based on agreements with other persons, at least 90% of the share capital of the subsidiary. Until the full payment of the buyout price is made, the shareholder will retain all of the rights attached to the shares held thereby. The holding law will limit this right twice: firstly, it may be exercised only once every financial year; and, secondly, it cannot be exercised earlier than three months from the disclosure in the National Court Register of the participation of a subsidiary in a holding.

Pursuant to the holding law, the meeting of the shareholders or the general meeting of the subsidiary will have the right to adopt a squeeze-out resolution pursuant to which the shares held by shareholders representing no more than 10% of the share capital will be acquired by the parent company, provided it holds at least 90% of the share capital. This right may be modified and be entrusted to the parent company even if it holds, directly or indirectly, no less than 75% of the share capital of the subsidiary. However, such exception must be provided for in the articles of association of the subsidiary.

6. Independent auditor

The holding law also grants additional rights to minority shareholders of a subsidiary. Shareholders who independently or jointly hold at least 10% of the share capital may apply to the registry court for the appointment of an independent auditor to examine the accounts and operations of the holding. The scope of such audit may be limited in the articles of association of the subsidiary. The registry court will order the applicants and the parent company to provide it with their respective positions on the matter within seven days from the receipt of the order notice. At the request of the parent company or a subsidiary, the court may limit the audit or specify the manner in which its results will be made public. When adopting such decision, the court will consider certain circumstances such as trade secrets or other legally protected information.

7. Conclusion

The holding law is intended to align the interests of the different groups that are engaged in the operation of a holding. On the one hand, the possibility of issuing binding instructions should improve the effectiveness of the management of a holding. The transparency of the solutions – in contrast to the current lack of regulations (de facto holdings) or contractual provisions (contractual holdings) – aims to provide comfort to management boards and other governing bodies of subsidiaries. On the other hand, our review of the Amendment to the Commercial Companies Code leads to the conclusion that participation in a holding will trigger a range of new obligations on the part of its members. The scope of liability of the parent companies will be extended to include, generally, any ramifications of the business decisions made within the holding.

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