

# EXERCISING NEW PROVISIONS



**MICHAŁ SMOLNY, OF COUNSEL AT SQUIRE PATTON BOGGS POLAND, WRITES ABOUT THE NEW PROVISIONS OF THE POLISH HOLDING LAW.**

The amendment to the Commercial Companies Code dated Feb 9, 2022, has just been signed by the President, published in the Official Journal on 12 April, 2022, and will become effective in 6 months from that date.

The major new feature is a parent company's liability for any damage caused to a holding subsidiary acting based on binding instruction from the parent's justified by the holding's interest. There are certain formalities to be followed by the parent when issuing such binding instruction, and by the subsidiary when accepting it, and cooperation between both companies' officers will be required.

## PARENT'S BINDING INSTRUCTION

According to the amendment, the parent company may give its holding subsidiary a binding instruction, justified by the holding's interest. Such binding instruction should indicate at least:

- the behavior which the parent company 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; and
- the anticipated manner and date of rectifying the damage suffered by the subsidiary following compliance with the instruction.

## REFUSAL

The holding subsidiary other than a single-shareholder company may refuse to comply with the binding instruction if it can reasonably fear that the instruction contradicts the subsidiary's interest and can cause damage to it, which will not be rectified by the parent company, or by

any other holding subsidiary, within two years as of the date of the event causing such a damage.

Other holding subsidiaries may refuse to comply with the binding instruction if doing so would lead to or threaten their 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 wished to introduce such additional compliance refusal prerequisites, the effectiveness of the resolution amending the subsidiary's articles of association would be contingent upon the parent company's purchasing the shares held by the subsidiary's dissenting shareholders.

## EXEMPTION OF LIABILITY

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, that is, for any damage caused by action or inaction contradicting the laws or the articles of association. By the same token, the management and supervisory board members, audit committee members and liquidators of the parent, acting in pursuit of 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.

## LIABILITY FOR DAMAGE

The parent company 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 company causes damage to its single-shareholder subsidiary, it is liable only if compliance with the binding instruction has led to the subsidiary's insolvency.

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

The holding subsidiaries amendment does not apply to public companies, companies in liquidation which have started dividing their assets, companies in bankruptcy and companies subject to financial market supervision provided for in Polish law.

## HODLING FINANCING

The 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 obtaining bank financing in Poland. For the holdings in which Polish subsidiaries serve as production centers less available and more expensive financing may significantly affect their operations. 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, 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 formalized holding, which will hold them harmless in case of any damage once they have complied with the parent's binding instruction, or seek financing the subsidiary's operations outside such holding, as previously, with only their company's interest in mind. Both options for the parent company to exercise its new right to give the subsidiary binding instructions, and for the holding subsidiary's management board member to quote acting in the holding's interest may be triggered only when participation in the holding has been disclosed in the register of entrepreneurs.

## CONCLUSIONS

Time will tell whether the new Polish holding law in practice shares the fate of the previously enacted 2010 partial holding which has become dead letter. However, Polish companies operating within international structures may be interested in reviewing their organizational and transactional frameworks once the new Polish holding law has taken effect. Formalizing the de facto functioning 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.