

HOLDINGS REGULATED



DR. MARCIN S. WNUKOWSKI, PARTNER, SQUIRE PATTON BOGGS, AND PAWEŁ BUKIEL, SENIOR ASSOCIATE, SQUIRE PATTON BOGGS, WRITE ABOUT THE NEW LAW REGULATING RELATIONS BETWEEN COMPANIES THAT BELONG TO THE SAME GROUP.

On Oct 13, new amendments to the Polish corporate law entered into force. Unlike certain foreign legal frameworks, Polish law had, so far, only fragmentary provisions regulating relations between companies within the same group. The new law addresses this area and brings about fresh opportunities, obligations and challenges related to the operations of groups of companies in Poland. It offers closer control over subsidiaries by a parent, for a price of extended liability of a parent company and its officers.

A PARENT COMPANY AT THE STEERING WHEEL

The new law introduces a definition of a "group of companies". It includes a parent company and its subsidiaries, guided by the pursuit of a common economic goal. From now on, companies within the same group could make decisions based on the common interest of the group, instead of solely seeking merely individual benefits. To form a group, shareholders of a

parent company may issue binding instructions to its subsidiaries. Such instructions must be then accepted by the directors of a subsidiary, unless:

- Following the instruction would lead to or threaten the subsidiary with insolvency;
- The instruction contradicts the subsidiary's interest and would result in damage to the subsidiary not being rectified within two following years. This latter exception does not apply to single-shareholder subsidiaries.

Shareholders of a subsidiary may introduce additional grounds allowing for refraining from executing the binding instruction.

The new law also provides an extended possibility for the buyback of minority shareholders in subsidiaries.

MORE POWER TO SUPERVISORY BOARDS

A supervisory board of a parent company (if established) will now be allowed and obliged to oversee the actions of its subsidiaries, and

board.

The supervisory board will also be equipped with the authority to appoint an external expert, and authorize such an expert to perform necessary examinations of a company's operations.

NEW RULES OF LIABILITY

From Oct 13, the directors and members of the supervisory boards of subsidiaries can exempt themselves from liability for any damage sustained by their companies, resulting from the performance of the parent company's binding instructions. The same applies to potential criminal liability for abuse of fiduciary duties by the directors and members of the supervisory board of the subsidiary.

On the other hand, the new regulations introduce a fault-based compensatory liability of a parent company towards its subsidiaries and the subsidiary's shareholders and creditors for damages that resulted from the performance of a binding in-

parent companies seeking to exercise their influence more subtly without resorting to the new instruments.

THE BUSINESS JUDGEMENT RULE

There is one more important innovation being introduced, which is not strictly connected to the group of companies. The new regulations have introduced, directly, a business judgment rule.

Doing business requires taking risky decisions. Such decisions may drive the company forward but may also turn out to be wrong. Despite their knowledge and experience, managers are not able to foresee every possible consequence of their decisions, if only because the business world experiences various changes at a very dynamic pace. For that reason, members of governing bodies must be provided with as much decision-making sovereignty as possible. The purpose of the business

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subsidiary must express such an intention by adopting a resolution supported by a majority of three-quarters of the votes. Participation in the group shall be disclosed in the commercial registry of a parent company and a subsidiary. If the parent company is located outside of Poland, the disclosure is made only in the register held for the subsidiary. Once the disclosure requirements

will have the right to access its books and request information on its activities.

To facilitate the operations of supervisory boards and to strengthen the independence of the supervisory board from the management board, they will also be granted the power to appoint a committee of selected members of the board to perform specified tasks on behalf of the whole supervisory

board. The amendment grants the right to shareholders in subsidiaries to claim damages against the parent company when the value of the subsidiary's shares drops due to the poor performance of the parent company.

These changes may unexpectedly bring about a struggle between subsidiaries trying to hide behind binding instructions and

judgment rule is to provide a defense to the corporate officers, whose actions were taken within a reasonable business risk, based on the information and analyses available while making the decision. The introduction of the business judgment rule emphasizes the decision-making process and elevates the importance of advisors being part of it.