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PUŁKA & PARTNERZY

THE SO-CALLED HOLDING LAW WILL COME INTO FORCE IN THE POLISH LEGAL SYSTEM

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As of October 12, 2022, the so-called holding law, also known as concern law, will come into force in the Polish legal system. From that date the new regulations introduced to the Code of Commercial Companies under the Act of February 9, 2022, amending the Act –the Code of Commercial Companies and certain other acts will become effective. The new regulations will apply only to capital companies, i.e. a limited liability company, a simple joint-stock company and a joint-stock company. However, the changes will not apply to, among others, limited partnerships which are very popular in Poland.

1) Formal requirements for recognizing companies as a group

Companies actually operating within holding companies **will not be automatically considered a group of companies** within the meaning of the new regulations, but only after meeting certain formal conditions. To be able to speak of a group of companies, its interest should result from the articles of association or a statute of each subsidiary. For this purpose, it is necessary to **amend the articles of association or a statue of the subsidiaries** in this respect. At the same time, it is necessary to **enter the participation in the group of companies into the National Court Register**. If the parent company has its registered office abroad, it will be sufficient for the subsidiary to enter the participation in the group into the National Court Register, indicating the parent company.

As the solutions of the holding law envisaged by the legislator are not obligatory, companies may continue their activities within capital groups on the same terms as before.

2) Acting in the interest of the entire capital group has been legitimized by law

The principle was introduced according to which **companies participating in a group of companies, apart from their own interest, also pursue the interest of the entire group** (referred to in the Act as "a common strategy to pursue a common interest"), provided that it does not infringe the interest of creditors and minority shareholders or stockholders. This means that making business decisions by managers in the interest of the entire capital group has been legitimized by law.

3) Possibility of issuing binding instructions by the parent company to the subsidiary

The key institution of the proposed holding law will be the possibility for the parent company to issue binding instructions to a subsidiary belonging to a group of companies. **Binding instructions are to relate to the conduct of the company's affairs and may only be issued when justified by the specific interest of the group of companies**.

The binding instruction will have to indicate:

- the behaviour of the subsidiary expected by the parent company in relation to the execution of a binding instruction,

- the interest of a group of companies that justifies the execution of a binding instruction by a subsidiary,

- the expected benefits or damage of the subsidiary, which will be a consequence of the execution of a binding instruction.

The execution and refusal to execute a parent company's instruction by a subsidiary requires a prior resolution of the subsidiary's management body (the subsidiary's management board or board of directors). However, the refusal to execute an instruction will be possible in strictly defined situations.

4) Liability of the parent company

The parent company will be liable for damage caused to the creditors of the subsidiary, if the damage resulted from the execution by the subsidiary of a binding instruction issued by the parent company. **The liability of the parent company will be of a subsidiary (additional) nature**, i.e. it will arise only when the creditor of the subsidiary is unable to satisfy its claim against the subsidiary.

The parent company will also be obliged to compensate for the damage caused by a binding instruction, if it has not been rectified within the time limit indicated in a given instruction, unless it is not at fault for it. In the case of a single-person company, the liability of the parent company will arise only when the execution of the instruction has led to the insolvency of the subsidiary.

5) Excluding the liability of the management for the execution of a binding instruction of the parent company

A member of the management board, supervisory board, audit committee and liquidator of a subsidiary **will not be held liable under the general regulations on liability of members of the company's bodies for causing damage to the company in connection with the execution of a binding instruction**.

Other changes

Apart from the topics related strictly to the holding law, the changes that will come into force on October 12, 2022,relate to several side issues. For example:

- the change relating to the liability of members of the governing bodies (management board members and supervisory board members) should be considered very beneficial for all persons who are members of the management board or the supervisory board. This liability will be based on the so-called business judgement rule. According to this rule, the correctness of the decision-making procedure is to be assessed, and not its results. As a consequence, members of the management board and supervisory boards will not be liable even for incorrect decisions, if they performed their duties with due diligence, loyally to the company and within the limits of justified economic risk. The actions of members of the management board and supervisory boards will be assessed through the prism of the correctness of the decision-making process, and not the result of the action.

- the principle was introduced that minutes of all meetings of the management board will have to be taken. Such minutes of the meeting should contain the agenda, names and surnames of the management board members present and the number of votes cast for individual resolutions. The minutes of the meeting also include the dissenting opinion submitted by the management board member along with its possible justification. The minutes are signed at least by the member of the management board chairing the meeting or ordering the vote, unless the articles of association or the management board regulations provide otherwise.

- the controversial issue of the term of office of members of the management board or supervisory board was also regulated, stipulating that it is calculated in full financial years (unless the articles of association or a statue provide otherwise).

Should you have further questions, we remain at your disposal.

** This Newsletter does not constitute legal or tax advice.*