

Rödl & Partner

EXPERT ADVICE

Legal status:
01.10.2022

HOLDING LAW IN POLAND



Dear Sir or Madam

The amended Code of Commercial Companies (CCC) is coming into force on 13 October 2022 and will modify numerous corporate obligations of Polish incorporated companies (limited liability companies, simple joint-stock companies and joint-stock companies, abbreviated in Polish as sp. z o.o., PSA and SA, respectively).

The amendments will also affect foreign holding companies which have their daughter companies in Poland.

From the corporate group's perspective, the economic interest of the entire group prevails over one member's interests. To address this issue, the CCC will be added provisions specifying detailed rules of the holding laws applicable to contractual and factual holdings.

Particularly significant for a group's decision-makers may be the new rules on binding instructions for daughter companies to act or decide in a specific manner.

These are just a few examples of the amendments. Other challenges ahead Our experts elaborate on the new mechanisms of the holding laws.

If you are interested in more details, please let us know.

Yours faithfully

Rödl & Partner

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1. HOLDING COMPANY'S RIGHTS

The amended CCC gives holding companies:

- decision-making rights as to the subsidiary's conduct of affairs,
- information and supervisory rights.

1. Issue binding instructions:

- instructions may be issued to subsidiaries that are members of the group,
- instructions may concern the company's conduct of affairs if this is justified by the group's interest and is not restricted by special laws,
- instructions need to be issued in writing or by electronic means, or else they are null and void.

2. Access the subsidiary's books and documents at any time and request information:

- the holding company may examine the subsidiary's books and documents at any time,
- the holding company may request the subsidiary for information concerning the subsidiary,
- if the subsidiary denies access to the books and documents or fails to provide information, the holding company may ask the registry court to order the management board to provide the books, document or information,
- these rights are not time-limited and may be exercised at any time, thus giving the holding company permanent control over the subsidiary.

3. The holding company's supervisory board may exercise permanent oversight over the group's interests:

- holding company's supervisory board (or the management board if no supervisory board is appointed) exercises permanent oversight over the subsidiary's pursuit of the group's interests,
- the holding company's or the subsidiary's constitutional document may exclude this right of the holding company's supervisory board,
- holding company's supervisory board may request the subsidiary's management board for books, documents and information to exercise oversight over the pursuit of the group's interests.

2. MANDATORY DISCLOSURE OF MEMBERSHIP IN A GROUP (TO THE NATIONAL COURT REGISTER)

Companies that would like to function as a corporate group should meet the following requirements to disclose their membership in a group:

- a company that would like to be a subsidiary or a holding company in a group must be an incorporated company – a limited liability company, a simple joint-stock company or a joint-stock company. Partnerships such as a limited partnership cannot be a member of a corporate group;
- a subsidiary (each of them if there are more) has to pass a resolution on participating in a corporate group. Such a resolution must be passed by the subsidiary's meeting of shareholders or an Annual General Meeting with a three-fourths majority. The resolution must name the holding company. The holding company does not need to pass a resolution on participating in the corporate group;
- both the subsidiary and the holding company should report the membership in a group to the National Court Register (NRC). A holding company established outside Poland does not need to report its membership in a group to the NRC. The date the group membership is recorded in the NCR is very important because the holding company and the subsidiary may use the instrument of binding instructions only after that.



3. PROFIT TRANSFER AGREEMENTS

Profit transfer agreements used to be governed by Article 7 CCC. That provision has been repealed. It dealt with so-called contractual holdings as part of which management agreements or profit transfer agreements were signed.

The amended CCC has introduced the concept of “factual holdings” to the Polish legal system. Contractual holdings may sometimes be similar to factual holdings.

Moreover, the new definition of a holding company means that it includes also a company which has a decisive influence on the subsidiary’s business, especially by signing a profit transfer agreement.

Consequently, profit transfer agreements performed so far as well as those still in the making may need to be reviewed to identify sources of legal and tax risk, and ultimately may need to be revised.



4. ADVANTAGES AND DISADVANTAGES OF HOLDING LAW

The advantages of the holding law include without limitation the right to:

- issue binding instructions to the subsidiary;
- examine the books and documents of the subsidiary being a member of the corporate group and request information;
- limit the liability of management board members who act in the corporate group's interest (only if a resolution on performing a binding instruction has been passed);
- buy out shares of minority shareholders;
- exercise the supervisory board's permanent oversight of the subsidiary's pursuit of group's interests;
- file a petition in the subsidiary's bankruptcy by the holding company.

However, the holding laws have several characteristics which make group management more difficult. They include:

- considerable formality – resolution of shareholders' meeting (AGM) on membership in a corporate group, disclosure of group membership in the register, written form of the binding instructions, mandatory resolution on performance of a binding instruction or refusal to perform a binding instruction, mandatory reporting of contractual relations with the holding company;
- the subsidiary's right to refuse to perform the binding instruction;
- in case of a multi-level group structure, the holding company has to issue binding instructions to a company many levels below;
- no right to issue binding instructions to companies established outside Poland;
- the amendment affects only incorporated companies – partnerships cannot participate in corporate groups.



5. AMENDED CCC VS OLD RULES

The new holding law that regulates private and legal relations between a holding company and its subsidiaries requires thorough preparation on the part of all members in a corporate group.

Without doubt, it may help to solve many problems with managing subsidiaries. However, only an individual assessment of the situation and relations among subsidiaries will let you decide if the measures offered by the holding law will bring the desired benefits.



The amendments to the CCC affect not only the holding law. Please note also organisational changes to the functioning of executive and controlling bodies of incorporated companies. They include:

6.1. Mandatory recording of management board resolutions

The minutes should include:

- the agenda,
- full names of current management board members,
- number of votes cast in individual resolutions.

The minutes should include divergent opinions expressed by management board members (if any) plus their arguments.

The minutes should be signed by at least the management board member who chairs the meeting or orders the voting, unless the articles of association or management board regulations stipulate otherwise.

6.2. Management board's statutory duty of due care

The CCC now includes a provision saying that while performing their duties management board members should exercise due care arising from the nature of their office and be loyal to the company.

The amended law introduces the business judgment rule. Also, management board members must not disclose the company's trade secrets also after their mandate expires.

These changes have a great impact on managers because they affect their liability for damage to the company they work for as management board members.

6.3. Supervisory board's new functioning rules

Supervisory boards have gained new rights and obligations which strengthen their role as an oversight body.

The amendments to the work organisation mainly refine the rules of convening supervisory board meetings and taking minutes of them.

From the effective date of the amended law, supervisory board meetings will have to be convened by invitation, unless all supervisory board members consent to the meeting without formal convening. Moreover, new laws stipulate how often the meetings need to be convened (at least once in every quarter of a financial year) and provide guidance on how to take minutes of supervisory board meetings (as with management board meetings).

6. EXECUTIVE AND CONTROLLING BODIES IN INCORPORATED COMPANIES – NEW FUNCTIONING RULES

6.4. Increased role of supervisory boards at companies

Supervisory boards have been given the right to oblige management board members, commercial attorneys (*prokurent*) and other officers hired in the company to provide the supervisory board with information, documents, reports and clarifications concerning the company.

A supervisory board in a joint-stock company has the right to approve transactions with the holding company, subsidiary or an associated enterprise in certain situations, i.e. if transactions already made with the same company exceed 10% of their assets in one financial year.

Another manifestation of the increased role of the supervisory board is the new management board's obligation to provide certain information to the supervisory board without request. This includes information about resolutions passed by the management board and their subject matter, financial standing, progress in budgeted growth, transactions that may have a significant influence on the company's financial standing and other events crucial for the company's functioning.

According to the amended CCC, a supervisory board may appoint two additional bodies: a committee and a supervisory board's consultant.

The former, whether ad hoc or standing, is appointed to perform tasks specified by the supervisory board.

The latter may be appointed by way a board's resolution to investigate a certain matter related to the company's operations or property. If a consultant is appointed, the management board is obliged to give him access to documents and all necessary information.



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