New rules for directors' and officers' liability for insolvency in Poland

Karol Tatara, Paweł Kuglarz and Mateusz Kaliński report on the new so called 'holding law' in Poland

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In Autumn 2022, new legislation will significantly amend the Commercial Companies Code in Poland with respect to directors' and officers' liability, including in the insolvency context. The amendments will introduce the so-called 'holding law' to the Polish legal framework.

It is estimated that around 46,000 Polish companies may be treated as holding companies, both based upon agreement or factual holding. The main aim of this legislation is to regulate the situation of groups of companies, though the provisions will not be mandatory for all holdings or groups. Moreover, the new rules will not apply to WSE (Warsaw Stock Exchange)-listed companies. Last but not least, the new law will not be applicable to companies already in bankruptcy (i.e. with the trustee appointed and operating), but may be applicable with regard to companies in restructuring.

The Rosenblum doctrine

The changes to be implemented introduced the so-called 'Rosenblum doctrine', which says that a director of an individual subsidiary may be deemed to have acted in the best interests of the group of companies to which the subsidiary belonged. The doctrine was created by a French criminal court in a case where managers were accused of acting wrongfully to the detriment of the company and they contended that they acted in the interests of the group itself. The court accepted this defence and released the managers from criminal liability.

Registration of holdings

If a group of companies decides to enter into the new arrangements, they should notify this fact to the National Court Registry. However, if the parent company is registered outside Poland, the notification is required only with regard to a Polish

subsidiary company. This raises questions on international aspects of new regulations, though this is beyond the scope of this article. Such companies included in the group will be subject to a specific regime of liability.

Holding liability and the binding instruction

According to the new legislation, the parent-company and its subsidiary involved in the group of companies, may act outside the company's interest, but with the interest of the group in mind, provided that this is not detrimental to the creditors or minority shareholders. This provision underlines the creditors' interest, which overrides even the interest of a group of companies. In order to realize the interest of the group of companies, a parent company can issue a binding instruction to the management board of the subsidiary.

A binding instruction is defined by law as a binding instruction related to carrying out the company's affairs issued by the parent company to the subsidiary involved in the group of companies and that is justified by the interests of the group, unless other rules provide otherwise. Such an instruction should include:

1. Planned and expected activity of the subsidiary in relation to the binding instruction;
2. Indication of the group interests justifying the need for the subsidiary to carry out the binding instruction;
3. Expected benefits or damage (detriment) to the subsidiary, if any, related to the act of carrying out the binding instruction; and
4. Planned manner and deadline for compensation for the damage (detriment) to the subsidiary connected with carrying out the binding instruction.

Liability of directors in the insolvency context

Under certain circumstances, however, the management board of the subsidiary may refuse to perform the binding instruction. These circumstances are particularly important and interesting within the insolvency context. According to new Article 21[4] sec. (1) of the Polish Commercial Companies Code, the subsidiary included in the group of companies may pass a resolution refusing the performance of the binding instruction if this could lead to the insolvency or the threat of insolvency of the subsidiary.

The definition of insolvency or the threat of insolvency have not been defined separately in the said amendments or in the Commercial Companies Code. Reference is thus required to the terms of Article 11 sec. 1 and 2 of the Insolvency Law (*insolvency through loss of the ability to perform due pecuniary obligations or where pecuniary obligations exceed the value of the debtor's property persisting for a period exceeding twenty-four months*) and/or Article 6 sec. 3 of the Restructuring Law may be required (*a threat of insolvency exists where the debtor's economic situation indicates that it may become insolvent soon*).

The interest of creditors

The resolution refusing performance of the binding instruction should be appended with the rationale behind the instruction. In our view, such rules support the opinion that the creditors' interests is above the interests of the group, especially when there is a shift of interest towards the company in an insolvency situation. The management of the subsidiary is in the first place obliged to assess whether the performance of the binding instruction will not lead to a threat of insolvency. Therefore, the grounds for refusal of performance of the binding instruction are to some extent extensive. The solvency tests that are already available in Poland with regard to a simple joint-stock company, which will be extended with the implementation of the EU Directive 2019/1023 in Poland, may further help any assessment.

Grounds for refusal of a binding instruction

Separate grounds for refusal of performance of the binding instruction are situations where the damage may be caused to a subsidiary (not, however, single-shareholder companies) and this damage will not be compensated within two years from the event causing damage. However, the profits gained by the subsidiary resulting from its involvement in the group should be taken into account.

Taking into consideration the situation of single-shareholder companies (subsidiaries), there is one change, namely compensation for the damage concerns only the case where performance of the binding instruction led to insolvency. It may be observed that this standard will be higher in such situations.

Liability with regard to a binding instruction

Other important rules are also set expressly with regard to directors' and officers' liability, i.e. pursuant to the new legislation, a member of the board or a liquidator may not be held liable for the damage caused by the performance of the binding instruction. However, it should be borne in mind that the grounds for refusal to perform the binding instruction are set in a way protecting creditors, as discussed above.

Summary

To conclude, the new rules that are about to be introduced will have an impact on the restructuring and insolvency context, especially with regard to the grounds of refusal towards the newly introduced legal instrument – the binding instruction, which may be issued by the parent company to its subsidiaries involved in the group. ■

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