

On liability for execution or non-execution of the binding instruction in the group of companies under Polish law

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On liability for execution or non-execution of the binding instruction in the group of companies under Polish law. This article deals with the new Polish regulation of the group of companies and the issue of internal liability between companies participating in such a group. The purpose of this paper is to analyse the regulation concerning not only the legal nature of binding instruction issued in the group of companies but also the liability in the case of damage caused by the execution or non-fulfilment of such an instruction. In the article pages that follow, references are made to the boundaries of the binding instruction, the premises for refusal to perform it and the issue of the parent company's liability for damage caused by the execution of a binding instruction and the subsidiary company's liability for failure to carry out the instruction.

Key words: group of companies, liability for non-execution of the binding instruction, liability for damage caused by the execution of the binding instruction, Polish law

Preliminary remarks

Amendment to the provisions of the Commercial Companies Code¹ made under the Act of February 9, 2022² has brought the regulation of groups of companies into force in Polish law for the first time. One of the most significant instruments enabling harmonisation of the functioning of companies within holding structures is now the mechanism of issuing binding instructions. The justification for the possibility of using this instrument in practice is to improve the management of capital structures. However, when introducing the binding instruction instrument, the legislature decided to make its application voluntary for specific parent companies³. It indicated that the parent company may – but does not have to – issue a binding instruction to a subsidiary company⁴ participating in a group of companies as to managing the subsidiary company's affairs (Art. 21² § 1 CCC). Thus, a binding instruction may be issued only within a group of companies by the parent company to the subsidiary.

In order for companies to be considered as participating in a group of companies, two conditions must generally be met. Firstly, the subjective conditions under Art. 4 § 1 pt. 5¹ CCC must be fulfilled⁵. Secondly, the objective condition must be met, according

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¹ Ustawa z dnia 15 sierpnia 2000 r. - Kodeks spółek handlowych (Dz. U. 2000 r., nr 94 poz. 1037 ze zm.), hereinafter referred to as CCC.

² Ustawa z dnia 9 lutego 2022 r. o zmianie ustawy - Kodeks spółek handlowych oraz niektórych innych ustaw (Dz. U. z 2022 r., poz. 807).

³ Originally in Polish: *spółka dominująca*. This notion could be also translated as a controlling company.

⁴ Originally in Polish: *spółka zależna*.

⁵ Pursuant to this provision, group of companies means parent company and a subsidiary company or subsidiary companies, other than partnerships, which, pursuant to a resolution on participation in a group of

to which the meeting of shareholders or the general meeting of the subsidiary company must adopt a resolution on participating in a group of companies by the majority of three-fourths of votes and with the indication of the parent company (Art. 21¹ § 2 CCC). However, it is not necessary for companies to be recognized as participating in a group of companies based on disclosing their participation in the register of entrepreneurs of the Polish National Court Register. The disclosure is declaratory in relation to the group formation.

The issue of binding orders seems to be important because of the future standards of the functioning of holding companies in the Polish reality⁶. Particularly important aspects regarding a binding instruction issued within a group of companies by the parent company are not only its nature and subject limits as well as the possibility to refuse its execution by the subsidiary, but above all there is the issue of liability for damage caused by the execution of a binding instruction or liability for non-fulfilment of the same.

The importance of issues related to liability is strengthened by the fact that the aforementioned doubts do not only have a theoretical legal dimension, but relate primarily to practical problems.

For this reason, this article discusses the nature of a binding instruction and the parent company's liability towards a subsidiary participating in a group of companies for damage caused by the execution of the binding instruction or the liability of such a subsidiary towards the parent company for its non-fulfilment.

1. The legal nature of the binding instruction

With regard to the purpose of a binding order, its legal nature seems to be an important issue. The above will be important in relation to the possible legal consequences of its issuance. The binding instruction issued by the parent company is intended to produce effects directly in relation to the subsidiary company, and also indirectly within the group of companies. With regard to the fact that the issuance of a binding instruction by the parent company goes beyond the internal sphere of the parent company functioning, and that the binding instruction must indicate behaviour of the subsidiary company expected by the parent (Art. 21² § 3 pt 1 CCC), there is no denying its legal character as an act in law. The binding instruction leads to the formation of legal relations between separate entities. The fact that it relates to the conduct of the subsidiary's affairs is a secondary issue here. A resolution on a binding instruction adopted by the competent authority of the parent company (management board or board of directors) is addressed to a separate entity – the subsidiary entity.

That the binding instruction is an act in law by nature is also evidenced by the fact that a binding instruction is issued directly by the parent company, and not its authority,

companies, are guided by the common strategy with a view to achieving a common interest (interest of a group of companies) justifying the single direction exercised by the controlling company of a subsidiary company or subsidiary companies.

⁶ MICHALAK S., *Wpływ nowelizacji Kodeksu spółek handlowych w zakresie prawa holdingowego na funkcjonowanie grup spółek oraz interesy wspólników mniejszościowych i wierzycieli spółek zależnych*. In *Monitor Prawniczy* 14/2022, p. 755 et seq.

as evidenced by the literal wording of the provision of Art. 21¹ § 3 pt 1 CCC. The legislature additionally provides for the nullity of a binding instruction that has not been issued in written or electronic form (Art. 21² § 2 CCC). Considering the provision of Article 73 § 2 of the Polish Civil Code, such measure may indicate the form stipulated for acts in laws⁷.

The legal nature of the binding instruction of being an act in law is also strengthened by the regulation of the parent company's liability for damage caused by the execution of the binding instruction by a subsidiary company (Art. 21¹² CCC). Liability for damage is therefore implemented between two separate entities – the parent company and the subsidiary company. It should not also exclude the possibility to invoke liability of the subsidiary company towards the parent company for non-fulfilment of the binding order, which will be described further in this study. Parenthetically, it must be noted that a contractual obligation between the parent company issuing a binding instruction and the subsidiary undertaking to execute it generally arises at the moment of adopting a resolution on the execution of a binding instruction (Art. 21³ § 1 CCC).

The objective limitations of the binding instruction are set out in a provision of Art. 21² § 1 CCC in Polish law. It stipulates that the parent company may issue to a subsidiary company within a group of companies a binding instruction related to managing the company's affairs (binding instruction), provided this is justified by the interest of the group of companies and unless special provisions stipulate otherwise. Therefore, this provision provides *expressis verbis* three limitations for a binding order: managing the company's affairs⁸, interest of the group of companies⁹, and the lack of a special provision, which excludes the possibility to issue the binding instruction in relation to certain categories of matters. However, the principle of legality, not mentioned in this provision, should not be forgotten. Legality seems to be another objective limitation¹⁰. The concept

⁷ Cf. SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F., Commentary on Art. 21² CCC, Rdn. 17. In SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F. (eds.) *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*, Warszawa: C.H. Beck, 2022. Legalis PL

⁸ For more on the meaning of the notion “managing the company's affairs” - see: STRZĘPKA J.A., ZIELIŃSKA E., Commentary on Art. 208 CCC, Rdn. 2. In STRZĘPKA J.A. (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa: C.H. Beck, 2015. Legalis PL; KUPRYJAŃCZYK D., Commentary on Art. 208 CCC, Rdn. 3. In JARA Z. (ed.), *Kodeks spółek handlowych. Komentarz*, Warszawa: C.H. Beck, 2022. Legalis PL; PABIS R., Commentary on Art. 208 CCC, Rdn. 1. In BIENIAK J. et al., *Kodeks spółek handlowych. Komentarz*, Warszawa: C.H. Beck, 2022. Legalis PL; OPALSKI A., Commentary on Art 368 CCC, Rdn. 2. In OPALSKI A. (ed.) *Kodeks spółek handlowych. Tom IIIa. Spółka akcyjna. Komentarz – art. 301 – 392*, Warszawa: C.H. Beck, 2016, Legalis PL.

⁹ For more on the “interest of a group of companies” see – SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F., Commentary on Art. 21¹ CCC, Rdn. 49-58. In SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F. (eds.) *Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe)*, Warszawa: C.H. Beck, 2022. Legalis PL; OPLUSTIL K., W sprawie optymalnego modelu prawa grup spółek. Uwagi krytyczne o projekcie prawa koncernowego z 20.7.2020 r. (cz. I). In *Monitor Prawniczy* 23/2020, p. 1225; MOSKAŁA P., Rozdział II. § 3 pkt I.3. In *Prawne instrumenty zarządzania zgrupowaniem spółek kapitałowych*, Warszawa: C.H. Beck 2020, Legalis PL and CHOMIUK M., HARNOS R., *Uwagi prawnoporównawcze z perspektywy prawa niemieckiego do projektu prawa grup spółek*. In *Monitor Prawa Handlowego* 1/2021, p. 10.

¹⁰ Cf. Černá S., *Jaké standardy platí pro koncernové pokyny? A lze koncernového prospěchu dosáhnout porušením zákona či smlouvy?* In. *Obchodní právo* 4/2018, p. 138.

of legality can be understood – in this case – in a strict or broad sense. Legality in the strict sense (*sensu stricto*) of the word should be understood in this case as compliance with applicable law, while in broad sense (*sensu largo*) it seems that a violation of legality can also be considered when a binding instruction violates the provisions of the articles of association of the subsidiary company. Due to the meaning of the binding instructions, it seems that the adequate framework within which a binding instruction may be issued is determined by legality in the broad sense.

2. Premises for refusing to execute the binding instruction

By placing the institution of a binding instruction at the center of the provisions regulating the functioning of groups of companies, the legislature has also preventively introduced instruments allowing to refuse of its execution. As was mentioned above, the purpose of a binding instruction is to balance the interests of individual companies within the holding company. The framework of a binding instruction is determined by the four objective limitations: managing the company's affairs, the interest of a group of companies, other legal exclusions forbidding issuance of the binding instruction and the legality of the binding instruction.

However, pressure and interference from the parent company on the conduct of affairs in the subsidiary company cannot be absolute, although it might fit within the aforementioned framework. Where a binding instruction falls within this framework, the subsidiary has the option to refuse the binding instruction under certain circumstances. The possibility of refusal depends on the occurrence of legal premises. The premises for refusal in the light of the applicable regulation can be classified as: absolute legal premises (Art. 21⁴ § 1 CCC), relative legal premises (Art. 21⁴ § 2 CCC) and statutory premises (Art. 21⁴ § 3 CCC).

Pursuant to the provision of Art. 21⁴ § 1 CCC a subsidiary company participating in a group of companies shall adopt a resolution on a refusal to implement a binding instruction if its implementation would lead to insolvency or a threat of insolvency of that company. Thus, an obligation was imposed on the subsidiary company, which comes down to preventing the negative effects of an instruction issued to it by the parent company if such an instruction lead either to insolvency or to the occurrence of a threat of insolvency of the subsidiary company. The Polish legislature, on the basis of the provisions of the Commercial Companies Code, does not give any other meaning to the terms “insolvency”¹¹ and “threat of insolvency”. In accordance with the provision of Art. 11 sec. 1 of the Polish Act on Bankruptcy Law¹², a debtor shall be insolvent if the debtor

¹¹ On understanding of the notion “insolvency” under Polish law – see ZIMMERMAN, P. Commentary on Art. 11 of the Bankruptcy Law, Rnd 1-2. In ZIMMERMAN P. (ed.), *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Warszawa: C.H. Beck. 2022, Legalis PL or GURGUL, S. Commentary on Art. 11 of the Bankruptcy Law, Rnd 1. In GURGUL, S. (ed.), *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Warszawa: C.H. Beck. 2020, Legalis PL.

¹² Ustawa z dnia 28 lutego 2003 r. - Prawo upadłościowe (Dz. U. 2003 r., nr 60 poz. 535 ze zm.), hereinafter referred to as BL.

has lost the ability to fulfill its matured pecuniary liabilities. On the other hand, we can talk about the debtor's loss of ability to fulfill its matured pecuniary liabilities where the delay in fulfilling the pecuniary liabilities is in excess of three months (Art. 11 sec. 1a BL). Additionally, in the case of a subsidiary company covered by the hypothesis of Art. 21⁴ § 1 CCC we have a brush with the insolvency where its pecuniary liabilities are in excess of the value of its assets, and this state of facts persists throughout a period exceeding twenty-four months. But there are no analogous premises, presumptions and regulations in the case of "threat of insolvency". In the literature, it is assumed that the state of insolvency is at risk when the debtor, despite performing its obligations (liabilities) and having the ability to perform them, according to a reasonable and objective assessment of its own economic situation, may foresee that it will soon become insolvent¹³.

According to the provision of Art. 21⁴ § 2 CCC a subsidiary company participating in a group of companies which is not a sole-shareholder company must adopt a resolution on the refusal to implement a binding instruction if there is justified concern that such instruction is in conflict with that company's interest and will cause that company to incur damage that will not be redressed by the parent company or a fellow subsidiary company of the group of companies within two years of the day that the injurious event occurred, unless the company deed or articles provide otherwise. Thus, a situation where there is a justified concern that the binding instruction is contrary to the interest of the subsidiary **and** that it will incur damage, which will not be remedied by the parent company or another subsidiary company participating in the group of companies, constitutes grounds for refusing to execute the binding instruction. These two premises must be fulfilled cumulatively as indicated by the logical connective (logical operator) of the logical conjunction "and". Furthermore, the damage should be redressed within two years from the moment of the occurrence. This premise could be excluded if the deed or articles of association provide so.

The Polish legislature has introduced an additional premise for refusing to execute a binding instruction. It was provided for in the provision of Art. 21⁴ § 3 CCC. Pursuant to this provision, the articles of association or deed of a subsidiary company participating in a group of companies may provide for additional grounds for refusing to execute a binding instruction. The legislature thus sanctioned significant freedom in specifying them. It will be the decision of the company alone to implement them.

3. Liability of the parent company towards the subsidiary company for damage caused by execution of the binding instruction by the subsidiary company

The rules of liability of the parent company towards the subsidiary executing a binding instruction of the parent are regulated in the provision of Art. 21¹² CCC.

¹³ See ZIMMERMAN, P. Commentary on Art. 6 of the Restructuring Law, Rnd 1. In ZIMMERMAN P. (ed.), *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*, Warszawa: C.H. Beck, 2022, *Legalis PL*.

Pursuant to Art. 21¹² § 1 CCC, a parent company shall be liable to the subsidiary company participating in a group of companies for the damage caused by the implementation of a binding instruction which was not redressed within the time limit set in the binding instruction, unless it is not at fault. In addition, the liability of the parent company is determined taking into account the duty of loyalty to the subsidiary when issuing and executing a binding instruction. The legislature also regulates separately the situation in which the subsidiary is a sole shareholder. The liability of the parent company towards the subsidiary in the above case was limited only to the situation where the implementation of a binding instruction led to its insolvency. In the case of subsidiaries in which shares belong to persons other than the parent company, the liability of the parent company is not subject to such limitation.

Indication of the expected method and time of redressing the damage that may arise in the assets of the subsidiary company as a result of the execution of a binding instruction is an important element of a binding instruction (Art. 21² § 3 pt 4 CCC). Issuing and then accepting a binding instruction for execution leads to the creation of a contractual obligation where the benefit on the part of the parent company is compensation for the damage suffered by the subsidiary as a result of the execution of the binding instruction¹⁴. With regard to that, failure to repair the damage within the time limit specified in the binding instruction results in the obligation to indemnify.

In order to be able to talk about the possibility of attributing liability to the parent company, four conditions must be met. A subsidiary wishing to hold its parent company liable must, in the light of the applicable regulations, demonstrate four elements. Firstly, that the subsidiary complied with a binding instruction issued and accepted in accordance with the provisions of the Commercial Companies Code. Secondly, the subsidiary must prove the damage to its assets as a result of the execution of the binding instruction. Thirdly, there must be an adequate causal link between the execution of the order and the damage. Fourthly, that the damage was not remedied by the parent company within the period specified in the binding order. The burden of proof regarding the basic conditions for liability for damage rests with the subsidiary company as the creditor.

Liability for damage caused by the execution of a binding instruction is determined on the basis of presumed fault, which should be assessed taking into account the subsidiary company's duty of loyalty. The parent company has the possibility of exculpation by demonstrating no fault in causing damage to the subsidiary complying with the binding instruction. That means that in the compensation process, the claiming subsidiary company does not have to prove the fault of the parent company, while the defending parent company can prove the lack of fault. Basing the liability of a legal person on the fault of its governing body does not mean that the damage must result from the culpable behaviour of all members of the company's collective body. The culpable behaviour of at least one person is sufficient, as long as that person acted in

¹⁴ Cf. SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F., Commentary on Art. 21² CCC, Rdn. 96. In SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F. (eds.) Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe), Warszawa: C.H. Beck, 2022. Legalis PL.

the pursuance of the functions of that body¹⁵. The wrongdoer's responsibility for the damage is legally significant, regardless of the form (degree) of fault. Thus, the occurrence of even a slight negligence is covered by the hypothesis of Art. 21⁴ § 1 CCC. It seems that the most common form of fault will not be intentional fault, but negligence. The wrongdoer's negligence consists in the lack of intention to exceed the standards of conduct, while the wrongdoer is aware of the possibility of violating these standards, but wrongly assumes that he will avoid it or does not foresee the possibility of exceeding the standards of conduct at all, although he should and could have foreseen it.

Possible claims for damages from the subsidiary against the parent company include not only the effects of non-execution, but also the effects of improper performance of obligations arising from the act in law, which was formed on the basis of a bilateral legal transaction. As a consequence, two elements, i. e. a binding instruction issued by the parent company and the acceptance thereof for execution by the subsidiary create the legal relation between the parties.

In the light of Art. 21⁴ § 2 CCC the time limit for redressing the damage may not exceed 2 years, counting from the occurrence of the event causing the damage. If, for various reasons – contrary to the provisions of Art. 21² § 3 pt 4 CCC – only the potential benefits related to the execution of a binding instruction were indicated, and the issue of the method and time and date of redressing the damage was omitted, it should be assumed that persons authorised to represent the subsidiary should call on the parent company to immediately repair the damage. In the above case, the basis for such a conclusion is the provision of the Art. 455 of the Polish Civil Code. Pursuant to this provision if the time limit for the performance is not specified and does not follow from the nature of the obligation, the performance must take place immediately upon demand. If the parent company fails to repair the damage within the time limit specified in the binding instruction or immediately upon a redress request, the subsidiary company's option to file a claim for damages is valid.

The damage covered by the hypothesis of the provision of Art. 21¹² CCC has a financial character and according to provision of Art. 361 § 2 CC may take the form of both *lucrum cessans* and *damnum emergens*. The amount of such damages relates to the loss suffered by the subsidiary company as a result of executing the binding instruction and failure to repair the damage on time, which includes complete failure to repair the damage or repairing it only in part or repairing it in whole or in part, but after the deadline (time limit). Polish legal literature indicates that in order to determine the extent of damage to a subsidiary company, the so-called differential method could prove to be the most accountable. This method consists of determining the amount of damage by comparing the current financial status of the injured party with the hypothetical status of its assets, which would exist if the event causing the damage had not occurred.

¹⁵ Cf. judgement of the Polish Supreme Court of November 5th, 2010, I CSK 12/10, Legalis PL.

4. *Actio pro socio*

The Polish legislature has introduced an additional right for shareholders of a subsidiary company to bring an action for damage caused to it by the parent company as a result of executing a binding instruction. The possibility of exercising this right was made conditional on the fact that the subsidiary company did not bring an action within one year from the date of expiry of the deadline indicated in the binding instruction. This right is vested in the shareholder, regardless of the amount of his share in the subsidiary company.

The prerequisites for the damage constituting the basis for bringing the action remain unchanged, even if brought by a shareholder. A shareholder bringing *actio pro socio* is acting in his own name but on the company's behalf. In practice, the *actio pro socio* institution will not be used in the sole-shareholder subsidiary company.

Based on the reference contained in Art. 21¹² § 6 CCC in relation to *actio pro socio* actions brought by shareholders of a subsidiary company, the standards protecting against unjustified filing of the above claims, contained in Art. 295 § 2–4, Art. 300¹²⁷ § 2–4 and Art. 486 § 2–4 CCC will be applicable¹⁶. These provisions regulate the plaintiff's civil liability for unjustified filing of a claim and the institution of a deposit to secure the coverage of damage threatened by the defendant in respect of such claims.

If the defendant's request is granted, the court may, at its discretion, specify the amount and type of deposit imposed. Neither the court decision imposing the obligation to provide security nor the decision refusing to impose such an obligation are subject to appeal¹⁷. Where the action has proved groundless and the plaintiff, in bringing the action, acted in ill faith or committed a gross negligence, the plaintiff is obliged to make good on the damage inflicted upon the defendant.

5. Limitation periods for subsidiary company claims

Pursuant to Art. 21¹² § 6 CCC on the grounds of the parent company's civil liability, the length of limitation periods and the beginning of their running are determined by the appropriate application of the provisions of Art. 297, 300¹³⁰ and 488 CCC. These provisions are of a special nature (*lex specialis*) in relation to the provisions of Art. 118 and 120 of the Polish Civil Code¹⁸. A claim for redressing a damage caused by the execution of the binding instruction will be barred by limitation on the lapse of three years from the day on which the subsidiary company became aware of the damage and of the person liable to make good the same. The aforesaid notwithstanding, the claim will

¹⁶ For more see SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F., Commentary on Art. 21¹² CCC, Rdn. 34-35. In SZUMAŃSKI A., KWAŚNICKI R. L., OSTROWSKI F. (eds.) Kodeks spółek handlowych. Komentarz do zmian (tzw. prawo holdingowe), Warszawa: C.H. Beck, 2022. Legalis PL.

¹⁷ See GOSZCZYK M., Commentary on Art 486 CCC, Rdn. 26. In OPALSKI A. (ed.) Kodeks spółek handlowych. Tom IIIa. Spółka akcyjna. Komentarz – art. 301 – 392, Warszawa: C.H. Beck, 2016, Legalis PL.

¹⁸ Ustawa z dnia 23 kwietnia 1964 r. - Kodeks cywilny (Dz. U. 1964 r., nr 16 poz. 93 ze zm.), hereinafter referred to as the Polish CC.

in any event be barred by limitation on the lapse of ten years from the incidence of the injurious event – in the case of limited liability company or simple joint-stock company or on the lapse of five years from the incidence of the injurious event in the case of private joint-stock company. Failure to repair the damage caused by the execution of a binding instruction within the time limit specified in the instruction, or within the time limit specified in the call to repair the damage, unless indicated in the instruction, must be considered to constitute a damage-triggering event.

6. Liability of the subsidiary company towards the parent company for non-execution of the binding instruction

The issue of liability for non-execution of the binding instruction basically covers three states of fact. The first circumstance has been partly outlined above. It is a situation where the parent company issues a binding instruction to the subsidiary, but the management board (board of directors) of the latter, despite the lack of any grounds for refusal to execute the binding instruction, adopts a refusing resolution. The second state of fact covers a situation where a binding instruction is issued within the legal or statutory limitation but the management board (board of directors) of the subsidiary fails to adopt any resolution on its execution. The third situation concerns a situation where the parent company issues a binding order, in relation to which there are grounds for refusing its execution, but the management board (board of directors) fails to adopt a resolution to implement it or a resolution refusing it. None of these states of facts has been stipulated by the Polish legislature, which may raise significant uncertainties in practice.

Considering the first situation, it seems at first glance that we are dealing with a classic situation in which there is a possibility of assigning liability for failure to perform an obligation. However, it should be remembered that so far, the legislature has not provided for a construction that would allow the parent company to hold the members of the management board of the subsidiary liable. The legislature rather limited itself to indicating that a member of the management board of a subsidiary does not incur any liability towards the subsidiary company for damage caused by executing the binding instruction (Art. 21⁵ § 1 CCC).

Making these roles liable under the provision of Art. 471 of the Polish CC could be possible, when the damage resulted from the non-performance or improper performance of the obligation¹⁹. Thus, in order to talk about liability for non-performance (non-execution) or improper performance of an obligation, there must be an obvious triad: action or omission of the debtor, damage and an adequate causal link. Assuming purely hypothetically that as a result of the subsidiary's management board (board of directors)

¹⁹ More about the non-performance or improper performance of the obligation under the Art. 471 of the Polish CC – see ZAGROBELNY K. Commentary on Art. 471 of the Polish CC, Rdn. 3. In GNIEWEK E., MACHNIKOWSKI P. (eds.) Kodeks cywilny. Komentarz, Warszawa: C.H. Beck, 2021. Legalis PL; POPIOLEK W. Commentary on Art. 471 of the Polish CC, Rdn. 19. In PIETRZYKOWSKI K. (eds.) Kodeks cywilny. Komentarz, Warszawa: C.H. Beck, 2021. Legalis PL.

adopting a negative resolution, the parent company incurs damage, the question arises as to whether members of the management board (board of directors) are liable at all for refusing to carry out a binding instruction, even though there were no grounds for passing a refusing resolution. Technically, any resolution refusing to execute a binding order should contain a justification (Art. 21⁴ § 5 *in fine* CCC), but in practice, the above will not be relevant if there is no reason to refuse to comply with the binding instruction. In the example presented, the creditor is the parent company. However, it is doubtful to assign the debtor's liability to individual members of the subsidiary entity's management board (board of directors). Members of the management board (board of directors) assume their offices within the body through which the subsidiary company operates. As a consequence, acts or omissions of members of the management board (board of directors) affect the company itself, leading to the conclusion that in the presented case the subsidiary will be the parent company's debtor.

With regard to the second statement of fact, i. e. issuing a binding instruction within the legal limitations and failure to adopt a resolution regarding its execution by the management board of the subsidiary company, we are basically dealing with an analogous scheme. The provisions of the Commercial Companies Code do not provide for a mechanism available to the parent company to hold the members of the management board of the subsidiary company liable. If, as a result of failure to adopt a resolution to execute the binding instruction, the parent company incurs damage, the parent company will be able to hold the subsidiary company liable based on the action of its debtor's authority.

The third state of fact assumes unlawful action by the parent company, which – despite the fact that there are grounds for refusing to execute the binding instruction – issues such an order, which in turn is not responded to by the management body of the subsidiary company. In the above situation, the limitation in question in the form of the already mentioned legality is violated. Therefore, there is no reason to hold the subsidiary company liable for non-execution of the binding instruction.

Conclusions

The current needs of the practice and – as it was emphasized in the justification to the bill introducing the provisions of the holding law to the Code of Commercial Companies – the postulates of entrepreneurs operating in dominance and dependency relations forced the Polish legislature to introduce the regulation concerning the holding companies. In accordance with the justification to the above-mentioned bill there was the implementation of a rule that liability should always be associated with the decision, because the divergence of the sphere of “decision” and the sphere of “liability” usually leads to pathological solutions²⁰. Therefore, from the objective side, the special liability

²⁰ See Justification to the project of the Act amending the Commercial Companies Code and some other acts – Uzasadnienie do projektu ustawy o zmianie ustawy Kodeks spółek handlowych oraz niektórych innych ustaw. Sejm RP. IX Kadencja, Druk 1515, p. 14 et seq. Dostęp: [http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-630-2021/\\$file/9-020-630-2021.pdf](http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-630-2021/$file/9-020-630-2021.pdf)

of the parent company under 21¹²–21¹⁴ KSH concerns only the harmful effects of issuing a binding instruction by the parent company and execution of a binding instruction by the subsidiary company.

The principle of linking the sphere of decision with the sphere of liability also takes into account the formalism of issuing and executing binding instructions which may also be used when seeking compensation by a subsidiary of the parent company on the basis of Art. 21¹² CCC. According to Art. 21¹² CCC the parent company's liability towards the subsidiary covers the indemnity of the damage caused by the execution of a binding instruction that has not been redressed within the time limit specified in the binding instruction.

Despite the relatively comprehensive regulation of the issue of the parent's liability towards the subsidiary for damage caused by the subsidiary's execution of the binding instruction, the newly adopted provisions completely omit the issue of possible liability in the other direction, i.e. the subsidiary's liability towards the parent company for non-execution of the binding instruction.

The assumption of this article was a comprehensive analysis of the issue of parent and subsidiary company liability in connection with the execution or non-execution of the binding instruction. While in the case of the parent company's liability for damage caused to a subsidiary that has executed a binding instruction, one can speak of an autonomous regulation, there is no autonomous regulation in relation to the subsidiary company's liability for non-execution of the binding instruction towards the parent company. As a result, the liability of a subsidiary company should be considered directly through the prism of the provisions of the Civil Code, including the regulation of the debtor's liability for non-performance or improper performance of an obligation.

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- Cf. judgement of the Polish Supreme Court of November 5th, 2010, I CSK 12/10.