



Brussels, 2 June 2023  
(OR. en)

9875/23  
ADD 3

LIMITE

FISC 103  
ECOFIN 501

## REPORT

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From:	General Secretariat of the Council
To:	Delegations
Subject:	Code of Conduct Group (Business Taxation) - Report to the Council

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### Poland's Holding regime amendments (PL017) (amendments to the Holding regime PL015)

#### Introductory remarks

We recall that Poland introduced a Holding regime by Act of 29 October 2021 which was notified and subsequently assessed by the Group in 2022 as 'Not Harmful'<sup>1</sup>.

In the framework of the Standstill notification exercise covering year 2022, Poland informed the Group of subsequent amendments introduced to its Holding regime:<sup>2</sup>

- *“Extension of the catalogue of legal forms in which a holding company can operate to include a simple joint stock company;*
- *Removal of the prohibition on the enjoying of Parent-Subsidiary Directive exemptions by the holding company;*
- *Removal of the prohibition on ownership by a Polish/foreign subsidiary:*
  - i. more than 5% of shares in another company and*

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<sup>1</sup> 14674/22 Report to the Council of 24.11.2022

<sup>2</sup> Act of 7 October 2022 amending the Act on Corporate Income Tax and certain other acts, published in the Journal of Laws on 25 October 2022

- ii. *of all rights and obligations in a company that is not a legal entity.*
- *Having exempted income by subsidiary under the special economic zone or Polish Investment Zone will not exclude this company from holding regime;*
  - *Granting 100% dividend exemption of the amount of dividends received by the Polish holding company from its subsidiaries (currently it is 95%);*
  - *Exclusion of a domestic subsidiary from acting as WHT tax remitter when dividends are paid to a holding company (with respect to the full dividend exemption mentioned in the paragraph above);*
  - *Stipulation of the period (two (un)interrupted years) during which exemption' conditions must be fulfilled jointly ”*

For ease of reference, these amendments to the Holding regime (PL017) are marked **in bold and underlined,** or ~~strikethrough~~, in the “agreed description” of the Holding regime endorsed previously by the Code of Conduct Group for measure PL015.

## **Poland's Holding regime amendments (PL017) — Agreed Description**

### **I. Background**

Poland has notified amendments to its Holding tax regime in the framework of the annual standstill exercise for the year 2022.

### **II. Relevant legal framework**

The amendments to the existing holding regime<sup>3</sup> (chapter 5b (articles from 24m to 24p) of the CIT act which determines the Holding tax regime) have been introduced by the Act of 7 October 2022 amending the Act on Corporate Income Tax and certain other acts, published in the Journal of Laws on 25 October 2022<sup>4</sup>. The newly introduced changes to the Holding tax regime are applicable as from 1 January 2023.

### **III. Purpose of the measure**

Poland already has a participation exemption based on the Parent-Subsidiary Directive. The purpose of the new measure is to exempt dividends received by holding companies not covered by the existing legislation.

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<sup>3</sup> Act of 29 October 2021 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts in the so called Polish Deal, published in the Journal of Laws on 23<sup>rd</sup> November 2021; Journal of Laws of 2021, item 2105

<sup>4</sup> Journal of Laws of 2022, item 2180.

#### IV. Design of the measure

The regime provides a CIT exemption for ~~95-100%~~ 100% of the dividends received by the Polish holding company from its subsidiaries (both Polish<sup>5</sup> and foreign<sup>6</sup>). ~~The remaining 5% of the dividend is subject to 19% CIT.~~ In addition, it grants a full exemption for profits from the sale of the shares of the subsidiaries, sold to non-related entities.

A Polish holding company status is available to a company that meets all following criteria:

- has limited liability, **is a simple joint-stock company** or is a joint stock company and is subject to Polish tax on its worldwide income,
- holds directly, for an uninterrupted period of at least 2+1 years, at least 10% of shares of its Polish or foreign subsidiary,
- does not belong to a tax capital group and does not enjoy special economic zone tax exemption,
- ~~does not enjoy CIT exemptions arising from the Parent Subsidiary Directive,~~
- conducts genuine business activity (substance requirement)<sup>7</sup>; and

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<sup>5</sup> A Polish subsidiary status is available to a company that meets all following conditions:

- The subsidiary has a certain legal form (a limited liability company or a joint-stock company) and is a Polish tax resident;
- At least 10% of its shares are held directly, for at least 2+1 years (uninterrupted), by the Polish holding company;
- The subsidiary ~~does not hold more than 5% of the shares of other companies (both Polish and foreign), does not hold participation titles in an investment fund or common investment institution, does not own a company lacking legal personality or other property rights connected with the right to receive a benefit as a founder or beneficiary of a foundation, trust or other entity of a similar nature;~~
- The subsidiary does not belong to a tax capital group, ~~and does not enjoy special economic zone tax exemption.~~

<sup>6</sup> A foreign subsidiary status is available to a company that meets all of the above conditions for a Polish subsidiary and needs to:

- be subject to tax on its worldwide income in its residency state and does not enjoy tax exemption there;
- have legal personality;
- and may not have its seat, management or registration in jurisdictions:
  - that apply harmful tax competition or
  - are included in the EU list of non-cooperative jurisdictions for tax purposes or
  - do not have a legal basis for exchange of information in tax matters.

<sup>7</sup> Reference is made to art. 24a, §18 of the Act on Corporate Income Tax. This paragraph lists the elements in particular taken into account when assessing whether a foreign controlled entity carries

- is not directly or indirectly owned by a shareholder seated or managed or registered in jurisdictions that:
  - apply harmful tax competition<sup>8</sup>; or
  - are indicated in the EU list of non-cooperative jurisdictions for tax purposes; or
  - have no legal basis for exchange of information in tax matters.

**The provisions shall apply, if, as at the day preceding the obtaining of revenues from dividends or transfer of shares, the above conditions have been met for an uninterrupted period of at least 2 years.**

### **Limitation of dividend exemption**

There is no exemption of the dividends if certain criteria linked to CFC legislation are met in the tax year in which the dividend is paid or during the preceding ~~five~~ **three** tax years. In this context, no exemption is granted in the following cases:

- at least 33% of the income distributed is of passive nature (e.g. dividends, gains from disposal of shares, gains from disposal of financial instruments, interest income, intellectual property income, income from certain intangible services, from leases and similar arrangements, sale of goods or products from or to related parties); and
- when the level of actual taxation of the subsidiary is at least 25% lower than the CIT that would be due if the subsidiary were a Polish tax resident subject to 19% CIT.

The exemption does not apply if the dividend payment allows a reduction of the tax base or the tax liability in the source state.

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out genuine economic activities. It should be noted here that substance requirement should be understood specifically, i.e. as referring to substance appropriate for holding activities. According to art. 24a, §18 of the Act on Corporate Income Tax, it is assessed whether:

- (1) the registration of a foreign controlled entity involves the existence of an enterprise in which that entity actually carries out activities which constitute an economic activity, including, in particular, whether the foreign controlled entity has premises, qualified personnel and equipment used in its business activity;
- (2) the foreign controlled entity does not create a structure that does not function economically;
- (3) there is a commensurate relationship between the scope of business of the foreign controlled entity and its actual premises, personnel or equipment;
- (4) the agreements entered into are in accordance with economic reality, are economically justified and do not manifestly run counter to the general economic interests of that entity;
- (5) a foreign controlled entity independently performs its essential economic functions using its own resources, including local managers.

<sup>8</sup> Jurisdictions that apply harmful tax competition are listed by the minister responsible for public finances in accordance with article 11j Act on Corporate Income Tax.

## **Capital gains exemption**

In order to benefit from the tax exemption on the capital gains on shares, a notification (declaration of the intention to enjoy the exemption) by the Polish holding company to the tax office is required.

The exemption does not apply to sales of shares in a so-called real estate company, i.e. a Polish/foreign subsidiary with at least 50% of its value derived directly or indirectly from Polish real estate or rights concerning such estate.

A Polish holding company cannot deduct its capital losses.

## **V. Follow-up**

The COCG agreed with the description of PL017 measure.

**Chapter 5b. Taxation of holding companies.**

**Art. 24m. 1.** Whenever in this Chapter there is a mention of:

- 1) a domestic subsidiary company – this shall mean a subsidiary company which is a limited liability company or a joint-stock company being the taxpayer referred to in Article 3, paragraph 1;
- 2) a holding company – this shall mean a limited liability company, **a simple joint-stock company** or a joint-stock company being the taxpayer referred to in Article 3, paragraph 1 that jointly meets the following conditions:
  - a) it holds, uninterruptedly for a period of at least 1 year and directly by virtue of an ownership title, at least 10 per cent of shares in the capital of a subsidiary company;
  - b) it is not a company making up a tax capital group;
  - c) it does not enjoy the tax exemptions referred to in Article 17, paragraph 1, subparagraphs 34 and 34a, Article 20, paragraph 3 or Article 22, paragraph 4;
  - d) it carries out actual economic activity; the provision of Article 24a, paragraph 18 shall accordingly apply;
  - e) no shares in that company are held, directly or indirectly, by a shareholder having its seat or management office or registered or situated in the territory or the country:
    - listed in the provisions issued under Article 11j, paragraph 2;
    - mentioned in the EU list of non-cooperative jurisdictions for tax purposes adopted by the Council of the European Union, as referred to in Article 86a, paragraph 10, subparagraph 1 of the Tax Ordinance;
    - with which the Republic of Poland has not ratified an international agreement, in particular a double taxation avoidance agreement, or with which the European Union has not ratified an international agreement forming the grounds for obtaining tax information from the tax authority of such state;
- 3) a subsidiary company – this shall mean a company (partnership) that jointly meets the following conditions:
  - a) at least 10 per cent of shares in the capital of that company (partnership) is held, directly by virtue of an ownership title and uninterruptedly for a period of at least 1 year, by a holding company;
  - b) it does not hold more than 5 per of shares in the capital of another company (partnership);**

c) it holds no participation titles in an investment fund or a collective investment institution and it has no rights and duties in a partnership or other property rights related to the right to obtain a benefit as the founder or beneficiary of the foundation, trust or another subject or a legal relationship of a trust nature or rights of a similar nature;

d) it is not a company making up a tax capital group;

~~e) it does not enjoy the tax exemptions referred to in Article 17, paragraph 1, subparagraphs 34 and 34a;~~

4) a foreign subsidiary company – this shall mean a subsidiary company being a company that jointly meets the following conditions:

a) it has legal personality;

b) it is liable to income tax in a state other than the Republic of Poland on the total amount of its incomes, irrespective of the place where they are earned, and it does not enjoy the exemption from such taxation;

c) it does not have its seat or management office and it is not registered or situated in the territory or the country:

- listed in the provisions issued under Article 11j, paragraph 2;

- mentioned in the EU list of non-cooperative jurisdictions for tax purposes adopted by the Council of the European Union, as referred to in Article 86a, paragraph 10, subparagraph 1 of the Tax Ordinance;

- with which the Republic of Poland has not ratified an international agreement, in particular a double taxation avoidance agreement, or with which the European Union has not ratified an international agreement forming the grounds for obtaining tax information from the tax authority of such state.

~~2. The provisions of this Chapter shall apply, if, as at the day preceding the obtaining of revenues from dividends or transfer of shares, the conditions set out in paragraph 1, subparagraphs 1 to 4, have been met for an uninterrupted period of at least 2 years.~~

#### **Art. 24n**

1. Revenues from dividends referred to in Article 7b, paragraph 1, subparagraph 1, letter a, obtained by a holding company from a domestic subsidiary company or a foreign subsidiary company shall be exempt from income tax. ~~in the part corresponding to 95 per cent of the amount of such dividends.~~

~~2. In the case where dividends are paid by a foreign subsidiary company, the deductions referred to in Article 20, paragraphs 1 and 6 shall be made taking into account the tax paid in a foreign state falling proportionally to 5 per cent of the amount of such dividends.~~

3. The exemption referred to in paragraph 1 shall not apply to the dividends paid by a foreign subsidiary company:

1) in the case where such subsidiary company meets the conditions referred to in Article 24a, paragraph 3, subparagraph 3, letters b and c, in the tax year in which the dividend is paid or in any of ~~3~~ 5 tax years preceding that year;

2) in the part in which the paid dividend is included in revenue earning costs or deducted from income, from tax base or from tax by a foreign subsidiary company, in any form.

4. The provision of paragraph 3, subparagraph 1 shall not apply to a foreign subsidiary company which is liable to taxation on the total of its incomes in a European Union Member State or in another state belonging to the European Economic Area, irrespective of the place where they are earned, if such company carries out significant actual economic activity in that state; that the provisions Article 24a, paragraphs 18 and 18a shall accordingly apply.

~~5. In the case of taking advantage of the exemption referred to in paragraph 1, the provisions of Article 20, paragraph 2 shall not apply.~~

#### **Art. 24o**

1. Incomes earned by a holding company from paid transfer of shares of a domestic subsidiary company or a foreign subsidiary company for the benefit of an unrelated subject referred to in Article 11a, paragraph 1, subparagraph 3 shall be exempt from income tax, on condition that the holding company files a declaration of the intent to take advantage of the exemption with the head of the revenue office that is competent for such company, at least 5 days before the day of such transfer.

2. A declaration of the intent to take advantage of the exemption shall include:

1) the forenames and surnames or names, addresses, and tax identification numbers of the parties to the agreement;

2) name, address, and tax identification number of the subsidiary company whose shares will be transferred;

3) indication of the share in the capital of the subsidiary company which will be the object of paid transfer;

4) the planned date of conclusion of the agreement.

3. The exemption referred to in paragraph 1 shall not apply to the transfer of shares of a domestic subsidiary company or a foreign subsidiary company, if at least 50 per cent of the value of assets of these companies, directly or indirectly, are the real properties situated in the territory of the Republic of Poland or the right to such real properties; the provision of Article 3, paragraph 4 shall accordingly apply.

**Art. 24p** In the tax statement referred to in Article 27, paragraph 1, the taxpayers taking advantage of the exemptions referred to in Article 24n, paragraph 1 or in Article 24o, paragraph 1 shall be obliged to show the data on the amounts of the incomes (revenues) covered by such exemptions.

#### **Art. 24a**

[...]

3. The following entities shall be deemed to be foreign controlled entities:

[...]

3) a foreign entity fulfilling jointly the following conditions:

**a)** in that entity, the taxpayer referred to in Article 3, paragraph 1 holds, on its own or jointly with related subjects or with other taxpayers having their place of residence, seat or management office in the territory of the Republic of Poland, directly or indirectly, over 50 per cent of the shares in the capital or over 50 per cent of the voting rights in the control, decision-making or managing bodies or over 50 per cent of the right to participate in profits, or exercises actual control over a foreign entity;

**b)** at least 33 per cent of the revenues of that entity earned in the tax year referred to in paragraph 6 is derived from:

- dividends and other revenues from shares in legal persons' profits;
- transfer of: shares in a company (partnership), all the rights and duties in a partnership, participation titles in an investment fund, a collective investment institution or another legal person, and rights of a similar nature;
- receivable debts;
- advisory and bookkeeping services, market research, legal services, advertising services, management and control, data processing, employee recruitment and staff sourcing services, and performances of similar nature;
- lease, sublease, tenancy, subtenancy and other contracts of a similar nature;
- interest and fruits from all kinds of loans;
- interest part of a leasing rate;
- guarantees and suretyships;

- copyrights or industrial property rights, including from transfer of these rights;
  - copyrights or industrial property rights which were taken into account in the selling price of a product or service;
  - transfer and exercise of the rights under financial instruments;
  - insurance, banking or another financial activity;
  - transactions with related subjects in the case where the entity does not generate in connection with such transactions any added value in economic terms or where such value is negligible;
- c) the income tax actually paid by that entity is lower by at least 25 per cent than the legal persons' income tax which would be due from that entity with the application of the tax rate referred to in Article 19, paragraph 1, subparagraph 1, if such entity was a taxpayer referred to in Article 3, paragraph 1; the tax actually paid shall mean the tax which is not subject to refund or deduction in any form, including the refund or deduction to another subject; or
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