

***THE 28TH OCTOBER 2002 ACT ON THE LIABILITY OF COLLECTIVE ENTITIES
FOR ACTS PROHIBITED UNDER PENALTY***

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The Rule of Law and its general principles

The law on corporations' and other collective entities criminal liability law in Poland is governed by the October 28, 2002 **Act on the Liability of Collective Entities for Acts Prohibited Under Penalty** (hereinafter referred to as "the Act" or "the Law"). The Act came into force on November 27, 2003 (Journal of Laws (Dziennik Ustaw) No 88, item 553, with subsequent amendments) and established the rules of enforcing criminal (crimes or fiscal crimes) liability on corporations'. The Act also sets out the principles of its operations and the penalties imposition code for such liability.

When the Act came into force, it was quite an innovative change¹ in the Polish legal system as it allowed imposing the liability on the offences committed by a specific person but also on collective entities. Its provisions were considered by the Polish Constitutional Tribunal (Judgment of the Constitutional Tribunal from the 3 of November 2004, 18/03) and amended in 2005 by the Parliament (amended by the Amending Act of 28 July 2005, Journal of Laws of 2005, No. 180, item. 1492) in accordance with a Tribunal decision. The criminal liability of an entity is secondary to the criminal liability of an individual acting on its behalf, and therefore prolonged criminal proceedings to establish the liability of an individual tend to discourage courts from considering the liability of corporate entities.

Establishing Company Liability

Article 3 of the Act lists the circumstances in which corporate entity incur criminal or quasi-criminal liability. The liability can be imposed on such entities where a specific person commits a specific offence and his/her conduct has or may have resulted in the corporates' entity benefit. Those offences must be committed by persons who:

¹ Comparison: *M. Filar, Z. Kwaśniewski, D. Kala, Komentarz do OdpPodZbiorU o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, Toruń 2006, s. 11.

- (1) act in the name or the interest of the entity pursuant to authority or obligations to represent it, undertaking in its name decisions or performing of internal reviews or by exceeding such authority or not fulfilling such obligation (art. 3 point 1 of the Law);
- (2) permitted to act as a result of exceeding authority or non-fulfillment of obligations by persons described in point 1 (art. 3 point 2 of the Law);
- (3) acting in the name or on behalf of the entity, with the consent or knowledge of persons described in point 1 (art. 3 point 3 of the Law).

Limitations on Corporate Liability

- (1) A collective entity is subject to corporate liability, only if a person as described in art. 3 of the Law committed one of the crimes listed in Article 16 of the Law. The list includes, *inter alia*, the crime as bribery and giving bribes defined in art. 229 of the (Polish) Penal Code² (in Polish: Kodeks Karny) of 6 June 1997, published in Journal of Laws (Dziennik Ustaw) No 88, item 553, with subsequent amendments.
- (2) As provided in art. 4 of the Law, a collective entity shall be liable if the fact of performing such forbidden act described in art. 16 of the Law, by a person described in art. 3 of the Law, has been confirmed by a final and enforceable court decision finding such person guilty, a court decision conditionally canceling criminal proceedings against them, a decision on granting such a person permission to submit to liability or a decision of the court canceling further proceedings due to circumstances excluding punishment.

² Art. 229 of the (Polish) Penal Code:

§ 1. Any person who gives or promises to give a financial or personal advantage to any person performing a public function in connection with performance of such a function shall be liable to the penalty of imprisonment for a period not shorter than 6 months and not longer than 8 years.

§ 2. In the case of a less serious crime, the perpetrator shall be liable to a fine, restriction of liberty or imprisonment for a period not longer than 2 years.

§ 3. If the perpetrator of the prohibited act referred to in § 1 above acts so as to induce a person performing a public function to violate legal regulations or gives or promises to give to such a person a financial or personal advantage for violation of legal regulations, then the perpetrator shall be liable to the penalty of imprisonment for a period not shorter than 1 year and not longer than 10 years.

§ 4. Any person who gives or promises to give a financial benefit of significant value to a person performing a public function in connection with the performance of the function shall be liable to the penalty of imprisonment for a period not shorter than 2 years and not longer than 12 years.

§ 5. Any person gives or promises to give a financial or personal advantage to a person performing a function in a foreign country or in an international organisation in connection with the performance of the function shall accordingly be liable to the penalties provided for under §§ 1 – 4 above.

(3) A collective entity shall be liable if at least, in performing the forbidden act the lack of due diligence occurred in the choice of the physical person described in art. 3 points 2 or 3 of the Law, or at least lack of adequate supervision over such persons on the part of bodies or representatives of the collective entity.

Corporate liability or lack of corporate liability of the collective entity pursuant to rules established in the Law does not exclude civil liability for damage caused, administrative liability or individual legal liability of the person performing such forbidden act.

Liability of the collective entity for the actions of the individuals

The first substantive basis for liability of collective entities is to achieve the benefits (even non-pecuniary benefit as well as even the possibility to achieve the benefits) as a result of a crime of a natural person acting on behalf or in the interest of the collective entities.

Another basis is resulting from art. 5 of the Law, which is based on finding specific quasi-fault of the collective entity³. To pull the collective entity responsible for the act of the individual, it must be stated (in accordance with Art. 5 of the Law):

- 1) at least a lack of due diligence in the selection of a natural person referred to in art. 3 point 2 or 3 of the Law or
- 2) at least the lack of adequate supervision of that person.

In the judgment form 11 April, 2013 (case citation: V KK 21/2013, Lexis) the Polish Supreme Court (Criminal Division) clearly confirms that from the date of entry into force of the Law the possibility of pulling collective entities criminally liable for acts committed by members of the management of these entities, including the president of the limited liability company has been eliminated. The Court stressed that:

"provision of art. 5 of the Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty (Journal of Laws of 2002 No. 197, item. 1661, as amended), as amended by the Amending Act of 28 July 2005 (Journal of Laws of 2005, No. 180, item. 1492) establish unequivocally the premise of the "fault" of the collective entity in relation to the persons mentioned in Art. 3, paragraphs 2 and 3 of this Act, by

³ Compare: T. Marzec, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary, wybrane zagadnienia*, available at:

<http://www.edukacjaprawnicza.pl/aktualnosci/a/pokaz/c/aktualnosc/art/odpowiedzialnosc-podmiotow-zbiorowych-za-czyny-zabronione-pod-grozba-kary-wybrane-zagadnienia.html>

pointing to the "fault" in the selection or supervision. The omission in this provision of prerequisite of the own responsibility of the collective for the acts of persons referred to in Art. 3 paragraph 1 and the lack of other rules concerning the liability of the entity for the actions of its management, in the inability to hold a collective entity liable for offenses of this category of persons."

As regards the abovementioned prerequisite of the “fault” *in the selection or supervision* we are dealing with a well-known concept of the fault in civil law in the selection (*culpa in eligendo*), fault in supervision (*culpa in custodiendo*) and the so-called organisational fault⁴.

For finding fault in the selection, or fault in supervision the court should take into account all the circumstances surrounding the activities of the collective entity. In addition, the fault in the supervision occurs only when the duty of supervision resulted from a specific source (laws, statutes, contracts). It should be noted, however, that the attempt to adapt solutions to complicated civil law basis for liability on the ground of a criminal nature, together with the ambiguity of interpretation of certain terms can lead to numerous problems of proof in proceedings relating to collective entities.

On the other hand, when the criminal liability of a manager, officer or director as determined in a final court’s judgment in criminal proceedings against specific person this may result in the criminal liability of an entity (if the other conditions for liability mentioned above are fulfilled). What should be stressed - at the same time, an entity's liability for an offence does not automatically determine the personal liability of its managers, officers or directors. On the margins of this considerations should be also pointed out that if a corporate entity is held liable for a fiscal offence, the officers or directors thereof may be held accountable on the basis of auxiliary liability. In order to incur such liability, it is sufficient that a director or officer be negligent in fulfilling his/her duties.

Offences falling within the Act (listed in Article 16)

Those are offences against, inter alia:

- (1) Economic turnover,
- (2) Trading in money and securities,
- (3) The protection of information,

⁴ *M. Filar, Z. Kwaśniewski, D. Kala, op. cit., s. 57.*

- (4) The reliability of documents,
- (5) Property,
- (6) Environment,
- (7) Bribery, corruption,
- (8) Fiscal offences.

Procedure

Proceedings related to potential corporate liability are initiated on the motion of a prosecutor or harmed party. In such proceedings the burden of proof rests on the person who submits evidence. The Management Board or the appropriately authorized body will represent the entity in liability proceedings. The entity can grant a power of attorney to a legal advisor or advocate. Evidence can be admitted on the motion of a party, and in justified cases, *sua sponte*; evidence that is obviously submitted in order to extend the procedure is not admissible. The Court shall individually make factual and legal decisions as limited by the motion; decisions which are described in art. 4 of the Law shall, however, be binding. Both the entity and the motioning party have a right to appeal for the decision of the court of first instance.

Nature of the liability

Currently, when it comes to the nature of the liability established in the discussed Law it shall be regarded in the light of the art. 5 of the Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. According to this provision the EU Member States shall implement liability provisions for legal entities. Wording of the provision leaves the nature of the liability – criminal, administrative or civil – up to the discretion of the States. The comparative overview shows a great diversity of the solution applied in national legislation⁵.

⁵ Rafał Kierzyńska, *Liability of legal persons in Poland - Legal framework, its advantages, shortcomings and auxiliary institutions - Confiscation of assets as the way of counteraction and fighting the corporate crimes*, available at: <http://www.asser.nl/upload/documents/20121114T044426-Rafal%20Kierzyńska%20Liability%20of%20legal%20persons%20in%20Poland.pdf>

The solution applied in Polish legal system meets the EU requirements however it has specific features. As R. Kierzyńska stressed, the nature of the liability is in Poland peculiar: quasi-criminal liability, nor civil, nor administrative, neither penal⁶.

The liability however is linked to criminal proceedings are clear: the action is taken by the prosecutor and the sanctions have repressive nature and the collective entity can participate in the criminal proceedings against the natural person.

Despite the similarities the liability of legal persons cannot be named strictly “criminal”, due to the principle of Polish criminal law that only the natural person can be held criminally liable.

Penalties available under the Law

Under the Law there are foreseen the following penalties:

1. Vis-à-vis the collective entity, the Court shall impose a fine in amounts from 1,000 to 20,000,000 PLN, no higher, however, than 10% of the income achieved in the fiscal year in which the forbidden act constituting the basis for liability of the collective entity, was performed.
2. Furthermore, decisions on forfeiture of objects of economic benefit shall be rendered vis-à-vis collective entities of:
 - a. objects resulting, even indirectly, from forbidden acts or which served or were designated for performance of forbidden acts;
 - b. economic benefits resulting, even indirectly, from a forbidden act;
 - c. the equivalent value of objects or material benefits resulting, even indirectly from forbidden acts,
 - unless the given object, economic benefit or its equivalent is to be returned to another authorized entity.
3. Furthermore, generally vis-à-vis collective entities, decisions can be rendered:

⁶ *Ibidem.*

- a. prohibiting the promotion or advertisement of commercial activities, production or sale of goods, performed services or consideration tendered;
- b. prohibiting the use of subsidies, benefits, or other form of financial support from public sources;
- c. prohibiting the use of international organizational aid, in which the Republic of Poland is a member;
- d. forbidding participation in public tenders;
- e. forbidding conduct of certain basic or other activities;
- f. submitting of a decision to public record.

The Court orders described in points a-e above are made for periods of one to five years.

The Law provides guidelines which the Court should follow in adjudicating a fine, prohibition, or submitting a decision to public record (art. 8 par. 2, art. 9 par. 3, art. 10-14 of the Law).

The conclusions

The level of enforcement of this regulation is low and it has rarely been used in practice taking into account the number of the indictments and the cases

According to statistics published by the Polish Ministry of Justice and the General Public Prosecutor's Office, from 2005 to 2010 only 104 corporate entities were prosecuted under the Liability Act, and fines (the highest of which was PLN 12,000 – approx. EUR 3,000) were imposed on only 31 of them⁷. Furthermore, in only seven cases were the judgments publicized. However, because of the tendency in Poland towards the creation of stricter criminal law, it is probable that provisions of the Liability Act will be used more frequently in future. Those statistics clearly show that instead of using the tools established in the Law, Polish authorities use existing mechanisms, as civil confiscation or tax confiscation, which are deeply-rooted in Polish tradition and legal consciousness. It may prove that sometimes it is more reasonable to use existing systems than introduce new ones.

⁷ <http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne/rok-2011/download,2487,0.html>

