

NEW ACT ON CORPORATE CRIMINAL LIABILITY IN POLAND

On 28 May 2018, the Polish Ministry of Justice published a draft Act that is to materially change the rules governing corporate criminal liability in Poland. The proposed Act on Liability of Corporate Entities for Acts Prohibited under Penalty is to replace the existing Act, commonly recognised as inefficient and very rarely applied in practice.

The work on the Act is still at the initial stage of the legislative process. However, the Act is to come into force three months after enactment. The new Act will also apply to prohibited acts committed before its entry into force if the corporate entity would have been liable on the basis of the regulations currently in effect.

The main assumptions of the proposed Act are as follows:

- The liability of a corporate entity is to be independent of any previous conviction of an individual (the direct perpetrator) and it is possible to hold a corporate entity liable for an offence committed in connection with an activity of the corporate entity, even without establishing who the direct perpetrator was.
- A corporate entity may be liable for any offence or treasury offence (at present corporate entities may be held liable only for the offences listed in the Act currently in effect).
- It will be possible to conduct preparatory proceedings against a corporate entity at the same time as proceedings are being conducted against an individual (the direct perpetrator) or even before proceedings against an individual have been instituted – this is to reverse the current rule.
- A fine of up to PLN 30,000,000 could be imposed on a corporate entity (currently the fine is up to PLN 5,000,000) and its amount will not depend on the amount of revenues generated (at present, the fine may not be higher than 3% of the corporate entity's revenues generated in the year in which the offence was committed).
- Measures will be introduced to protect whistleblowers, along with an obligation for the corporate entity to conduct internal investigations in order to verify irregularities reported by whistleblowers. Failure to conduct

Key issues

- Corporate criminal liability to be independent of the liability of the individual who committed the offence
- Corporate criminal liability for any offence or treasury offence
- Obligation to prove introduction of a compliance system
- New fines of up to PLN 30,000,000
- Protection of whistleblowers
- Obligation to conduct internal investigations
- New institution similar to deferred prosecution agreements

internal investigations could result in a fine's being increased up to PLN 60,000,000.

- Corporate entities will be subject to criminal liability notwithstanding any merger, demerger or transformation of the corporate entity.
- It will be possible for the corporate entity to voluntarily admit liability in order to avoid holding a trial and agree a more lenient fine with the public prosecutor (this might be a similar institution to the UK/US deferred prosecution agreements).

Grounds for corporate criminal liability

At present, the liability of a corporate entity depends on the liability of an individual. In order to prosecute an entity, it is necessary to obtain a final conviction against the direct perpetrator. Such person must therefore be known to the enforcement authorities, and the offence committed by such person must be proven in separate proceedings. Proceedings against the corporate entity may be instituted only on the basis of a ruling in the form of a final conviction.

The scope of liability of the corporate entity is to be expanded. The corporate entity will be liable:

- as it is now, for a prohibited act committed by an individual if the corporate entity obtains an economic gain, even indirectly, in a situation of either lack of due diligence in the selection of, or supervision over, the individual, and if the act is committed as a result of a method of business organisation that does not prevent material threats leading to the commission of a prohibited act;
- for a prohibited act relating to the activities carried out, caused by an action or an omission by its corporate body or a member of such body and which has been committed as a result of a wilful action or failure to exercise caution;
- for prohibited acts committed directly in connection with the operations of the business or establishment of the corporate entity as a result of failure to comply with the rules of caution, even if the identity of the individual perpetrator of the act is not established.

Consequently, it will be possible to institute and conduct criminal proceedings against corporate entities separately or jointly with criminal proceedings relating to a prohibited act committed by individuals for whom the corporate entity may be liable.

A corporate entity will be able to avoid liability if it proves that the individuals and bodies authorised to act in its name acted with due care and diligence in the relevant circumstances. The corporate entity will also have to prove that it is using mechanisms to ensure compliance of its activities with law. It can be expected that, for this purpose, the corporate entity will be able to rely on a compliance system in operation, including anti-corruption policies.

At present a corporate entity may be held liable only for the offences specifically listed in the Act. The list of those offences is to be replaced by the liability of corporate entities for every prohibited act constituting an offence or a treasury offence.

Criminal liability of corporate entities will not exclude potential civil and administrative liability of corporate entities or individual liability of individuals.

The proposed Act will also apply to foreign entities if the prohibited act giving rise to liability has been committed or has had an effect in the territory of Poland or has been directed against the interests of a Polish citizen or corporate entity.

Fines and punitive measures

The fine that may be imposed on a corporate entity is to be increased to PLN 30,000,000. It currently amounts to PLN 5,000,000, but not more than 3% of the revenues generated in the financial year in which the prohibited act was committed.

A new penalty is also envisaged in the form of winding-up or liquidation of the corporate entity if such entity has been used, in full or in a substantial part, to commit a prohibited act, and the imposition of any other penalty is deemed insufficient.

It will also be possible to impose the following punitive measures on the corporate entity:

- forfeiture of assets or economic gains originating from, or used to commit, the prohibited act;
- prohibition of promotions or advertising;
- prohibition of pursuit of business activity of a specific kind if the continued pursuit of such activity may result in a further prohibited act's being committed;
- prohibition of use of financial support from public funds;
- prohibition of seeking the award of public contracts;
- publication of the judgment;
- punitive damages (*nawiązka*) of up to PLN 5,000,000 for the injured party;
- permanent or temporary closure of a branch of the corporate entity.

The prohibition of seeking the award of public contracts will apply automatically if the corporate entity has committed a corruption or terrorism offence. Prohibitions will be imposed for a period of between six months and 10 years (currently prohibitions may be imposed for a maximum of five years).

Protection of whistleblowers and obligation to conduct internal investigations

The draft Act provides for legal protection of whistleblowers who, in the public interest, report material irregularities in the organisation of the corporate entity that could lead to a prohibited act's being committed. Under the draft Act, a whistleblower can be an employee of the corporate entity, a member of its corporate bodies, as well as a person acting on behalf or in the interest of the corporate entity based on a contract. If the whistleblower's employee rights are infringed or the employment of, or the contract with, the whistleblower is terminated for reasons relating to the reporting of irregularities, the court will be able to reinstate the employment of that person at his/her request or award compensation.

Corporate entities will also be obliged to conduct an internal investigation in cases where the information reported by the whistleblower may be of significance to the criminal liability of the corporate entity. If the corporate entity fails to conduct such internal investigation and to remedy any

irregularities found during the investigation, it will be possible to increase a fine up to PLN 60,000,000 in criminal proceedings against the corporate entity.

Liability in the event of a merger, demerger or transformation of a corporate entity

The draft Act introduces the possibility of corporate entities' being held liable in the event of a merger, demerger or transformation (The existing regulations did not contain sufficient provisions in this respect, which might have made it easier for corporate entities to avoid liability.):

- In the event of a merger of corporate entities, the liability for a prohibited act committed before the merger date lies with the corporate entity acceding, as a result of the merger, to the rights and obligations of the corporate entity that is being merged.
- In the event of a demerger of a corporate entity, other corporate entities that have taken over at least some of the rights and obligations of the demerged entity will be liable.
- With regard to liability in the case of a transformation of a corporate entity, the transformed entity will be liable.

In some cases it will be possible to limit the liability of the corporate entity. In the event of a demerger of a corporate entity, the entities that have obtained, as a result of the demerger, at least some of the rights and obligations of the entity being demerged, will be jointly and severally liable. This liability is limited to the value of the assets received. Exempting from liability those entities that have participated in a merger or a demerger of a corporate entity but have been unable to obtain information about the prohibited act is envisaged. Not only corporate entities existing at the time of the merger or demerger, but also, for example, newly created companies, may be liable.

Voluntary submission to liability

In the course of the proceedings against a corporate entity, the entity will be able to voluntarily admit its liability in order to avoid a trial and agree a more lenient fine with the public prosecutor. In such a case, the public prosecutor will be able to file with the court, instead of an indictment, a motion for the authorisation of voluntary submission to liability of a corporate entity, provided that:

- the circumstances of the criminal offence are beyond doubt;
- the corporate entity has disclosed to the authorities information on the criminal conduct of an individual acting for or on behalf of the corporate entity or directly collaborating with the entity, including substantial information regarding the committed offence;
- the corporate entity has paid the equivalent of the damage caused by the offence;
- the corporate entity has paid the equivalent of the lowest financial penalty for the offence in question, but not more than PLN 3,000,000;
- the corporate entity has consented to forfeiture (or, where the material profit cannot be returned, has paid the equivalent amount).

The public prosecutor's motion for voluntary submission to liability will be subject to the court's approval which, if granted, will be in the form of a judgment.

The benefit for the corporate entity, arising from this specific type of settlement concluded with the enforcement authorities, is that the final judgment issued according to this procedure would not have to be recorded in the National Criminal Register. In addition, only the penalties and punitive measures set out above can be imposed on the corporate entity, and therefore it is not possible in such a case to impose, for example, a prohibition of further business activity or a prohibition of use of subsidies, which may be more onerous for such entities than the obligation to pay a fine.

The conditions of voluntary submission to liability will be favourable in comparison with the possible liability under the draft new Act on Corporate Criminal Liability, which provides for fines of up to PLN 30,000,000, whereas in the case of the voluntary submission to liability the maximum penalty is PLN 3,000,000.

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