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# Anti-Corruption

**Poland**

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## Trends and Developments

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### **Pandemic Justification**

#### *An exemption from punishing public officials and other individuals due to counteracting COVID-19 in Poland*

##### **Introduction**

The Polish Parliament is planning to introduce a provision to the legal regime that could be called a “pandemic justification”. This is Article 10d, to be implemented to the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and the Crisis Situations they Cause, dated 2 March 2020 (Journal of Laws of 2020, item 374, as amended, the “COVID-19 Law”).

This provision – in the wording proposed in the report of the Public Finance Committee of the Polish Sejm of 16 November 2020 – will exclude the criminal liability stipulated in Articles 231 § 1 and 3 or Article 296 § 1, 1a, 3 and 4 of the Polish Penal Code (the PPC) with respect to anyone “who, during a state of an epidemiological threat or a state of epidemic announced due to COVID-19, while acting to counteract COVID-19, breaches professional obligations or binding applicable laws, and without the breach thereof the undertaken actions could not have been performed or would have been materially threatened, where the breach is less valuable than the action undertaken”. The exclusion from criminal liability can be used – subject to certain conditions – by any public official who exceeds their rights or fails to perform an obligation (for example, issues a specific instruction without authorisation, which then leads to damage being inflicted on someone), or a person in charge of another entity’s property or business (eg, state-owned companies), who goes beyond their duties or fails to perform an obligation, thereby inflicting major property damage to this entity.

The challenges related to the COVID-19 pandemic may probably justify the need to loosen certain rules previously governing specific areas of public life, in particular those associated with spending or distributing public funds (eg, public procurements) or other public resources. However, it is difficult to deny that loosening the rules binding public officials creates room for corruption and increases the risk that such actions will be undertaken, since the anti-corruption brakes implemented into the legal regime are weakened.

The proposed draft of the pandemic justification gave rise to a lively public debate in Poland, raising a number of controversies, in particular political and social ones. The legal reservations raised must not be disregarded either. The proposed provision – as in a lens – concentrates many problems of the “crisis-related” laws.

It should be noted that this is not the first attempt to limit the scope of criminal liability using COVID-19 as an excuse. Less than a month after the COVID-19 Law was adopted, Article 10c was introduced, excluding from criminal liability for offences stipulated in Articles 231 or 296 PPC any individuals who, during a state of epidemiological threat or a state of epidemic announced due to COVID-19, while purchasing goods or services necessary to combat this disease, breached their professional duties or provisions governing these issues, provided that they acted in the public interest, and that without the breach the goods or services could not have been bought, or the public interest could have been materially threatened. It is clear that the structure of the proposed Article 10d of the COVID-19 Law refers to a certain extent to the no-longer applicable Article 10c of the COVID-19 Law, but expands its application.

##### **Factual background**

To understand better the reasoning behind the regulation and the motives of the legislator, it is worth examining the broader factual background preceding the submission of the draft of Article 10d of the COVID-19 Law.

Poland has been struggling with the COVID-19 pandemic since the beginning of March 2020, while a state of epidemic was officially announced on 20 March 2020. Along with most other countries around the world, the Polish authorities were not fully prepared for the scale of the challenges related to counteracting the spreading of the virus. The Polish government struggled to buy more personal protective equipment (masks, gloves and shields) and lifesaving devices (mainly respirators), since national supplies were unsatisfactory. It soon turned out that some of these actions, which consumed significant funds from the budget, proved to be ineffective.

The Polish media reported that over USD10 million worth of personal protective equipment imported by the Health Ministry,

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predominantly from China, had failed to fulfil the basic norms, and was essentially useless. This information was confirmed by the Ministry of Health, which guaranteed that the PPE would be used in facilities other than hospitals. Further, as more investigative journalism revealed, later confirmed by the Health Ministry, 1241 respirators worth almost USD39.5 million had been ordered from an internationally known gun dealer, who then supplied just 15% of the ordered products (of which a majority allegedly failed to satisfy the contractual requirements). The outstanding funds have not yet been repaid. The governmental officials – specifically those on the front line against COVID-19 – were accused of mismanagement, failing to perform their duties and even the embezzlement of public funds.

What raised even greater controversy throughout the country was the organisation of presidential elections which, pursuant to the calendar set in the Polish Constitution, were initially planned for 10 May 2020. Due to the COVID-19 pandemic, there were serious discussions about postponing the date. This idea was supported by most of the candidates, constitutional experts, and representatives of the Supreme Court, as well as the Ombudsman. The arguments in favour of postponing were that organising the presidential elections as planned would pose a threat to the health and lives of citizens, collecting signatures to support the candidates (under Polish law, candidates need to collect 100,000 signatures in order to stand) was materially hindered, and that running a normal presidential campaign in a state of epidemic was impossible. Despite these arguments, the government sought to hold elections on the first date at all cost, as it was believed this would support the re-election of President Andrzej Duda. Due to the state of epidemic, the decision was made to organise a postal ballot. Contrary to the plans of the parliamentary majority in the Sejm (the lower chamber of parliament), the statute intended to introduce the provisions necessary to organise such elections was temporarily blocked by the Senate (the higher chamber of parliament in Poland, where the opposition now has a majority).

Given the short period of time available in which to organise elections, even before the ballot statute was due to enter into force, on 16 April 2020, the Prime Minister decided to request that Poczta Polska S.A. (the Polish postal operator) undertake actions to prepare to carry out the elections by post. The State Assets Minister ordered that election packages be printed out (including voting cards), which according to official data cost approximately PLN70 million (approximately USD18 million). Due to further political turmoil, and formal legal problems related to changing the rights of the National Electoral Commission, finally the idea of a postal ballot was given up and new elections were scheduled for 28 June 2020, to be held using the ordinary procedure. The printed packages with the voting cards were never used and, according to unofficial reports, were

destroyed, which led to another wave of allegations about mismanagement.

The Ombudsman appealed before the Warsaw Voivodeship Administrative Court (VAC) against the Prime Minister's decision to conduct postal elections, claiming it was made without legal grounds (the Act on Postal Elections was not in force at the time) and it was grossly in breach of law (and of the Polish Constitution, too). In its judgment of 15 September 2020, the VAC shared the Ombudsman's arguments and declared that the Prime Minister's decision was invalid. The VAC considered the Prime Minister's decision requesting that Poczta Polska commence the organisation of postal elections had breached, among other things, the Constitution, the Elections Code and the Act on the Council of Ministers. The judgment is not final yet and may still be appealed against to the Supreme Administrative Court. Nevertheless, the justification as to the merits leaves no doubt that the Prime Minister's decision was illegal.

Certain lawyers believe that the judgment confirming the illegality of the actions of the Prime Minister, and of the ministers co-ordinating those actions, creates a path to press charges against them in the future for offences arising from Articles 231 and Article 296 of the PPC. It gives rise not only to criminal liability or the imposition of severe punishment but also has political consequences. The Polish Elections Code states that politicians with a final judgment convicting them of an offence cannot stand for elections, which is a painful punishment for a professional politician.

## **Pandemic justification limits**

“Pandemic justification” may be used by those accused of specific types of offences referred to in Article 10d of the COVID-19 Law, ie, offences referred to in Articles 231 § 1, 231 § 3, 296 § 1, 296 § 1a, 296 § 3 or 296 § 4 of the PPC.

Article 231 § 1 of the PPC provides for the criminal liability of a public official who, by going beyond their duties, or failing to perform their duties, intentionally acts to the detriment of a public or private interest, while Article 231 § 3 of the PPC concerns a public official who unintentionally perpetrates an offence, thereby inflicting material damage. The definition of a public official was formulated in Article 115 § 13 of the PPC and is quite broad. The provisions of Articles 296 § 1, § 1a § 3 and 4 of the PPC, in turn, penalise the inflicting of property damage on an injured party in an amount exceeding PLN200,000 (approximately USD50,000), or causing a direct threat of inflicting such a damage, even unintentionally, by the perpetrator, who, under the provisions of law, the decision of a competent authority or agreement, is obliged to handle the property affairs or business of the injured party. As regards the potential perpetrators, the scope of provisions of Article 296 of the PPC is

broadier than that of Article 231 of the PPC, since it is not limited to public officials.

The prerequisites (conditions) to excuse illegal actions or omissions under the proposed Article 10d of the COVID-19 Law are the following:

Firstly, the perpetrator must act “to counteract COVID-19”. This condition constitutes a certain “core” of the pandemic justification. Interestingly, it refers to “good intentions” rather than good effects of counteracting COVID-19 (such as limiting the spread of COVID-19).

Secondly, Article 10d of the COVID-19 Law can be applied only to acts perpetrated “during the state of an epidemiological threat or a state of epidemic announced due to COVID-19.” Poland has been in a state of epidemic since 20 March 2020. Formally, this is a requirement independent of the requirement “to counteract COVID-19.” However, if the condition “to counteract COVID-19” is satisfied, then, except for extraordinary situations, this condition will be satisfied, too.

Thirdly, similarly to Article 10c of the COVID-19 Law, Article 10d of the COVID-19 Law requires a determination as to whether the actions undertaken (to counteract COVID-19) were impossible to implement, or would be materially threatened, without breaching the professional obligations and applicable laws.

Fourthly, a presumption that merely counteracting COVID-19 during the state of an epidemiological threat or a state of epidemic announced because of COVID-19 should automatically legalise breaching the legal interest would be unjustified. Counteracting an epidemic does not constitute a legal interest per se, it is only a tool to protect certain interests, primarily human life and health. An assessment of all situations of illegal actions taken to counteract COVID-19 should take into consideration the “actual” legal interests in a given case, rather than hypothetical ones. A circumstance whereby counteracting COVID-19 can be used to protect socially important interests is not tantamount to determining that all interests conflicting with that are less valuable. The degree of threat posed to certain legal interests due to the epidemic may vary, which must translate to the protective measures undertaken. Hence, it is good that the analysed Article 10d of the COVID-19 Law contains an express condition that the “value of the breach is less valuable than that of the action taken”, which was missing in its initial version.

The prerequisites for applying Article 10d of the COVID-19 Law are rather general. Therefore, public officials who perpetrated certain illegal actions during the pandemic, their subordinates and representatives of public and private economic entities cooperating with them (commercial companies controlled by the State Treasury), will eagerly rely on this provision to protect themselves. Looking again at the costly and ultimately unnecessary organisation of a postal ballot, where the elections could not have been held legally, it may be possible to claim that these actions were undertaken to counteract COVID-19 (a ballot is a safer alternative to voting personally given the nature of transmission of coronavirus), that the delay in organising the election, in particular waiting for the ballot statute to enter into force, would make keeping the deadline impossible, while the citizens’ lives and health are worth more than PLN70 million. Since the ballot was ultimately not organised, the fact that preparing voting packages did not effectively contribute to combating COVID-19 would not constitute a counter-argument.

### **Pandemic justification versus necessity**

The requirements whereby the undertaken actions could not have been implemented or would have been materially threatened without breaching the professional duties and applicable provisions of law, and whereby the breach was less valuable than the action taken, as referred to in Article 10d of the COVID-19 Law, attempt to incorporate therein the classic prerequisites of a state of necessity, known in the majority of legal regimes. According to Polish law, a state of necessity is governed by Article 26 of the PPC. It constitutes justification (Article 26 § 1 of the PPC) when the situation concerns sacrificing one legal interest to save a greater one, and is an excuse in the remaining scope (Article 26 § 2 of the PPC).

It should be noted that there is a material difference between Article 10d of the COVID-19 Law and Article 26 § 1 of the PPC. The necessity justification occurs when there is a specific and direct threat to a legal interest. For example: careless parents shut their toddler in a hot car and go shopping; a passerby sees that the child is at risk of suffocation and breaks the car window to save the child. The direct hazard to a certain legal interest (the child’s life) is neutralised by sacrificing a less valuable legal interest (property – destroying the car window). Article 10d of the COVID-19 Law does not require a specific and direct threat to a legal interest. Depending on the professional duties or provisions (regarding public procurement, public spending, etc) breached by the perpetrator, the specific actions undertaken to counteract COVID-19 do not need to neutralise any direct hazard to any legal interest. A real threat to a legal interest may be abstract and sometimes difficult to distinguish from an apparent one.

It is important to remember these circumstances when analysing the consequences of adopting a provision addressed directly to politicians. Hence, there exists a material risk that the provision may be used to protect them against the legal consequences of acts that could be classified as ordinary mismanagement, the embezzlement of public means, abuse of powers or other offences typified in the specific part of the Penal Code and other criminal provisions.

Finally, it is necessary to focus on the practical aspects. A fundamental difference between the existing provision of the Penal Code on necessity and the proposed justification may be the actual shifting of the decision on whether an offence has been perpetrated from the court to the prosecutor's office, since the justification may become the basis to discontinue certain cases at the investigatory stage, hence without the need to conduct the procedure of collecting evidence and assessing whether the perpetrator had to protect the sacrificed interest. Therefore, there is a risk that the criminal law assessment may be based on a vague prerequisite of "counteracting COVID-19". The problem is that, in this way, almost any abuse of law during a state of epidemic can be justified.

### **Pandemic justification versus extraordinary measures**

When the parliamentary majority argued for the introduction of a pandemic justification, they claimed that public health, as a social value defined as a characteristic of a complex system protecting a large group of people, must not be threatened directly. They emphasised that, since the state must fight epidemic diseases, it should prepare such legal instruments in advance, which would allow it to react appropriately at an early stage of the threat.

Of course, an extraordinary situation such as a pandemic, which forces quick and non-standard actions to be taken in order to save the lives and health of people, justifies a certain flexibility in shaping and interpreting statutory rules. With this in mind, state institutions are allowed to make purchases disregarding the public procurement rules, or to waive temporarily certain binding provisions through "special acts". Nevertheless, the need to fight an epidemic must not justify the general exclusion of liability of public officials for their actions. Even in extraordinary circumstances, public officials must obey certain rules to protect citizens against their full discretion. Even in "normal" times, there are extraordinary, untypical and abnormal situations that create a risk of losing a specific legal interest that can only be mitigated (ie, the interest at stake protected) by breaching another legal interest. Nevertheless, not everyone who acts to protect a threatened legal interest in this situation and breaches another one will avoid criminal liability. Only those who satisfy the criteria governing necessity, as stipulated in Article 26 of the PPC will do so.

It could be said that the provisions of the PPC on necessity are drafted for "normal" times, when extraordinary situations happen rarely (they constitute something untypical, while abnormalities are much more readily met during pandemics). This is certainly true, but it still does not justify the introduction of a new, special justification such as the "pandemic justification". The Polish legal system, just like the legal systems of a number of states, provides for special legal solutions to be used in such difficult times, namely the constitutional institution of extraordinary measures, such as a state of natural disaster. Pursuant to Article 228.1 of the Polish Constitution (the Constitution), in the event of specific threats, in the face of which ordinary constitutional measures are unsatisfactory, appropriate extraordinary measures may be announced: martial law, a state of emergency or a state of natural disaster. Hence, if the political authorities determine that, given the epidemic, the existing legal and system-based regulations are unsatisfactory, they may introduce extraordinary measures, such as a state of natural disaster, which would be typical when fighting an epidemic. Hence, the authorities are allowed more flexibility, provided that they act in compliance with the procedure specified in the Constitution and in appropriate acts, such as the Act on Natural Disasters, which provides for "exceptional", extraordinary rules of operation of public authorities, including the right to introduce partial or temporary limitations of freedom and on human and citizen rights.

Despite publicly raised comments on the legitimacy of introducing a state of natural disaster, the Polish authorities decided not to introduce any of the Constitutional states of emergency.

### **Retrospective operation of the Act**

If Article 10d of the COVID-19 Law becomes binding law, the exclusion from punishment that it sets out will apply to acts perpetrated before it entered into force. Pursuant to Article 4 § 1 of the PPC, if, at the time of passing a ruling, the statute in force is different from what was in force at the time of committing the offence, the current statute applies (unless the statute previously in force is more lenient to the perpetrator).

### **Conflict with the Constitution**

Due to the foregoing, excluding the illegality of acts such as an abuse of power on the basis of a vague formula of "counteracting COVID-19" is controversial also from a constitutional point of view. In fact, Article 10d of the COVID-19 Law provides potential "justification" for any actions undertaken by practically all public authorities without legal basis, contrary to the applicable law, using non-statutory means or using illegal sanctions. This would pose a threat to important constitutional guarantees, and weaken the meaning of the principle of a closed catalogue of sources of generally applicable laws (Article 87.1 of the Constitution) and the principle of the rule of law, whereby public

authorities act pursuant to and within the limits of the law (Article 7 of the Constitution). It would also mean that citizens' rights and freedoms could be limited, irrespective of the requirements of the proportionality test (Article 31.3 of the Constitution). The introduction of a pandemic justification might lead to a situation in which every controlling act of the authorities, even if undertaken in a stark breach of powers and inflicting damage to citizens' interests, could be justified by the pursuit of achieving one overarching aim; it should be added that the pursuit need not be more than "declared".

Article 10d of the COVID-19 Law also raises concerns from the point of view of the Constitution concerning extraordinary measures – a pandemic justification would allow the citizens' rights and freedoms to be limited in a way that the Polish Constitution reserves for extraordinary measures, without being formally introduced, hence disregarding their legal norms (Articles 228.1 and 2, Articles 232 and 233 of the Constitution). It is worth emphasising again that the introduction of any extraordinary measure would, in principle, be permitted in order to achieve the declared objectives of Article 10d of the COVID-19 Law, since it would allow the constitutional rights of citizens to be limited in any scope, and any binding decisions to be issued, despite disregarding statutory provisions. Such a solution would be subject to certain constitutional frames and the Sejm's supervision, while the introduction of a pandemic justification may allow the provisions of the Constitution and statutes governing extraordinary measures to be circumvented. Article 10d of the COVID-19 Law may therefore lead to further-reaching interference in citizens' rights than the extraordinary measures, while at the same time maintaining the pretence that the state is operating "normally".

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He is currently working on his PhD thesis at the Institute of Legal Sciences of the Polish Academy of Science. During the crises related to the COVID-19 pandemic he was among the initiators of the "Europe, a Patient" initiative, where he prepared legal opinions and legislative proposals for the European Union. He has attended meetings with key representatives of European institutions, including the Vice President of the Commission Frans Timmermans.

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