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Principles of Criminal Liability of Collective Entities in Poland – the Current Situation v the Government’s Plans

White-collar crimes are associated with the abuse of various organisational structures that exist as independent entities with rights and obligations (eg, companies). Frequently these entities – let’s call them “collective entities” – are, at least formally, the beneficiaries of the offence. For this and other important reasons, certain legal systems provide solutions stipulating the criminal liability of collective entities.

Criminal Liability of Collective Entities Now

The Polish legal system ascribes *sensu stricto* criminal liability only to individuals. Yet, there are circumstances where legal entities and other collective entities may be exposed to the risk of repressive liability (*sensu largo* criminal liability) in the event that an individual associated with them perpetrates a criminal offence or a criminal fiscal offence.

The liability of legal entities and other organisational units for prohibited acts under threat of a penalty (offences or fiscal offences) was introduced in Poland almost 20 years ago by the Act on the Criminal Liability of Collective Entities for Punishable Offences (the “CLCE”) of 28 October 2002 (consolidated text: Journal of Laws of 2020, item 358). The liability provided for under the CLCE is not criminal liability *sensu stricto*. Nevertheless, it constitutes a repressive type of liability and hence constitutes criminal liability within the meaning of Article 42 Section 1 of the Polish constitution (*sensu largo* criminal liability).

According to Article 3 and Article 16 of the CLCE, a collective entity is held liable for a punishable prohibited act involving the conduct of an individual:

- 1) acting for or on behalf of the collective entity within the framework of their right or obligation to represent the entity, making decisions on behalf of the entity or performing internal audits, or violating that right or obligation; or
- 2) enabled to act because of a violation by the person referred to in point 1 above of their rights or obligations; or
- 3) acting for or on behalf of the collective entity with the consent or acquiescence of the person referred to in point 1 above; or
- 3a) being an entrepreneur directly collaborating with the collective entity to achieve a legal purpose,

if the collective entity benefited or could have benefited from that conduct, even if not financially, and if that conduct constitutes one of the offences or fiscal offences listed in Article 16 of the CLCE.

The definition of “collective entity” in the CLCE is broad, covering all Polish and foreign legal entities and organisational units that do not have legal personality but have the capacity to undertake legal actions (save for the State Treasury, local government units and their associations – Article 2 of the CLCE).

The nature of the criminal liability of a collective entity is subsequent to the criminal liability of an individual connected with this entity. This principle is established by Article 4 of the CLCE, whereby a collective entity is held liable if the person referred to in Article 3 of the CLCE has committed an offence referred to in Article 16 of the CLCE that has been confirmed by:

- a final and non-appealable judgment convicting that person;
- a judgment conditionally discontinuing the criminal proceedings or criminal fiscal proceedings against that person;
- a ruling to grant that person the right to voluntarily surrender; or
- a court ruling on discontinuing the proceedings against that person due to circumstances preventing them from being punished (for which it is a requirement to first obtain a final and non-appealable judgment against the perpetrator).

According to Article 5 of the CLCE, a collective entity is held liable if the punishable prohibited act is committed as a result of:

- at least a lack of due diligence in selecting the individual referred to in Article 3.2 or 3.3 of the CLCE, or at least a lack of due supervision over that individual by part of a body or a representative of the collective entity; or
- the operations of the collective entity being organised in such a manner that did not prevent an offence from being committed by the individual referred to in Articles 3.1 or 3.3a of the CLCE, if it could have been prevented by the collective entity's body or representative acting with the due diligence required in these circumstances.

If a collective entity is held criminally liable under Article 7 of the CLCE, the court may impose a fine ranging from PLN1,000 to PLN5,000,000,

but not more than 3% of the revenue earned by the collective entity in the business year in which the offence was perpetrated.

In addition, the court orders that any items coming at least indirectly from a prohibited act, or which were used or designated to perpetrate a prohibited act, are forfeited to the State Treasury, like the property benefit coming at least directly from the prohibited act, or an equivalent of such items and benefits, unless the items, property benefits or their equivalent are to be returned to an authorised entity (Article 8 of the CLCE). Other repressive measures include a prohibition on promoting or advertising the collective entity's business, products manufactured or marketed by the entity, or the services provided by the entity (Article 9 of the CLCE).

The fact of holding a collective entity criminally liable under this act does not exclude civil liability for the damage inflicted, administrative liability or the individual liability of the perpetrator (Article 6 of the CLCE).

The Proposed New Laws

On 11 January 2019, a government bill was filed with the Polish parliament. The new bill, dated 28 May 2018 (the "New CLCE" or the "Bill"), introduces material changes to the existing model of criminal liability of collective entities.

The authors of the New CLCE emphasised that the number of court procedures pending under the CLCE is minor (14 cases were initiated in 2015, 31 in 2014 and 26 in 2013), while the penalties imposed on collective entities under this act are low, which may imply that it is used only with respect to small collective entities. This, according to the authors of the act, distorts the concept of criminal liability of collective entities and implies that the Polish model of criminal liability of collective entities has not worked out, while the solutions applied so far

have been ineffective, even though they have been in force for close to two decades. Hence, they should be modified in detail. The need for the New CLCE is justified by the state's need to guarantee that regulations concerning the criminal liability of collective entities is efficient, as well as Poland's international legal obligations. Yet, only a glimpse is necessary to see that the New CLCE exceeds these obligations.

The fundamental differences between the New CLCE and the current laws are as follows:

- the criminal liability of collective entities is extended to practically all punishable prohibited acts constituting criminal or fiscal offences;
- there is no longer the general requirement that a collective entity may be held criminally liable for a prohibited act perpetrated by an individual associated with this entity, as long as the prohibited act has or could have brought a benefit, even if not a financial one, for this entity;
- there is no longer a requirement to first obtain a final and non-appealable judgment against the perpetrator, ie, an individual associated with a collective entity;
- the criminal liability of collective entities has been expanded to cover a collective entity's "own" conduct, ie, the actions or omissions of individuals performing functions on the collective entity's bodies and separating the liability of a collective entity for this conduct from the principle of fault; and
- the principle of fault has been removed when it comes to the liability of a collective entity for its own conduct related to the conduct or omission on the part of a body or a member of a body, and a major objectification of liability in the remaining scope.

What is New (in the Details)?

The scope of the criminal and fiscal offences for which a collective entity may currently be held criminally liable is defined in Article 16 of the CLCE. Two circumstances are of material importance here. First of all, the catalogue of criminal and fiscal offences referred to in the CLCE is a closed list. The New CLCE no longer limits the scope of the prohibited acts which – if committed – may result in holding a collective entity criminally liable; there is no closed catalogue of such actions. Pursuant to Articles 1.1.1 and 2.2 of the Bill, almost any prohibited act may, in theory, trigger the criminal liability of a collective entity since only a narrowly defined class of offences is excluded. This class includes offences prosecuted as a result of private indictment and prohibited acts perpetrated by the publication of press materials and other breaches of law resulting from sharing human thoughts, since they are governed by the Press Law of 26 January 1984. Therefore, the proposed change, if passed, will materially expand the scope of criminal liability of collective entities, and hence increase the risk of exposing collective entities to this liability.

The New CLCE not only considerably expands the scope of prohibited acts that may constitute grounds for criminal liability of a collective entity, but also modifies the remaining prerequisites for liability, making them much more liberal. Currently, a condition for holding a collective entity liable for a prohibited act perpetrated by an individual associated with that entity requires at least that the collective entity derives some theoretical benefit, not necessarily financial, from that act. The modified bill generally moves away from this requirement. This means that the scope of criminal liability of collective entities will be expanded to cover prohibited acts that did not bring, or were not even able to bring, the collective entity any benefit. Hence, this scope will be materially expanded and the risk of liability being ascribed

to the collective entity will increase considerably. Pursuant to the Bill, a collective entity could even formally be held criminally liable for prohibited acts perpetrated to the detriment of the entity (eg, when a member of the company's management board abuses their rights and by doing so intentionally inflicts material property damage – which is an offence specified in Article 296 § 1 of the Polish Criminal Code).

Thus far, to hold a collective entity criminally liable, the perpetrator (individual) of the prohibited act associated with the entity referred to in Article 3 of the CLCE had to be identified, and a final judgment had to be issued against this person for this act. Having realised that corporate activities continue to gain importance and are often characterised by major complexity and the size of the organisation, the authors of the New CLCE arrived at the conclusion that associating the liability of collective entities with the acts perpetrated by individuals makes the possibility of putting the collective entity on trial too dependent on the ability to punish the individual (and hence the ability to first ascribe fault to this individual under criminal law). In their assessment, the condition to obtain a final and non-appealable judgment against an individual constituted a major obstacle to the effective punishment of legal entities with proportionate and deterring sanctions, and this was one of the reasons for the relatively rare application of the CLCE, which is why the authors decided to remove it. Indeed, the fact that the procedure against a collective entity could only be instituted after the procedure against the perpetrator (individual) was closed, often gave rise to certain evidence-related difficulties, such as determining the state of facts when the prohibited act was perpetrated. During the procedure against an individual (perpetrator), the evidence should have been collected with a view to ascribing potential liability to a collective entity – however, this was usually disregarded in practice.

Lifting this limitation would change the role played by the collective entity in criminal proceedings, and would considerably modify the model of a collective entity's criminal liability. Under the New CLCE, a collective entity's liability is fully distinctive and independent, which means that it is not conditional upon the criminal liability of any individual. Since there would no longer be a requirement to first obtain a final and unappealable judgment of the court for an individual associated with the collective entity for the prohibited act, which would then constitute the basis of liability of the collective entity, this means that, during the criminal procedure against the collective entity conducted under the New CLCE, the court would be bound to make independent arrangements regardless of whether the prerequisites of a prohibited act occurred, and if so – whether they took place under the conditions specified in Articles 5 or 6 of the Bill.

The liberalisation of the link between the liability of a collective entity for a prohibited act and the criminal liability of an individual for perpetrating the act, as proposed in the New CLCE, goes further and considerably exceeds the requirement to first obtain a final and non-appealable judgment against the perpetrator. Article 7 of the Bill is clear that the criminal liability of a collective entity is not excluded by the fact that:

- there are circumstances in which the perpetrator cannot be sentenced, such as when the perpetrator has died, has not been found or caught, or cannot take part in the procedure due to a psychological or other serious condition;
- the prohibited act was perpetrated through the acts or omissions of several bodies, their members or individuals as referred to in Articles 6.1 and 6.2 of the Bill;
- the composition of the body changed after the prohibited act was perpetrated;

- the identity of the individuals referred to in Articles 5.2.2 or 6.1 or 6.2 of the Bill, or the individual who allowed the perpetrator to act, has not been established.

It seems clear that even the failure to find the individual perpetrator is not an obstacle to holding a collective entity criminally liable for this act. This means that the statutory liability for prohibited acts perpetrated by collective entities would be much stricter than it currently is.

The New CLCE builds the criminal liability of collective entities on two different principles that are independent of one another but still complementary. These are liability for the collective entity's own conduct (Article 5 of the Bill) and liability for the actions or omissions of the collective entity's employees or other individuals performing authorised tasks for it (Article 6 of the Bill). Both these principles are broader in the New CLCE than in the CLCE.

Under Article 5 of the Bill, a collective entity is liable for prohibited acts if the prerequisites have been satisfied by an action or omission directly related to the entity's business, provided that the prerequisites have been satisfied as a result of an action or omission of this entity's body or as a result of an intentional action or omission on the part of a member of this entity's body. Article 5.2 of the Bill stipulates that, in order to ascribe criminal liability to a collective entity for its own actions, the prerequisites of the prohibited act need to be satisfied by the action or omission of this entity's body or an intentional action or omission on the part of a member of this body. Pursuant to Article 5.2.2 of the Bill, the actions or omission on the part of a member of the collective entity's body that satisfy the prerequisites of a prohibited act constitute the basis for criminal liability only when it is "intentional". Intentionality is no longer necessary when the collective entity's criminal liability is based on the satis-

faction of prerequisites of a prohibited act as a result of actions or omission of this entity's body (Article 5.2.1 of the Bill). Here, the threshold for the collective entity's criminal liability is much lower than when the criminal liability stems from the actions or omission on the part of a member of this entity's body (here intentionality is required). For instance, if the prerequisites of a prohibited act are satisfied as a result of the collective entity's managing body adopting a specific resolution, then the collective entity can be held criminally liable for this prohibited act, even if none of the members of the body that adopted that resolution was aware that it might satisfy the prerequisites of the prohibited act. This makes the collective entity's criminal liability in this situation closer to risk-based liability. Therefore, if the New CLCE enters into force, the basis of the criminal liability of a collective entity for its own actions, ie, for the specific actions of members of its bodies, would be considerably extended.

The scope and principles of the criminal liability of a collective entity for a "third party's" actions or omissions, ie, of individuals who are not members of the collective entity's bodies (its employees or other individuals performing tasks in favour of this entity under the tasks entrusted to them) is governed by Article 6 of the Bill. This article distinguishes two groups of individuals, differentiating the prerequisites of criminal liability of a collective entity for prohibited acts perpetrated by these individuals, depending on the group to which they belong. The first of these groups is specified in Article 6.1 of the Bill, the second in Article 6.2 of the Bill.

Under Article 6.1 of the Bill, a collective entity is liable for a prohibited act directly associated with the business conducted by the entity if it is perpetrated by:

- an individual authorised to represent it, make decisions or perform supervision on its behalf

- (eg, a commercial representative or another attorney of a collective entity), in relation to the conduct for or in the interest of the entity;
- an individual admitted to act by the entity's body, a member of this body or a person referred to in the point above, as a result of an abuse of rights or a failure to perform obligations; or
 - a person employed by the entity (under an employment relationship or on any other basis), in relation to rendering work for the entity.

This group of individuals is broad. In order to associate a prohibited act perpetrated by these individuals with a collective entity it is enough to – as in the circumstances referred to in Article 5.2 of the Bill – determine that this prohibited act is directly related to the business activity carried out by the collective entity. If this condition is satisfied, the prohibited act may become the basis of the collective entity's liability, even if the collective entity did not achieve, or could not have achieved, any benefit therefrom.

While it could be said that the collective entity has at least some slight degree of influence on the conduct of the individuals referred to in Article 6.1 of the Bill, the same cannot be said about those referred to in Article 6.2 of the Bill. Pursuant to this provision, a collective entity is responsible for a prohibited act that led to it enjoying, even indirectly, a financial benefit and which was perpetrated by (i) a subcontractor or another entrepreneur, where this prohibited act was related to the performance of an agreement entered into with the collective entity, or (ii) an employee or a person authorised to act in the interest of or for the collective entity, if the perpetrated prohibited act is related to the performance of an agreement entered into with the collective entity – if the body, a member of the body or a person referred to in Article 6.1 of the Bill knew or could reasonably have known

that these individuals had perpetrated or would try to perpetrate a prohibited act, or that any of the irregularities referred to in Article 6.4 of the Bill were involved.

Extending criminal liability for prohibited acts to cover the individuals referred to in Article 6.2 of the Bill, in particular the collective entity's subcontractors and contractors and the individuals associated with them on conditions provided for in this provision, would significantly increase the risk of the collective entity being exposed to criminal liability, since the collective entity has no real direct influence over them, or at least, this influence is insufficient.

In the circumstances referred to in Articles 5.2 and 6.1 of the Bill, in order to link a collective entity and a prohibited act, it is necessary to determine whether this prohibited act is directly associated with the business carried out by that entity. According to Article 6.2 of the Bill, it must be determined whether the collective entity generated any financial benefit from the prohibited act. However, a benefit might also come indirectly from this act.

The New CLCE limits the scope of criminal liability of a collective entity for prohibited acts perpetrated by the individuals referred to in Article 6.2 of the Bill, in particular the prohibited acts of the collective entity's subcontractors and contractors and the individuals associated with them, to circumstances where a body, a member of a body or a person referred to in Article 6.1 of the Bill knew, or could reasonably have known, that the individuals referred to in Article 6.2 of the Bill had perpetrated or would attempt to perpetrate this act, or where the irregularities referred to in Article 6.4 of the Bill are revealed in the undertaking referred to in Article 6.2.2 of the Bill.

Is the Principle of Fault No Longer Necessary?

As mentioned, the liability of collective entities under the CLCE is criminal liability within the meaning of Article 42 Section 1 of the Polish constitution. Hence, it benefits from the guarantees for this type of liability offered by the Polish constitution. One of these guarantees is the principle of fault, whereby if you cannot ascribe fault to a person, then this person cannot be held liable. The New CLCE provides for overly-extensive objectification of criminal liability of a collective entity, which is manifested through:

- actual deviation from the principle of fault in the event of liability of a collective entity for its own actions related to the acts or omissions of the entity's body or a member of that body (Articles 5.2.1 and 5.2.2 of the Bill);
- structuring the prerequisites to ascribe fault in the event of liability of a collective entity for a "third party's acts" (Articles 6.1 and 6.2 of the Bill) in a way that reduces the importance of subjective factors; and
- shifting the burden of proof in the scope specified in Article 6.6 of the Bill from the prosecutor to the collective entity.

Other Changes

The New CLCE introduces material changes not only to the principles (prerequisites) of the criminal liability of collective entities, but also to almost every other aspect of this liability. For example, the Bill sets out material changes in the scope of penalties and other repressive measures adjudicated as part of this liability. In addition to the fines provided for in the CLCE, the Bill supplements the catalogue of penalties with another penalty consisting of the dissolution of the collective entity. At the same time, the penalty thresholds have been increased to range from PLN30,000/EUR7,500 to PLN30,000,000/EUR7,500,000 (they currently

range from PLN1,000/EUR250 to PLN5,000,000/EUR1,250,000).

Tightening up Criminal Policy

The solutions contained in the New CLCE prove there have been attempts to tighten up the criminal policy related to the criminal liability of collective entities for punishable prohibited acts. They provide for a significant expansion of the scope of the criminal liability of collective entities, a far-reaching "loosening" of the prerequisites for this liability and a visible objectification, as well as the possibility for enforcement bodies to apply intrusive temporary measures. If the planned solutions and solutions similar to them become law, the risk of a collective entity facing criminal liability will materially increase, along with the requirements that a collective entity would have to satisfy in order to mitigate this risk to an acceptable level.

The New CLCE was filed with the Polish parliament during its eighth term. By the end of that term, the Bill had not been adopted, most probably for political reasons since the government had a parliamentary majority and would have been able to push this bill through. Nevertheless, there are no signals that the government, and in particular the Ministry of Justice which authored the New CLCE, plan to give up the intention to implement the solutions contained in the Bill. Therefore, it is likely that the government will soon file a bill containing the same solutions as those offered in the New CLCE, or solutions very similar to them (from a formal point of view, the bill would have been filed again due to the principle of discontinuation, whereby legislative processes that did not end during a given parliamentary term are closed when that term of office expires and are not moved for consideration by the new parliament). Most probably, political reasons will decide on whether that will happen or not.

DeBenedetti Majewski Szczęśniak Spk (DMS) is a transactional-litigation boutique with close to 20 lawyers in Warsaw, Poland. It specialises in corporate law, private equity, M&A, bankruptcy/restructuring, litigation and mediation, as well as criminal law. DMS's experience in drafting complicated transactions, tailored to the needs of very demanding clients, makes it

the go-to firm for any difficult commercial situations, both in Poland and abroad. It acts as a subcontractor for many international law firms that do not have a Warsaw office, assisting with cross-border M&A transactions, advising on local aspects of FCPA/Bribery Act claims, and amending contracts in order to reflect Polish law and business aspects.

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