

Corporate Criminal Liability in Poland

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A BRIEF GUIDE FOR ALL CONCERNED

In Poland, the Act on Liability of Collective Entities for Punishable Offences has been in force for nearly 20 years. It regulates the liability often referred to in practice as corporate criminal liability.

The act was introduced to meet international obligations and more effectively combat serious economic and fiscal crime, of which corporations are often beneficiaries. To this end, regulations were adopted making it possible to subject such entities to criminal sanctions. The act breaks with the principle that only natural persons may be guilty of criminal and fiscal offences. Under the act, such liability may be pursued against collective entities, and if they are convicted, penalties may be imposed on them.

Although the act has been in force for many years, law enforcement agencies rarely decide to indict collective entities. There are many reasons for this, but the main reason is the dysfunctionality of the act (for example, the requirement in most instances of prior conviction of individuals such as board members, employees or associates).

However, companies must take into account that in the near future, law enforcement authorities may more frequently pursue criminal liability of collective entities for criminal and fiscal offences committed by their employees or associates. It is also likely that the provisions on corporate criminal liability will be reformed, with expansion of liability, stricter penalties, and streamlining of the procedure for indictment and punishment of companies.

In this guide, we outline the rules for corporate criminal liability under the current law. In particular, we answer such questions as:

- Who specifically may bear liability under the act?
- For what offences can a collective entity be held liable, in what circumstances and under what conditions?
- What are the sanctions?
- What are the proceedings like and how can a company defend itself?
- Is liability “transferred” to the buyer when a company is sold—and thus is there a danger of buying a “pig in a poke”?

We invite you to read our guide.

What is a collective entity?

Liability under the act may be borne by legal persons and by organisational units that lack legal personality but have legal capacity, i.e.:

- Partnerships (registered partnerships, professional partnerships, limited partnerships, joint-stock limited partnerships) and companies (limited-liability companies and joint-stock companies, regardless of who holds shares in them)
- Agricultural and residential cooperatives
- Foundations and associations, including unincorporated ones
- Political parties
- Churches and religious denominations
- Homeowners associations.

The act further specifies that liability may be also borne by:

- Companies in organisation
- Entities in liquidation
- Business entities that are not natural persons
- Foreign business units (e.g. branches and representative offices).

Collective entities do not include the State Treasury or territorial government units and unions thereof.

Principles of liability of collective entities

Collective entities are liable in relation to the commission of a criminal act by natural persons (individuals) linked to them. In other words, a criminal act is committed by an individual, but in addition to the individual's criminal liability, criminal liability may subsequently be imposed on a collective entity as well. This liability can be attributed to a collective entity if:

- 1 A prohibited act (criminal or fiscal offence) for which collective entities may be held liable has been committed
- 2 The prohibited act was committed by a natural person linked to the collective entity (e.g. a member of its corporate bodies, an agent, an employee or an associate)
- 3 The collective entity has benefited or could have benefited from the offence
- 4 Commission of a prohibited act by the perpetrator (a natural person linked to the collective entity) has been confirmed by a legally final judicial ruling—this does not apply to the liability of a collective entity for an environmental offence
- 5 Commission of the offence resulted from the collective entity's culpability (the entity was improperly organised or did not adequately select or supervise a natural person linked with it).

Condition 1: Prohibited act

Collective entities may be held liable only for criminal or fiscal offences indicated in the act. This is a closed list, but is steadily being expanded. The table below shows selected types of acts, indicating whether collective entities can be held liable for them.

| Act | Can be liable |
|--|---------------|
| Exposure to immediate danger of loss of life or health | no |
| Causing an event threatening lives or health of many people (e.g. fire, collapse of a structure) or imminent danger of such an event | no |
| Environmental pollution | yes |
| Persistent violation of employee rights | no |
| Public and private corruption | yes |

| Act | Can be liable |
|---|---------------|
| Influence peddling | yes |
| Forgery, use of a forged document, or making a false statement in a document or invoice | yes |
| Theft, misappropriation | no |
| Fraud | yes |
| Money laundering | yes |
| Bid rigging | yes |
| Failure to prepare a financial statement | no |
| Manipulation of financial instruments | yes |
| Tax evasion | yes |
| Tax fraud | yes |
| Involvement in illicit export of medicines | no |

Condition 2: Linking the perpetrator with the collective entity

The liability of a collective entity depends on a link between it and the natural person who perpetrated the act. This link may take many forms. The type of link determines the form of culpability that must be attributed to the collective entity for it to be liable (more on culpability on pp. 8-9).

| Link with collective entity | Definition | Example | Form of culpability |
|-----------------------------|--|--|-----------------------|
| Representatives | Persons acting for or on behalf of a collective entity under the power or obligation to represent it, make decisions on its behalf or perform internal controls, or in the event of exceeding this power or failure to comply with this obligation | Partners, members of corporate bodies (e.g. management board or supervisory board), commercial proxies, agents | Fault in organisation |

| Link with collective entity | Definition | Example | Form of culpability |
|---|---|--|-----------------------------------|
| Persons allowed to act | Persons allowed to act as a result of exceeding powers or failure to fulfil obligations by the representative | Lower-level managers or employees managing particular departments operating within the collective entity's structure | Fault in supervision or selection |
| Secondary representatives | Persons acting for or on behalf of the collective entity, with the consent or knowledge of the representative | Lower-level managers or employees managing particular departments operating within the collective entity's structure, agents | Fault in supervision or selection |
| Business entities cooperating directly | Persons who are business entities directly cooperating with the collective entity to achieve a legally permissible goal | A company acting as a member of a consortium participating in a public contract | Fault in organisation |

In practice, it can be problematic to identify persons to whose activities the culpability of the collective entity can be linked, as many actions and decisions are taken collectively and some are decided privately.

Question:

Is a collective entity liable for actions of its management board members?

Yes, but this applies only to acts committed on or after 14 November 2011. With respect to earlier acts, such liability was excluded due to a legislative error, as the Supreme Court of Poland has repeatedly held.

See e.g. Supreme Court order of 5 May 2009 (case no. IV KK 427/08) and Supreme Court judgments of 11 April 2011 (V KK 57/11), 18 October 2011 (IV KK 276/11), 4 November 2011 (KK 136/11), 26 January 2012 (IV KK 266/11), 29 January 2013 (V KK 438/12), 11 April 2013 (V KK 21/13) and 4 September 2014 (V KK 254/14).

Condition 3: Benefit

The concept of a benefit is understood broadly. The benefit can be either material (e.g. profit, saving an expense, avoiding a loss, obtaining a gratuitous benefit) or non-material (e.g. getting rid of a problem). The benefit need not be achieved. It is enough that it could have been achieved. In the practice of the act, which has mostly been used to prosecute fiscal offences resulting in underpayment of tax, the courts have often regarded as an advantage the “financing” of the entity’s activities made possible by not paying advances of personal income tax.

Condition 4: Commission of prohibited act by perpetrator confirmed by a legally final judicial ruling

As a rule, a collective entity may be liable for a prohibited act only if a legally final ruling confirming commission of a prohibited act has been issued against a natural person (predicate ruling). This involves:

- A judgment of conviction (including as a result of voluntarily submission to punishment for a criminal or fiscal offence)
- A judgment conditionally discontinuing criminal or criminal fiscal proceedings
- A decision granting an individual linked with a collective entity permission to voluntarily submit to liability for a tax offence
- A court decision discontinuing the proceedings due to circumstances excluding punishment of the perpetrator (e.g. when the law indicates that the perpetrator is not subject to punishment).

Thus, in most instances, corporate criminal liability of a collective entity follows a cascading course. Proceedings can be initiated and pursued against a collective entity only after the proceedings against a natural person have concluded.

However, from 1 September 2022, as mentioned, this does not apply to a situation where a collective entity is held liable for an environmental offence. In the case of environmental offences, liability of the collective entity no longer depends on issuance of a predicate ruling against an individual.

Condition 5: Fault of collective entity

For a collective entity to be liable under the act, the entity must be found to be culpable for the offence. The type of culpability varies depending on the linked natural person who committed the act (see table on pp. 5-6).

Fault in selection consists in the improper selection of a given person (e.g. hiring an employee or associate) by a collective entity, without exercising due diligence. This situation may arise, for example, when an employee:

- Was selected for a particular position without verifying whether he or she has the required experience and qualities
- Was hired even though the collective entity knew that the person did not meet the requirements under the contract, the specifics of the position or legal provisions (e.g. regarding a building site manager, qualified security guard, or carrier), or
- Was punished multiple times for offences in the past and was hired for a position carrying a special duty of loyalty and trust.

Fault in selection must be a contributing factor in commission of the offence by the natural person.

There can be said to be **fault in supervision** when an offence was committed due to improper supervision or control on the part of the collective entity. The basis for exercising such supervision (e.g. statute, employment contract, civil contract or articles of association), and thus whom it concerns (employee or associate), is also relevant. As a rule, the possibilities of control are greater in the case of an employer-employee relationship. The actual ability to exercise supervision and implement supervisory measures is also relevant. Supervision in large, global entities may look different than in family-owned businesses.

In addition, there is **fault in organisation**. The provisions state enigmatically that the fault of a collective entity also exists when its organisation did not prevent commission of the offence by its representative or a business entity cooperating directly with it, when the exercise of due diligence required in the given circumstances by its body or representative could have prevented it. The act does not specify exactly what organisational flaws may be incriminating for a collective entity. It seems that the existence of such a flaw may be evidenced, for example, by an unclear division of duties between the management board members of the collective entity or the lack of compliance procedures (e.g. anti-corruption, whistleblowing or procurement policy). In the practical application of the act, the courts must assess whether commission of the offence was the result of errors in organisation or other factors lying

outside the organisation of the collective entity. Cases of failure to pay taxes have offered an occasion for the courts to consider this issue. For example, conflicts between partners over financial policy have been held to be errors in organisation. On the other hand, the lack of financial liquidity, resulting for example from a poor economic situation, has been held not to constitute grounds for attributing organisational fault to the collective entity.

Limitations period

The limitation periods are different than for natural persons. The limitations period for adjudication (i.e. the time after which proceedings cannot be brought and sanctions cannot be ordered) is 10 years after the predicate ruling becomes legally final. However, the law does not include a separate rule on the limitations period for adjudication in the case of the liability of collective entities for environmental offences, for which a predicate ruling is no longer required. The statute of limitations for enforcement of sanctions is 10 years after the judgment finding the collective entity liable becomes legally final.

Sanctions

In the case of conviction of a collective entity, the court will impose a punishment: a fine, forfeiture, or a ban on conducting certain activities.

Fine

The basic sanction is a fine ranging from PLN 1,000 to PLN 5 million, or in the case of liability for an environmental offence PLN 10,000 to PLN 5 million. However, it cannot be higher than 3% of the revenue generated in the financial year in which the offence was committed (this limit does not apply to liability for an environmental offence). But this method of determining the amount of a fine seems inadequate, particularly in a situation where the ruling on the liability of the collective entity is issued several years after commission of the offence. This may discourage seeking higher penalties, especially against entities whose financial position is much weaker than it was at the time of commission of the offence.

Forfeiture

As a rule, when finding a collective entity liable, the court must also rule on forfeiture of:

- Items originating even indirectly from the offence, or their equivalent value
- Items that were used or intended to be used to commit the offence
- Material benefit derived even indirectly from the offence, or the equivalent.

In practice, the ruling on forfeiture of the equivalent of financial benefit may prove to be much harsher for collective entities. Unlike fines, there are no “brackets” and the entity must pay an amount corresponding to what it obtained from the offence.

However, forfeiture will not be ordered if the item, financial benefit or equivalent is returned to another entitled entity (e.g. the injured party).

Bans

In addition, for a period of 1 to 5 years, collective entities may be prohibited from promoting or supporting their activities (promotion, advertising, using various forms of support (grants, subsidies or other forms of financial support from public funds, or assistance of international organisations of which Poland is a member)), as well as competing for public contracts. Publicising the judgment against the entity may also be ordered. In the case of liability for the offence of entrusting work to foreigners present in Poland without a valid document authorising them to stay in Poland, a collective entity may be ordered to pay the State Treasury an amount equal to the public funds received by the entity in the 12 months preceding issuance of the predicate ruling.

Rules for imposing penalties

In each case, when determining the amount of the imposed sanctions, the court takes into account, in particular:

- The seriousness of the irregularity in selection or supervision
- The extent of the benefit that was obtained or could have been obtained by the collective entity as a result of the offence by a natural person
- The financial situation of the collective entity
- Social consequences of punishment
- The impact of punishment on further operation of the collective entity.

Moreover, in practice, as in cases against natural persons, the courts take into account whether the collective entity has already been punished in the past.

Question:

Can the court waive a fine?

Yes. The conditions for the court to refrain from imposing a fine on a collective entity are the existence of a particular justification and the absence of an advantage for the collective entity from the predicate offence. Among others, this includes cases where the financial situation of the entity is so unfavourable that imposing a fine could lead to dire consequences (such as bankruptcy).

However, if the court decides to waive a fine, it must order other sanctions: forfeiture, prohibition of certain activities (indicated above) aimed

at promoting or supporting the operations of the entity or competing for public contracts, or publicising of the judgment.

Question:

Is punishment of a collective entity shown in the criminal record?

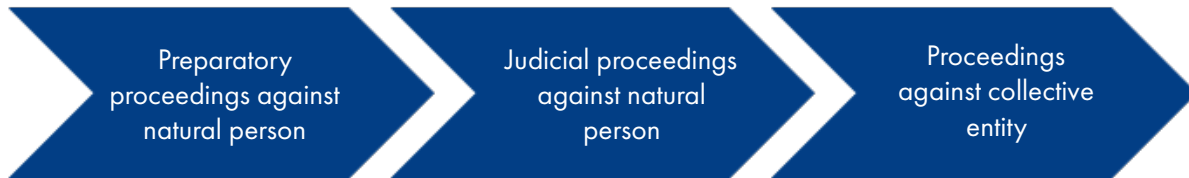
Yes. The National Criminal Register collects data on collective entities against which a final fine, forfeiture, prohibition, or publicising of the judgment was ordered. The entry is deleted 10 years after the fine, forfeiture, prohibition or publicising of the judgment has been executed or discharged or become time-barred.

Question:

When imposing a penalty, will the court take into account the behaviour of the collective entity during the criminal proceedings? In particular, can the entity count on a lighter penalty if it reported the offence which later gave rise to holding it criminally responsible, and cooperated with the justice system by providing explanations and presenting documents?

Cooperation by the collective entity in disclosure and subsequent prosecution of an offence may, but does not have to, result in mitigation of its liability. However, it is important to remember that a collective entity can take steps to reduce the risk of liability. In the event of notification of an offence, the company may act as a notifier in the proceedings against a natural person and exercise its procedural rights (e.g. review the files, request admission of evidence, or file an appeal against discontinuance of the proceedings). Filing notification of an offence, as well as cooperation on the part of a collective entity, may also in practice influence the decision of the prosecutor, the injured party or the president of the Office of Competition and Consumer Protection to refrain from filing a request to initiate proceedings against the collective entity.

Proceedings against collective entity



Criminal proceedings against a natural person and the role of the collective entity

The cascade model of liability means that a natural person must first be found guilty of a criminal or fiscal offence (except in the case of environmental offences). However, this does not mean that the collective entity must wait idly for conclusion of the criminal proceedings against that person. In those proceedings, the collective entity may participate and defend its interests. In particular, it may act through a representative, e.g. a board member, commercial proxy, or other manager. But the representative may not be a natural person linked with the collective entity against whom such proceedings are brought. The court must inform the collective entity of its right to participate in the proceedings. The representative may be questioned as a witness or may refuse to testify. A collective entity also has other rights: in these proceedings, it may be represented by an attorney, participate in hearings and other sessions, review the case file, apply for admission of evidence, question witnesses, make a closing statement, and file an appeal against the judgment.

Criminal proceedings against a collective entity

Proceedings against a collective entity follow the legally final conclusion of the case against a natural person linked to it (but in the case of environmental offences, proceedings against a collective entity may take place at the same time, or even prior to initiation of proceedings against a natural person). Proceedings are conducted exclusively in court. They are initiated at the request of the prosecutor, the injured party, or in some cases the president of the Office of Competition and Consumer Protection.

The court proceedings themselves are similar to criminal proceedings against natural persons.

Perhaps the most important difference relates to allocation of the burden of proof. The burden of proof rests on whoever proffers evidence. This means that the collective entity must prove facts it asserts. In particular, this applies to mitigating or exculpatory circumstances.

However, the principle remains unchanged that the burden of proving the prerequisites for liability of a collective entity, including in particular guilt and rebuttal of the presumption of innocence, rests with the prosecution.

In practice, evidentiary proceedings are limited to hearing the person representing the collective entity, possibly questioning another person as a witness (e.g. the person convicted of the offence giving rise to the proceedings against the collective entity), and/or analysing the files of the criminal proceedings against the natural person.

A collective entity participates in the proceedings through a person appearing on behalf of the entity who is a member of the body authorised to represent the entity. However, this person may not be the natural person who committed the offence that is the basis for the collective entity's alleged liability. The person acting on behalf of the collective entity has the right to give explanations and answer questions. They may also refuse to provide explanations or answer specific questions without giving any reason. They may also present clarifications regarding any evidence given at the court hearing.

Among other things, a collective entity may also appoint defence counsel, review the case file, apply for admission of evidence, question witnesses, make a closing statement, file an appeal and, at a later stage, a cassation appeal against the judgment of the appellate court.

After conducting the proceedings, the court of first instance will issue a judgment imposing or refusing to impose liability or, alternatively, discontinuing the proceedings.

Question:

Does a collective entity have the right to remain silent, or when questioned by the prosecution, must it provide information as to facts bearing on its liability under the act?

A collective entity may exercise its right to a defence. It also enjoys freedom from self-incrimination: it cannot be forced to admit responsibility. Therefore, it has the right to remain silent. But this does not mean that

law enforcement authorities cannot carry out actions aimed at uncovering evidence that exists independently of the collective entity. Therefore, they are entitled to conduct a search at the premises of the entity and (with certain exceptions) to seize documents indicating facts unfavourable to the collective entity.

Question:

If a company retained a lawyer to prepare an opinion for it on the risk of corporate criminal liability, is the opinion covered by the attorney-client privilege or defence counsel privilege, or can it be obtained and used by the prosecution against the company?

Depending on the specific circumstances, such a document may be covered by attorney-client privilege or defence counsel privilege. Attorney-client privilege is protected in proceedings involving liability of collective entities. The use of documents containing information covered by attorney-client privilege in such proceedings is possible only under strictly defined requirements, by order of the court. Such an order is subject to appeal. Documents covered by defence counsel privilege are even more protected—they cannot be used at all.

Preventive measures

Preventive measures may be taken against a collective entity in proceedings involving the liability of a collective entity, as well as in criminal or criminal fiscal proceedings against a natural person whose act may constitute the basis for liability of a collective entity. These measures include bans on:

- Merger, division, or reorganisation
- Competing for public contracts
- Encumbrance or transfer of assets without the consent of the court.

Preventive measures are imposed for the duration of the proceedings. A decision to apply a preventive measure against a collective entity is issued by the court. An appeal may be filed against the decision.

Security against property

In addition to applying preventive measures to a collective entity, its property may also be secured against the threatened fine or forfeiture. Such security may involve, among other things:

- Seizure of movable property, receivables in a bank account, other receivables, or other property rights
- Encumbering the real estate of a collective entity with a compulsory mortgage
- Establishing compulsory administration of the collective entity's enterprise.

A decision imposing security against property is issued by the court. The collective entity may file an appeal against the decision.

Question:

Can security be ordered against the property of a collective entity prior to institution of proceedings against it, e.g. during the proceedings against the natural person?

Yes. The prosecutor, the injured party, and in some cases the president of the Office of Competition and Consumer Protection may apply for security against the property of a collective entity even before initiation of proceedings against the entity. In addition, in the course of the proceedings against a natural person, security against property may be ordered in the form of compulsory administration of the enterprise of a collective entity and appointment of an administrator. This is only possible if the evidence in proceedings against the natural person indicates a high probability that the collective entity may be subject to liability under the Act on Liability of Collective Entities for Punishable Offences.

Costs of criminal proceedings against a collective entity

Due to the defectiveness of the regulations governing the costs of criminal proceedings against collective entities, it is doubtful whether a collective entity can be charged with such costs even if the entity is found guilty. In practice, courts often exempt collective entities from the obligation to pay costs. If the court finds no grounds for liability, the collective entity may seek reimbursement of costs related to the appointment of defence counsel in the case, as well as expenses required for participation in the proceedings (e.g. costs of the representative's travel to the hearing).

Duty to report an offence

The duty of collective entities to report a crime can be either social or legal in nature.

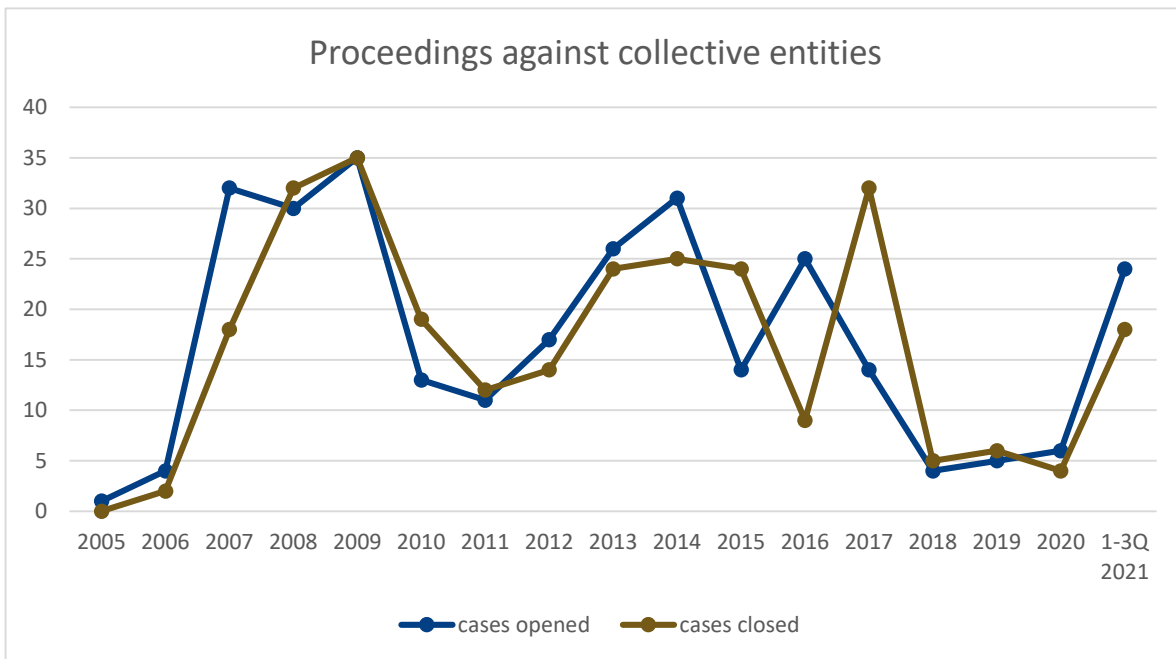
In essence, a social obligation amounts to a duty, not subject to sanction, to report a crime by any entity that becomes aware of commission of an offence prosecuted publicly (*ex officio*). This type of duty applies to most offences, including those for which a collective entity cannot be held liable. In such a case, the submission of a notification of an offence may express, in particular, a refusal to condone unlawful actions committed by particular natural persons.

The legal duty concerns the obligation on the part of every natural person to notify law enforcement authorities of certain offences specified in the Criminal Code (e.g. homicide, bringing about an event posing a threat to the lives or health of many people or property of great magnitude, or a terrorist offence), if the person has reliable information about such an offence. However, this obligation does not apply to collective entities, and they are not responsible for failure to report such offences. But such a duty may be borne for example by members of the management board of a collective entity who learn of such offences.

In addition, a sanctioned legal obligation to report circumstances indicating the commission of specific offences may arise under separate regulations that may apply to collective entities (e.g. a duty on the part of financial institutions to notify the General Inspector of Financial Information of suspected money laundering).

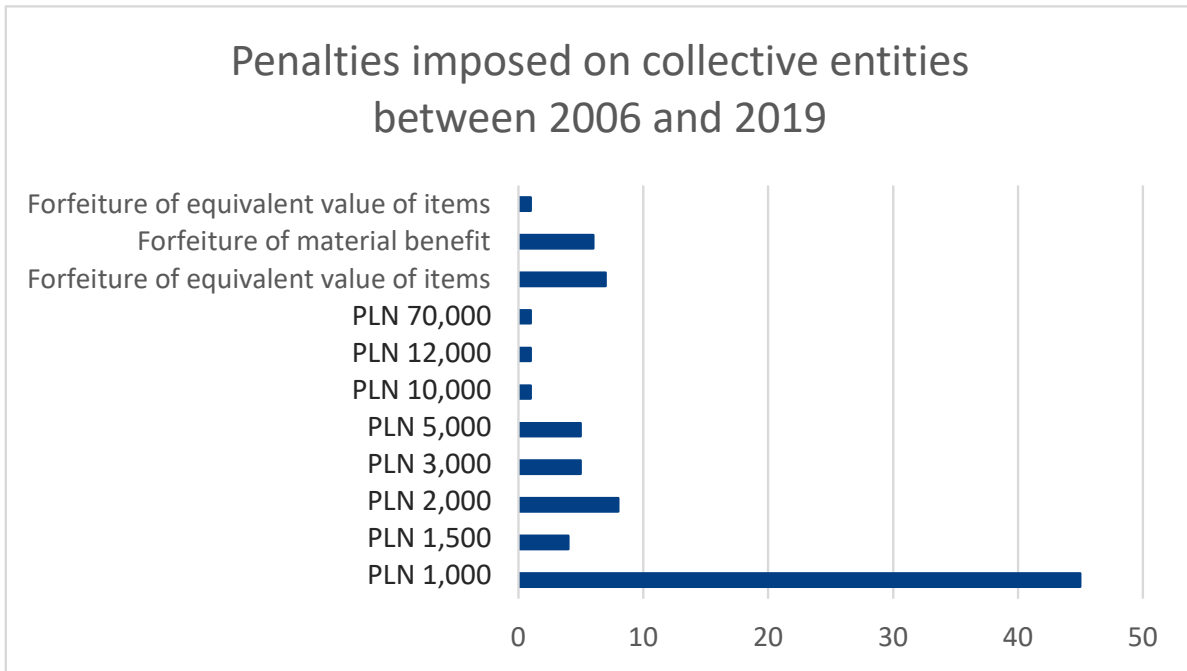
Theory and practice—how does the liability of collective entities really function in Poland?

So far, the practice of applying the Act on Liability of Collective Entities for Punishable Offences demonstrates the ineffectiveness of the act. Available sources report a small number of proceedings on corporate criminal liability.



Source: Impact assessment of the Act Amending the Act on Liability of Collective Entities for Punishable Offences

In the great majority of cases, the amounts of fines imposed under the act are also insignificant. Information presented by the Ministry of Justice shows that between 2006 and 2019, the highest fine imposed under the act was PLN 70,000 and the second-highest was PLN 12,000, but these were isolated instances. The most common fine was PLN 1,000, imposed in 45 cases. In 2021, a fine of PLN 50,000 was imposed in one case.



Source: Impact assessment of the Act Amending the Act on Liability of Collective Entities for Punishable Offences

Liability of collective entities as a transactional risk

In M&A transactions, especially share deals, the parties pay increasing attention to risks associated with corporate criminal liability. These risks are related to the possibility that an acquired company may be held liable for offences by its employees or associates committed prior to the transaction. This is material from the point of view of the ability of the target to continue conducting its business. This risk affects the target's reputation and value, and consequently is a factor that may have an impact on the decision to acquire the company.

These risks can be assessed by conducting due diligence of the target, not only at the stage preceding the transaction but also post-completion. The company's risk of liability under the act should also be taken into account when negotiating the purchase agreement by appropriately structuring the representations and warranties and contractual provisions on the parties' liability (indemnification clauses). Otherwise, acquisition of a company exposed to liability under the act may have negative economic consequences for the acquirer.

Due diligence

Due diligence on the liability of an acquired company under the act is primarily aimed at identifying offences for which the company may be held liable and assessing the risk of their occurrence. This is based primarily on:

- Creation of a risk map
- Verifying circumstances indicating that offences may have been committed
- Checking whether criminal proceedings are being or have been conducted concerning such offences, in particular whether:
 - ◊ The target has received any reports or has information about irregularities that could result in criminal liability of its employees or associates
 - ◊ The target is aware of pending criminal proceedings against these persons
 - ◊ Law enforcement authorities have requested the target to hand over documentation, or conducted a search of the target.

The examination of a company's liability risk also includes verification of circumstances that may indicate irregularities in its management or organisation. This examination focuses on establishing the internal procedures (written or customary) followed in the company and identifying its organisational culture. Detailed procedures, regular training, conducting regular internal audits and focusing on ethical values give rise to a belief that the risks of irregularities are lower. On the other hand, a lack of procedures, focusing solely on financial results, or the lack of internal audits, increases the potential risk.

This examination is supplemented by verification of selected transactions or processes in the company (e.g. the manner of acquiring key customers or public contracts, and how funds are spent on sponsorship and marketing).

The due diligence process should be tailored to the specifics and scope of operations of the specific target. But within the criminal law examination, special attention is devoted to analysing the risk of corruption (both public and private). As circumstances indicating corrupt practices are usually not reflected in documents, it is necessary to examine the culture of the organisation and how it operates. Such an examination may involve, for example, the functioning of tender procedures in the company, the process for selecting contractors and obtaining contracts, and the licences and permits necessary for the target's operations. This may require interviews with company employees.

Apart from pre-transaction due diligence, the examination of the company's risks under the act should also be carried out after the transaction is completed, when the buyer has full access to documentation and an unrestricted

opportunity to gauge its actual mode of operation. (Before the closing, it is usually the seller who decides what documents and information to disclose to the potential buyer, so often it is impossible for the buyer to fully examine how the company operates.) The post-transaction inspection should not be delayed, especially if indemnification by the seller or insurer is limited in time.

Transaction structure and indemnification

Due diligence enables an assessment of risks, but can never eliminate them. Meanwhile, appropriate structuring of the transaction and proper framing of contractual liability mechanisms may in many cases mitigate the negative impacts of the company being held liable under the act.

Therefore, at the stage of negotiating and drafting the contractual relationship between the seller and the buyer, it is worth taking into account the risks connected with the company's potential corporate criminal liability, including the sanctions it might be exposed to.

Additionally, to minimise risks under the act, the acquisition agreement should:

- Provide for appropriate representations and warranties by the seller
- Specify the liability rules if the representations and warranties prove untrue
- Adequately insure representations and warranties
- Guarantee the buyer's right to retain part of the price or to pay it into escrow.

All this is done so that the transaction does not bring the buyer more harm than good.

What next for the liability of collective entities?

In 2018, the Ministry of Justice published a [draft of a new Act on Liability of Collective Entities for Punishable Offences](#). According to the [justification](#) for the bill, the purpose of the proposal was to increase the effectiveness of the regulations on corporate criminal liability. The bill was subject to minor amendments, and then [submitted to the 8th Sejm](#). It provided for a number of revolutionary changes: greatly expanding the grounds for liability of collective entities, significantly raising fines, introducing the sanction of dissolution of the collective entity, and greatly modifying the procedure by eliminating the requirement of a predicate ruling and allowing simultaneous prosecution of

the individual perpetrator and the collective entity. However, the bill was not passed, and was dropped from further consideration.

In September 2022, the Ministry of Justice published another proposal, this time to amend the current act rather than introduce a new act. While the proposed changes are not so drastic, they are still far-reaching. They include the following:

- Narrowing the group of collective entities that can be held criminally liable under the act to large entities with the principal or statutory aim of conducting commercial activity, employing at least 500 people in the last two financial years or generating annual net turnover from the sale of goods, products and services or from financial operations exceeding the equivalent of EUR 100 million
- Expanding the liability of collective entities to include all fiscal or criminal offences (except for offences committed by publishing press materials or other infringements connected with content and governed by the rules for press cases)—currently the criminal liability of collective entities is limited to strictly defined criminal and fiscal offences
- Extending the grounds for criminal liability of collective entities by:
 - ◊ Providing for liability of a collective entity's own actions—those committed through an act or omission of an authority of the entity, directly related to the activity pursued by the entity
 - ◊ Linking all forms of culpability of the collective entity with the actions of all persons for whom the entity may be responsible (currently specific forms of fault relate only to certain categories of natural persons for whose actions the entity may be held responsible)
- Eliminating the requirement of a predicate ruling
- Imposing on collective entities the burden of proving the exercise of due diligence as a defence against liability due to fault in organisation
- Providing for the liability of collective entities arising as a result of a merger or division of the collective entity as well as of the collective entity arising as a result of a reorganisation, for acts committed before the date of the merger, division or reorganisation, for which the merged, divided or reorganised entity would be responsible

- Providing for liability of the acquirer of the enterprise of a collective entity or a majority of its assets, and other sanctions ordered against the collective entity for actions committed before the date of transfer of ownership, if made without consideration or for a price grossly below the market value of the enterprise or its assets
- Enabling release from the foregoing types of liability by a collective entity participating in a merger or division, or by the acquirer of a collective entity's enterprise or the majority of its assets, if it shows that the bodies and persons authorised to act for the entity participating in the merger or division or the acquirer had no knowledge of the prohibited act that is the basis for liability and could not have gained such knowledge in the exercise of due diligence, and the collective entity was not created with the aim of executing a merger or division
- Increasing the minimum fine from PLN 1,000 to PLN 10,000, and the maximum fine from PLN 5 million to PLN 30 million
- Eliminating the limitations period on the liability of collective entities
- Reducing the procedural protections of a collective entity by:
 - ◆ Enabling prosecutors to conduct investigative measures aimed at gathering evidence against a collective entity based on rules of administrative procedure rather than criminal procedure
 - ◆ Denying a collective entity the right to present a defence in the criminal proceeding against a natural person for whose actions the entity would be responsible (when such proceeding is conducted earlier than or simultaneously with the proceeding against the collective entity)
- Introducing the possibility for the injured party to pursue a civil suit against the collective entity during the course of the criminal proceeding against the collective entity, for financial claims arising directly out of commission of the offence
- Providing for a leniency procedure (in the case of offences punishable by up to 8 years in prison, the collective entity would not be liable if it discloses material circumstances of the offence to law enforcement authorities before the authorities obtain such information or take measures aimed at uncovering the offence)

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- Enabling collective entities to submit to criminal liability voluntarily, allowing for mitigation of liability and not entering the offence in the National Criminal Register, if certain conditions are met.

If the planned changes enter into force, the number of criminal proceedings in Poland against collective entities will undoubtedly rise, as will the fines they are ordered to pay. Although limited to large entities, the criminal liability of collective entities will be harsher, and efforts to hold them liable will be more effective. Introduction and observance of internal compliance procedures and criminal-law due diligence in M&A transactions will also gain new significance. When properly conducted, compliance and due diligence will effectively release the company from criminal liability.

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