

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

NINTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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This article was first published in November 2020
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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Enquiries concerning editorial content should be directed to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-432-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANAGNOSTOPOULOS

ANTONIN LÉVY & ASSOCIÉS A.A.R.P.I.

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WILMERHALE

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This ninth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including new chapters covering Indonesia and Spain. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past year, countries across the globe continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

This past year saw French-headquartered Airbus SE reach a US\$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continues to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najib Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro has taken the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis confronting us in the remainder of 2020 and into 2021, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of corruption in

foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Washington, DC

October 2020

POLAND

Tomasz Konopka and Katarzyna Randzio-Sajkowska¹

I INTRODUCTION

Combating corruption is a key policy priority for the Polish prosecuting authorities. Over the past 20 years, a range of legislation has been introduced aimed at targeting corruption both in the public and economic spheres.

In the Corruption Perceptions Index survey carried out by Transparency International in 2019, Poland was ranked 41st out of 198 countries.²

The most recent data considering official corruption and bribery can be found in the Statistical Yearbook of the Republic of Poland issued by the Central Statistical Office in December 2019. In 2005, 361 people with public functions were sentenced for acts of official corruption with final verdicts. In 2010, this figure reached 364; in 2015, it was only 219; in 2017, it was 294; and in 2018, it was 230. With regard to bribery, in 2010, 2,009 people were sentenced with final verdicts. In 2015, this figure reached 1,213; in 2017 it was 1015; and in 2018, it was only 871.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The Polish Criminal Code (CC) provides for the criminal liability of both the person accepting a bribe and the person offering it, in all types of corruption crimes provided for by legal provisions. Separate provisions regulate issues related to liability for official, international and business corruption.

Criminal liability for handing over or promising a bribe may be imposed on each individual.³ However, liability is varied depending on the function performed by the person accepting the bribe.⁴

1 Tomasz Konopka and Katarzyna Randzio-Sajkowska are partners at Sołtysiński Kawecki & Szlęzak.

2 <https://www.transparency.org/en/cpi/2019/results>.

3 Pursuant to Article 229 of the CC, anyone who gives or promises to give a material or personal benefit to a person holding a public function (including a person holding a public function in a foreign state or international organisation) is liable to imprisonment for between six and eight years. If the value of such a benefit is significant, the perpetrator is liable to imprisonment for between two and 12 years. Moreover, anyone who gives a material or personal benefit to a person holding a public function to induce the person to disregard his or her official duties, or provides such a benefit for disregarding these duties is liable to imprisonment for between one and 10 years. The offender would not be liable for the offence if he or she reports it to the body responsible for prosecution, disclosing all the relevant circumstances of the offence before the authority learns of it.

4 Pursuant to Article 228 of the CC, anyone who, in connection with holding a public function (including a person holding a public function in a foreign state or international organisation) accepts a material or

i People holding public functions

In the case of a crime of ‘official corruption’, the person accepting the bribe must be a person holding a public function (this is a notion broader than that of a ‘public official’). Pursuant to Article 115, Section 19 of the CC, a person holding a public function (including a member of a local government body, an employee of an organisational unit with public funds – e.g., a school director, hospital director or a person managing these organisations) is a public official if his or her rights or duties in the scope of public activity have been defined by legal provisions. Public officials are a broad category of people covering, inter alia, the president, members of Parliament, members of the European Parliament, senators, judges, prosecutors, notaries public and bailiffs, as well as employees of the government administration, local government, state inspection bodies and services designated for public security, as well as persons performing active military service.

ii Bribes

In all cases of corruption, a bribe is a material or personal benefit. Polish law does not define the minimum value of a material benefit, which is considered to be the profit gained by the person who accepts the bribe, therefore it may be an act leading to an increase in assets or a lessening of the liabilities of the accepting person. Money and presents of considerable material value will always be classified as material benefits.

A personal benefit is understood to be a particular outcome desired by the person accepting the bribe, but not necessarily one that involves material gain, for example, a promotion at the workplace, making it possible to participate in an entertainment or sports event or acceptance of a job.

iii Acceptance of, giving or promising a benefit

Conduct that constitutes a crime is not only the giving and accepting of a material or personal benefit, but also the promise of giving such a benefit or demanding it. In cases where a person holding a public function’s performance of his or her duties is made dependent upon the giving of a benefit, the CC provides more severe liability. This also applies to situations where a person holding public functions accepts a material benefit, or the promise of such a benefit, that has a value in excess of 200,000 zlotys. The crime of corruption of persons holding public functions carries a penalty of imprisonment for six months to eight years or, if more severe, up to 12 years.

It is important to note that what constitutes the crime is the giving of a material or personal benefit to someone that holds a public function because of the position that they hold; the benefit itself does not necessarily have to relate directly to that person. A material and personal benefit could be a benefit for oneself, but it could also be for another person.

The CC makes it possible for a person who has given a material benefit (which has been accepted) to avoid criminal liability if he or she informs the relevant authorities of his or her actions before the authorities become aware of the crime.

personal benefit, or the promise thereof, is liable to imprisonment for between six months and eight years. If the acceptance is in return for unlawful conduct, the offender is liable to imprisonment for between one and 10 years. The offender is also liable for making the performance of official duties dependent upon receiving or demanding a material benefit, or the promise thereof. Moreover, if the value of a benefit is considerable, a perpetrator is liable to imprisonment for between two and 12 years.

iv Influence peddling

Polish legal provisions also consider the following to be a crime: actions consisting of invoking influence in a state or local government institution or a domestic or foreign organisation that has public funds, when handling a matter in exchange for material or personal benefit or the promise of such a benefit. Similarly, giving a benefit in such a situation is a crime.⁵

v Corruption in business

Provisions of criminal law also provide for criminal liability in the case of corrupt conduct in business relations.⁶

Similar to the corruption of officials, the subject of business corruption may be a material or personal benefit. Material and personal benefits include both the benefit for oneself, and for another person. Criminal conduct may consist of giving, accepting, demanding or making a promise of benefits. Both the giver and the receiver of the bribe are subject to criminal liability.

It is a crime to corrupt a person holding a managerial function in a business entity or an employee of a business entity in exchange for an abuse of the powers granted to him or her or for the non-performance of his or her duty, which may cause material damage to that entity or constitute an act of unfair competition or an inadmissible preferential act in favour of a buyer or recipient of goods, services or performances. If, as a result of actions taken by a corrupt manager or employee, damage is caused that is in excess of 200,000 zlotys, then the Act provides for a more severe penalty.

vi Anti-corruption Act

Corrupt conduct may be prevented by restrictions imposed on persons holding public functions linked to participation in business activity. Pursuant to the provisions of the Act of 21 August 1997,⁷ persons holding public functions may not be members of the governing bodies of commercial law companies, or work or undertake actions on behalf of business entities if the objectivity of their role is called into question. Persons holding public functions also cannot hold more than 10 per cent of the shares in commercial companies or conduct their own business activity. In addition, they are obligated to submit asset declarations, including those assets that are part of marital joint ownership.

vii Financing of political parties

The financing of political parties in Poland is based mainly on obtaining subsidies from the state budget, as well as support from individuals. The provisions of the Act on Political Parties⁸ ban political parties from obtaining financing from commercial law companies, as well as from other business entities. The Act also bans obtaining financial support from foreigners, as well as from individuals who do not reside in Poland, unless they are Polish citizens. Furthermore, the annual support granted to a political party by an individual cannot exceed a specific amount representing 15 times the minimum wage (i.e., 39,000 zlotys in 2020).

5 Article 230, Sections 1 and 2 of the Criminal Code (Journal of Laws No. 1997.88.553).

6 Article 296(a), Sections 1 to 5 of the Criminal Code (Journal of Laws No. 1997.88.553).

7 Act of 21 August 1997 on Limiting the Conduct of Business Activity by Persons Holding Public Functions (Journal of Laws No. 2017.1393).

8 Act of 27 June 1997 on Political Parties (Journal of Laws No. 2011.155.924 consolidated text).

viii Liability of collective entities

Since 28 November 2003, the Act on Liability of Collective Entities for Acts Prohibited under Penalty has been in force, which regulates issues of quasi-criminal liability of commercial companies. This Act is applicable if a person acting in the name of a company has committed one of the crimes specified in the Act, and the company gained or could have gained benefit from this act, even if this gain was non-financial.

A condition for commencing proceedings against a company is a final verdict that (1) establishes that a crime has been committed; (2) conditionally discontinues criminal proceedings; or (3) discontinues criminal proceedings by stating that despite the fact that a crime has been committed, the perpetrator cannot be punished.

Administrative corruption, corruption in business and money laundering are included in the catalogue of crimes that may cause the commencement of proceedings.

With regard to criminal proceedings, although in the strictest sense a company cannot be the accused during the course of such proceedings, it is nonetheless possible to hand down a judgment ordering a company to reinstate any benefits that were gained from a crime committed by an individual. In this case, the company becomes a quasi-party and may defend itself against liability by availing itself of certain rights to which the accused is usually entitled. An entity obliged to return benefits has the right to study the case files of the proceedings, take part in the hearing before the court, file motions to admit evidence, put questions to the witnesses and appeal unfavourable decisions and verdicts.

The Act on Liability of Collective Entities for Acts Prohibited under Penalty provides for the possibility of a judgment imposing a fine on a company of between 1,000 and 5 million zlotys (which cannot exceed 3 per cent of the revenue gained in the year in which the crime that forms the basis of the liability was committed). The court will mandatorily order the forfeit of any financial benefits gained from the crime, even those obtained indirectly.

In addition, the following punishments are possible with regard to collective entities: a ban on applying for public tenders, and making public information about the judgment handed down. The collective entity might also be subject to a preventive measure in the form of a ban on mergers, divisions and transformations.

It should be emphasised that, following practice, law enforcement bodies do not always commence proceedings in a case where there is the option of imposing a fine on a company, but the latest press releases by prosecutors of the national public prosecution office suggest a tightening up of the policy in this regard. The statistics of the Ministry of Justice show that in 2017 only 14 court proceedings of this type were commenced. However, in 2018, there were only four cases opened, and in the first half of 2019 only two. These figures are very low, especially taking into account the fact that each year over 10,000 people are sentenced for committing business crimes.

III ENFORCEMENT: DOMESTIC BRIBERY

Criminal proceedings in Poland in corruption cases are conducted in the form of investigations, which means that the public prosecutor's office conducts them. Tasks that are part of the investigation may be entrusted to the police or other services appointed to combat crime.

In 2006, a special service was appointed, the Central Anti-Corruption Bureau (CBA), whose priority is to detect and prevent corruption in the public domain.⁹ The CBA conducts secret operations aimed at detecting crimes, and carries out tasks as part of criminal trials under the supervision of the prosecutor's office. Just like other special services, the CBA has the right to carry out operations, for example, conduct observations, use bugging devices and even to engage in entrapment (controlled giving of bribes).¹⁰

In 2019, the CBA disclosed damage to property owned by the state amounting to over 5 billion zlotys, and secured the property in cash at a value of 374 million zlotys, €76,600 and nearly US\$19,000 dollars. The CBA charged 804 suspects and reported 64 suspected instances of crime or the suspicion of crimes having been committed as a result of the inspections it conducted.¹¹

Many significant proceedings have been carried out by the CBA. For example, in July 2020 officers of the CBA detained a former member of the Polish Parliament, former Minister of Transport and former head of the National Motor Road Service of Ukraine (Ukravtodor). Other detainees in the case are a former commander of GROM and a businessman from Gdańsk. The investigation concerns suspicion of both corruption and operation within an organised crime group. The former minister is suspected of accepting financial and personal benefits in exchange for awarding contracts for road construction in Ukraine to private entities.¹²

In addition to the CBA, the Internal Security Agency (ABW) and the police hold powers to pursue crimes of corruption.¹³ The tasks of the ABW related to combating corruption include monitoring public procurement contracts that are being carried out, as well as privatisation processes, and conducting investigations into operations on the basis of materials obtained in the courts or entrusted to the ABW by the prosecutor's office in cases of high importance for the economic security of the country. There are also special police units in operation, created to combat economic crime and corruption.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

In principle, Polish criminal law provides for criminal liability for acts that were committed in Polish territory or the effect of which occurred in Poland. Criminal liability is also envisaged for crimes committed abroad by a Polish citizen. A foreigner may be held liable if the crime committed was against the interests of Poland, a Polish citizen or a Polish legal person. For a perpetrator to be held liable for a crime committed abroad, the act must be deemed a crime under the laws and regulations in force at the place where it was committed. The foregoing limitation shall not apply, however, to a crime directed against the operation of Polish public offices or the economic interests of the state.

9 Act of 9 June 2006 on the Central Anti-Corruption Bureau.

10 <https://www.rp.pl/Sedziowie-i-sady/307319949-Korupcja-w-krakowskim-sadzie-jest-akt-oskarzenia-10-osob.html>.

11 <https://cba.gov.pl/pl/antykorpuc/informacja-o-wynikach/4364,Informacja-o-wynikach-dzialalnosci-Centralnego-Biura-Antykorpucyjnego-w-2019-rok.html>

12 <https://cba.gov.pl/en/news/647,Former-Minister-of-Transport-detained-for-corruption-and-leading-an-organised-cr.html>.

13 Act of 24 May 2002 on the Internal Security Agency, and on the Intelligence Agency (Journal of Laws No. 2015.1929 consolidated text).

It is, therefore, possible for foreigners to be held liable under Polish criminal law for the corruption of Polish officials in spite of the fact that the crime in question was not committed in Poland.

On the other hand, Polish criminal law envisages criminal liability for the corruption of persons holding public functions in foreign states.¹⁴ The mechanism of liability for this is the same as would be applied to Polish officials.

When sentencing a crime that consists of the corruption of a person holding a public function in a foreign state, it is possible to apply regulations on the liability of collective entities according to the same rules that are applied in cases involving officials in Poland.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

In cases of corruption, especially business-related corruption, the crime committed is often accompanied by other crimes. Most often these are the following: money laundering, acting to the detriment of the company, appropriation, falsifying documents, keeping inaccurate (usually financial) records and filing inaccurate tax returns regarding corporate income tax and VAT.

i Obligation to report a crime

Polish law provisions do not impose a legal obligation to report a crime, apart from the most serious crimes such as murder or crimes committed against the security of the state.¹⁵ The possession of information concerning less serious crimes does not entail an obligation to report it to the relevant authorities under the sanction of criminal liability. In some cases, however, management board members may be held liable (both compensation liability and criminal liability) if, in spite of becoming aware of a crime that harms the entity they manage, they failed to take suitable measures (e.g., to file a notification on the suspected commission of a crime). This may be deemed to be acting to the detriment of the company through failure to fulfil key obligations, and therefore a crime.

However, specific regulations provide for the obligation to report certain serious crimes. For instance – under banking law¹⁶ – if there is a reasonable suspicion that the bank's activities are used to conceal any criminal activity or for any purposes connected with a fiscal offence, the bank is obliged to notify the enforcement authority with the competence to conduct criminal proceedings.

ii Financial record-keeping laws

Business entities are obligated to keep financial records and, in the case of commercial law companies, their financial records and statements are subject to mandatory examination by an independent certified auditor.

Under the Act on Certified Auditors, Audit Firms and Public Supervision, a certified auditor who, in connection with a financial audit, has learnt that a public official of a foreign

14 Article 228, Section 5 of the Criminal Code and Article 229, Section 5 of the Criminal Code (Journal of Laws No. 1997.88.553).

15 Article 240, Section 1 of the Criminal Code (Journal of Laws No. 1997.88.553).

16 Article 106a, Act of 29 August 1997, Banking Law (Journal of Laws No. 1997.140.939 consolidated text).

state or state of the European Union accepted a financial or personal benefit or accepted the promise of such a benefit is required to notify the relevant law enforcement bodies of this fact.¹⁷ The same obligation applies where a certified auditor has learnt of someone giving or promising to give a material or personal benefit to a person performing a public function in a foreign state or state of the European Union.

Keeping inaccurate financial records constitutes a crime under fiscal criminal law.¹⁸ Inaccurate financial records are understood as records containing false entries. With regard to criminal liability, under fiscal criminal law it is possible to hold a management board member liable even if financial record-keeping was not included in his or her responsibilities. Such a board member shall be subject to criminal liability for fiscal crimes committed as part of the operations of the company he or she manages. Importantly, a management board member may even be subject to liability under fiscal criminal law for crimes committed at a time when he or she did not hold this position.¹⁹

iii Tax deductibility of domestic or foreign bribes

It is often the case in business-related corruption that bribe funds are siphoned from the company under a fictitious (ostensible) agreement, which entails specific consequences regarding the company's accounting system, as well as VAT and corporate income tax (CIT) settlements. Expenses transferred from a company on the basis of a fictitious agreement, partially fictitious agreement or one that does not reflect the business reality may not be taken into consideration in CIT and VAT settlements. Hence, in situations where an act of corruption using funds that represent the company's resources is detected, a need often arises to make corrections to CIT and VAT settlements and to pay the missing tax amount. If a person avails him or herself of the possibility of voluntary rectification of the irregularities in tax settlements, the risk of criminal liability may, under certain circumstances, be avoided.

It should be noted that the fiscal authorities may carry out tax inspections on their own initiative or upon receipt of information from the law enforcement bodies conducting corruption-related proceedings. Tax obligations and liability under fiscal criminal law are barred by the statute of limitations after expiry of five years counting from the end of the year in which the incorrect settlement took place.

iv Tax fraud

The regulation in the Fiscal Criminal Code concerning tax fraud is considered to be the specific provision of the general regulation in the CC regarding fraud.

v Money laundering

A crime of corruption is very often accompanied by money laundering, at both the stage after the money is siphoned from the company and before the benefit is given to the beneficiary, and at the stage after the benefit is given to the beneficiary. Money laundering consists of

17 Article 77 of the Act of 11 May 2017 on Certified Auditors, Audit firms and Financial Supervision (Journal of Laws No. 2017.1089 consolidated text).

18 Article 61 of the Act of 10 September 1999 – Fiscal Criminal Code (Journal of Laws No. 2013.186 consolidated text).

19 Article 9, Section 1 of the Act of 10 September 1999 – Fiscal Criminal Code (Journal of Laws No. 2013.186 consolidated text).

taking actions aimed at concealing the criminal origin of funds.²⁰ In cases where money is laundered by the beneficiary of the bribe, the basic crime consists of corruption. However, money laundering is often aimed at concealing the siphoning of the money from the company, which can constitute an appropriation of the company's funds²¹ or acting to the detriment of the company.²²

The Act on Money Laundering and Terrorism Financing Prevention (the Money Laundering Prevention Act), which entered into force in July 2018, provides for specific obligations on banks, payment institutions and other obligated institutions (including lawyers).²³ The Act was applied in line with EU legislation and the recommendations of the Financial Action Task Force. Pursuant to the Act, the main responsibility of the General Inspector for Financial Information (GIIF) is to detect money laundering crimes and take preventative measures. Furthermore, under the new Act, obliged institutions, such as banks and other financial institutions, must apply the provisions of the Act. The Money Laundering Prevention Act, among other things, imposes an obligation to register transactions and convey information on transactions suspected of being related to money laundering. The Money Laundering Prevention Act also imposes an obligation to appoint a compliance officer, who is responsible for supervising the appropriate application of the Act. The officer – on behalf of the entity – conveys information about suspected offences such as money laundering, financing of terrorism and others. The Money Laundering Prevention Act also introduces a requirement to create an anonymous whistle-blowing procedure for reporting irregularities in relation to money laundering by employees. If the GIIF comes to the conclusion that a given transaction is suspicious, it may demand that the institution withhold the transaction, and may notify the prosecutor's office. The failure of the obliged institutions to fulfil statutory requirements is sanctioned with many administrative penalties.

A Central Registry of Ultimate Beneficial Owners has been created. The Registry is available to the public. All companies, with the exception of public companies, are obliged to report and update the information about their ultimate beneficial owners. Failure to fulfil these duties is sanctioned with the imposition of high monetary penalties.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to statistics presented by the Ministry of Justice, in the period from 2001 to 2016, only 17 people were convicted by a final legal judgment for bribery of a foreign public official.²⁴

The most recent and significant foreign bribery-related proceedings concern the case of the former minister, mentioned above. It is reported that the first signals about possible corruption had been obtained from the National Anti-Corruption Bureau of Ukraine, while incriminated decisions had been most likely made in Kiev and the financial settlements had

20 Article 299 of the Criminal Code (Journal of Laws No. 1997.88.553).

21 Article 284, Section 2 of the Criminal Code (Journal of Laws No. 1997.88.553).

22 Article 296, Sections 1 to 5 of the Criminal Code (Journal of Laws No. 1997.88.553).

23 The Money Laundering and Terrorism Financing Prevention Act of 1 March 2018 (Journal of Laws No. 2018.723 consolidated text).

24 isws.ms.gov.pl/baza-statystyczna/opracowania-wieloletnie/.

been made in Poland and Cyprus. Currently, the proceedings are being conducted by an international investigative team including agents of the Ukrainian anti-corruption service and the Polish CBA.

Notwithstanding the above, one of the most known international bribery-related proceedings involved a scandal connected with public procurement procedures for IT equipment delivered to government offices; this took place in Poland and the corrupting party was the Polish subsidiary of Hewlett-Packard. There were over 30 people suspected or accused in the case, and in June 2015 an indictment was filed against the leading suspect. On 16 February 2016, the suspect received a suspended sentence of four and a half years' imprisonment and a fine as a result of his motion to be sentenced without a trial having been accepted by the court. An investigation concerning the bribery offence was carried out in close collaboration with the US authorities. Consequently, Hewlett-Packard entered into a settlement agreement with the United States Securities and Exchange Commission, whereby Hewlett-Packard pleaded guilty to bribing Polish public officials and undertook to pay a penalty of US\$108 million.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Poland is a member of numerous international organisations whose task is to combat bribery. The country was admitted to the European Council on 26 November 1991 and is party to the Criminal Law Convention on Corruption of 27 January 1999 (this Convention started to apply on 1 April 2003). Since 1 August 2014, Poland has also been subject to the Additional Protocol to the Criminal Law Convention on Corruption.

In addition, Poland ratified the United Nations Convention against Corruption on 15 September 2006.

Since 7 November 2000, the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, drawn up in Paris on 17 December 1997, has been in force in Poland.

As a member of the European Union, the country has also implemented a range of EU legal acts on combating corruption.

VIII LEGISLATIVE DEVELOPMENTS

Currently, legislative developments in Polish criminal law mainly concern efforts to eradicate widespread value added tax (VAT) fraud and other kinds of business crime (including bribery and corruption). In this matter, Polish law already provides for the institutions of extended confiscation and the forfeiture of an enterprise. However, the Ministry of Justice is planning to provide the prosecutors with further instruments to fight criminal offences in business.

In August 2020, the most discussed foregoing amendments were the bill on the preventive confiscation of assets and a new bill on the Act on Liability of Collective Entities for Acts Prohibited under Penalty. None of the bills has been officially published. The new law has raised controversy as there are many statements saying that new provisions may be in conflict with constitutional property rights. The most controversial amendment would allow the law enforcement authorities to take over property that was once possessed by a suspect regardless of the current owner. The state authorities would be able to seize material benefits such as properties, money, cars or other assets that had belonged to a suspect or someone accused of having acted in an organised criminal group in the past five years.

As regards the new bill concerning the liability of collective entities, the amendment would apply only to companies with 250 employees and more. Proceedings against these entities would be initiated in the case of justified suspicion that a criminal offence had been committed. Moreover, to initiate the proceedings a public interest would have to appear. The planned penalties are fines between 50,000 and 50 million zlotys or a ban on conducting business activity.

It should be mentioned that previously in January 2019, the Polish government published a bill on the Act on Liability of Collective Entities for Acts Prohibited under Penalty. The key purpose of that bill was to enhance the effectiveness of preventing and fighting serious economic and tax crime, including corruption. The effective tools included, inter alia, more extensive liability, new obligations imposed on collective entities (such as obligations regarding whistle-blowers, compliance and internal issues) and stricter sanctions. The most important changes included that there was no closed list of criminal offences liability for which may be incurred by collective entities and that there was a possibility to hold a collective entity liable without the natural person having been previously convicted by a valid court judgment. This amendment was to introduce severe penalties and other sanctions. The proposed penalties were a fine of 30,000 to 30 million zlotys (and in special cases, 60 million zlotys); and the dissolution or liquidation of the collective entity. However, work on the bill was stopped in November 2019 due to the end of the previous Parliament's term.

Another important amendment is the revision of the Code of Criminal Procedure, which came into force in October 2019. The main purpose of the revision is to speed up and simplify criminal proceedings at the judicial stage. However, the amendments undermine some procedural guarantees for the accused. For instance, the revision provides for the statute of repose to limit the time within which the parties are entitled to report evidence. Other crucial changes include the possibility of conviction by the court of appeal after a conditional discontinuance of proceedings in the first instance or the possibility for the court of appeal to make the sentence more severe by imposing a life imprisonment sentence. On the other hand, in a case in which no public prosecution counsel participates, the failure of the subsidiary prosecutor and their attorney to appear at the main trial without justification shall be deemed to be withdrawal of the charge.

These changes lead to the conclusion that parties to criminal proceedings will be forced to involve a professional attorney in any case.

In June 2019, the Polish parliament was also working on an amendment to the CC. The purpose of the amendment was to provide severe sanctions for corruption and bribery crimes. However, many Polish experts on criminal law criticised the bill, stating that the anti-corruption amendments may not apply to persons managing the largest strategic commercial companies of the State Treasury. In the experts' opinion, the amendment could result in impunity for some corrupt acts in the public sector. At the final stage of the legislative process, the President directed the bill to the Constitutional Tribunal. In July 2020, the Tribunal decided the amendment would not come into force due to procedural mistakes that violated constitutional standards.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

Other matters that could be relevant when dealing with bribery and corruption are, for example, whistle-blowing and data protection.

In Polish law, there is no general whistle-blowing regime governing how to proceed with information obtained in this manner. However, some pieces of legislation contain elements concerning whistle-blowers. For instance, under the above-mentioned Money Laundering Prevention Act, an obliged institution is required to create an anonymous whistle-blowing procedure for reporting irregularities in relation to money laundering by employees. Moreover, in November 2019, an amendment was passed to the Act on Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organised Trade and on Public Companies. It provides an obligation on any legal entity that issues or proposes to issue securities to have procedures for anonymous employee reports to a designated member of the management board, and, in special cases, to the supervisory board, of violations of the law, in particular of the provisions of Regulation 2017/1129 of the European Parliament and of the Council of 14 June 2017, procedures and ethical standards.

It is important that a whistle-blower, as an employee, is subject to protection against retaliatory discrimination (e.g., dismissal of the employee from the company). Moreover, whistle-blowers (pursuant to the general rules of internal legal frameworks) are subject to the protection of Article 10 of the European Human Rights Convention, pursuant to the Strasbourg standards set out in the *Heinisch v. Germany* case. These standards provide for the need to weigh up the interests of a given entity (e.g., protection of a company's good name) with the public interest, and the protection against sanctions afforded to a whistle-blower depends upon his or her motives, as well as the alternative means available to him or her of achieving the assumed goal of disclosing information.

When it comes to data protection in Polish law, the legal norms contained in the regulations on personal data protection and protection of privacy are found mainly in the newly introduced Personal Data Protection Act. The Act, which was applied in May 2018, was amended to adjust Polish law to the amended provisions of the General Data Protection Regulation.²⁵ Data protection provisions are also found in the CC. The general rule is that the processing of data shall be permitted only when the person to whom the data belongs has given his or her consent.

X COMPLIANCE

The law does not impose a general obligation for business entities to have a compliance programme; however, some pieces of legislation do stipulate requirements in this vein. For instance, the Money Laundering Prevention Act provides an obligation to appoint a compliance officer.

XI OUTLOOK AND CONCLUSIONS

The general outlook is that the government is ready to increase the effectiveness of preventing and combating corruption and bribery. This objective is likely to be achieved through increasing the scope of liability, imposing new obligations, introducing more severe sanctions, providing authorities with additional instruments and speeding up criminal procedures. Notwithstanding the above, 2020 is going to be different from any other year before due

25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

to the restrictions and limitations provided by the Polish government to fight the covid-19 pandemic. In March 2020, the Polish courts limited the number of cases under review by cancelling the vast majority of public hearings during the pandemic. At the same time, law enforcement has also limited the actions taken. Hence, there is no doubt that the pandemic is going to have a big impact on the course of criminal investigations in 2020.

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ISBN 978-1-83862-432-3