The Anti-Bribery and Anti-Corruption Review

Fifth Edition

Editor
Mark F Mendelsohn

Law Business Research

The Anti-Bribery and Anti-Corruption Review

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Mark F Mendelsohn

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EDITOR'S PREFACE

This fifth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour.

Over the past year, the foreign bribery landscape has continued to grow increasingly complicated for multinational companies, particularly in light of the sweeping fallout from multiple high-profile corruption scandals. In Brazil, Operation Car Wash, the investigation that uncovered a sprawling embezzlement ring at state-owned oil company Petróleo Brasileiro SA (Petrobras), has ensnared politicians at the highest levels of the Brazilian government as well as numerous companies that engaged with Petrobras around the world. In March 2016, Brazilian authorities raided the home of former President Lula de Silva and detained him for questioning. Lula and his wife were subsequently indicted by Brazilian prosecutors on money laundering charges in September 2016. The Brazilian crackdown on corruption shows no signs of abating, and has expanded to include investigations related to Eletrobras, Brazil's state-owned utility.

In Malaysia, the misappropriation of more than US$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malyasia Development Berhad (1MBD) has sparked worldwide investigations and asset tracing and recovery exercises. Authorities in several countries, including the United States, the United Kingdom, Switzerland, Singapore, Hong Kong and Australia have all launched probes into lenders and banks with ties to 1MDB. In July 2016, the US Department of Justice (DOJ) filed civil forfeiture complaints seeking the forfeiture and recovery of more than US$1 billion in assets associated with the laundering of misappropriated funds from 1MBD, the largest forfeiture action ever brought under the DOJ's Kleptocracy Asset Recovery Initiative.

Global efforts to combat corruption were further impacted by the massive leak in April 2016 of more than 11 million documents connected to Panama law firm Mossack Fonseca, dubbed the Panama Papers. Dating back over four decades, the Panama Papers revealed that, among other things, the law firm appears to have helped establish at least 214,000 secret shell companies and offshore accounts in known tax havens to shelter and hide the wealth of clients that included approximately 300,000 corporate entities, 12 current

and former world leaders, and at least 128 other public officials. While international law enforcement agencies have only begun to assess the contents and significance of the leaked documents, it is clear that prosecutors are looking to the Panama Papers as a road map for uncovering foreign bribery, among other offences, and furthering international corruption investigations.

In the United States, enforcement authorities continue to vigorously enforce the Foreign Corrupt Practices Act (FCPA), with the past year's cases showing a significant increase in the number of enforcement actions from 2015. The Securities and Exchange Commission (SEC) alone brought more FCPA enforcement actions within the first six months of 2016 than in any year since 2011. The investigation and enforcement focus has cut across a range of industries, including pharmaceutical and medical device companies, airlines, financial services and the telecommunications sector. While these cases continue to cover many regions, business activity in China has remained a major FCPA enforcement priority. As this edition of *The Anti-Bribery and Anti-Corruption Review* goes to print, 15 corporate enforcement actions have implicated multinationals' China operations, representing over half of all FCPA actions brought in 2016 to date.

Importantly, the past year's FCPA cases have demonstrated that the DOJ and SEC will continue to actively and aggressively pursue large-scale corporate bribery cases. In February 2016, the DOJ and SEC, together with the Public Prosecution Service of the Netherlands, entered into a US$795 million global settlement with the world's sixth-largest telecommunications company, Amsterdam-based VimpelCom Limited, a foreign issuer of publicly traded securities in the United States, and its wholly owned Uzbek subsidiary, Unitel LLC. The settlement, which resolved allegations that VimpelCom and Unitel violated the FCPA and certain Dutch laws by funnelling over US$114 million in bribe payments to a shell company beneficially owned by a government official in Uzbekistan, represents the second-largest global FCPA resolution to date and the sixth-largest in terms of penalty payments made to US regulators. The VimpelCom settlement was the culmination of significant collaboration between US regulators and international law enforcement agencies, with the DOJ proclaiming it 'one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA'. In September 2016, Och-Ziff Capital Management Group agreed to pay the DOJ and SEC US$412 million for FCPA violations stemming from the hedge fund's use of third-party intermediaries, agents and business partners to pay bribes to senior government officials in Africa. The settlement represents the fourth-largest FCPA enforcement action to date.

Though not uncontroversial, self-reporting and cooperation by companies has continued to be a theme in the United States. In April 2016, the DOJ launched a one-year pilot programme to provide greater transparency on how business organisations can obtain full mitigation credit in connection with FCPA prosecutions through voluntary self-disclosures, cooperation with DOJ investigations and remediation of internal controls and compliance programmes. The DOJ memorandum announcing the initiative makes clear that any mitigation credit offered through the Pilot Program is separate from, and in addition to, any mitigation credit already available under the US Sentencing Guidelines. The DOJ further emphasised that voluntary self-reporting is the central aim of the Pilot Program, and is therefore an essential requirement for receiving maximum mitigation credit. Whether companies participating in the programme truly benefit, and whether the promise of greater transparency is realised, remains to be seen.

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners and their clients in navigating the corruption minefield that exists when conducting foreign and transnational business.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2016

Chapter 17

POLAND

Tomasz Konopka[1]

I INTRODUCTION

Combating corruption is a key priority in the policy of Polish prosecuting authorities. Over the past 20 years, a range of legal acts have 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 2015, Poland was ranked 30th out of 167 countries.[2]

According to data from the Ministry of Justice, in 2001 just under 550 persons holding public functions were sentenced with final verdicts for acts of official corruption. In 2010, this figure reached 2,371 and in 2014, it was 1,689.

From 2001 to 2007, no sentence was handed down for the crime of corruption in business. In subsequent years, up to a dozen people were sentenced to a one-year jail term for this crime.[3]

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The Polish Criminal Code (CC) provides for criminal liability both for the person accepting a bribe and for 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.

1 Tomasz Konopka is a partner at Sołtysiński Kawecki & Szlęzak.

2 www.transparency.org/cpi2015#results-table.

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

Criminal liability for handing or promising a bribe may be imposed on each individual.[4] However, liability is varied depending on the function performed by the person accepting the bribe.[5]

4 Act of 6 June 1997: Criminal Code (Journal of Laws of 1997.88.553). Article 229:

a Section 1. Anyone who gives or promises to give a material or personal benefit to a person holding a public function is liable to imprisonment for between six months and eight years.

b Section 2. If the act is of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to two years.

c Section 3. Anyone who gives a material or personal benefit to a person holding a public function to induce him to disregard his official duties, or provides such a benefit for disregarding such duties is liable to imprisonment for between one and 10 years.

d Section 4. Anyone who gives or promises to give a material benefit of significant value to a person holding a public function is liable to imprisonment for between two and 12 years.

e Section 5. The penalties specified in Sections 1 to 4 also apply to anyone who gives or promises to give a material benefit to a person holding a public function in a foreign state or international organisation in connection with such duties.

f Section 6. The offender is not liable for the offences specified in Sections 1 to 5, where the personal or material benefit, or the promise, was accepted by a person holding a public function, and the offender reported this to the body responsible for prosecution, disclosing all the relevant circumstances of the offence before this authority learned about it.

5 Article 228:

a Section 1. Anyone who, in connection with holding a public function, accepts a material or personal benefit, or a promise thereof, is liable to imprisonment for between six months and eight years.

b Section 2. In cases of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to two years.

c Section 3. Anyone who, in connection with holding a public function, accepts a material or personal benefit, or a promise thereof, in return for unlawful conduct liable to imprisonment for between one and 10 years.

d Section 4. Anyone who, in connection with his or her official capacity, makes the performance of official duties dependent upon receiving a material benefit, or a promise thereof, or who demands such a benefit, is liable to the same penalty as specified in Section 3.

e Section 5. Anyone who, in connection with holding a public function, accepts a material benefit of considerable value, or a promise thereof, is liable to imprisonment for between two and 12 years.

f Section 6. The penalties specified in Sections 1 to 5 also apply to anyone who, in connection with his or her public function in a foreign state or international organisation, accepts a material or personal benefit, or a promise thereof, or who demands such a benefit, or makes the performance of official duties dependent upon receiving a material benefit.

i Person holding a public function

In the case of a crime of 'official corruption', the person accepting the bribe is 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 public functions (including a member of a local government body, employee of an organisational unit having public funds – e.g., school director, hospital director or a person managing these organisations) is a public official if their rights or duties in the scope of public activity have been defined by legal provisions. A public official is a broad category of persons covering, *inter alia*, the president, members of Parliament, members of the European Parliament and senators, judges, prosecutors, notaries public, bailiffs, employees of government administration, employees of local government, employees of state inspection bodies, services designated for public security, as well as persons performing active military service.

ii Bribe

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 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 in situations where a person holding public functions accepts a material benefit, or promise of such a benefit, which 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, 12 years.

It is important to note that what constitutes the crime is the giving of a material 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.

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 inform the relevant authorities of his or her actions, before the authorities become aware of the crime.

iv Influence peddling

Polish legal provisions also consider the following to be a crime: actions consisting in invoking influence in a state, 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.[6]

v Corruption in business

Provisions of criminal law also provide for criminal liability in the case of corrupt conduct in business relations.[7]

Similar to the corruption of officials, the subject of business corruption may be material or personal benefit. Criminal conduct may consist in 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 that may 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,[8] persons holding public functions may not be members of governing bodies in 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 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 Parties[9] ban political parties from obtaining financing from commercial law companies, as well as from other business entities. The Act also bans the obtaining of financial support from foreigners, as well as from individuals who do not reside in Poland, unless they are Polish citizens. Furthermore, annual support granted to a political party by an individual cannot exceed a specific amount representing 15 times the minimum wage.

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6 Article 230, Sections 1 and 2 of the Criminal Code (Journal of Laws of 1997.88.553).

7 Article 296a, Sections 1 to 5 of the Criminal Code (Journal of Laws of 1997.88.553).

8 Act of 21 August 1997 on Limiting the Conduct of Business Activity by Persons Holding Public Functions (Journal of Laws of 2006.216.1584 consolidated text).

9 Act of 27 June 1997 on Political Parties (Journal of Laws of 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 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 obligated 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 for liability was committed). The court will mandatorily order the forfeit of any financial benefits gained from the crime, even indirectly.

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

It should be emphasised that following from 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 each year only two dozen proceedings of this type are commenced. This figure is 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 an investigation, which means that the public prosecutor's office conducts them. Tasks as 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 was to detect and prevent corruption in the public domain. 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 entrapment (controlled giving of bribes).[10]

The activity of the CBA has given rise to controversy. In cases in which the indictment was based on evidence collected by this service, courts sometimes identify irregularities in the evidence.[11] The CBA has also been criticised for using entrapment methods that exceed permitted limits. In the public debate, the opinion has been voiced that, rather than disclosing crimes, the CBA sometimes tests the morality of citizens and in fact creates corrupt situations. In one such case, the prosecutor's office filed an indictment against the former heads of the CBA. In March 2015, a Warsaw court sentenced four people from the former directorship of the service to penalties of two and a half to three years' imprisonment for crimes consisting in exceeding one's powers as part of proceedings conducted by the service in 2007.[12] The judgment has not been finalised and the key accused was pardoned by the President.

Apart from the CBA, the powers to pursue crimes of corruption are held by the police, as well as the Internal Security Agency (ABW).[13] The tasks of the ABW related to combating corruption include monitoring public procurement contracts that have been carried out, as well as privatisation processes, and conducting investigations on the basis of materials obtained in the court of operations or entrusted by the prosecutor's office in cases of high importance for the economic security of the state.

There 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 took place 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, their 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 economic interests of the state.

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.

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

11 http://wyborcza.pl/1,76842,14105688,Uzasadnienie_wyroku_ws__Beaty_Sawickiej__Czego_nie.html; www.tvn24.pl/wiadomosci-z-kraju,3/kardiochirurg-miroslaw-g-uniewinniony-wyrok-nieprawomocny,392105.html.

12 www.polskieradio.pl/5/3/Artykul/1410783,Mariusz-Kaminski-skazany-Polityczna-burza-po-wyroku-w-sprawie-bylego-szefa-CBA.

13 Act of 24 May 2002 on the Internal Security Agency, and on the Intelligence Agency (Journal of Laws No. 2015. 1929 consolidated text).

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

When sentencing a crime that consists in the corruption of a person holding public functions in a foreign state, it is possible to apply regulations on 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 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 those 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, the 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 suspected commission of a crime). Such conduct may be deemed a crime of acting to the detriment of the company through failure to fulfil key obligations.

ii Financial record-keeping laws

It should be noted that 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, a certified auditor who, in connection with a financial audit, has learnt that a public official accepted a financial or personal benefit is obligated to notify the law enforcement bodies about this fact.[16] This obligation shall also apply to the act of corruption of public officials of foreign states and the European Union. It should be noted that the foregoing obligation shall apply to acts of corruption of public officials rather than persons holding public functions. Hence, the obligation of certified auditors shall not apply to each act of corruption in the public sphere that constitutes a crime.

14 Article 228, Section 5 of the Criminal Code and Article 229, Section 5 of the Criminal Code (Journal of Laws 1997.88.553).

15 Article 240, Section 1 of the Criminal Code (Journal of Laws 1997.88.553).

16 Article 58 of the Act of 7 May 2009 on Certified Auditors and their Government, Entities Authorised to Examine Financial Statements and on Public Supervision (Journal of Laws 2016.1000 consolidated text).

In the case of corruption of persons holding public functions who are not public officials, a certified auditor is not obligated to notify the law enforcement bodies, but is authorised to submit such a notification. The situation is similar for corruption in business.

Keeping inaccurate financial records constitutes a crime under fiscal criminal law.[17] 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 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.[18]

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 the case where an act of corruption using funds that represent the company's resources is detected, a need often arises to make corrections in 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 at 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

In connection with the fact that it is prohibited to settle the material benefits given to a beneficiary in the submitted tax returns, in some cases tax fraud is committed[19] along with falsification of documents. As in the case of inaccurate financial records, a management board member of the company that can be connected with the tax return that contains false information may be held liable.

17 Article 61 of the Act of 10 September 1999 – Fiscal Criminal Code (Journal of Laws 2013.186 consolidated text).

18 Article 9, Section 1 of the Act of 10 September 1999 – Fiscal Criminal Code (Journal of Laws 2013.186 consolidated text).

19 Article 56 of the Act of 10 September 1999 – Fiscal Criminal Code (2013.186 consolidated text).

v Money laundering

A crime of corruption is very often accompanied by money laundering, both at the stage after the money was siphoned from the company and before the benefit was given to the beneficiary, and at the stage after the benefit was given to the beneficiary. Money laundering consists of 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 in the 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 funds[21] or acting to the detriment of the company.[22]

To prevent money laundering, a suitable act was adopted[23] that established the office of General Inspector for Financial Information (GIIF). The Inspector's main responsibility is to detect crimes consisting in money laundering and take preventive measures. The Money Laundering Prevention Act imposes on a number of entities, including banks and other financial institutions, an obligation to register transactions and convey information on transactions that are suspected of being involved in money laundering. If GIIF comes to the conclusion that a given transaction is suspicious, it may demand that the institution withhold the transaction, and notify the prosecutor's office. Bank accounts may be blocked for three months by virtue of the prosecutor's decision.

The Money Laundering Prevention Act provisions do not envisage the possibility of extending the bank account blocking period. However, in the course of their practice, the law enforcement bodies have developed mechanisms that make it possible, when necessary, to safeguard funds for a longer period to conduct criminal proceedings and then return the funds to the authorised person. In many cases, the prosecutor's office accepts the funds deposited in the bank account as important evidence for the resolution of the case and, having clarified any doubts it may have, returns them to the authorised person. The courts view such conduct in different ways, but in most cases allow such a solution.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to statistics presented by the Ministry of Justice, in the period from 2001 to 2014, only 16 people were convicted by a legally final judgment for bribery of a foreign public official.[24]

Recently, however, there have been significant foreign bribery-related proceedings involving a scandal connected with public procurement procedures for IT equipment delivered to government offices. The bribery practices took place in Poland and the corrupting party was the Polish subsidiary of Hewlett-Packard. There are over 30 people suspected or accused in the case, and in June 2015 an indictment was filed against the leading suspect.[25]

20 Article 299 of the Criminal Code (Journal of Laws 1997.88.553).

21 Article 284, Section 2 of the Criminal Code (Journal of Laws 1997.88.553).

22 Article 296, Sections 1 to 5 of the Criminal Code (Journal of Laws 1997.88.553).

23 The Money Laundering and Terrorism Financing Prevention Act of 16 November 2000 (Journal of Laws 2016.299 consolidated text).

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

25 www.warszawa.pa.gov.pl/news/500.

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.[26]

An investigation concerning the bribery offence was carried out in close collaboration with US services. Consequently, Hewlett-Packard entered with the United States Securities and Exchange Commission into a settlement agreement whereby they pleaded guilty to bribing Polish public officials and undertook to pay a penalty of US$108 million.[27]

Law enforcement bodies that handle bribery connected with the deliveries of electronic equipment have to check a large number of public procurement procedures. These proceedings are still largely in the investigation stage.

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

On 1 July 2015, a crucial amendment to the criminal procedure came into force. The aim of the amendment was to depart from an inquisitorial system, where it was the court that was obligated to seek evidence, in favour of an adversarial system, where the court is a passive arbitrator and parties to the trial are obligated to prove their arguments. The above amendment was largely reversed on 15 April 2016, but proceedings instigated within the period from 1 July 2015 to 14 April 2016 shall be conducted pursuant to non-inquisitorial regulations.

One of the later-reversed substantial changes involved the introduction of a ban on using illegally seized evidence. Such a ban had not been directly provided for in the provisions of law, but has followed from some court judgments, despite it not being a uniform view of the courts. Until 2014, the Supreme Court did not clearly state that evidence seized as a result of a crime committed by secret service agents (e.g., gathering evidence contrary to the provisions

26 wiadomosci.onet.pl/kraj/wyrok-ws-infoafery-4-5-roku-w-zawieszeniu-dla-glownego-oskarzonego-andrzeja-m/b0p693.

27 www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery.

of law) was inadmissible.[28] The introduction of the ban meant that even a very crucial piece of evidence would be excluded if it was seized illegally, such as during phone tapping or bugging. However, in proceedings instigated from 15 April 2016 onwards, illegally seized evidence shall not be automatically disqualified and might be used in proceedings, unless it has been obtained in circumstances related to murder, intentional occasioning of bodily harm or deprivation of liberty committed by a public official. Rigours regarding phone tapping or bugging have also been relaxed, and evidence seized within the course of such activities can now be freely (at the prosecutor's discretion) used in all criminal proceedings for the purposes of which said evidence was seized.

Legislative works are currently under way to broaden the scope of confiscation of assets obtained by means of criminal activity. Current drafts provide for an effective extended confiscation model, which would mean that the scope of confiscated assets would cover not only all and any criminally obtained benefits, but also direct and indirect returns on these benefits (e.g., interest on embezzled funds or dividends from shares purchased with these funds).

IX COMPLIANCE

The law does not impose the obligation of having compliance programmes on business entities. However, the introduction of internal regulations is deemed to be a duty of the managers, since it is an element of ensuring legal security for the entity they manage. Additionally, the introduction of compliance programmes may be grounds for withdrawal from proceedings based on the Act on Liability of Collective Entities. Internal regulations governing employees' obligations are also of significance when taking appropriate measures against employees under labour law.

X OUTLOOK AND CONCLUSIONS

Considering the pace of subsequent amendments to crucial acts governing the course of criminal proceedings, at the moment there are three parallel regimes of such proceedings. To make matters more confusing, the most widespread fraud-related business crime is VAT fraud,[29] which is examined in fiscal criminal proceedings, which have their own peculiarities.

28 Supreme Court judgment of 19 March 2014 II KK 265/13. In Poland, Supreme Court judgments are not legal precedents and do not shape the law; however, they are of great significance in construing and applying provisions of law owing to the authority of the Supreme Court.

29 Guidelines of Prosecutor General dated 6 July 2016 on rules governing the conduct of preparatory proceedings in cases of VAT fraud: pk.gov.pl/wytyczne-prokuratora-generalnego-1449/wytyczne-i-zarzadzenia-2.html, Introduction.

Prosecutors have been formally advised to assume the strictest possible approach against such crimes and, whenever possible, consider imposing an obligation to refrain from pursuing and exercising the relevant business activity.[30]

The recently introduced regime can be described as oriented towards prompt and inquisitorial proceedings, especially in more serious cases. Some traditionally accepted guarantees such as disclosure of all evidence to the suspect or accused have been limited in their scope, while imposition of temporary arrest can now be based solely on the severity of crime with which the accused is charged. The latter regulation applies to most bribery-related offences.

Most recent regulations of the criminal procedure were intended to increase the number of indictments and accelerate the proceedings. Formal requirements to be met by indictments were relaxed to the point that, in some cases, an indictment does not have to be formally substantiated and the public prosecutor is not obliged to appear at the hearing. The level of organisational effort required to file and indictment has been drastically reduced in the current regime.

Considering the rapid and recent nature of changes in the criminal procedure, it is difficult to assess the effects they could or would have. It seems that a reduction of the effort required to file an indictment and relaxation of premises for imposition of preventive measures might result in a larger number of proceedings instigated and higher burdens imposed on the suspects or accused.

30 Guidelines of Prosecutor General dated 6 July 2016 on rules governing the conduct of preparatory proceedings in cases of VAT fraud: pk.gov.pl/wytyczne-prokuratora-generalnego-1449/wytyczne-i-zarzadzenia-2.html, Guideline No. 3.

Appendix 1

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Tomasz specialises in business crime cases including white-collar crime, investigations, and representation of clients related to custom seizures of counterfeit products, cybercrimes and court litigation. He represents Polish and foreign clients before the courts and law enforcement authorities. Mr Konopka joined SK&S in 2002, and has been a partner since January 2013. He currently leads the criminal law department. Prior to joining SK&S, Tomasz was a lawyer in a number of companies, including those listed on the Warsaw Stock Exchange. He is also a member of the Association of Certified Fraud Examiners.

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