The International Investigations Review

Fourth Edition

Editor
Nicolas Bourtin

Law Business Research

The International Investigations Review

The International Investigations Review

Reproduced with permission from Law Business Research Ltd.
This article was first published in The International Investigations Review - Edition 4
(published in July 2014 – editor Nicolas Bourtin).

For further information please email
Nick.Barette@lbresearch.com

The International Investigations Review

Fourth Edition

Editor
Nicolas Bourtin

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

ACCOUNT MANAGER
Felicity Bown

PUBLISHING COORDINATOR
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Jo Morley

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-09-7

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

ACKNOWLEDGEMENTS

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

ALUKO & OYEBODE

ANAGNOSTOPOULOS

BOWMAN GILFILLAN INC

CASSELS BROCK & BLACKWELL LLP

CHAVES AWAD CONTRERAS SCHÜRMANN

DE PEDRAZA ABOGADOS SLP

DEBEVOISE & PLIMPTON LLP

ELIG, ATTORNEYS-AT-LAW

ESTUDIO DURRIEU ABOGADOS SC

FANGDA PARTNERS

GILBERT + TOBIN

KNIERIM | HUBER RECHTSANWÄLTE

LINKLATERS

MARTIN KENNEY & CO SOLICITORS

MASON HAYES & CURRAN

MOTIEKA & AUDZEVIČIUS

PETER YUEN & ASSOCIATES IN ASSOCIATION
WITH FANGDA PARTNERS

SATOR REGULATORY CONSULTING LIMITED

SÉRVULO & ASSOCIADOS – SOCIEDADE DE ADVOGADOS, RL

SETTERWALLS ADVOKATBYRÅ AB

SINELS ADVOCATES

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STEPHENSON HARWOOD

STUDIO LEGALE PULITANÒ-ZANCHETTI

SULLIVAN & CROMWELL LLP

WKK LAW RECHTSANWÄLTE

WONGPARTNERSHIP LLP

CONTENTS

Editor's Preface vii
Nicolas Bourtin

Chapter 1 ARGENTINA 1
Roberto A Durrieu and Federico de Achával

Chapter 2 AUSTRALIA 11
Rani John, Elizabeth Avery and Peter Feros

Chapter 3 AUSTRIA 35
Norbert Wess and Bernhard Kispert

Chapter 4 BELGIUM 46
Françoise Lefèvre and Stefaan Loosveld

Chapter 5 BRITISH VIRGIN ISLANDS 62
Martin S Kenney

Chapter 6 CANADA 76
Wendy Berman and Jonathan Wansbrough

Chapter 7 CHILE 100
Miguel Chaves, Alejandro Awad, Marcos Contreras and Miguel Schürmann

Chapter 8 CHINA 112
Benjamin Miao, Peter Yuen and Melody Wang

Chapter 9 ENGLAND & WALES 125
Tony Woodcock

Chapter 10 FRANCE 136
Antoine Kirry and Frederick T Davis

Chapter 11 GERMANY 149
Hans-Peter Huber, Leila Louisa Ait-Bouziad and Anna Oehmichen

Chapter 12 GREECE 161
Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti

Chapter 13 HONG KONG 169
Peter Yuen

Chapter 14 IRELAND 185
Catherine Allen

Chapter 15 ITALY 196
Mario Zanchetti

Chapter 16 JERSEY 208
Philip Sinel and Helen Hatton

Chapter 17 LITHUANIA 218
Ramūnas Audzevičius

Chapter 18 NIGERIA 227
Babatunde Fagbohunlu, Imaobong Haastrup, Rebecca Dokun and Joshua Abe

Chapter 19 POLAND 240
Tomasz Konopka

Chapter 20 PORTUGAL 250
José Lobo Moutinho, Teresa Serra and Raul Taborda

Chapter 21 SINGAPORE 260
Joy Tan and Koh Swee Yen

Chapter 22 SOUTH AFRICA....287
Matthew Purchase

Chapter 23 SPAIN....300
Mar de Pedraza and Cristina de Andrés

Chapter 24 SWEDEN....312
Ulf Djurberg and Erik Hellners

Chapter 25 TURKEY....320
Gönenç Gürkaynak and Ç Olgu Kama

Chapter 26 UNITED STATES....329
Nicolas Bourtin and Nathaniel Green

Appendix 1 ABOUT THE AUTHORS....341

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....357

EDITOR'S PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. LIBOR. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Environmental crimes. Export controls and other trade sanctions.

US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. As this edition went to press, the debate over the 'too big to jail' phenomenon was being resolved with the US Department of Justice insisting on guilty pleas from two large, foreign financial institutions.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and

concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its fourth edition, this volume covers 26 countries.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin
Sullivan & Cromwell LLP
New York
July 2014

Chapter 19

POLAND

Tomasz Konopka[1]

I INTRODUCTION

Violations of law during the conduct of business activity may result in the criminal liability of persons managing the enterprise, quasi-criminal liability of business entities or entail broadly understood administrative sanctions. Depending on the character of the legal violation, the investigation or control proceedings may be conducted by law enforcement bodies or administrative bodies.

Criminal investigations are, as a matter of principle, carried out by a prosecutor's office, as it is the key obligation of each prosecutor's office to maintain law and order and to prosecute crimes. In particular, the purpose of the investigation is to establish whether a crime has been committed, the identity of the perpetrator, and subsequently – if the evidence collected seems to proves fault and perpetration – to file an indictment. The prosecutor's office should also make sure that no indictment is filed against an innocent person; in such an event the case should be annulled.

The prosecutor is obliged to launch an investigation at every instance in which there is a justified suspicion of a crime having been committed. An investigation may be launched *ex officio* or at the initiative of the aggrieved party, who must submit a formal (oral or written) notification. For the institution of proceedings with respect to certain crimes, the aggrieved party must file a motion for prosecution. After such a motion has been filed, the proceedings are conducted by enforcement bodies, but it is the aggrieved party that decides whether it wants the perpetrators of the crime to be prosecuted. A motion must be filing for the prosecution of certain business crimes, such as mismanagement (if the State Treasury is not the aggrieved party), or the use of someone else's business secrets in one's own business. If such motion is not filed no proceedings will take place.

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

The structure of the National Public Prosecution Office is aimed at ensuring political neutrality of the institution. It is headed by the National Public Prosecutor (NPP), who is independent of the government. Investigations into serious business crimes are conducted by prosecutors at the appellate prosecutor's offices and the regional prosecutors' offices in which divisions dedicated to fighting business crime, corruption and organised crime operate. The NPP issues guidelines in which he or she may point to categories of cases that should be examined by the prosecutor's office with particular attention. In recent times it has been noticeable that law enforcement bodies have increasingly focused their attentions on business crime[2].

Crimes are also identified and prosecuted by the police, which has powers to institute preparatory proceedings for less serious crimes; the investigations carried out by the police are supervised by a prosecutor. In addition to the police, the powers to prosecute crimes are also enjoyed by the Internal Security Agency, Central Anticorruption Bureau, Central Investigation Bureau, Border Guard and bodies authorised to conduct preparatory proceedings in cases for fiscal offences (Tax Office, Tax Inspection Office, Customs Office).

The Code of Criminal Procedure imposes on business entities the obligation to assist law enforcement bodies at their request. During the course of an investigation the law enforcement bodies may request that business entities 'voluntarily provide documents' that could represent evidence in a case. If release of the documents is denied, they are most frequently secured through a search, but the law enforcement bodies are not able, for example, to impose a financial penalty for lack of cooperation. An alternative approach may be adopted with respect to obstructing criminal proceedings by helping the perpetrator of a crime avoid criminal liability. An action that consists, for example, of concealing or destroying evidence that supports a suspicion of a crime is also punishable and the perpetrator subject to the penalty of imprisonment from three months to five years. Therefore, one should distinguish between the instances of limited cooperation during which account is taken of company interests (for example, by demanding that the bodies respect company secrets) and the aforementioned crime, which entails intentional action with the purpose of another person avoiding liability.

II CONDUCT

i Self-reporting

Polish law does not provide for the obligation to self-report in relation to committing crimes. What is significant is that the lack of the obligation to self-incriminate is one of the key principles of criminal proceedings. Given that criminal liability may only be incurred by individuals, this principle is not directly applicable to business entities.

2 On 30 January 2014 Prosecutor General, the Minister for Internal Affairs and the Finance Minister signed the 'Understanding on cooperation in developing system solutions concerning counteracting and combating business crime'. The understanding provides for closer cooperation in investigations concerning business crime, and is also aimed at preparing a common position regarding the required changes in legislation.

The obligation to report that an offence has been committed only applies to situations in which crimes have been committed by other parties, and these are serious crimes prosecuted under the Criminal Code or those that will harm national security. As regards any remaining crimes, the criminal procedure provisions do not provide for a sanction for failure to report them; in particular, Polish law does not provide for a general obligation to report internal irregularities in business entities.

With respect to fiscal crimes, it is only possible for the person responsible for committing the act to avoid criminal fiscal liability by making an 'unprompted voluntary disclosure' or adjustment to a tax return. The Act provides for a number of specific requirements for acts of 'repentance' that need to be met for any actions commenced to avoid responsibility to be effective.

Although not exactly a self-reporting obligation, it is worth mentioning the obligation to report transactions that may represent acts of money laundering.[3] The types of institution set out in the Act are obliged to immediately report such transactions to the General Inspector of Financial Information.

ii Internal investigations

Polish law does not directly provide for the obligation to carry out internal investigations once managers receive information on irregularities within an enterprise, nor is there any obligation to report any such results thereto. It is assumed, however, that the conduct of internal investigations represents fulfilment of the obligation to take care of the interests of the enterprise under management. Failure to verify signs of irregularity may represent grounds for liability for damages and, in extreme cases, for criminal liability for mismanagement. Internal investigations are not only conducted when the provisions of law have been violated to obtain benefits for the enterprise but also when, as a result of violation of the law, the enterprise has been harmed.

As there are no regulations pertaining to the principles of conducting internal investigations, the course of investigation in these two situations will not differ considerably; however, substantial differences appear in the position of the enterprise when law enforcement bodies institute official investigations or the company decides to report existing irregularities. Then, the enterprise may obtain the status of aggrieved party and enjoy the attributable rights within preparatory proceedings and, at a later stage, court proceedings if the indictment is filed. These rights include the right to inspect the files of the case, participation in the investigation or the right to appeal disadvantageous decisions taken during the proceedings (such as a decision on discontinuation of proceedings). At a court stage an aggrieved party may act as auxiliary prosecutor.

In recent years, the number of internal investigations regarding irregularities in the private sector has noticeably increased. In many instances, this is due to the operation in Poland of companies regulated by the strict rules of the US Foreign Corrupt Practices Act (FCPA) or the UK Bribery Act.

3 As per the Act of 16 November 2000 on Counteracting Money Laundering and Terrorism Funding.

Commonly, internal investigation measures encompass reviews of business e-mail correspondence and electronic files, conversations with employers, and reviews of company documents.

iii Whistle-blowers

The situation of whistle-blowers is not in any way defined by the provisions of Polish law. In turn, numerous firms have adopted measures to allow the anonymous reporting of irregularities noticed within firms. Sometimes, anonymous hot lines or e-mail boxes are made available through which to point out violations of law and standards.

When it comes to criminal liability, a person disclosing information to law enforcement bodies regarding crimes and the circumstances of the perpetration thereof may expect extraordinary mitigation of punishment. If a perpetrator discloses to law enforcement bodies new, previously unknown, circumstances relating to a crime that carries a penalty of more than five years of imprisonment, he or she may submit a motion for extraordinary mitigation of punishment or even a conditional suspension thereof. Furthermore, in the event of corruption in business and in the public sector, a perpetrator of 'active' corruption is not subject to penalty if, after the fact of the corruption, such person notifies law enforcement bodies and discloses all significant circumstances of the deed, and all this takes place before law enforcement bodies have become aware of the facts.

It should be noted that the provisions of the Labour Code do not provide any protection for the people who were – in the capacity of employees – involved in illegal activities either. An employment contract with a whistle-blower who was involved in criminal activities may be terminated under ordinary procedures or even under dismissal procedures depending on the circumstances of an individual case, even though that person reported the irregularities.

Therefore, it should be considered that the introduction of regulations to the labour law while regulations protecting whistle-blowers are missing from the Labour Code, in many situations, potential whistle-blowers will not have any incentive to disclose irregularities.

III ENFORCEMENT

i Corporate liability

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 non-financial.

The catalogue of crimes the commission of which may cause the commencement of proceedings include:

a crime of mismanagement;
b corruption in business;
c credit and subsidy fraud;
d money laundering;

e crimes linked to making impossible and reducing satisfaction of creditors;
f failure to file a bankruptcy petition on time;
g insider trading; and
h administrative corruption.

There are also numerous other crimes specified in Acts regulating specific areas of economic activity.

A condition for commencing proceedings against a company is that it has been established by a legally final guilty verdict that a crime has been committed, a verdict conditionally discontinuing criminal proceedings, or a verdict that discontinues criminal proceedings by stating that despite a crime having been committed, the perpetrator cannot be punished.

Liability on the basis of this Act may be imposed in the event that one of the following is proven: (1) at least a lack of due diligence in the choice of the person representing the entity, at the same time being the perpetrator of a crime; or (2) the defective organisation of the activity of the company, which did not ensure the avoidance or the commission of the crime, and this would not have occurred had due diligence been observed in organising the activity.

It should be emphasised that it follows from practice to date that the law enforcement bodies do not commence proceedings in every case in which such a possibility arises, but the latest press releases by prosecutors of the National Public Prosecution Office suggest a tightening up of the policy of law enforcement bodies in this regard. The statistics of the Ministry of Justice show that each year only a couple of 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.

As regards criminal proceedings, although in the strict 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 gained thanks to 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, may take part in the hearing before the court, file motions to admit evidence, put questions to the witnesses, as well as appealing unfavourable decisions and verdicts.

In turn, in criminal-fiscal proceedings the company may face auxiliary liability. An entity that is liable on an auxiliary basis is liable for a fine imposed on the perpetrator of a fiscal crime if, when committing the crime, the perpetrator acted in the name of the company, and the company gained or could have gained financial benefit.

ii Penalties

The Act on Liability of Collective Entities for Acts Prohibited under Penalty provides for the possibility of a judgment with regard to a company imposing a fine 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 a ban on promotion and advertising;
b a ban on availing of public aid;
c a ban on availing of aid of international organisations;
d a ban on applying for public tenders;[4] and
e making public information about the judgment handed down.

In the event of auxiliary liability for a tax crime, the scope of liability is determined by the amount of the fine ordered with regard to the accused. Essentially, fines for a fiscal crime range from 560 to 16.1 million zlotys for crimes committed in 2014 and these change each year in line with the increase in the minimum wage. In ruling practice, however, it is very unusual for fines to exceed 100,000 zlotys.

iii Compliance programmes

Legal provisions do not impose the obligation on business entities to implement compliance programmes, although such programmes operate in many firms. They are particularly common in firms with foreign capital and in the financial sector.

In reality, the existence of a compliance programme and ensuring its existence may significantly limit the risk of liability under the Act on Liability of Collective Entities for Acts Prohibited under Penalty, even if the commission of a crime resulted from inappropriate organisation of work.

A functioning compliance programme is helpful in cases of actions contrary to the law that harm the interests of enterprises. A frequent problem that appears in criminal proceedings involving crimes harming enterprises is the lack of internal regulations clearly laying down the procedures and scope of duties, as a result of which it is difficult to show the actions or omissions of the guilty party.

iv Prosecution of individuals

As has already been mentioned, the position of a company in proceedings conducted by law enforcement bodies against an individual depends to a large extent on whether the company gained any benefit from the crime or whether it was harmed by the crime.

At present, the Code of Criminal Procedure provides that an aggrieved party is an entity whose interests have been directly harmed or threatened by a crime. Not every crime as a result of which an enterprise suffers damage will allow it to exercise its rights as an aggrieved party in criminal proceedings.

On the other hand, newly amended provisions of the Code of Criminal Procedure grant a firm the right to appeal decisions of the prosecutor on discontinuing an investigation if the firm notified the prosecutor about a crime that harmed its interests, even if only indirectly. To date, only a directly aggrieved party has had the right to file a

4 These bans may be ordered for a period of one year to five years.

complaint against decisions on discontinuing an investigation, while a person indirectly aggrieved has not had the right to any control of the court. The new regulation should be viewed positively as it grants greater litigation guarantees and may lead to more effective crime prevention.

If proceedings against an individual involve a breach of law that may lead to a company being held liable, a question arises as to the legitimacy of cooperation between the accused and the firm. In the vast majority of cases a judgment favourable to the accused rules out the risk of sanctions for the firm. There are no prohibitions whatsoever on joint defences, so cooperation within the proceedings is admissible. It should be noted, however, that situations may occur when the accused's line of defence will not be consistent with the interests of the firm. This may be the case, for example, when the accused bases his or her defence on pointing to another company employee or manager who is indeed guilty of committing a crime.

The basic duty of the lawyer towards a client in criminal proceedings is to act exclusively for his or her benefit. Pursuant to the position of the judiciary and doctrine that has dominated for years, a defence lawyer must disclose all circumstances that are favourable to the client, even if the client does not consent to this him or herself.

As regards employee issues, commission of a crime undoubtedly entitles an employer to terminate the employment contract under a disciplinary procedure. What is important is that in a written termination of the employment contract the reasons for termination of the contract should be precisely indicated, which reasons can be verified by the court if the employee appeals to the Labour Court. In the event that the reasons given in the termination of the contract prove groundless, the employee may be reinstated to work by the court or may be entitled to a compensation claim, or both.

IV INTERNATIONAL

i Extraterritorial jurisdiction

Polish criminal law provisions essentially provide for the liability for crimes committed in Poland. Pursuant to the provisions of the Criminal Code, a crime is deemed to have been committed at the place perpetrator acted or omitted to perform an act he or she was obligated to perform it, or where the effects of the crime were felt or were to intended to occur.

With regard to crimes committed abroad, the rule of the 'double criminality' of an act applies. This means that law enforcement bodies may conduct criminal proceedings only with respect to acts that constitute a crime both in Poland and in the country in which they were committed. Polish citizens are liable for crimes committed abroad in all instances where an act constitutes an offence under Polish law and at the place it was committed. As regards foreigners' liability for acts committed abroad, Polish criminal law may be applied if a crime harms the interests of Poland, a Polish citizen or a Polish company, and at the same time the requirement of double criminality is satisfied.

The requirement of the double criminality of an act does not apply, *inter alia*, to a situation where a crime harms the internal or external safety of Poland or its material economic interests, or is aimed against Polish offices or officials, nor does it apply to a

situation where a financial gain (even an indirect one) was derived in the territory of Poland.

ii International cooperation

Polish law enforcement bodies cooperate with the authorities of other countries. The rules and scope of cooperation vary due to the fact that in some cases of cooperation, bilateral international agreements, multilateral conventions or international organisation regulations (including primarily the European Union law) will apply with some countries, whereas in the absence of an international agreement the provisions of the Code of Criminal Procedure apply.

The possibility of handing over a Polish citizen as part of an extradition procedure is excluded in principle. By way of exception, the court may decide to extradite a Polish citizen if such possibility follows from an international agreement ratified by Poland. An additional condition is that the crime that the subject of the extradition procedure is charged with must have been committed outside Poland, and that the act such person is charged with must constitute a crime under Polish law, both at the time the court decision is taken and at the time it was committed.

International cooperation also covers issues related to handing over persons prosecuted within the EU under the European arrest warrant (EAW). In 2013, Member States extradited 2,009 persons with respect to whom EAWs were issued. In the same year, Polish courts issued decisions to hand over 248 persons under an EAW.

V YEAR IN REVIEW

One of the most widely discussed media investigations in recent months has concerned a number of companies in the information and communications technology sector that gave money to government officials to rig tenders in public administration informatisation processes. The scandal concerns irregularities involving many administrative institutions, including the Ministry of Justice, the Ministry of Internal Affairs and Administration, the Ministry of Finance, the National Police Headquarters, the Internal Security Agency, the Agency of Modernisation and Development of Agriculture and the Polish Border Guard. As part of its investigations, the Central Anti-Corruption Bureau closely cooperates with the American Department of Justice (DoJ). The FBI, in cooperation with the Central Anti-Corruption Bureau, has searched the headquarters of some of the largest US companies in this technology sector.

In connection with the investigation conducted by the Central Anti-Corruption Bureau under the supervision of the Warsaw Appellate Prosecutor's Office, several dozen persons have been charged to date, and new reports on irregularities having taken place in subsequent informatisation-related tenders are still appearing.

As a result of proceedings conducted by the Central Anti-Corruption Bureau and US enforcement authorities, Hewlett-Packard concluded an arrangement with the DoJ and Securities and Exchange Commission, in which Hewlett-Packard undertook to pay in aggregate an amount exceeding US$108 million in respect of a breach of the US

FCPA in Russia, Mexico and Poland[5]. Hewlett-Packard admitted having organised, from 2006 to 2010, a mechanism for the corruption of public officials in connection with the handling of tenders for the delivery of equipment for the National Police Headquarters in Poland. The total amount of bribes exceeded US$600,000.

The Internal Security Agency, in turn, conducted in 2013 a number of investigations related to tampering with VAT refunds on the basis of new regulations introduced to the VAT Act in the middle of 2013[6]. One of these proceedings concerned imaginary trading in granulated gold in the EU and Poland, which was conducted by fictitious persons who were hired to issue invoices for non-existent transactions as part of the business activities of their companies. According to preliminary estimates of the Internal Security Agency, over several months of the criminal group's activity, the Treasury could have lost over 300 million zlotys.

VI CONCLUSIONS AND OUTLOOK

In 2013 Parliament adopted an amendment to the Code of Criminal Procedure, which provided for system changes that should have a significant impact on the criminal procedure model. The first change to court proceedings will be that courts will hear evidence at their own initiative only exceptionally. In the current model, the prosecutor's office is often passive at the stage of court proceedings, and the burden of seeking evidence testifying to both the disadvantage and advantage of the accused person rests with the court. As a result of the amendment passed by Parliament, the court will be obligated to adjudicate to the advantage of the accused person not only on any doubts that remained unclarified in the proceedings as to evidence, but also in cases where, due to lack of a pertinent motion, no evidence proceedings were conducted. These changes are aimed at making the parties to the proceedings more active and, at the same time, at releasing the court from the obligation to comprehensively clarify all the circumstances of the case.

Experts envisage that the resulting number of acquittals (which currently constitutes only 2.5 per cent[7]) will grow considerably. The changes are intended to force the engagement of attorneys-at-law and legal counsels as attorneys-in-fact for the aggrieved parties in order for them to support prosecutors both during court proceedings and at earlier stages, during internal investigations aimed at collecting detailed evidence. Another important change is that it will be admissible to base factual findings on the content of private expert opinions ordered by parties to the proceedings.

---

5 www.justice.gov/opa/pr/2014/April/14-crm-358.html.

6 *Raport z działalności Agencji Bezpieczeństwa Publicznego za rok 2013* [The 2013 Report on the Activity of Internal Security Agency]; www.google.pl/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDAQFjAB&url=http%3A%2F%2Fwww.abw.gov.pl%2Fdownload%2F1%2F1270%2Fraport2013.pdf&ei=wKZ0U5SuDpCI7Aagn4CwDQ&usg=AFQjCNEdS_gKANIHyJ318zwPD258w3_iYg&bvm=bv.66917471,bs.1,d.bGE.

7 *Opracowania wieloletnie Ministerstwa Sprawiedliwości – Uniewinnienia* [Analyses of many years of the Ministry of Justice – Acquittals]; http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

The amendment described above will come into force on 15 July 2015.

The declarations made by representatives of law enforcement bodies with regard to tougher business crime prevention have not been unrealistic, which is well illustrated by the detection of business corruption crimes. According to police statistics, the number of business corruption cases detected in 2012 slightly exceeded 100, as compared with almost 400 cases detected in 2013.

It should also be noted that a tougher fiscal policy by the government can enhance the activities of law enforcement bodies in preventing business crimes, which can particularly harm the interests of the State Treasury. Given the increasing professionalism of the services engaged in preventing business crimes, one can expect greater efficiency in the prosecution of business-related crimes.

Appendix 1

ABOUT THE AUTHORS

TOMASZ KONOPKA
Sołtysiński Kawecki & Szlęzak
Tomasz Konopka specialises in business crime cases including white-collar crime, representation of clients related to custom seizures of counterfeit products and court litigation. He represents Polish and foreign clients before the courts, arbitration institutions and law enforcement authorities. Mt Konopka also advises on matters relating to corporate law and securities. He 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, Mr Konopka 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 (ACFE).

SOŁTYSIŃSKI KAWECKI & SZLĘZAK
ul. Jasna 26
00-054 Warsaw
Poland
Tel: +48 22 608 70 67
Fax: +48 22 608 70 70
tomasz.konopka@skslegal.pl
www.skslegal.pl