



# ICLG

The International Comparative Legal Guide to:

## **Business Crime 2019**

**9th Edition**

A practical cross-border insight into business crime

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# Poland

Sołtysiński Kawecki & Szlęzak

Tomasz Konopka



## 1 General Criminal Law Enforcement

### 1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

The power to prosecute business crimes is enjoyed by Public Prosecutors' Offices, the Police, the Internal Security Agency, the Central Anticorruption Bureau, the Central Investigation Bureau, the Border Guard, the Military Police (in a very narrow scope), Tax Offices, the National Tax Administration, Tax Administration Chambers, and Tax and Customs Offices.

The National Tax Administration, the Internal Security Agency, the Central Anticorruption Bureau and the Central Investigation Bureau are organised at the national level.

### 1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

As a rule, criminal investigations are carried out by public prosecutors. All other enforcement agencies support public prosecutors. The list of enforcement authorities and the scope of their competences are regulated in national statutes and regulations issued by the Minister of Justice.

### 1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

There are no civil enforcement agencies for business crimes. The injured party may also pursue its claims under separate civil proceedings. There is an administrative enforcement path against infringements of regulatory law (i.e. in case of a violation of antitrust law, infringements of consumer rights, or failure to observe certain regulatory obligations regarding compulsory agreements provided in telecommunications or energy law).

### 1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The majority of business crime cases in Poland in the past year focused on VAT fraud.

## 2 Organisation of the Courts

### 2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

There are District Courts, Regional Courts and Appeal Courts (common courts) in the Polish judiciary system. Criminal cases are conducted by Criminal Divisions of common courts. Such cases are handled by judges specialised in criminal law (excluding particular types of crimes).

The Supreme Court exists separately from the common courts of law system. The Supreme Court examines cassations (one of the extraordinary measures of appeal) and other matters specified in the law. The Criminal section of the Supreme Court examines criminal cases.

### 2.2 Is there a right to a jury in business crime trials?

The institution of a jury does not exist in Polish criminal procedure; however, the panel at the main trial consists of a professional judge and lay judges in certain cases.

## 3 Particular Statutes and Crimes

### 3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

#### o Securities fraud

Article 183 of the Trading in Financial Instruments Act ("TFIA") penalises so-called "manipulation". This provision refers to "manipulation" as was defined in the Article 39 TFIA. This Article was revoked on 6 May 2017 by force of the Act of 10 February 2017 on the amendment of, *inter alia*, TFIA. These changes result from the implementation of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse ("MAD") regime into Polish law and its adjustment to Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse ("MAR"). Said amendment also altered Article 183 TFIA by referring to manipulation as defined in Article 12 of the MAR. Under the revoked Article 39 of the TIFA, this term covered

several behaviours, *inter alia*, giving orders to trade or entering into transactions (i) which were misleading as to the real demand for, supply of, or price of a financial instrument, (ii) whereby the price of one or more financial instruments was set at an abnormal or artificial level, (iii) with the intent of bringing about other legal effects than those for the attainment of which a given act in law was in fact performed, and (iv) while misleading participants of the market or taking advantage of their miscalculation of prices of financial instruments. Disseminating, whether through the mass media including the internet or otherwise, false or unsound information or rumours which mislead or are capable of misleading as to financial instruments as a result of manipulation, also constitutes a crime. Under the current existing MAR/MAD regime, such behaviour would be explicitly equated with manipulation pursuant to Article 12(2)(d) of the MAR.

There are two regimes of criminal liability for manipulation. Generally, the perpetrator shall be liable to a fine of up to PLN 5 million or imprisonment for a period of three months to five years. The second regime applies to those who enter into an agreement with another person aimed at manipulation. This person is liable to a fine of up to PLN 2 million.

#### o Accounting fraud

Under Article 78 of the Accounting Act, expert auditors issuing an untrue opinion on financial statements and their underlying account books, or the property and financial standing of an undertaking, are liable to a standard fine or imprisonment for a period up to two years, or both penalties jointly. In this case, non-deliberate violations of these standards are also penalised – although in a more lenient fashion.

#### o Insider trading

Pursuant to Article 181 TFIA, whoever engages in insider trading shall be liable to a fine of up to PLN 5 million or imprisonment for a period of three months to five years, or both penalties jointly.

The amendment mentioned in the answer referring to securities fraud altered Article 181 TFIA by introducing a uniform criminal liability regime for all aspects of use of insider information in violation of Article 14(a) of the MAR (insider trading and illegal disclosure of insider information). All kinds of perpetrators are subject to a fine of up to PLN 5 million or imprisonment for a period of three months to five years or both penalties jointly.

#### o Embezzlement

Pursuant to Article 296 of the Criminal Code (“CC”), anyone who, while under a legal obligation, a decision of an appropriate authority or a contract to manage the property or business of an individual, a company, or an organisational unit without legal personality, by abusing the authority vested in him, or by failing to perform his duties, inflicts substantial damage is liable to imprisonment for between three months and five years. If the offender referred to above, by abusing the authority vested in him, or by failing to perform his duties, creates an imminent danger of causing substantial damage to property, he is liable to imprisonment for up to three years. A stricter regime is provided for perpetrators acting in order to obtain a material benefit – the imprisonment period is six months to eight years. Non-deliberate violations are subject to imprisonment for up to three years.

Embezzlement may be also classified as an offence of misappropriation. According to Article 284 of the CC, anyone who misappropriates moveable properly entrusted to him is liable to imprisonment for between three months and five years.

#### o Bribery of government officials

The general definition of penalised behaviour is giving or promising to give a material or personal benefit to a person performing a public function in relation to activities related to that public function.

Additionally, in specific circumstances, bribery of government officials might be also construed as instigation to the offence defined in Article 231 of the CC, i.e. exceeding the authority of a government official or failing to perform the duties of a government official to the detriment of public or individual detriment, in order to gain a material benefit.

#### o Criminal anti-competition

The CC provides for criminal liability for corruption in business. It is stipulated that anyone who, while in a managerial position in an organisational unit performing business, or in an employment relationship, a service contract or a contract for a specific task, demands or accepts a financial or personal benefit or the promise thereof, in return for abusing the authority granted to him, or for failing an obligation, could inflict material damage on the unit, or constitute an act of unfair competition or an unacceptable act of preference for the buyer or recipient of goods, services or benefits, is liable to imprisonment for between three months and five years.

Additionally, Article 23 of the Combating of Unfair Competition Act (“CUCA”) criminalises illegal use of business secrets. Anyone who causes serious damage to an entrepreneur by violating their obligation towards that entrepreneur by disclosing business secrets to another person or using such secrets in their own business, shall be liable to a standard fine, restriction of liberty, or imprisonment for a period of up to two years. The same penalty applies to anyone who illegally obtained access to business secrets and disclosed them to another person or used such secrets in their own business.

Article 24 of the CUCA criminalises causing serious damage to an entrepreneur by reproduction or copying of their products in a manner that might mislead the customers as to the identity of the manufacturer. The perpetrator is liable to a standard fine, restriction of liberty, or imprisonment for a period of up to two years. In case such reproduction or copying involves marking the products with counterfeit trademarks in order to introduce them to trading or trading in such counterfeit products, under Article 305 of the Industrial Property Law (“IPL”), the perpetrator is liable to a standard fine, restriction of liberty, or imprisonment for a period of up to two years. Note that under Article 305 of the IPL no damage to another entrepreneur is required for the liability to arise. A stricter regime applies to perpetrators who deal with counterfeit goods of significant value or made such criminal activity a permanent source of their income. Such perpetrators are liable to imprisonment for a period of six months to five years.

#### o Cartels and other competition offences

Cartels and other competition deeds are defined and regulated on the basis of administrative law, in particular, the Protection of Competition and Consumers Act, and they are subject to a fine.

Moreover, the CC provides for liability for hindering a public tender. The law states that anyone who, in order to achieve a material benefit, prevents or obstructs a public tender, or acts in concert with another entity to the detriment of the owner of property or an entity or institution for which the tender is to be held is liable to imprisonment for up to three years.

Additionally, spreading false information or withholding circumstances of significant importance to the conclusion of the agreement that is the subject of the tender, or acting in concert with another entity to the detriment of the owner of property or an entity or institution for which the tender is to be held, is subject to the same penalty.

#### o Tax crimes

Tax offences are described in a separate legal act – the Fiscal Penal Code (“FPC”). Criminal fiscal crimes are punishable by a fine, the penalty of restriction of liberty and imprisonment (up to five years). Tax crimes may be committed intentionally or unintentionally.



The most popular tax offence, VAT fraud, usually involves use of fake or otherwise unreliable invoices. Under the newly introduced articles 270a and 277a of the CC, forgery of or tampering with an invoice in relation to circumstances influencing the amount of a tax (or other public obligation) or its refund, in order to use such invoice as an authentic one, or using such a fake invoice, constitutes a separate offence. The perpetrator is liable to imprisonment for a period of six months to eight years. In case the perpetrator forged or used invoices documenting transactions whose value exceeded PLN 10 million or made forging or using fake invoices a source of their permanent income, the offence is considered to be a felony. Such perpetrator is liable to imprisonment for a period of five to 25 years.

#### o Government-contracting fraud

The CC states that anyone who, in order to obtain a subsidy or subvention order for himself or for another person, from an institution disposing of public funds, submits a forged or altered document or a document stating an untruth, an unreliable document, or an unreliable written statement regarding the circumstances that are significant for obtaining the financial support mentioned above or a payment instrument or order, is liable to imprisonment for between three months and five years.

#### o Environmental crimes

The CC provides for several environmental crimes. These crimes relate to causing significant destruction to plant or animal life, causing pollution of water, air and soil, and improper storage of waste. These offences can be committed intentionally and unintentionally (with less risk of punishment). Environmental crimes are punishable by up to eight years in prison.

#### o Campaign-finance/election law

Offences against elections are defined in the Election Code and the CC. The CC provides for the crime of election corruption. It is punishable to accept financial or personal benefit or request such benefits for voting in a certain way.

#### o Market manipulation in connection with the sale of derivatives

Please see the answer referring to securities fraud.

#### o Money laundering or wire fraud

The CC provides that anyone who receives, transfers or transports abroad, or assists in the transfer of title or possession of legal tender, securities or other foreign currency values, property rights or real or moveable property obtained from the profits of offences committed by other people, or takes any other action that may prevent or significantly hinder the determination of their criminal origin or place of location, their detection or forfeiture, is liable to imprisonment for between six months and eight years.

#### o Cybersecurity and data protection law

Article 287 of the CC provides that anyone who commits so-called “computer fraud”, i.e. without due authorisation (i) influences automatic processing, collection or transfer of electronic data, or (ii) alters (this covers, e.g., SQL-injection type attacks), deletes or creates electronic records, in order to obtain material benefit or to cause damage to another, is liable to imprisonment for a period of three months to five years. Pursuant to Article 269a of the CC, significantly interrupting the operations of a computer system or an IT network by means of: data transmission (e.g. DDOS attacks); deletion, corruption, or alteration of data; or restriction of access to data (this might cover, e.g., ransomware attacks), is subject to the same penalty.

Moreover, under Article 268a of the CC, unauthorised (i) deletion of electronic data, (ii) destruction of such data, (iii) restriction of access to such data (e.g. ransomware attacks), and (iv) prevention of

access or automatic processing of such data is subject to a penalty of imprisonment for a period of up to three years. If the perpetrator causes significant damage, they are liable to imprisonment for a period of three months to five years.

Pursuant to Article 269 of the CC, corruption, alteration, or deletion of any data of particular significance for national defence, transport security, operation of government or local government or interruption or prevention of access to such data or their processing is subject to a penalty of imprisonment for a period of six months to eight years. Destruction or exchange of related hardware is subject to the same penalty.

Additionally, under Article 269b of the CC, anyone who prepares, obtains, transfers, or sells any software enabling the user to commit the above offences (this covers various backdoors, “Trojan horses”, keyloggers, webcam hacks, botnet-related software, viruses, ransomware software, etc.) or to cause threat to life or health of multiple persons or assets whose value exceeds PLN 1 million is subject to imprisonment for a period of three months to five years. Note that it is not necessary to use said software in order for criminal liability to arise. The same penalty applies to preparing, obtaining, transferring or selling passwords, access codes or other data enabling access to data stored in a computer system or an IT network.

There is an exclusion of criminal liability of persons performing penetration tests at the request of the interested party – i.e. launching controlled attacks, preparing software intended to find and test so-called “exploits”, sending so-called spoof mails to check the employees’ cybersecurity awareness, etc.

Bug bounty programmes are also decriminalised. Hunting bug bounties will not constitute an offence if the person who identified a “bug” (malfunctioning software), security loophole, or other exploit caused no damage by their activity (either to the interested entity or to the public interest) and immediately informed the administrator of the relevant system or network of the “bug’s” existence and the threat it could pose.

Cyber-crimes related to payment instruments (e.g. payment card systems) still remain a major challenge to Polish prosecutors. Apart from being classified as the earlier discussed “computer frauds”, they are sometimes considered to be regular frauds (subject to a penalty of imprisonment) or even burglaries (subject to a penalty of imprisonment for a period of one to 10 years). Polish regulation of payment services does not contain any particular provisions criminalising such violations of cybersecurity.

Common violations of cybersecurity, i.e. various online scams, mostly related to unsolicited use of premium-SMS services, are classified as regular frauds.

#### o Trade sanctions and export control violations

Trade sanctions and export control violations are described in particular in the Fiscal Penal Code.

Pursuant to Article 64 of the FPC anyone who – without the notification of appropriate authorities – takes the excise goods which are not marked by excise stamps out of the tax warehouse in order to export them, shall be subject to the penalty.

### 3.2 Is there liability for inchoate crimes in your jurisdiction? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

An individual may be criminally liable for attempting to commit a crime. Assignment of the responsibility for the attempt to commit a crime takes place under the following factors: (i) a person acts with criminal intent; (ii) an accused has already started to carry out the crime; and (iii) an attempt failed or was ceased by the accused due to a force external to the accused.

## 4 Corporate Criminal Liability

### 4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

The quasi-criminal liability of collective entities such as companies and partnerships is provided in the Act on Criminal Liability of Collective Entities for Punishable Offences ("CLCE").

Pursuant to this Act, a collective entity may be held liable for an offence involving the conduct of an individual (employee):

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

if the collective entity benefitted or could have benefitted from that conduct, even non-financially.

The collective entity may bear criminal liability under the CLCE if other detailed prerequisites are fulfilled; *inter alia*:

- (1) the offence is confirmed by a final non-appealable convicting judgment, a judgment conditionally terminating the criminal proceedings or criminal fiscal proceedings, a ruling to grant the right to voluntary surrender, or a court ruling to terminate the proceedings due to circumstances preventing the perpetrator from being punished;
- (2) the offence was committed as a result of (1) a lack of due diligence in selecting an individual who committed the offence or a lack of due supervision over that person on the part of a body or representative of the collective entity, or (2) the organisation of the operations of the collective entity in such a manner that it did not prevent an offence committed if it could have been prevented if the body or representative of the collective entity had applied that due diligence required in the circumstances in question; and
- (3) the offence committed is one of the offences listed in the Act (*inter alia*, abuse of trust, corruption of managers, financial fraud, frustration of creditors).

At present, the Ministry of Justice is working on the amendments of the Act on Liability of Collective Entities for Acts Prohibited under Penalty; however, the novelty's bill has not been announced yet. From recently announced projects it follows that the requirement of a previous final conviction of a natural person as a condition of the collective entity's responsibility will be eliminated. The draft Bill predicts also resignation from the catalogue of crimes for which a collective entity could be held responsible. This will involve responsibility for all prohibited acts indicated by the legislator. The amount of the fine will be raised to the limits of PLN 30,000 to PLN 30 million. The court in a verdict may also decide on dissolution and liquidation of a collective entity. Moreover a collective entity will have to implement compliance procedures in order to run a company not only in accordance with the law, but also in accordance with the ethical standards, risk management rules and other internal standards. The planned date of entry into force of these amendments is not known yet.

### 4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

Under the Act of the CLCE, the criminal liability of the collective entity derives from the criminal liability of the individual, and not *vice versa*.

However, it should also be noted that under the regulation of the FPC, a person who, under a provision of law, a decision of the pertinent authority, an agreement, or as a result of actual performance, deals with business matters of a legal person or other entity, shall be liable for fiscal offences as an offender.

### 4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

To this day, the enforcement authorities have shown a determined preference to prosecute individuals as opposed to collective entities. To date, criminal proceedings against collective entities have been very rare in Poland, and fines have not been severe. However, the draft Bill described in question 4.1 predicts a change.

### 4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Liability arising under the CLCE is not subject to succession and the CLCE does not contain any provisions regulating this matter. Liability arising under the CLCE is considered to be quasi-criminal and therefore subject to similar constitutional guarantees and rules as ordinary criminal liability, which is always personal and not subject to succession. It should also be noted that, under Article 26a of the CLCE, the court might apply a precautionary measure consisting in prohibition of any transformations, divisions and/or mergers of the entity subject to liability arising under that act.

## 5 Statutes of Limitations

### 5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

An offence ceases to be punishable after the lapse of a certain number of years (from five to 30 years) from the moment of its commission.

A private prosecution crime ceases to be punishable after the lapse of one year from the moment the injured party has learned the identity of the perpetrator of the crime, yet no later than after the lapse of three years from the moment of its commission.

If the commission of a crime is dependent on the occurrence of a consequence provided for in a statute, the running of the prescription period commences at the moment of the occurrence of the consequence.

If the criminal proceedings in any form (whether against a specified suspect or not) have been instituted within the period mentioned above, the prescription period of all offences covered by their scope is extended by 10 years. The only exception refers to private prosecution crimes, whose prescription period is extended by only five years in the above case.

### 5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

In the case of “continuous crime”, the limitations period starts running after the last act was completed. Continuous crime refers to a crime when two or more prohibited acts of conduct are undertaken at short intervals with premeditated intent.

### 5.3 Can the limitations period be tolled? If so, how?

The limitations period does not run if a provision of law does not permit the criminal proceedings to be instituted or to continue; this, however, does not apply to the lack of a motion or a private charge. Note that instigation of any proceedings covering a given offence (even if the suspect or exact circumstances of the offence are unknown) significantly extends the prescription period.

## 6 Initiation of Investigations

### 6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

In Polish criminal law, there is no special regulation regarding business crimes, and the “extraterritorial jurisdiction” to prosecute business crimes does not exist.

As for the general rule:

- (1) a Polish criminal statute applies to a Polish citizen who has committed a crime abroad;
- (2) a Polish criminal statute applies to a foreigner who has committed abroad a prohibited act against the interests of the Republic of Poland, a Polish citizen, a Polish juridical person or a Polish organisational entity without legal personality, and also to a foreigner who has committed a crime of a terrorist character abroad; and
- (3) liability for an act committed abroad is applicable only if this act is also recognised as a crime by the statute being in force where the commission of the act was located.

In case the above-mentioned conditions are met, the Polish authorities are entitled to initiate and conduct criminal proceedings. However, the Polish authorities may conduct their activity only on Polish territory. Any action that should be carried out on foreign territory requires a motion for legal aid.

When it comes to business crimes, the Polish authorities mostly use legal aid in VAT fraud cases. However, they also use legal aid in minor issues such as witness hearings.

### 6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

An investigation is initiated if there is a justified suspicion that an offence was committed. A decision to initiate the investigation is issued *ex officio* or as a result of a report by the competent authority.

In general, there exist no special rules or guidelines governing the initiation of an investigation. However, pursuant to the Prosecutor General's Guidelines of 6 July 2016, enforcement authorities shall act in a manner allowing the fastest possible collection of evidence indicating fraudsters engaged in widespread VAT frauds.

### 6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

The authorities have many formal mechanisms for cooperating with foreign enforcement authorities. The mechanisms of cooperation between criminal authorities are stated in the Code of Criminal Procedure, many bilateral treaties and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.

The authorities should not use any “informal mechanism” as it could affect the correctness and admissibility of the evidence.

The criminal authorities in Poland cooperate with foreign enforcement authorities on a daily basis.

## 7 Procedures for Gathering Information from a Company

### 7.1 What powers does the government have generally to gather information when investigating business crimes?

The enforcement agencies (as opposed to the government itself) have wide powers to gather any type of information. Under the provisions of the criminal procedure, any legal person/organisational unit/individual is obliged to assist the authorities conducting criminal proceedings (*inter alia*, render documentation, give information).

### Document Gathering:

### 7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

The enforcement agencies conducting criminal proceedings (as opposed to the government itself) are entitled to demand that a company produce the documents if the lack of the documentation required would significantly hinder the conduct of the proceedings or make them impossible.

The documentation that may serve as evidence should be surrendered at the request of the court, the public prosecutor, and in urgent cases, of the Police or another authorised agency. In case the seizure is conducted by the Police or another authorised agency acting at its own behest, the person surrendering the documentation may immediately request that the decision approving the seizure be drawn up by the court or the public prosecutor and delivered. A person surrendering an object should be advised of that right. The decision should be served within 14 days of the seizure.

**7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?**

In the Polish criminal procedure, there are several limitations and restrictions regarding the seizure of certain types of documentation:

- (1) documentation containing information pertaining to the performance of the function of defence counsel;
- (2) documentation containing confidential information or information constituting a professional or other legally protected secret, or documentation of a private nature; and/or
- (3) a file of psychiatric treatment.

The labour law itself does not itself protect the personal documents of employees in the course of criminal proceedings.

**7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?**

Yes, in May 2018 General Data Protection Regulation entered into force.

**7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?**

The government can demand that a company's employee produces documents under the same circumstances as in the case of the company (please refer to question 7.2 above).

**7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?**

The government can demand that a third person or entity produce documents under the same circumstances as in the case of the company (please refer to question 7.2 above).

## Questioning of Individuals:

**7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?**

The enforcement agencies (as opposed to the government itself) carrying on criminal proceedings are entitled to summon any person (*inter alia*, an employee, officer or director of the company) to testify. A person who has been formally summoned as a witness is obliged to appear at the place indicated by the authority and to testify.

The interrogations generally take place at the premises of the summoning authority; however, conducting the questioning in a different place is not excluded.

**7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?**

Please refer to question 7.7 above.

**7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?**

The accused has the right to give explanations. However, without giving any reasons, he may refuse to answer individual questions or to give explanations. He shall be instructed about this right.

The witness may decline to answer a question if it could expose him, or his next of kin, to the accountability for an offence or a fiscal offence. Moreover, the next of kin of the accused may refuse to testify. The witness must be advised of these rights before or during the interrogation, and advised of the criminal liability for giving false testimony.

The defendant and the injured party have the right to be accompanied by attorneys.

The witness may appoint an attorney, but the competent authority may refuse to admit such assistance.

## 8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

**8.1 How are criminal cases initiated?**

An investigation may be launched *ex officio* or at the initiative of the injured party, who must submit a formal (oral or written) notification. For the institution of proceedings with respect to certain crimes, the injured party must file a motion for prosecution. If such motion is not filed, then no proceedings will take place.

**8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?**

The public prosecutor shall issue a decision on the presentation of charges on an individual if the data existing at the moment the investigation is initiated, or those gathered in its course, justify sufficiently a suspicion that the offence was committed by a defined person.

**8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.**

In the cases referred to in Article 335 of the Code of Criminal Procedure, the prosecutor may bring an indictment requesting the



sentencing of the accused without a hearing (§ 1) or a motion for conviction of the accused without a hearing (§ 2). This requires the following conditions: the confession of the accused to commit the crime; an explanation of all the circumstances of the case that does not contradict conclusions based on other gathered evidence; and attitude of the accused indicating that the purpose of proceedings will be achieved without a trial.

**8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.**

All the deferred prosecution or non-prosecution agreements shall be accepted by the court. The court shall verify whether the circumstances of the commission of the offence give rise to doubts and the attitude of the accused indicated that the purposes of the proceedings shall be obtained.

**8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.**

In cases where, due to the defendant's action, a third party incurred damage, he has a right to seek compensation for such damage by filing the applicable motion to the criminal court. The court, when sentencing, will then be obliged to impose the obligation to redress the full damage inflicted by a crime, to redress part of it, or to compensate for the suffered harm, pursuant to the provisions of the civil law. The injured party does not need to specify the amount of requested redress in the motion. Even if the injured party does not file the motion, the court may still award the compensation *ex officio*. Moreover, the imposition of redress or compensation or punitive damages does not impede the pursuance of the dissatisfied part of the claim in civil proceedings.

## 9 Burden of Proof

**9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?**

In the Polish legal system, as a general rule, the burden of proof "rests on who asserts, not on who denies". Under the criminal procedure, this means the burden of proving the defendant's guilt lies with the prosecution, and that fact must be established beyond reasonable doubt. The defendant is innocent until proven guilty.

The court might allow evidence and analyse it *ex officio*, but this does not shift the burden of proof.

However, under the Act of 23 March 2017 on the amendment of the CC and certain other acts, there is a new institution in Polish criminal law called extended confiscation. According to this new regulation, in case of sentencing for: (i) an offence resulting in direct or indirect benefit of substantial value; (ii) an offence subject to a penalty of five or more than five years of imprisonment resulting in – even potential – direct or indirect benefit; or (iii) an offence committed in an organised crime group, all the assets acquired by the perpetrator within five years prior to commission of an offence

would be considered a benefit thereof, unless the perpetrator or the other interested party submit evidence in rebuttal. So the burden of proof is reversed in this case.

**9.2 What is the standard of proof that the party with the burden must satisfy?**

It must be proven beyond reasonable doubt that all prerequisites of an offence have been fulfilled. All doubts which cannot be dispelled shall be resolved to the benefit of the accused.

**9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?**

Only the court is entitled to weigh the evidence, which is reflected in its obligation to indicate what facts have been found by the court to be proven or not proven and the evidence upon which the court has relied, as well as the reasons why the evidence to the contrary has been dismissed by the court.

The court would violate one of the core principles of Polish criminal procedure, should it fail to analyse the circumstances of the case on its own and, e.g., blindly accept the prosecution's assessment of the facts.

## 10 Conspiracy / Aiding and Abetting

**10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?**

As a general rule, not only the offender, but also anyone, who:

- induces or orders the offender to commit a crime;
- (intending another person to commit a crime) facilitates the commission of the act; and/or
- organises a prohibited act to be carried out,

is liable for his actions, and the penalty will be imposed within the limits of the penalty provided for the liability provided for the offence itself. Nonetheless, in the case of aiding, the court may apply extraordinary mitigation of the penalty.

## 11 Common Defences

**11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?**

Polish criminal law provides that an offence may be committed intentionally or unintentionally, except for felonies, which might be committed only intentionally. In the case that criminal intent is required, this intent must be proven within the course of criminal proceedings, not unlike any other circumstance of the case.

**11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?**

Error of law is an institution of Polish criminal law. Criminal

liability (fault) is disabled if the error is justified. If the offender's mistake is not justified, the court may apply an extraordinary mitigation of the penalty. The prosecution and the court shall examine and explain whether the accused acted in justified error of the law or otherwise.

**11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?**

A criminal deed is not committed if the accused acts in justified error as to any factors of the offence. The prosecution and the court shall examine and explain whether the accused acted in justified error of facts or otherwise.

## 12 Voluntary Disclosure Obligations

**12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?**

Anyone who has learned of an offence being committed has a social (as opposed to legal) obligation to notify the public prosecutor or the Police thereof. In general, failure to report the crime does not lead to potential criminal liability.

However, specific regulations provide an obligation to report certain serious crimes, such as crimes against human life or crimes against the Republic of Poland.

In general, no special "credit" is granted for voluntary disclosure of any offence. Under specific circumstances, rewards might be offered by the Police or other enforcement agencies for assistance in ongoing criminal proceedings, especially those pertaining to crimes that cause widespread social outrage (e.g. violent murders or vandalism at historical sites). This practice is, however, not founded in the provisions regulating criminal procedure.

## 13 Cooperation Provisions / Leniency

**13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?**

The court will apply an extraordinary mitigation of the penalty, or may even grant a suspended sentence, with respect to an offender who acted in concert with others in committing an offence, and will subsequently reveal information to the prosecutors about other offenders involved in committing the offence, or the essential circumstances thereof.

Regardless of the above, the court may apply an extraordinary mitigation of the penalty, or even grant a conditional suspended sentence, with respect to an offender who, irrespective of any

explanations given in his case, provides prosecutors with substantial assistance concerning an offence that they did not previously know about, and which is subject to imprisonment for more than five years.

As regards tax offences, the perpetrator who voluntarily disclosed the significant circumstances of the offence to the enforcement authorities (in particular by identifying other perpetrators) and paid the due amount of public obligation within the term specified by said authority, is not subject to liability for the relevant tax offence. This, however, does not exclude general criminal liability and such disclosure might (and often does) lead to the perpetrator being prosecuted and sentenced for criminal offences related to the tax offence he or she disclosed (e.g. using fake invoices or committing an accounting fraud).

No additional "credit" is offered for voluntary disclosure and cooperation. However, when deciding on the penalty, the court is obliged to assess the attitude of the accused and their behaviour after the offence has been committed. Such disclosure should be favourable to the perpetrator to that extent.

**13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.**

The institution of leniency applies only to individual natural persons.

## 14 Plea Bargaining

**14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?**

Polish criminal law provides for various separate regulations of plea bargaining.

**14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?**

The application to an individual of provisions relating to plea bargaining depends on the stage of criminal proceedings.

First, the public prosecutor may place in the act of indictment (or in separate motion), a request for the accused to be sentenced to the penalties agreed upon therewith in the sentence together with the penal measure for an offence liable to a penalty of up to 10 years of deprivation of freedom without a hearing if the circumstances of the commission of the offence give rise to no doubt and the attitude of the accused indicates that the purposes of the proceedings shall be achieved.

Second, until the closing of the first examination of all accused at the main trial, the accused may submit a motion to be sentenced to a penalty or a penal measure without the conduct of evidentiary proceedings, provided that the accused is not charged with an offence subject to a penalty of imprisonment for a period exceeding 15 years. The court may grant the motion of the accused to be sentenced when the circumstances of the offence do not raise doubts and the objectives of the trial will be achieved despite the fact that the trial is not conducted in its entirety. Such a motion may be granted only if the public prosecutor and the injured party do not object.

## 15 Elements of a Corporate Sentence

### 15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

The Code of Criminal Procedure provides the following rules governing the court's imposition of a sentence on the defendant. After closing the judicial trial, the presiding judge shall give the floor to parties. After hearing the speeches, the court shall retire without delay for deliberation. The court shall draw up the judgment in writing without delay. The sentence shall be published in the open court.

Every judgment shall include the designation of the court which has rendered it, as well as: the names of the judges, lay persons, accusers and recording clerk; the date and place the case was heard and the judgment rendered; the name, surname and other particulars to identify the accused; the description and legal classification of the deed which has been imputed to the accused by the prosecutor; the adjudication of the court and the indication of the Penal Law provision applied. The sentence shall also include: a detailed description of the deed alleged to the accused; and its legal classification, the penalty or penal sanction.

### 15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The court is obliged to justify the sentence against a corporation. In such a judgment, it shall be determined whether the premises of corporate criminal liability (see question 4.1 above) were satisfied.

## 16 Appeals

### 16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Both guilty and non-guilty verdicts are appealable by the public prosecutor. The defendant may file an appeal against the guilty verdict as he has no legal interest to challenge a non-guilty verdict.

### 16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The guilty verdict is appealable by the public prosecutor, defendant and injured party acting in trial as an auxiliary prosecutor.

### 16.3 What is the appellate court's standard of review?

According to the provisions governing the proceedings before the court of second instance, after the appellate measures have been examined, the court shall decide whether the decision subject to appeal shall be upheld, changed or quashed in its entirety or part. A judgment shall be quashed or changed if it is found that: (i) a breach of the provisions of substantive law has occurred; (ii) procedural provisions were breached, if this may have affected the content of the judgment; (iii) the facts of the case on which the judgment was based were established erroneously, if this may have affected the content thereof; or (iv) the penalty imposed is glaringly disproportionate to the offence, or the application, or the failure to apply a preventive measures, or any other measure, has been groundless.

### 16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

Polish criminal procedure is, in principal, a two-instance system. Thus, the judgment of the court of second instance is final and legally binding.

As an extraordinary means of appeal, the party, Ombudsman and Attorney General may file a cassation against the judgment of force of law of the appellate court which ends the proceedings. A cassation may be filed only for reason of a glaring infringement of the law, if it could have had a crucial impact on the content of the judgment.

If the court of second instance quashed the challenged verdict and referred the case back to the court of first instance for adjudication, any party might file a complaint against such decision with the Supreme Court. The complaint might be based solely either on the circumstance that the premises of such referral were not satisfied or on invalidity of the proceedings (particularly gross violations of procedure).

In certain circumstances, the proceedings might also be re-opened. The motion to re-open the proceedings is justified if an offence was committed within the course or in relation with the proceedings and it could influence the sentence or new, previously unknown, facts favourable for the sentenced were discovered. Additionally, such motion is justified if the Constitutional Tribunal ruled that the sentence was based on a provision incompatible with the Constitution or a binding international treaty. In the latter case, the proceedings might be re-opened only in favour of the sentenced. The proceedings might also be re-opened *ex officio*, provided that one of the above premises is satisfied.

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