

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

SEVENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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Mark F Mendelsohn

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PREFACE

Anti-corruption enforcement continues to be an increasingly global endeavour and this seventh edition of *The Anti-Bribery and Anti-Corruption Review* is no exception. It presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Canada, Israel and Korea.

Given the exceptionally large penalties levied last year against Odebrecht SA and Braskem SA, as well as those against Rolls-Royce Plc, Telia Company AB, and VimpelCom Limited, the size of the fines in global enforcement actions have declined somewhat year-on-year, but multinational cooperation in global enforcement has remained robust. For example, the September 2018 conclusion in the United States of an US\$853.2 million settlement with Petróleo Brasileiro SA (Petrobras) entailed cooperation between Brazil's Federal Public Ministry (MPF), the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC). Under the non-prosecution agreement with Petrobras, the DOJ and SEC will credit the amount the company pays to the MPF, with Brazil receiving 80 per cent (US\$682,560,000) of the penalty. Likewise, the conclusion of an enforcement action against SBM Offshore NV, a Netherlands-based oil services company, and its US subsidiary entailed the participation of the MPF, the Netherlands Public Prosecution Service and the DOJ, each of which shared a combined worldwide criminal penalty in excess of US\$478 million. Similarly, Keppel Offshore & Marine, Ltd, a Singapore-based shipping services company, and its US subsidiary entered into coordinated settlement agreements with the DOJ, MPF and Singapore's Corrupt Practices Investigation Bureau. In an enforcement action against Paris-based Société Générale SA and its wholly owned subsidiary, the DOJ credited half the penalty assessed in connection with the bribery charges (over US\$292 million) for payments to the French National Financial Prosecutor's Office. In a related enforcement action against Maryland-based Legg Mason, Inc, the DOJ also credited amounts paid to other law enforcement authorities.

Crediting fines in this way is in keeping with the DOJ's policy, announced in May 2018, of discouraging 'piling on', and encouraging coordination with other enforcement agencies in an attempt to avoid multiple penalties for the same conduct. In the FCPA context, the new policy arguably goes further than Article 4 of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory states with shared jurisdiction over a foreign bribery case merely to consult with each other 'with a view to determining the most appropriate jurisdiction for prosecution'. For example, notwithstanding evidence of violations of the US Foreign Corrupt Practices Act, the DOJ closed its investigation of Guralp Systems Ltd, a UK-based manufacturer of broadband seismic instrumentation and

monitoring systems, in part owing to a parallel investigation and subsequent charges brought by the UK Serious Fraud Office (SFO).

Large-scale multinational coordination has also continued in connection with ongoing efforts to prosecute corruption in international football. Since May 2015, approximately 45 individuals have been charged in the United States alone. Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US\$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB), including the arrest of former Malaysian prime minister Najib Razak, who was charged with money laundering and various other offences, and eight former officers of the Malaysian External Intelligence Organisation, including its former chief. Hundreds of millions of dollars in assets have been seized. Following a formal request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a US\$250 million luxury yacht belonging to Low Taek Jho, the Malaysian financier at the centre of the 1MDB scandal.

At an even more fundamental level, and in concert with the growing trend towards multinational cooperation in global enforcement, this past year, around the world, countries have adopted important enhancements to their anti-corruption laws. Argentina established criminal liability for domestic and foreign companies and imposed strict liability for various offences, including active domestic bribery, transnational bribery and participating in the offence of illicit enrichment of public officials. Canada implemented legislation outlawing 'facilitation payments', which are made to government officials to facilitate routine transactions, such as permits. In China, the Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law that specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. India passed the Prevention of Corruption (Amendment) Act, which criminalises giving an 'undue advantage' to a public official, establishes criminal liability for corporations and creates a specific offence penalising corporate management. Furthermore, Italy announced a new law aimed at strengthening protection for whistle-blowers, while Peru passed a law imposing criminal liability on domestic and foreign corporations.

A significant trend in legislative changes this past year was the widespread introduction of alternative forms of resolution for companies, short of criminal conviction and often referred to as deferred prosecution agreements (DPAs). Argentina, as part of its new law establishing criminal liability for domestic and foreign companies, introduced 'effective collaboration agreements', which allow for non- and deferred-prosecution agreements. Canada created a legal regime for 'remediation agreements' to resolve corporate offences under the Criminal Code and the Corruption of Foreign Public Officials Act. Singapore also introduced similar new legislation. Notably, these new DPA regimes, unlike non-prosecution agreements in the American regime, but in keeping with US DPAs and the regime in the United Kingdom, all require court approval of any proposed agreement. Additionally, in November 2017, France announced its first deferred prosecution agreement under the Sapin II Law with HSBC Private Bank (Suisse) SA, enacted in December 2016.

There have also been a number of significant developments in data protection laws that affect the conduct of international investigations, of which the EU General Data Protection Regulation (GDPR) is the most well known and impactful. In the first court ruling

concerning the application of the GDPR, a German court held that the Internet Corporation for Assigned Names and Numbers could no longer demand from a registrar of domain information data containing, among other things, the contact information for domain name registrants, administrators and technicians. Meanwhile, a number of developments affect the ability of law enforcement authorities to compel production of certain records from outside their national borders. For example, in the United States, Congress passed the Clarifying Lawful Overseas Use of Data Act (or CLOUD Act), which expressly requires email service providers to preserve and disclose to law enforcement electronic data within their possession, custody or control even when that data is located outside the United States. Following two decisions of the Court of Appeal of England and Wales, the SFO can compel production of documents held outside the United Kingdom by companies incorporated outside the United Kingdom, but the protections of ‘litigation privilege’ will still be accorded to documents produced in internal investigations. It will be interesting to see how courts and companies navigate these differing and evolving legal regimes in the year ahead.

The chapters in this book, which contain a wealth of learning about these significant developments around the world, will serve as a useful place to begin. They will help to guide practitioners and their clients when navigating the perils of corruption in the conduct of foreign and transnational business, and of related internal and government investigations. I wish to thank all the contributors for their support in producing this volume and for taking time from their practices to prepare these chapters.

Mark F Mendelsohn

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POLAND

*Tomasz Konopka*¹

I INTRODUCTION

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

In the Corruption Perceptions Index survey carried out by Transparency International in 2017, Poland was ranked 36th out of 176 countries.²

The most recent data considering official corruption and bribery can be found in the Statistical Yearbook of the Republic of Poland issued by the Central Statistical Office in December 2017. In 2005, 361 people with public functions were sentenced for acts of official corruption with final verdicts. In 2010, this figure reached 364; in 2014, it was 256; in 2015, it was only 219; and in 2016, it was 338. With regard to bribery, in 2005, 1,364 people were sentenced with final verdicts. In 2010, this figure reached 2,009; in 2015, it was 1,213 and in 2016, it was 1,228.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

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

Criminal liability for handing or promising a bribe may be imposed on each individual.³

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

2 https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

3 Act of 6 June 1997: Criminal Code (Journal of Laws No. 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.

However, liability is varied depending on the function performed by the person accepting the bribe.⁴

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 Bribes

In all cases of corruption, a bribe is a material or personal benefit. Polish law does not define the minimum value of a material benefit, which is considered to be the profit gained by the person who accepts the bribe, therefore it may be an act leading to an increase in assets or a lessening of 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.

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.

4 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.

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, up to 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 informs 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.⁵

v Corruption in business

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

Similar to the corruption of officials, the subject of business corruption may be 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 1997,⁷ persons holding public functions may not be members of governing bodies

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

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

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

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 Parties⁸ 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 (i.e., 31,500 zlotys).

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 obliged to return benefits has the right to study the case files of the proceedings, take part in the hearing before the court, file motions to admit evidence, put questions to the witnesses and appeal unfavourable decisions and verdicts.

The Act on Liability of Collective Entities for Acts Prohibited under Penalty provides for the possibility of a judgment imposing a fine on a company of between 1,000 and 5 million zlotys (which cannot exceed 3 per cent of the revenue gained in the year in which the crime that forms the basis 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 public information about the judgment handed down. The collective entity might also be subject to a preventive measure in the form of a ban on mergers, divisions and transformations.

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

It should be emphasised that, following practice, law enforcement bodies do not always commence proceedings in a case where there is the option of imposing a fine on a company, but the latest press releases by prosecutors of the national public prosecution office suggest a tightening up of the policy in this regard. The statistics of the Ministry of Justice show that 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.

On 25 May 2018, the Ministry of Justice announced an amendment to the Act on Liability of Collective Entities for Acts Prohibited under Penalty. In September 2018, a revised version of the Act was announced. The new amendment provides significant changes. The most important is elimination of the previous requirement of final conviction of a natural person as a condition of the collective entity's responsibility. The changes also include the extension of the catalogue of offences for which a collective entity can be held responsible, and an increase in the level of fines to between 30,000 zlotys and 30 million zlotys. The amendment introduces sanctions for taking retaliatory action against whistle-blowers, and a requirement to implement compliance procedures with regard to detecting and preventing offences (including corruption and money laundering). The amendment provides for voluntary acceptance of liability by a collective entity in certain circumstances and for the provisions of the Act to be retroactively binding in relation to some offences, including fiscal offences. Under the provisions of the new Act, foreign entities may be held responsible if a prohibited act is committed in Poland. The details of the amendments are currently pending and their planned date of entry into force is not known yet.

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

Many significant proceedings have been carried out by the CBA. For example, since December 2017, the CBA has been conducting proceedings involving Stanisław Kogut, a senator from PiS, the ruling party in Poland. Kogut was chairman of the board of a foundation that received many donations from firms and businessmen, and he is alleged to have made improper use of the public powers he had as a senator in exchange for the donations.¹¹

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

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

11 <https://www.tvp.info/35873853/znam-wojewode-prezydenta-zalawie-szczegoly-zarzutow-dla-senatora-stanislawakoguta>.

In addition to the CBA, the Internal Security Agency (ABW) and the police hold powers to pursue crimes of corruption.¹² 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 into operations on the basis of materials obtained in the courts or entrusted to the ABW by the prosecutor's office in cases of high importance for the economic security of the country. There are also special police units in operation, created to combat economic crime and corruption.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

In principle, Polish criminal law provides for criminal liability for acts that were committed in Polish territory or the effect of which 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.

On the other hand, Polish criminal law envisages criminal liability for the corruption of persons holding public functions in a foreign state.¹³ 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 the following: money laundering, acting to the detriment of the company, appropriation, falsifying documents, keeping inaccurate (usually financial) records and filing inaccurate tax returns regarding corporate income tax and VAT.

i Obligation to report a crime

Polish law provisions do not impose a legal obligation to report a crime, apart from the most serious crimes such as murder or crimes committed against the security of the state.¹⁴ The possession of information concerning less serious crimes does not entail an obligation

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

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

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

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). This may be deemed to be acting to the detriment of the company through failure to fulfil key obligations, and therefore a crime.

ii Financial record-keeping laws

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

Under the Act on Certified Auditors, Audit firms and Public Supervision, a certified auditor who, in connection with a financial audit, has learnt that a public official of a foreign state or state of the European Union accepted a financial or personal benefit or accepted promises of such a benefit is required to notify the law enforcement bodies of this fact.¹⁵ The same obligation applies where a certified auditor has learnt of someone giving or promising to give a material or personal benefit to a person performing a public function in a foreign state or state of the European Union.

Keeping inaccurate financial records constitutes a crime under fiscal criminal law.¹⁶ 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.¹⁷

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

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

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

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

corruption-related proceedings. Tax obligations and liability under fiscal criminal law are barred by the statute of limitations after expiry of five years counting from the end of the year in which the incorrect settlement took place.

iv Tax fraud

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

v Money laundering

A crime of corruption is very often accompanied by money laundering, 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.¹⁸ 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 funds¹⁹ or acting to the detriment of the company.²⁰

The new Act on Money Laundering and Terrorism Financing Prevention (the Money Laundering Prevention Act) entered into force in July 2018.²¹ The Act was amended in line with EU legislation and recommendations of the Financial Action Task Force. Pursuant to the Act, the main responsibility of the General Inspector for Financial Information (GIIF) is to detect money laundering crimes and take preventative measures. Furthermore, under the new Act, obliged institutions, such as banks and other financial institutions, must apply the provisions of the Act. The Money Laundering Prevention Act, among other things, imposes an obligation to register transactions and convey information on transactions suspected of being related to money laundering. The Money Laundering Prevention Act also imposes an obligation to appoint a compliance officer, who is responsible for supervising the appropriate application of the Act. The officer – on behalf of the entity – conveys information about suspected offences such as money laundering, financing of terrorism and others. The Money Laundering Prevention Act also introduces a requirement to create an anonymous whistle-blowing procedure for reporting irregularities in relation to money laundering by employees. If the GIIF comes to the conclusion that a given transaction is suspicious, it may demand that the institution withhold the transaction, and may notify the prosecutor's office. The failure of obliged institutions to fulfil statutory requirements is sanctioned with many administrative penalties.

The Money Laundering Prevention Act has also created a Central Registry of Real Beneficiaries. The Registry will enter into force in October 2019 and will be available to the public. All companies, with the exception of public companies, are obliged to report and update information about real beneficiaries. Failure to fulfil these duties is sanctioned with the imposition of high monetary penalties.

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

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

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

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

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to statistics presented by the Ministry of Justice, in the period from 2001 to 2016, only 17 people were convicted by a final legal judgment for bribery of a foreign public official.²²

Recently, there have been no significant foreign bribery-related proceedings. The most recent known bribery-related proceeding involved a scandal connected with public procurement procedures for IT equipment delivered to government offices; this took place in Poland and the corrupting party was the Polish subsidiary of Hewlett-Packard. There were over 30 people suspected or accused in the case, and in June 2015 an indictment was filed against the leading suspect. On 16 February 2016, the suspect received a suspended sentence of four and a half years' imprisonment and a fine as a result of his motion to be sentenced without a trial having been accepted by the court.

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

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

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

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

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

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

VIII LEGISLATIVE DEVELOPMENTS

Recent changes to the Code of Criminal Procedure focus on adapting Polish proceedings to Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters. Following this change, Member States may ask – by way of a judicial decision – for actions to be carried out in another Member State; for example, to obtain evidence in a case.

Following earlier changes to criminal procedure, a ban on using illegally seized evidence was removed. In proceedings instigated on or after 15 April 2016, illegally seized evidence shall not be automatically disqualified and may 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. Rules regarding phone tapping or

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

bugging have also been relaxed, and evidence obtained in the course of these activities can, in practice (in fact, at the prosecutor's discretion), now be used in all criminal proceedings for the purposes for which the evidence was obtained. Furthermore, in criminal procedure, the enforcement of a judgment may now be secured through the appointment of a compulsory manager. The manager ensures the continuity of the work of the secured undertaking and provides the court or prosecutor with information relevant to the proceedings in progress. The manager draws up an inventory of the assets and property rights of the company and passes it on to the prosecutor or court.

A recent amendment to the CC concerns VAT fraud. Following the introduction of Articles 270(a) and 277(a), the forging of or tampering with an invoice in relation to circumstances influencing the amount of a tax (or other public obligation), or its refund, with a view to using the invoice as an authentic one, or using such a fake invoice, constitutes a separate offence. 'Extended confiscation' is another new institution (based on earlier changes) that has been introduced to the CC. Extended confiscation covers not only all criminally obtained benefits, but also direct and indirect returns on these benefits. At the time of sentencing for crimes from which the perpetrator gained a benefit of substantial value, property held by the perpetrator, or to which the perpetrator obtained any title in the five years prior to committing the crime, may be confiscated. This rule also applies if the perpetrator gained a material benefit from committing a crime punishable by the penalty of deprivation of liberty with an upper limit of no less than five years, and from crimes committed in an organised group or in an association whose purpose was to commit offences. The amendment to the CC also introduced the possibility of enterprise forfeiture if the perpetrator has committed a serious offence.

The Bill on Openness of Public Life was introduced in October 2017 and aims to increase social control over people exercising public functions. While it was expected that the Bill would be passed and enter into force in 2018, the most recent work done on the project was in January 2018. However, the Bill will probably enter into force within the next few months. The most important provision of this legislation is the obligation to introduce internal anti-corruption procedures, which will also apply to medium-sized enterprises and public-sector entities. Failure to carry out this duty will be punishable by a fine of up to 10 million zlotys. The Bill also extends the list of people obliged to publish a personal finance statement detailing income and assets.

Moreover, the Bill introduces a new provision for whistle-blowing. People who give reliable information about the possibility of a corruption offence being committed (as defined in the CC) will be given special protection by the prosecution. Whistle-blowers will also be permitted to recover legal costs. An additional benefit is that a whistle-blower's work contract cannot be terminated without the prosecution's permission.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

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

In Polish law, there is no general whistle-blowing regime governing how to proceed with information obtained in this manner. However, some pieces of legislation contain elements concerning whistle-blowers. For instance, under the above-mentioned new Money Laundering Prevention Act, an obliged institution is required to create an anonymous whistle-blowing procedure for reporting irregularities in relation to money laundering by employees. The

recent amendment to the Act on Liability of Collective Entities for Acts Prohibited under Penalty provides sanctions for taking retaliatory measures against whistle-blowers. Moreover the Bill on Openness of Public Life makes provision for whistle-blowers. The prosecutor grants people who give reliable information about the possible commission of corruption offences the status of whistle-blowers. This status benefits from special protections (e.g., the whistle-blower's work contract cannot be terminated without the prosecutor's permission, nor changed to less favourable terms). Whistle-blowers are also permitted to recover the legal costs of proceedings.

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

When it comes to data protection in Polish law, the legal norms contained in the regulations on personal data protection and protection of privacy are found mainly in the newly introduced Personal Data Protection Act. The Act, which was applied in May 2018, was amended to adjust Polish law to the amended provisions of the General Data Protection Regulation.²³ Data protection provisions are also found in the CC. The general rule is that the processing of data shall be permitted only when the person to whom the data belongs has given his or her consent.

X COMPLIANCE

The law does not impose a general obligation for business entities to have a compliance programme; however, some pieces of legislation do stipulate requirements in this vein. For instance, the new Money Laundering Prevention Act provides an obligation to appoint a compliance officer. The recent amendment to the Act on Liability of Collective Entities for Acts Prohibited under Penalty introduces the requirement to implement compliance procedures for detecting and preventing offences, including corruption and money laundering. The Bill on Openness of Public Life also features a requirement to introduce an internal anti-corruption procedure. The introduction of internal regulations is deemed to be management's responsibility, since it is an element of ensuring legal security for the entity they manage. Internal regulations governing employees' obligations are also of significance when taking appropriate measures against employees under labour law.

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

XI OUTLOOK AND CONCLUSIONS

The current criminal procedure regime can be described as oriented towards prompt and inquisitorial proceedings, especially in more serious cases.

The government is now working on significant amendments to the Act on Liability of Collective Entities for Acts Prohibited under Penalty. The works on the Bill on Openness of Public Life are still pending. The current government is trying to improve crime detection and increase efforts in the fight against VAT fraud offences. Moreover, the Ministry of Justice plans to increase the severity of penalties and remove cumulative penalties, and instead of these introduce a quasi-American punishment system (with long-term penalties).

The National Public Prosecutor has issued new instructions on penalties demanded for economic crimes; for example, prosecutors should demand no less than 10 years' imprisonment for offences that cause damage of a value exceeding 10 million zlotys. In the most recent guidelines issued by the Public Prosecutor General, prosecutors have been formally advised to always consider the principle of concurrent crimes (i.e., when an offender has committed two or more offences and the court sets one cumulative penalty for all offences, which is usually more severe than the penalty that would be given for each separate offence). From the initial stage of the proceedings, their actions should be aimed at identifying the leading perpetrators of criminal conduct. In addition, whenever possible, prosecutors should consider imposing an obligation to refrain from pursuing and exercising the relevant business activity or other preventative measures. All cases of VAT fraud should be conducted by prosecutors specialising in combating such fraud. From the initial stage of the proceedings, prosecutors and the police should determine the financial status of suspects and their property rights that may be subject to forfeiture. If the perpetrator has committed a crime under specified terms, property arrangements should take into account assets acquired by the perpetrator both during and after the offence, as well as five years prior to the crime. Property transferred at that time by the perpetrator to third parties could also be covered by forfeiture. Prosecutors should always consider the need for enterprise forfeiture. In cases where the value of the depleted or expropriated receivables exceeds 1 million zlotys and the damage has not been repaired, prosecutors should apply for the penalty of absolute deprivation of liberty.²⁴

24 Guidelines of the Public Prosecutor General dated 10 August 2017 on rules governing the conduct of preparatory proceedings in cases of VAT fraud: <http://pk.gov.pl/aktualnosci-prokuratury-krajowej/wytyczne-prokuratora-generalnego-dotyczace-postepowan-o-wyludzenie-nienależnego-zwrotu-podatku-vat.html#.Wa5YXOSQyUm>, Guideline No. 5.

ABOUT THE AUTHORS

TOMASZ KONOPKA

Sołtysiński Kawecki & Szlęzak

Tomasz Konopka joined Sołtysiński Kawecki & Szlęzak in 2002 and has been a partner since January 2013. Tomasz specialises in business crime cases, including white-collar crime, investigations, representation of clients related to custom seizures of counterfeit products, cybercrime and court litigation. He represents Polish and foreign clients before the courts and law enforcement authorities. He leads the firm's white-collar crime department. Prior to joining Sołtysiński Kawecki & Szlęzak, Tomasz was a lawyer in a number of companies, including some 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



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