Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top ranked lawyers

White-Collar Crime

Poland

Sołtysiński Kawecki & Szlęzak

2019

chambers.com

Law and Practice

Contributed by Sołtysiński Kawecki & Szlęzak

Contents

Sołtysiński Kawecki & Szlęzak was established in 1991 and has become one of the leading law firms in Poland, serving both Polish and foreign businesses. The firm employs over 150 attorneys and provides the highest standard of legal services in all areas of business activity. Combining a theoretical reflection on law (SK&S employs several current and historical academic authorities on Polish law) with a focused emphasis on practical solutions, SK&S is uniquely equipped to deal effectively with the most complicated legal issues present in complex business transactions.

Authors

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).

Katarzyna Randzio-Sajkowska joined Sołtysiński Kawecki & Szlęzak's litigation department in 2006. She has extensive experience in representing clients in civil lawsuits and criminal matters as well as representing clients in court arbitration. She specialises in matters relating to white-collar crime, business crime and supporting clients in conducting internal investigations. Her practice also includes criminal law aspects of intellectual property rights. She is a member of the Association of Certified Fraud Examiners (ACFE) and the International Association of Young Lawyers (AIJA).

1. Legal Framework

1.1 Classification of Criminal Offences

Pursuant to the Polish Criminal Code (CC), an offence may be classified as a felony or a misdemeanour. A felony is a prohibited act penalised with the deprivation of liberty for a period of no less than three years or with a more severe penalty. A misdemeanour is an offence penalised with a fine exceeding 30 daily rates or exceeding PLN5,000, the limitation of liberty exceeding one month or the deprivation of liberty exceeding one month. A felony may be committed only intentionally, while a misdemeanour may also be committed unintentionally if the law provides for it in a particular instance.

The perpetrator may also be held liable for attempting to commit an offence in the event the attempted offence is not completed. However, whoever voluntarily abandons commission of a prohibited act or prevents the consequence of a prohibited act is not subject to a penalty for the attempt.

Moreover, Polish law provides for a liability for less severe unlawful acts under the Code of Petty Offences. A petty offence may be committed intentionally or unintentionally. However, the statute may exclude a liability for a petty offence committed unintentionally. The perpetrator could also be liable for attempting to commit a petty offence.

Notwithstanding the above, there is a classification of tax offences regulated under the Fiscal Criminal Code (FCC). A tax offence is an act prohibited under the FCC and penalised with fines calculated on daily rates, limitation of liberty or deprivation of liberty. A fiscal petty offence is also an act prohibited under the FCC but penalised with a fine specified in an exact amount. A tax offence is classified as a fiscal petty offence if the amount depleted or exposed to depletion of public debt or the value of the object of the act does not exceed five times the minimum remuneration at the time of its commission (amounting to PLN11,250 in 2019). What is more, the perpetrator could be liable for attempting to commit a tax offence. In such a case the penalty may not exceed two thirds of the upper limit of the statutory penalty prescribed for a particular tax offence.

1.2 Statute of Limitations

Polish law provides for the statute of limitation. The limitation period varies depending on the type of the offence. Pursuant to the CC, a crime ceases to be punishable after the lapse of the following number of years from the moment of its commission:

- 30 – in the case of homicide;
- 20 – in the case of another felony;
- 15 – if the act constitutes a misdemeanour subject to the penalty of deprivation of liberty exceeding five years;
- 10 – if the act constitutes a misdemeanour subject to the penalty of deprivation of liberty exceeding three years; and
- 5 – for other misdemeanours.

A private prosecution offence ceases to be punishable after the lapse of one year from the moment the harmed party learned the identity of the perpetrator of the crime, but no later than after the lapse of three years from the moment of its commission. If the proceedings are instituted within the aforementioned periods, the punishability of the offences ceases ten years after the lapse of the particular period (five years in the case of private prosecution offences).

Tax offences cease to be punishable after the lapse of (i) ten years when the act constitutes a tax offence penalised with the penalty of deprivation of liberty exceeding three years or (ii) five years when the act constitutes a tax offence penalised with the penalty of a fine, limitation of liberty or deprivation of liberty up to three years.

Regarding a fiscal petty offence, the limitation period is one year; however, if proceedings were instituted within this period, the offence ceases to be punishable after the lapse of two further years.

1.3 Extraterritorial Reach

In Polish criminal law, there is no special regulation on the extraterritorial jurisdiction to prosecute white-collar offences.

As for the general rule:

- the CC applies to a Polish citizen who has committed a crime abroad;
- the CC 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
- 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.

If 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.

1.4 Corporate Liability and Personal Liability

The current Act on Liability of Collective Entities for Acts Prohibited Under Penalty (ALCE), which regulates issues of quasi-criminal liability of commercial companies, has been in force since 28 November 2003. The ALCE is applicable if a person acting in the name of a company has committed one of the offences specified in the statute and the company gained, or could have gained, any benefit from this act, whether financial or not.

The list of offences, the commission of which may cause the commencement of criminal proceedings, includes:

- mismanagement;
- public corruption;
- corruption in business;
- credit and subsidy fraud;
- money laundering;
- crimes related to making repayment of creditors impossible and reducing their satisfaction;
- failure to file a bankruptcy petition on time; and
- insider trading.

Numerous other offences are specified in other pieces of legislation that regulate specific areas of economic activity.

A condition for commencing proceedings against a company is that it has been established by a legally binding and final guilty verdict against a person acting in the name of a company. There are two other instances when proceedings against a company may be commenced: a verdict that conditionally discontinues criminal proceedings against such an individual, or a verdict that discontinues criminal proceedings by stating that even though the crime has been committed, the perpetrator cannot be punished. Criminal personal liability is always ahead of quasi-criminal corporate liability.

Liability on the basis of the ALCE may be imposed in the event that one of the following is proven:

- at least a lack of due diligence in the choice of the person representing the entity, who is at the same time the perpetrator of an offence; or
- the defective organisation of the company, which did not ensure avoidance of commission of an offence, when it could have been prevented if the body or representative of the collective entity had applied required due diligence.

It should be noted that the liability arising under this Act is non-transferable; that is, in the case of a merger, division or restructuring of the relevant company, the liability expires. However, the court might impose an interim prohibition of such transformations at a company to prevent it from avoiding liability.

It should be emphasised that it follows from practice to date that the law enforcement bodies do not commence proceedings in every case in which such a possibility arises. The Ministry of Justice statistics show that only a couple of dozen proceedings of this type are commenced each year. This figure is very low, especially taking into account the fact that more than 10,000 people are sentenced each year for committing business crimes. However, the latest instructions issued by the prosecutors of the National Public Pros-

ecutor's Office may suggest a tightening up of the policy in this regard.

At present, the Ministry of Justice is working on amendments of the ALCE. 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 Act eliminates the catalogue of crimes for which a collective entity could be held responsible. This will involve responsibility for all prohibited acts, if related to the activity of a company. The amount of the fine will be raised to limits of PLN30,000 to PLN30 million (or even up to PLN60 million in some specific situations, such as when a necessary internal investigation was not conducted). 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 with the ethical standards, risk management rules and other internal standards. Under the draft Act, any transformations, divisions and/or mergers of the entity would not exempt from criminal liability. The planned date of entry into force of these amendments is not known yet.

1.5 Damages and Compensation

Victims of a white-collar crime may seek compensation based on both civil and criminal law. The choice of civil or criminal proceedings would determine the jurisdiction of a civil or criminal court.

Pursuant to Article 46 ss. 1 of the CC, in the event of a conviction, the court may order the offender to partially or fully remedy any damage caused by the offence, or compensate for any injury. Ordering the compensation is obligatory if a pertinent motion has been filed by the harmed party or the prosecutor. The criminal court shall apply the civil law rules while deciding on the compensation.

There is no class action in criminal procedure. A harmed party may join the dispute as an auxiliary prosecutor together with the public prosecutor; however, the court may limit the number of auxiliary prosecutors if it is necessary to secure a correct course of proceedings. The court decides that a subsidiary prosecutor cannot participate in the proceedings if the maximum number of prosecutors defined by the court is already involved. Seeking remedies in class actions is, however, possible under civil law regulations.

1.6 Recent Case Law and Latest Developments

In June 2019, the Polish Parliament worked on an amendment to the CC. The purpose of the amendment was to provide for more severe sanctions for corruption and bribery crimes. However, many Polish experts of criminal law criticised the bill, stating that the anti-corruption amendments may not apply to persons managing the largest State-owned companies. In experts' opinion, the amendment may result in impunity for some corrupt acts in the public sector. At the final stage of the legislative process, the President directed the bill to the Constitutional Tribunal, which will decide whether the amendment will come into force.

In July 2019, the Polish Parliament passed an amendment to the Code of Criminal Procedure. This amendment is intended to improve and speed up criminal proceedings as well as to adapt the procedure to technological development.

The major changes are as follows: quasi-preclusion of evidence, the possibility of conducting evidence proceedings in the absence of the accused or the defence attorney, and the possibility of conviction by the court of appeal even if the first instance conditionally discontinued the case. Some of these changes decrease procedural guaranties of the accused, including the core right to defence.

One of the recent interesting judgments was the Supreme Court – Criminal Chamber interpretation of the scope of a manager's responsibility for acting to the detriment of a company. The main thesis of the verdict is that where the decision-making process is split between several managing bodies, the sole fact of not being totally independent in deciding or being obliged to consult any resolutions with other bodies does not exclude the manager's guilt (Judgment dated 3.07.2019, case ref. No V KK 256/18).

The Court of Appeal in Warsaw provided a clarification of the notion of "unbeneficial disposition of property", which is one of the statutorily required elements of fraud. It was stated that unbeneficial disposition of property takes place whenever the perpetrator brings another person to such a disposal with property that is disadvantageous to his interests. This unfavourable disposition of property may also amount to a situation in which the interests of the victim deteriorate even though there has been no material damage on the part of the disposer. Moreover, the disadvantageous character of property disposition must be assessed in the light of the circumstances that existed at the time of disposing of the property and not those that have occurred afterwards (Judgement of 12.02.2019, case ref. No II AKa 437/18).

2. Enforcement

2.1 Enforcement Authorities

White-collar crime is prosecuted by the Public Prosecutors' Offices with the support of 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, the Tax Administration Chambers, and Tax and Customs Offices.

Within the enforcement agencies there are specialised divisions dealing with particular kinds of crime, including white-collar. However, the public prosecutors and the courts usually handle all kinds of criminal matters and there are no dedicated court chambers for white-collar crime cases.

There are no civil/administrative enforcement agencies for white-collar crime; however, some activities falling within the scope of white-collar crime are also examined by the regulators, including infringements of antitrust law, consumer protection, and regulations of stock companies and financial institutions, as well as energy law. Pertinent regulators proceed with their cases based on administrative law, but also have the right to file notification of an offence to the public prosecutor.

2.2 Initiating an Investigation

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 upon notification filed by any other party. The notifying party does not need to be harmed by the offence to efficiently file the notification; however, the harmed party has much wider procedural rights than a sole notifying party.

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

2.3 Powers of Investigation

The enforcement agencies 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 by providing requested information.

The public prosecutors may demand the production of documents or any other evidence (including seizure of electronic devices). Refusal to provide the requested information may result in a dawn raid.

The documentation that may serve as evidence should be surrendered at the request of the court, the public prosecutor, or, in urgent cases, the Police or another authorised agency. If 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. A person surrendering an object should be advised of that right.

The enforcement authorities 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, questioning in a different place (eg, a company's seat) is not excluded.

2.4 Internal Investigations

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

Notwithstanding the above, specific entities (eg, banks, investment funds, entities managing alternative investment companies, insurance companies, reinsurance companies, as well as entities conducting brokerage activities and fiduciary banks) are obliged on the basis of special provisions to maintain tight compliance control or an internal audit system. These systems have a similar function to internal investigations and are, at times, subject to compulsory reporting. Failure to properly maintain the aforementioned systems may result in one or more of many administrative sanctions being imposed on the entity. Moreover, if the new regulations of the ALCE come into force, the collective entities would be obliged to conduct internal investigations to clarify the irregularities occurring in the structure of such an entity.

As internal investigations are not regulated, the course of an investigation in either of the situations described above will not differ considerably. However, substantial differences appear when law enforcement bodies institute official investigations or a company decides to report existing irregularities. The enterprise may obtain the status of a harmed party and enjoy the attributable rights within preparatory proceedings and, at a later stage, court proceedings if an indictment is filed. These rights include inspecting the case files, participating in the investigation (ie, participation in witness hearings) and appealing disadvantageous decisions made during the proceedings (such as a decision to discontinue the proceedings). At the court stage, a harmed party may act as an auxiliary prosecutor to, inter alia, demand compensation of damage or a particular penalty.

In recent years, the number of internal investigations regarding irregularities in the private sector has increased noticeably. In many instances, this is due to the operation in Poland

of companies regulated by the strict rules of the US Foreign Corrupt Practices Act or the UK Bribery Act.

Commonly, an internal investigation will encompass a review of business email correspondence and electronic files, meetings with employees, and of the company's financial and contractual documents. As regards confidentiality and secrecy, no specific regulations exist and, therefore, use of any information within an internal investigation must comply with generally applicable provisions (especially the General Data Protection Regulation). Processing of personal data (except sensitive data) is generally permitted within an internal investigation. However, it is recommended to obtain the necessary consent from the person to whom the data relates.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Polish law enforcement bodies co-operate with the authorities of other countries. The rules and scope of co-operation are various. Co-operation with particular countries is prescribed under bilateral international agreements (eg, the Agreement between the Republic of Poland and the Russian Federation on legal aid and legal relations in civil and criminal matters), multilateral conventions or international organisation regulations (including primarily EU law and its implementations; eg, regarding Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 or Council Framework Decision 2009/948/JHA of 30 November 2009).

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

Polish enforcement authorities routinely co-operate with the authorities of a significant number of countries, including Germany and the United Kingdom, mainly as a result of the large Polish populations in those countries.

2.6 Prosecution

As already mentioned, crimes (including white-collar crimes) are initiated in one of two modes: ex officio and at the request of the harmed party. Whenever the harmed party is the State Treasury, the proper mode is in general ex officio. Examples of types of crimes prosecuted ex officio are insurance fraud, money laundering, sham bankruptcy, etc. Examples of types of crimes prosecuted on request – unless the harmed party is the State Treasury – are: fraudulent frustrating of a public tender, fraudulent non-satisfaction of creditor's demands, causing loss due to culpable maintenance of unreliable documentation, etc. The request should be filed to the Police, the public prosecutor's office or other relevant enforcement authority.

Generally the same rules govern charging and filing the indictment in all kinds of matters, including white-collar crime cases. A justified suspicion of an offence is sufficient to institute the proceedings and collect evidence. The prosecution has discretionary power to decide if the examination of evidence provides for grounds of charges/indictment. The indictment is then verified in two-instance court proceedings.

In some specific matters, like combating tax frauds, the Public Prosecutor General issues guidelines for the enforcement.

2.7 Deferred Prosecution

There are no deferred prosecution agreements under Polish law. However, there are some mechanisms that allow the mitigation of the penalty and a criminal investigation to be resolved without a trial. In cases referred to Article 335 of the Code of Criminal Procedure, the prosecutor may move for conviction of the accused without a trial. This requires the following conditions to be met: the confession of the accused, an explanation of all the circumstances of the case that does not contradict conclusions based on other gathered evidence, and the attitude of the accused indicating that the purpose of proceedings will be achieved without a trial. 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.

Upon the public prosecutor's motion, the court may apply extraordinary mitigation of the penalty, and may even conditionally suspend its enforcement. Such a situation may occur with regard to a perpetrator who has, apart from giving explanations in his own case, disclosed a crime subject to the penalty of deprivation of liberty for five years and presented its substantive circumstances to a law enforcement authority that had no prior knowledge of these facts.

Pursuant to the CC, an active briber is not subject to a penalty if the benefit or its promise has been accepted by a passive briber and the perpetrator has reported this to a law enforcement authority. An active briber must disclose all the substantive circumstances of the crime before this authority has learned about it.

2.8 Plea Agreements

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

First, the public prosecutor may place in the act of indictment (or in a separate motion) a request for the accused to be sentenced to the penalties agreed upon therewith in the sentence together with the penal measure 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, the accused who has been charged with a criminal offence punishable by imprisonment for a term not exceeding 15 years may, before a notification of the date of the trial is served on them, file a motion for the issuance of a judgment of conviction and the imposition of a specific penalty or a criminal measure upon them or for ordering forfeiture or a redress measure without an evidentiary hearing being conducted. Such a motion may also concern the issuance of a specific decision as to the payment of the costs of the proceedings.

Third, until the closing of the first examination of the accused (or all of the accused, if more than one) 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.

3. White-Collar Offences

3.1 Criminal Company Law and Corporate Fraud

Pursuant to Article 296 of the CC, anyone who, while under a legal obligation 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.

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

The CC provides also for criminal liability for corruption in business (see **3.2 Bribery, Influence Peddling and Related Offences**).

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 the event that such reproduction or copying involves marking the products with counterfeit trade marks 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 make such criminal activity a permanent source of their income. Such perpetrators are liable to imprisonment for a period of six months to five years.

3.2 Bribery, Influence Peddling and Related Offences

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

The subject of a bribe may be material or personal benefit. A material and personal benefit includes both the benefit for oneself, as well as for another person. Criminal conduct may consist in giving, accepting, demanding or making a promise of benefits.

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

In the case of an offence of "public corruption", the person accepting the bribe is a person performing a public func-

tion (this is a notion broader than that of a "public official"). Pursuant to Article 115, Section 19 of the CC, a person performing a public function is a public officer; a member of a self-government authority; a person employed in an organisational entity utilising public funds, unless this person performs exclusively servicing duties; as well as any other person whose public activity powers and duties are established or recognised by a statute or an international agreement binding for the Republic of Poland. The "public corruption" refers also to persons performing a public function in a foreign state or international organisation.

As already described, provisions of criminal law also provide for criminal liability in the case of corrupt conduct in business relations. 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 which 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 PLN200,000, then the Act provides for a more severe penalty.

3.3 Anti-bribery Regulation

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 on Limiting the Conduct of Business Activity by Persons Holding Public Functions, persons holding public functions may not be members of governing bodies in commercial law companies, or work or undertake actions on behalf of business entities if the objectivity of their role is called into question. Persons holding public functions also cannot hold more than 10% of the shares in commercial companies or conduct their own business activity. In addition, they are obliged to submit asset declarations, including those that are part of marital joint ownership. At present, legal provisions do not impose the obligation on business entities to implement compliance programmes. However, many firms operate such programmes.

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

Pursuant to Article 181 of the Act on Trading in Financial Instruments, anyone who engages in insider trading shall be liable to a fine of up to PLN5 million or imprisonment for a period of three months to five years, or both penalties jointly.

The amendment of the aforementioned Act in the response referring to securities fraud altered Article 181 of the Act on Trading in Financial Instruments by introducing a uniform criminal liability regime for all aspects of use of insider information in violation of Article 14(a) of the Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (MAR) (insider trading and illegal disclosure of insider information). All kinds of perpetrators are subject to a fine of up to PLN5 million or imprisonment for a period of three months to five years or both penalties jointly.

3.5 Tax Fraud

As mentioned, tax offences are described under a separate legal act – the FCC.

Under Polish law there is an obligation to prevent tax evasion. Failure to prevent tax evasion is a criminal offence. The tax offence occurs when a taxpayer exposes a tax to depletion by submitting a tax return to a tax authority that is untrue or conceals the truth.

The most popular tax offence, VAT fraud, usually involves the use of fake or otherwise unreliable invoices. These crimes are provided under the CC and under Articles 270a and 277a of this code, 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. If the perpetrator forged or used invoices documenting transactions whose value exceeded PLN10 million or made forging or using fake invoices a source of their permanent income, the offence is considered to be a felony. The perpetrator is liable to imprisonment for a period of five to 25 years.

3.6 Financial Record Keeping

Business entities are obliged 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.

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

3.7 Cartels and Criminal Competition Law

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.

Pursuant to the CC, whoever takes on intercession in settling a matter in exchange for a material or personal benefit or its promise by (i) asserting to have influence in a domestic or foreign organisational entity utilising public funds, (ii) inducing another person's belief of the existence of such an influence, or (iii) assuring another person of existence of such an influence, is subject to the penalty of deprivation of liberty for between six months and eight years.

3.8 Consumer Criminal Law

The Act on Competition and Consumer Protection (ACCP) provides for prohibition of practices harmful to the collective interests of consumers. The president of the Office of Competition and Consumer Protection may impose on an entrepreneur a financial penalty amounting to no more than 10% of the turnover generated in the financial year preceding the year in which the penalty is imposed if the entrepreneur, even unintentionally, concluded an agreement with a consumer including the illicit contractual provisions or harmed the collective interest of consumers by proposing to consumers the purchase of financial services that do not correspond to the needs of these consumers ascertained on the basis of the information available to the entrepreneur in the scope of these consumers' features, or proposing the purchase of such services in a manner inadequate to their nature, breaching the obligation to provide reliable, correct and complete information to consumers, doing unfair market practices or acts of unfair competition, etc.

The aforementioned are administrative offences. The ACCP provides for one petty offence related to consumer criminal law under its Article 114, which states that any person who is in breach of the obligation to provide the explanations and information as may be required by the consumer ombudsman, or to respond to the comments and opinions of the consumer ombudsman, shall be liable to a fine of an amount not lower than PLN2,000.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

Article 287 of the CC provides that anyone who commits so-called computer fraud, ie, without due authorisation (i) influences automatic processing, collection or transfer of electronic data, or (ii) alters (this covers, eg, 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.

Under Article 278 of the CC, whoever, without the permission of an authorised person, obtains someone else's computer software with the purpose of gaining a material benefit is subject to the penalty of deprivation of liberty for between three months and 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 (eg, distributed denial-of-service attacks); deletion, corruption, or alteration of data; or restriction of access to data (this might cover, eg, 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 (eg, 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 PLN1 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; ie, launching controlled attacks, preparing software intended to

find and test so-called exploits, and sending so-called spoof mails to check the employees' cybersecurity awareness.

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.

Cybercrimes related to payment instruments (eg, 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 ten years). Polish regulation of payment services does not contain any particular provisions criminalising such violations of cybersecurity.

3.10 Financial/Trade/Customs Sanctions

Financial, trade and customs sanctions are described particularly under the FCC.

The main offences in relation to the aforementioned sanctions are tax fraud, unreliable books and records, the import or export of goods without presentation to customs or without customs declaration, misrepresentation of the customs control authority, a change in the purpose of the goods or another condition to exempt the goods from customs duty.

3.11 Concealment

Pursuant to the CC, whoever obstructs or frustrates criminal proceedings by assisting a perpetrator of a crime or a fiscal crime in evading criminal liability, especially by concealing the perpetrator, is subject to the penalty of deprivation of liberty for between three months and five years. Moreover, whoever assists in concealment of an item obtained by means of a prohibited act is subject to the penalty of deprivation of liberty for between three months and five years (up to two years if the perpetrator acts unintentionally). Concealment of financial instruments, securities, foreign exchange, property rights or other movable or immovable property may also be the subject of money laundering and penalised by deprivation of liberty for between six months and eight years. A person who just conceals cannot be liable for a predicate offence and concealment within one behaviour.

3.12 Aiding and Abetting

As a general rule, not only the offender, but also anyone who (i) induces or orders the offender to commit a crime, (ii) (intending another person to commit a crime) facilitates the commission of the act, and/or (iii) 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.

3.13 Money Laundering

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 movable 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.

The anti-money laundering act provides for new obligations on banks, payment institutions and other obligated institutions (including lawyers). As a result, failure to fulfil particular obligations may constitute a criminal offence. For instance, whoever, acting in the name of or on behalf of an obliged institution, fails to comply with the obligation to provide the General Inspector with a notification of any circumstances that may indicate a suspicion that the criminal offence of money laundering or terrorist financing has been committed shall be subject to imprisonment for a period from three months to five years. The same penalty shall apply to whoever fails to provide the General Inspector with a notification of a reasonable suspicion that a given transaction or the assets that are the object of that transaction may be linked to money laundering or terrorist financing. Moreover, the Act also penalises preventing or inhibiting the performance of public control over the fulfilment of obligations related to counteracting money laundering.

4. Defences/Exceptions

4.1 Defences

As already mentioned, Polish jurisdiction does not provide for the obligation to self-report or to carry out internal investigations and does not impose a sufficiently general regulation on whistle-blowing. Moreover, at present, legal provisions do not impose the obligation on business entities to implement compliance programmes. Nevertheless, many companies implement such programmes and this is one of the defence arguments for white-collar offences. The compliance programmes are particularly common in companies with foreign capital and in the financial sector.

A functioning compliance programme is helpful in cases of actions contrary to the law that harm the interests of enterprises. A frequent problem that arises in criminal proceedings involving crimes harming enterprises is the lack of internal regulations clearly laying down the procedures and

scope of duties, as a result of which it is difficult to show the actions or omissions of the guilty party.

In the absence of a general regulation of compliance, it would be difficult to establish any specific recommended elements of compliance programmes. As a rule, it would be advisable for the scope of such programmes to cover all branches and subsidiaries of a given entity and ensure regular reviews of their activity. Shortcomings to that extent usually have a very strong negative effect on the efficiency of compliance programmes. The preferred course of action tends to be to involve accounting and auditing experts.

Notwithstanding the above, upcoming legal revisions foresee such an obligation being introduced (eg, the law on anti-money laundering and amendments to the ALCE).

4.2 Exceptions

Polish criminal law provides for some exceptions for bearing criminal liability in general. Some of them may be applicable to white-collar crimes.

First of all, whoever acts with the purpose of performing an economic experiment that is expected to yield results of significant cognitive or economic value – and the expectation of achieving them, purposefulness and a method of performing the experiment are well-founded in the light of contemporary knowledge – does not commit a crime.

Secondly, whoever acts with the purpose of averting an immediate danger to any legally protected interest, if the danger cannot be otherwise avoided, and the sacrificed interest represents a lower value than the interest that is being salvaged, does not commit a crime.

Moreover, if the perpetrator of a white-collar crime has voluntarily redressed the full damage, the court may apply extraordinary mitigation of the penalty or even waive its imposition.

As regards fiscal offences, a mechanism of "active repentance" is in place. A perpetrator who notifies enforcement authorities about relevant circumstances concerning the offence (particularly the persons assisting in its committing) before the authorities had knowledge about the offence shall not be subject to a fiscal crime or fiscal petty offence. This rule is applicable only if public debt was fully paid.

4.3 Co-operation, Self-Disclosure and Leniency

In general, no special "credit" is granted for voluntary disclosure of any offence. However, as described above, in the case of some offences – like active bribery – disclosure of all the substantive circumstances of an offence results in lack of punishment.

With respect to fiscal crimes, it is only possible for the person responsible for committing the act to avoid criminal fiscal liability by presenting the "active repentance" described above or adjustment to a tax return. The FCC stipulates a number of specific requirements for acts of "repentance" that need to be met for any actions to avoid liability to be effective.

4.4 Whistle-blowers' Protection

In the Polish legal system there is no general regulation concerning the issue of whistle-blowing. At the moment, the reaction of an entity that receives information from a whistle-blower depends entirely on its internal policies and procedures. In recent years, the process of creating legal norms concerning whistle-blowing in Polish law has begun. For instance, according to the Polish Anti-Money Laundering Act, banks or other financial entities are obliged to create an anonymous whistle-blowing procedure of reporting irregularities in the scope of money laundering. More significant and complex provisions concerning whistle-blowing issues appear in draft acts. The works on the Act on Transparency in Public Life (ATPL) and on the ALCE are in progress in the Polish Parliament. The dates of entry into force of those drafts are not known yet; however, the amendment to the ALCE may enter into force at the beginning of the new Parliament's cadency (at the turn of 2019 and 2020).

The ATPL provides for the following.

- The status of a whistle-blower is granted by a public prosecutor to a person who gave reliable information (testimonies) regarding the suspicion of committing an offence by a collective entity. The whistle-blower may be an employee or work for this entity on the basis of a civil contract.
- Special protection provided for the whistle-blowers; ie, their work contract cannot be terminated or changed to a less favourable one without the public prosecutor's permission. Otherwise, employees may seek for damages equal to double their annual salary.
- The whistle-blowers are permitted to recover legal costs of proceedings that are pending as a result of reported information.
- When the perpetrator of offences like corruption, fraud and acting to the detriment of the company is convicted, the court may award exemplary damages to the whistle-blower or to his or her company. In fact, it may be treated as a kind of reward for reported information.

The planned amendment to the ALCE provides for the following.

- The whistle-blower is a person who reported information about any irregularities that occurred in a collective entity; for instance, about the suspicion of committing an

offence or about the lack of due diligence that is required in specific circumstances.
- Severe sanctions for causing negative consequences for whistle-blowers that are imposed on a collective entity. For instance, if a company has terminated work contracts with a whistle-blower, the court may restore them to work or grant them compensation. The conditions of such a court's ruling are reliability of reported information and the fact that reported information prevented somebody from committing an offence or could have helped to accelerate the detection of a criminal offence.
- The obligation of clarifying reported information by employees concerning, inter alia, (i) the suspicion of committing an offence; (ii) a failure to comply with obligations or abuse of rights; (iii) the lack of due diligence, required in specific circumstances by a collective entity; and (iv) irregularities in the organisation of business activity of a collective entity.
- If a collective entity fails to conduct an internal investigation and fails to eliminate irregularities reported by employees, the court may impose a fine to a company of a double amount; ie, up to PLN60 million (if the court determines that a collective entity is liable for the offence).

5. Burden of Proof and Assessment of Penalties

5.1 Burden of Proof

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.

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

In exceptional cases, the criminal procedure provides for a derogation from the need to prove certain facts. In these cases, there is no need to take an evidence of a particular circumstance; however, it does not preclude a counter-proof to be taken. These are the so-called surrogates of proof, which include (i) notoriousness, (ii) obviousness, (iii) probability and (iv) presumptions – factual or legal.

A notoriousness provides for the rule that the facts indisputably known by the legal authority and the parties shall not require proof. An obviousness is something more than a notoriousness, as it relates to the knowledge that every averagely educated and intelligent person possesses. A probability is a substitute for an evidence that does not provide certainty, but only the likelihood (reliability) of a claim about a certain fact. In such a situation a proof is not required, not because there is no doubt about the fact, but because it will be proved at a later stage; eg, the precautionary measures may be applied if there is a high probability that the accused has committed a criminal offence. As regards presumptions, they constitute a judgment about a high probability of some fact deduced from another fact (or facts) that do not induce any doubts. There are factual presumptions (existing irrespectively of legal system) and legal presumptions (provided under the provisions of criminal procedure). The most significant legal presumption is the rule that the accused shall be presumed innocent until their guilt is proven and recognised in a final judgment.

5.2 Assessment of Penalties

The court imposes the punishment according to its own discretion, within the limits prescribed by law. The court is obliged to observe that the onerousness of a penalty does not exceed the degree of fault, taking into account the degree of social harmfulness of the act and taking into consideration preventative and educational aims it is to achieve with regard to the sentenced person, as well as the need to develop the legal awareness of society.

The CC provides for the general guidelines that state that while imposing a penalty, the court takes into account especially the perpetrator's motivation and manner of conduct; eg, the type and degree of the violation of the perpetrator's duties, the type and the extent of negative consequences of the crime, the characteristics and personal conditions of the perpetrator, the perpetrator's way of life prior to the commission of the crime and their behaviour after the commission of the crime. The court should take into account especially the perpetrator's efforts to redress the damage or to satisfy the public sense of justice in any other form, as well as the harmed party's conduct.

The court also takes into consideration the positive results of the mediation between the harmed party and the perpetrator or the settlement they have reached during the proceedings held before a court or a public prosecutor. Nevertheless, there are no specific rules or guidelines addressed to the judges regarding the assessment of penalties in the event of a deferred prosecution agreement, non-prosecution agreement or plea agreement.

Sołtysiński Kawecki & Szlęzak

ul. Jasna 26
00-054 Warsaw
Poland

Tel: +48 22 608 7000
Fax: +48 22 608 7070
Email: office@skslegal.pl
Web: www.skslegal.pl