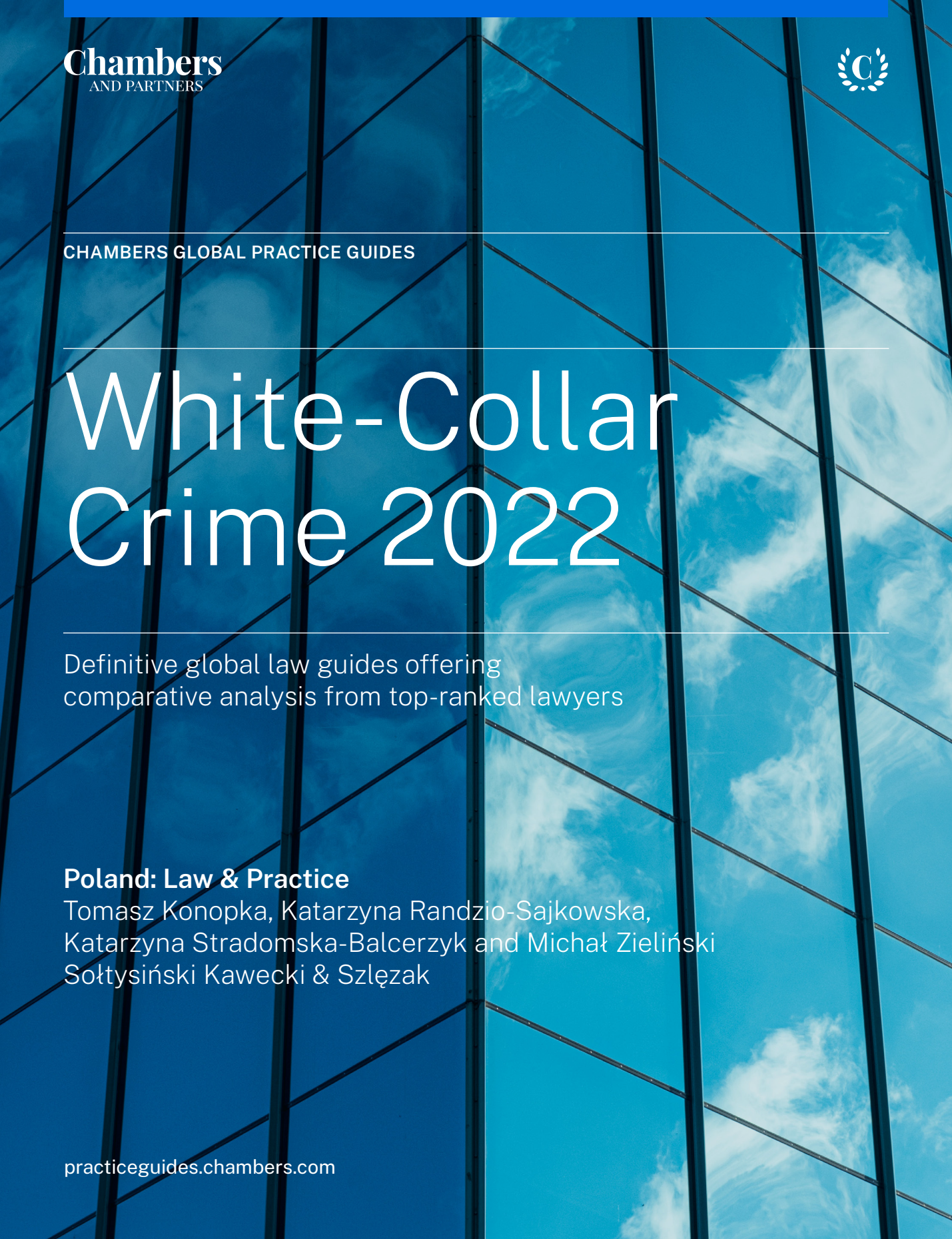

Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

White-Collar Crime 2022

Definitive global law guides offering comparative analysis from top-ranked lawyers

Poland: Law & Practice

Tomasz Konopka, Katarzyna Randzio-Sajkowska, Katarzyna Stradomska-Balcerzyk and Michał Zieliński
Sołtysiński Kawecki & Szlęzak

practiceguides.chambers.com

POLAND

Law and Practice

Contributed by:
Tomasz Konopka, Katarzyna Randzio-Sajkowska, Katarzyna Stradomska-Balcerzyk and Michał Zieliński
Sołtysiński Kawecki & Szlęzak see p.21

Contents

Contributed by:
Tomasz Konopka, Katarzyna Randzio-Sajkowska, Katarzyna Stradomska-Balcerzyk and Michał Zieliński,
Sołtysiński Kawecki & Szlęzak

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 so. The perpetrator could also be liable for attempting to commit an offence.

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. A perpetrator could also be liable for attempting to commit a petty offence if the law provides so.

Notwithstanding the above, there is a further 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 of public debt depleted or exposed to depletion, 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 PLN15,050 in 2022). 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 maximum 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, as a general rule, an offence 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;
- ten if the act constitutes a misdemeanour subject to the penalty of deprivation of liberty exceeding three years; and
- five for other misdemeanours.

Private prosecution offences cease to be punishable one year after the harmed party learns the identity of the perpetrator of the crime, but no later than three years after the commission of the offence. If the proceedings are initiated within the aforementioned time periods, the punishability of the offence ceases ten years after the lapse of the specific period (five years in the case of private prosecutions).

The punishment of tax offences ceases after ten years if the act constitutes a tax offence penalised by a deprivation of liberty exceeding three years or five years if the act constitutes a tax offence penalised by a fine, limitation of liberty or deprivation of liberty of up to three years.

A fiscal petty offence is subject to a one-year limitation period; however, if proceedings were

instituted within this period, the offence will cease to be punishable after two further years have elapsed.

1.3 Extraterritorial Reach

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

As a general rule:

- the CC applies to a Polish citizen who has committed a crime abroad;
- the CC applies to a foreigner who commits a prohibited act abroad against the interests of the Republic of Poland, a Polish citizen, a Polish juridical person or a Polish organisational entity without legal personality, as well as 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

Crimes That Provide for Corporate Liability (ALCE)

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.

Conditions for Corporate Liability

A condition for commencing proceedings against a company is that a legally binding and final guilty verdict against a person acting in the name of that company has been established. 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.

Contributed by:
Tomasz Konopka, Katarzyna Randzio-Sajkowska, Katarzyna Stradomska-Balcerzyk and Michał Zieliński,
Sołtysiński Kawecki & Szlęzak

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 the 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.

For years, the Polish government has signalled the need to amend the ALCE in respect of the liability of collective entities. On 2 September 2022, a draft act to amend the ALCE was published. Under the terms of the draft act, the legislator plans to introduce a new definition of a collective entity with the effect that the act will apply only to:

- collective entities employing at least 500 people in at least one year of the last two financial years; or
- entities that achieve an annual net turnover from the sale of goods, products and services and financial operations exceeding the equivalent of EUR100 million.

In practical terms, this means that only the largest entities will be covered by the new act. One of the most important legislative changes is the elimination of the so-called preliminary ruling as a condition for holding a collective entity liable. The effect of this change is that it will be possible to conduct proceedings against a collective entity, regardless of whether or not there has been a trial against a natural person for the alleged criminal act. Under the draft act, the main condition for bringing a collective entity to justice will be the fact that an offence has been committed for its benefit, regardless of whether the natural person who carried out the prohibited act has been identified. In addition, the current closed catalogue of offences for which a collective entity could be held liable will be removed. A collective entity could be held liable for any offence or tax offence, without restriction. The fine imposed on the entity for violations under the draft act is capped at PLN30 million.

In addition, under Article 24 of the FCC, a legal entity (eg, a company) should be liable in whole or in part for a fine imposed on a perpetrator of a fiscal offence, if the perpetrator is a substitute for that entity conducting its affairs as a proxy, manager, employee or acting in any other capacity, if the entity obtained or could have obtained any financial benefit from the committed fiscal offence.

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 Section 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 available 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 for the proceedings. The court will decide that a subsidiary prosecutor cannot participate in the proceedings if the maximum number of prosecutors defined by the court is already involved. Seeking remedies through class actions is, however, possible under civil law regulations.

1.6 Recent Case Law and Latest Developments

The special act, containing provisions related to COVID-19, is still in force. This act introduced, among other matters, a suspension of the statute of limitations for offences and tax offences from 14 March 2020 until the end of a six-month period following the end of the epidemic emergency or epidemic state in Poland. While the state of epidemic in Poland has now ended, the Ministry of Health has declared a state of epidemic emergency, which results in the continuation of the suspension of the statute of limitations for offences or tax offences.

The Polish parliament is working on a wide-ranging amendment to the CC that aims to strengthen the criminal regime through, among other things, introducing more severe penalties. The proposed changes include:

- an increase in the maximum penalty of 25 years to 30 years imprisonment;
- a new penalty of forfeiture of a motor vehicle (or its equivalent) when a perpetrator commits a road safety offence while under the influence of alcohol or drugs;
- an increase to the penalties for particular types of offences; and
- an extension of the statute of limitations for murder to 40 years.

The changes also apply to white-collar offences. For example, the amendments increase the penalty for corruption offences, ie, a penalty of imprisonment increases from maximum 12 years to 15 years if the financial benefit resulting from this offence exceeds PLN200,000. In addition, the act introduces new qualified types of corruption offences, ie, if the financial benefit exceeds PLN1 million, the perpetrator is subject to criminal liability from three to 20 years of imprisonment (see **3.2 Bribery, Influence Peddling and Related Offences**).

The act also introduces modifications regarding corruption relating to tenders. Currently, the relevant provision covers only public tenders while the amendment is intended to extend liability to private tender proceedings conducted under the Civil Code.

A recent interesting judgment was that of the Criminal Chamber of the Supreme Court con-

cerning the status of legal benefits obtained with money from economic crimes. The excerpt from the judgment is as follows: "*the nature of dirty money also includes legal benefits obtained with the money laundered, such as interest on funds in bank accounts or securities or dividends on shares.*" (Judgment dated 21 January 2021, case ref. No III CSKP 80/21).

On 16 April 2022, an act of parliament entered into force: special remedies for counteracting support for the aggression against Ukraine and for protecting national security (Act).

The Act's aim is to ensure the effective application of the sanctions imposed by the European Union (EU) as a result of the Russian aggression against Ukraine.

The Act provides for new types of crimes for violating the EU's regulations that impose an embargo on goods which are being sold to the Russian Federation, Belarus, and the Donetsk and Luhansk oblasts. The Act also makes it punishable to participate in an activity for the purpose or as a result of circumventing the prohibitions provided in EU regulations. It is also prohibited under the Act to import or transport coal (under items 2701 and 2704 of the Combined Nomenclature (CN)) from the Russian Federation or Belarus to or through Poland.

Perpetrators of the above-mentioned offences could be subject to imprisonment from three up to 15 years.

The Act was designed to protect national security, therefore its provisions have worldwide application, including with regard to foreigners (see more details on this rule in **1.3 Extraterritorial Reach**).

The Act not only addresses criminal law issues but also provides extremely severe fiscal sanctions, up to PLN20 million, a list of sanctioned persons and entities, and new powers for the head of the National Revenue Administration.

2. Enforcement

2.1 Enforcement Authorities

White-collar crimes are prosecuted by public prosecutors in conjunction with the support of the police, the Internal Security Agency, the Central Anti-corruption Bureau, the Central Investigation Bureau, the Border Guard, the Military Police (in a very narrow scope), the Tax Offices, the National Tax Administration, the Tax Administration Chambers, and the Tax and Customs Offices.

In the enforcement agencies, there are specialised divisions that deal with particular types of crime, including white-collar crimes. However, the public prosecutors and courts usually handle all types of criminal cases, and there are no dedicated courtrooms for white-collar crimes.

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 laws, consumer protection violations, and regulations of stock companies and financial institutions, as well as energy laws. Regulatory authorities are permitted to proceed with their cases in accordance with administrative law but may also file a notification of an offence with 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, the Public Prosecutor General is entitled to issue guidelines for prosecutors that may be relevant to practice. For example, the Guidelines of 10 August 2017 concern VAT frauds and other tax evasion offences. According to the Guidelines, these cases should be handled by prosecutors who specialise in combatting this type of crimes, and these cases should be conducted jointly with other units such as the Internal Security Agency or the Central Anti-Corruption Bureau. From the beginning, the investigation should focus on identifying the perpetrators who are responsible for the main acts of this criminal activity. The prosecutor also underlines that securing the fiscal interests of the State is a priority.

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.

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

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. Interrogations generally take place at the premises of the summoning authority; however, questioning in a different place (eg, a company's headquarters) is not excluded.

2.4 Internal Investigations

Currently, under Polish law there is no 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. This will change, however, when the whistle-blower regulations are introduced (see **4.4 Whistle-Blower Protection**). Currently it is assumed 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.

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 initiate 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 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 EU General Data Protection Regulation). Processing personal data (except sensitive data) is generally permitted within an internal investigation. However, it is recommended that the necessary consent be obtained from the person to whom the data relates.

New legal regulations in respect of the issue of reporting breaches, the obligations resulting from this, and the protections provided will be implemented by the so-called Act on the protection of whistle-blowers (see **4.4 Whistle-Blower Protection**).

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

The Polish law enforcement authorities co-operate with the authorities of other countries. There are various rules and scopes of co-operation. It is prescribed that countries cooperate with each other under bilateral international agreements, multilateral conventions or international organisation regulations (including, primarily, EU law and its implementations).

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 stated, crimes (including white-collar crimes) are initiated in two ways: ex officio or 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 grounds for charges/indictment. The indictment is then verified in two-instance court proceedings.

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, namely, 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 that the attitude of the accused indicates 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 their 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

The following kinds of plea agreement are available in Poland.

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 them, or by failing to perform their 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 them, or by failing to perform their duties, creates an imminent danger of causing substantial damage to property, they are liable to imprisonment for up to three years. For perpetrators acting with the intent to gain a material benefit, a more severe punishment is prescribed, ranging from six months to eight years in prison. Non-deliberate violations are subject to imprisonment for up to three years. If the perpetrator of the above offence caused damage exceeding PLN1 million, they are liable to imprisonment for between one and ten 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 them is liable to imprisonment for between three months and five years.

The CC also provides 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 dis-

closing 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 function (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 using public funds, unless they exclusively perform service duties, and any other person whose public activity powers and duties are established or recognised by a statute or by an international agreement binding on the Republic of Poland. The term "public corruption" also refers 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 them or for the non-performance of their 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 uses inside information contrary to the prohibition referred to in Article 14 (a) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (MAR) shall be liable to a fine of up to PLN5 million or imprisonment for a period of three months to five years, or both these penalties jointly. Article 14(a) of the MAR provides that it is forbidden to:

- engage or attempt to engage in insider dealing;
- recommend that another person engage in insider dealing or induce another person to engage in insider dealing; or
- unlawfully disclose inside information.

3.5 Tax Fraud

As mentioned in **1.1 Classification of Criminal Offences**, 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. 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 Articles 270a and 277a of the CC. Forgery of or tampering with an invoice in relation to circumstances influencing the amount of a tax (or other public obligation) or its refund, in order to use such invoice as an authentic one, or using such a fake invoice, constitutes a separate offence. The perpetrator is liable to imprisonment for a period of six months to eight years. If the perpetrator forged or used invoices documenting transactions whose value exceeded PLN5 million or forging or using fake invoices constituted a source of their permanent income, the offence is considered as a felony and punishable by at least three years of imprisonment. Moreover, if the value exceeded PLN10 million, 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 state-

ments 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 their responsibilities. Such a board member shall be subject to criminal liability for fiscal crimes committed as part of the operations of the company they manage. Importantly, a management board member may even be subject to liability under fiscal criminal law for crimes committed at a time when they did not hold this position.

3.7 Cartels and Criminal Competition Law

Cartels and other competition deeds are defined and regulated under administrative law, in particularly the Protection of Competition and Consumers Act, and are subject to fines. Further, 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 asserting to have influence in a domestic or foreign organisational entity utilising public funds, inducing another person's belief in the existence of such an influence, or assuring another person of the 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, or performing unfair market practices or acts of unfair competition.

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

Classification of Cybercrimes

According to Article 287 of the CC, anyone who commits computer fraud, ie, influences automatic data collection, processing or transfer without due authorisation, alters (for example, SQL-injection type attacks), deletes or creates electronic records with intent to obtain material benefit or cause damage to others, is liable to imprisonment for a period of three months to five years.

According to Article 278 Section 2 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.

According to Article 269a of the CC, anyone who significantly interrupts the operation of a computer system or an IT network by means of data transmission (eg, distributed denial-of-service attacks), deletes, corrupts, or alters data, or restricts access to data (such as ransomware attacks), will be subject to the same penalty.

Additionally, as stated in Article 268a of the CC, the unauthorised deletion, destruction, and restriction of access to electronic data (eg, ransomware attacks), as well as the prevention of access to or automatic processing of such data is subject to imprisonment 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.

Moreover, under Article 269b of the CC, anyone who prepares, obtains, transfers, or sells any devices or software enabling the user to commit the above offences (this covers various "back doors", "Trojan horses", keyloggers, webcam hacks, botnet-related software, viruses, ransomware software, etc), as well as computer passwords, access codes or other data enabling unauthorised access to information stored in an IT system or IT network, is subject to the penalty of deprivation of liberty for between three months and five years.

Exemptions

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 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.

Cybercrime Related to Payment Instruments
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 merely conceals cannot be liable for a predicate offence and concealment within one act.

3.12 Aiding and Abetting
As a general rule, not only the offender, but also anyone who induces or orders the offender to commit a crime, or (intending another person to commit a crime) facilitates the commission of the act, and/or organises a prohibited act to be carried out is liable for their 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 valuables, 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, or 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 in **2.4 Internal Investigations**, the currently binding legal regulations in Poland do not provide for the obligation to self-report or to carry out internal investigations and do not impose a sufficiently general regulation on whistle-blowing (see more in section **4.4 Whistle-Blower Protection**). Furthermore, current legal provisions do not impose any obligation on businesses to implement compliance programmes. Nevertheless, many companies implement such programmes, and this is one of the defence arguments for white-collar offences. 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 in criminal proceedings involving crimes harming enterprises is the lack of clear internal regulations defining 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 on compliance programmes, it would be difficult to establish any specific recommended elements for such programmes. As a rule, it would be advisable for their scope 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.

It is expected that the implementation of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of EU law will encourage entrepreneurs to implement effective compliance programmes in their organisations (more in section **4.4 Whistle-Blower Protection**).

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.

Firstly, whoever acts with the intention of performing an economic experiment that is expected to produce significant cognitive or economic value, and whose expectation of achieving those objectives, purposefulness, and method of performing the experiment are well-founded in 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.

Fiscal offences are subject to a mechanism of "active repentance". A perpetrator of a fiscal crime or fiscal petty offence who notifies enforcement authorities of relevant circumstances concerning the offence (particularly the persons who assisted in committing the offence) before the authorities become aware of the offence shall not be subject to a fiscal crime or fiscal petty offence. This rule is applicable only if the public debt has been fully repaid.

4.3 Co-operation, Self-Disclosure and Leniency

In general, no special "credit" is granted for voluntary disclosure of any offence. However, as described in **4.2 Exceptions**, in the case of some offences – such as active bribery – disclosure of all the substantive circumstances of an offence can result 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-Blower 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. The Polish legal system has begun to develop legal norms regarding whistle-blowing in recent years. 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 are expected to appear in the Polish legal system in the near future.

Legislative work is underway on a draft act on the protection of persons who report violations of the law, ie, the so-called Act on the protection of whistle-blowers. This is related to the obligation to implement Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting breaches of EU law.

The act on the protection of whistle-blowers is to regulate issues related to reporting breaches of law, both internally (ie, within the organisation) and externally (ie, to central authorities), and define the conditions and measures to protect whistle-blowers. The draft law also provides for an obligation to introduce a procedure to report law violations and take follow-up measures.

The following entities will be subject to this obligation:

- private entities employing at least 50 people; and
- legal entities with a presence in the field of services, products and financial markets, in prevention of money laundering, terrorist financing, transport safety, and environmental protection, regardless of the number of people employed.

Under the Act, failure to fulfil the obligation to establish an internal procedure and failures

relating to the established procedure will attract criminal liability.

The draft act also imposes an obligation to protect the confidentiality of the identity of:

- the reporting person;
- the person assisting in the reporting; or
- a person related to the reporting person.

Violating this obligation is a crime punishable by a restriction of liberty, or imprisonment for up to one year.

The draft act contains detailed regulations concerning the protection of whistle-blowers such as:

- no retaliation can be taken against the reporting person;
- the whistle-blower cannot be adversely treated because of the reporting or public disclosure;
- the whistle-blower will be entitled to compensation in the event of retaliation against them;
- the reporting person's disciplinary liability and liability for damage arising from the violation of the rights of other persons or obligations set out in legal provisions will be excluded; and
- the termination of a contract due to reporting or public disclosure will be considered ineffective.

However, a condition for whistle-blowers to be protected is that they make a good faith report.

In addition, the project introduces new types of offences, ie:

- obstructing the submission of a notification;
- using violence, threats, or deception to obstruct the reporting process;
- taking retaliatory actions against:
  (a) the person who made the report;
  (b) the person assisting in the reporting; or
  (c) the person related to the reporting person;
- breaching the obligation to maintain confidentiality regarding the identity of:
  (a) the person who made the report;
  (b) the person assisting in the reporting; or
  (c) the person related to the reporting person; and
- knowingly submitting a report or public disclosure that contains false information.

The draft Act also introduces one new misdemeanour, ie, failing to establish an internal procedure or establishing a procedure that does not meet statutory requirements.

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

provide evidence of a particular circumstance; however, it does not preclude a counter-proof being provided. The so-called surrogates of proof are notoriousness, obviousness, probability and presumptions, either factual or legal.

Notoriousness provides for the rule that the facts indisputably known by the legal authority and the parties shall not require proof. Obviousness is something more than 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. A proof is not required in such a situation not because there is no doubt about the fact, but because it will be proved later. For example, the precautionary measures may be applied if there is a high probability that the accused has committed a crime. 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 the 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 the law. It 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 the 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 wider society.

The CC provides for the general guidelines that state that while imposing a penalty, the court takes into account, in particular, 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 CC also states the court should consider, in particular, 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 is also expected to take 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.

Contributed by:
Tomasz Konopka, Katarzyna Randzio-Sajkowska, Katarzyna Stradomska-Balcerzyk and Michał Zieliński,
Sołtysiński Kawecki & Szlęzak

Sołtysiński Kawecki & Szlęzak is an independent Polish law firm, with over 160 lawyers offering legal services to businesses both in Poland and abroad. Its white-collar crime practice, which includes both defence work and investigations, has been operating since 2008. The group specialises in issues relating to corruption, fraud, tax fraud, actions against companies and creditors, cybercrime, money laundering, construction, and labour law violations. This breadth and depth of experience enables the team to perform comprehensive analyses of relevant business crime issues as well as mitigate/prevent criminal liability risks. It manages major projects involving both internal investigations and the implementation of comprehensive compliance systems. To provide its clients with full support in crisis management situations, the firm co-operates with leading forensic firms, reliable detective agencies and security experts, as well as professional business partners.

Authors

Tomasz Konopka is a partner at Sołtysiński Kawecki & Szlęzak where he oversees the white-collar crime and investigations team since 2013. As well as providing advice to clients who are victims of abuses such as fraud, theft, actions against the company's interests, forgery, money laundering, and cybercrime, he provides assistance to clients who are at risk of criminal liability, eg, as a result of corruption. Aside from providing advice on planning and implementing compliance procedures, he also offers solutions designed to improve the security of businesses. In addition to nearly 20 years of experience, he has extensive experience representing clients before law enforcement authorities and courts, both in Poland and throughout the European Union.

Katarzyna Randzio-Sajkowska is a partner in Sołtysiński Kawecki & Szlęzak's white-collar crime and investigations department with extensive experience in representing clients at all stages of criminal proceedings regarding, among others, business crimes, fraud, corruption, tax avoidance, money laundering, and accounting fraud. As well as managing teams in large and complex internal investigations, including those related to FCPA violations, she also provides support to clients in the implementation of compliance systems. She is a member of the Association of Certified Fraud Examiners (ACFE) and the International Association of Young Lawyers (AIJA), where she participates in the Commercial Fraud Commission's work. She is also a visiting lecturer at the Warsaw School of Economics.

Contributed by:
Tomasz Konopka, Katarzyna Randzio-Sajkowska, Katarzyna Stradomska-Balcerzyk and Michał Zieliński,
Sołtysiński Kawecki & Szlęzak

Katarzyna Stradomska-Balcerzyk is an associate in the white-collar team at SK&S. An advocate and doctoral student at the Department of Civil Law, Faculty of Law and Administration, University of Warsaw, she specialises in criminal business law and civil law. Her responsibilities include participating in internal investigation proceedings. Moreover, she has experience handling cases related to the seizure of counterfeit goods by customs and the representation of clients before law enforcement authorities and common courts.

Michał Zieliński joined the SK&S team in 2019. He specialises in criminal business law. He has extensive criminal law experience, both as an attorney for injured persons and as a defence attorney for the accused. Aside from whistle-blowing and compliance matters, he has also drafted procedures for ensuring compliance and protecting whistle-blowers, as well as participated in their implementation. Additionally, he has gained valuable experience representing clients in Supreme Court proceedings as well as and pardon proceedings.

Sołtysiński Kawecki & Szlęzak

Jasna 26
00-054 Warsaw
Poland

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

30 YEARS | SK&S SOŁTYSIŃSKI KAWECKI SZLĘZAK

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com