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Criminal liability of collective entities – the Polish perspective**

ABSTRACT: This paper aims to present the Polish perspective on the criminal liability of collective entities. The author refers to the legal nature of the criminal liability of collective entities. Also, the material prerequisites for the criminal liability of companies are scrutinized in this article. The legal status of companies' internal investigation in the context of criminal liability of collective entities is also discussed.

KEYWORDS: Internal investigation, criminal liability, legal persons' criminal liability, companies' criminal liability, corporations' criminal liability, collective entities criminal liability.

1. Introduction

The purpose of this paper is to present the issue of the general legal framework of legal persons' liability, mandatory internal investigation, and obligation to disclose documents and circumstances relevant to criminal proceedings under Polish legal regulations. I will also tackle the topic of self-incrimination and leniency statements in the context of criminal punishment mitigation.

The first point which should be brought to light is the general legal framework of responsibility of legal persons. The Polish regulation on this matter has been in force for almost twenty years and is stated in The Act of 22 October 2002 on the Liability of Collective Entities for Punishable Offences (as amended Journal of Laws of 2020, item 358). This is the first comprehensive legal regulation introducing the institution of liability of legal persons into Polish law.

2. Material scope

The aforementioned Act of Parliament is subjectively relevant to collective entities, as legal persons or organizational units without legal personality, to which separate legal provisions grant legal capacity. Also, a commercial company with the State Treasury as its shareholder, local government units or associations formed by them, a company in the process of incorporation, an entity under liquidation, and an entrepreneur other than a natural person, as well as foreign organizational units, are defined as collective entities. Exceptions are the State Treasury and local government units and associations formed by them.

Let the material scope of the given Act be the starting point for the forthcoming scrutiny. The first issue, which should be addressed in this paragraph, is the catalogue of material prerequisites for the criminal liability of legal persons.

Due to the provision of the aforementioned Act, a collective entity shall be held liable for an offence involving the conduct of an individual:

- acting for or on behalf of the collective entity within the framework of his right or obligation to represent the entity, make decisions on behalf of the entity, or perform internal audits, or violating that right or obligation,

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- enabled to act because of a violation by the person referred to of his rights or obligations,
- acting for or on behalf of the collective entity with the consent or acquiescence of the person referred to,
- being an entrepreneur directly collaborating with the collective entity to achieve a legal purpose,

if the collective entity has benefited or could have benefited from that conduct, even non-financially. A collective entity shall be held liable if the natural person referred to has committed an offence, as confirmed by a final and non-appealable judgment convicting that person.

3. The legal nature of criminal liability of collective entities

In the view of the mentioned Act, the corporation does not itself commit an act that is forbidden as an offence, but the responsibility of the corporation is a result of the act committed by its member. Thus, it is a secondary liability. It is also claimed that *mens rea* and *actus reus*, known in criminal law, cannot be attributed to corporate liability. Therefore, it is justified to say that a new form of liability has been created. The reference to jurisprudence and doctrine seems to be significant here. The view presented in the judgment of November 3, 2004; No. K 18/03 of the Polish Constitutional Tribunal is similar to that presented above. Nevertheless, some authors claim¹ that the discussed Act has a criminal nature, and could be assessed as a piece of criminal law *sensu largo*. Others point out that such institutions used in the act *as culpa in eligendo* or *culpa in custodiendo* contradict its criminal nature.² It is unquestionable that the statute does not refer to the Criminal Code at all.³

In the context of the given regulations, defining the legal nature of such a structure appears as a fundamental question of responsibility. The legal doctrine presents two different positions in this respect. The first assumes that the liability of collective entities introduced into Polish law under discussion is criminal liability. The second position recognizes that the discussed Act introduced a new type of repressive liability into Polish law, which was not strictly criminal.⁴ In my opinion, the liability of a collective entity is not a criminal liability *sensu stricto* because of a violation of a sanctioned legal norm not by a collective entity but by a natural person.⁵ Nevertheless, the court shall impose a monetary penalty on the collective entity, ranging from PLN 1000 to PLN 5 000 000, which may not exceed 3 percent of the revenue earned in the business year.

To sum up this thread, the model of liability of collective entities adopted so far has not proved successful. The number of proceedings conducted based on the analyzed regulation reflects this. According to information from the National Prosecutor's Office, in the years 2016-2021, 54 applications were submitted to declare the liability of collective entities based on the existing regulation.⁶ In the mentioned period, the courts issued 33 judgments confirming the liability in question.⁷ As a result, work on the new version of the act, the draft of which was published in 2023, is ongoing.⁸ Work on the bill stopped at the government stage of work and was not submitted to the parliament.

¹ Waltoś, 2003, p. 396–406; Namysłowska-Gabrysiak, 2004, p. 62. et. seq.

² Filar, 2006, p. 23; Mik, 2003, p. 67.

³ Pniewska, 2010, p. 206.

⁴ Ibid.

⁵ See also: Pawluczuk-Bućko, 2021, p. 375.

⁶ Ministry of Justice, 2022, p. 3.

⁷ Ibid.

⁸ Ministry of Justice, 2022, p. 1.

4. Internal investigation in the context of criminal liability of collective entities

Firstly, let me briefly characterize the circumstances under which internal investigations are mandatory. They are all connected with internal whistleblowing procedures. Several normative regulations oblige to perform them:

- the provisions of Countering Money Laundering and Terrorist Financing Regulations,
- the provisions of the Banking Law,
- the provisions of Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organized Trading, and on Public Companies,
- the provisions of Civil Aviation Law.

A common factor for all the above-listed regulations is the issue of implementing internal whistleblowing procedures. The largest group of persons being potential whistleblowers are employees. In some cases, the personal scope is extended, e.g., to other persons performing work activities on behalf of a given obliged institution, as AML regulations state.

In each case, the internal whistleblowing procedure aims to report any actual or potential infringements of general law provisions, internal regulations, and ethical standards. Worth underlining is the fact that documents and reports produced, and scrutinized during internal investigations, are private documents. If, during a proceeding, it turns out that there is a possibility of committing a crime, the organization is obliged to inform the law enforcement authorities (Police or public prosecutor's office) about this fact.

This raises the question of the status of the internal investigation proceedings' documents during criminal proceedings. Firstly, let me indicate that there is no obligation to prepare separate documents for use in criminal proceedings. Nevertheless, internal documentation can be claimed as a piece of evidence. Items that may constitute evidence in a criminal case should be issued at the request of the court or the prosecutor, and in urgent cases - also at the request of the Police or another authorized body. Also, the public prosecutor may call a company for the voluntary release of documents. In the event of voluntary failure to disclose given papers or to find items that may constitute evidence, the premises and other places may be searched if there are reasonable grounds to believe that the said items are there. Under Polish law, authorized bodies may conduct a search to discover, arrest or involuntarily haul in a suspect, as well as find things that may constitute evidence in the case or be subject to seizure in the criminal proceeding.

Another way of gaining knowledge about internal investigations, and following their documents, is to question witnesses on those circumstances. These statements are made under the pain of criminal responsibility for false testimony. None of the presented evidence sources are directly connected with producing special documentation preparation of documentation for the needs of pending criminal proceedings.

When analyzing the topic of internal investigations, it is worth taking into consideration, that Polish criminal law does not foresee internal investigations and leniency statements as grounds for mitigation of punishment. As mentioned at the beginning, the liability of collective entities has a secondary meaning compared to the criminal liability of individual persons. It can be described as quasi-criminal liability. Consequently, also self-incrimination statements do not apply.

5. Conclusion

To sum up, the liability of collective entities is not a typical criminal liability. It is secondary to the criminal liability of individual persons, but the corporation's responsibility is a result of the act committed by its member. Moreover, internal investigations are not directly connected with a criminal investigation nor constitute part of it. Conclusions drawn from them are not binding

for law enforcement authorities. Nevertheless, internally collected material may create one of the sources of evidence.

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