

# Liability for Corruption in Poland in Light of the Commission Proposal for a New Directive on Corruption

The Devil is in the Details

Celina Nowak \*



## Article

### ABSTRACT

This article refers to the Polish anti-corruption law and the new European Commission proposal for a Directive on combating corruption. It aims at analysing the Polish provisions currently in force in light of the Commission proposal. Against the background of the anticipated new EU legal instruments, the author points out the most significant loopholes in Polish law hindering an effective fight against corruption. The analysis carried out in the article indicates, in particular, that there is a high need to modify the Polish legal framework as regards the liability of collective entities for offences. Compliance measures need to be adopted. In addition, the author advocates putting in place preventive measures and effectively penalizing corruption in the private sector in Poland.

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## I. Introduction

On 3 May 2023, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on combating corruption.<sup>1</sup> The proposal's objective is to update and develop the existing EU legal framework on corruption in the light of evolving national criminal legal frameworks and the international standards binding on the EU, in particular the 2003 United Nations Convention against Corruption (UNCAC). Although the proposal focuses to a large extent on strengthening mechanisms to repress corruption, prevention constitutes an equally important part of the initiative.

This twofold ambition is expressed in Art. 1 of the proposal, which stipulates that "the proposal establishes minimum rules concerning the definition of criminal offences and sanctions in the area of corruption, as well as measures to better prevent and fight corruption." The structure of the proposed Directive largely reflects that of the UNCAC: the first set of provisions refers to preventive measures, whereas further articles are devoted to criminal matters.

Once adopted, the entry into force of the proposal will certainly imply modifications in the national legal systems of the EU Member States, including Poland, which has struggled with the elimination of corruptive conduct for a long time. Therefore, in the following, the provisions of the Directive will be mirrored against the relevant current provisions of Polish law, and the need for reform of the Polish law elaborated. The article will point out the most important provisions of the proposal and the most significant loopholes in Polish law that hinder an effective fight against corruption.

## II. Preventive and Institutional Measures

The Commission's proposal for a Directive provides for an obligation to prevent corruption, i.e., to detect and eliminate the causes of and conditions for corruption, through development and implementation of a system of appropriate measures and deterrence against corruption-related acts.

Most of the preventive measures mentioned in the proposal are focused on **raising awareness** of the fight against corruption, through education and research programmes and by involving civil society and non-governmental organisations. Such a preventive system requires the establishment of an adequate risk assessment process in order to identify and tackle gaps and sectors most at risk of corruption. Prevention also includes **training** for national officials on corruption offences and corruption risks.

In addition, the proposal refers to implementing "measures to ensure the highest degree of **transparency and accountability** in public administration and public decision-making with a view to prevent corruption", as well as "effective rules regulating the interaction between the private and the public sector."<sup>2</sup>

In these areas, Polish law (and Polish administrative practice) does not seem to be in compliance with the proposal. The main problem lies in the lack of systemic mechanisms focused on prevention, as outlined in the proposal. Although some programmes for raising awareness and education have been implemented in Poland, they have hardly been widespread. In addition, risk assessment has not been adopted in the public administration as an effective tool to prevent corruption. There is certainly also much room for improvement when it comes to transparency and anti-corruption trainings, which are not offered to all national officials on a regular basis.

The proposal for a Directive also refers to measures of an **institutional nature**. In particular, it requires Member States to set up one or several bodies or organisation units specialised in the prevention of corruption as

well as in the repression of corruption. These bodies must, *inter alia*, be functionally independent from the government and have a sufficient number of qualified staff members and financial, technical, and technological resources as well as the powers and tools necessary to ensure the proper administration of their tasks, and they must be known to the public.<sup>3</sup>

Poland has several bodies specialised in the investigation and prosecution of corruption, the chief of which is the Central Anti-Corruption Bureau,<sup>4</sup> which enjoys the status of a special service. However, there are **no bodies or institutions responsible for the prevention of corruption**; this task is shared by all public administration entities, effectively leaving no one entity in charge. This is a significant downside of the Polish institutional framework, which should be amended once the proposal at hand is adopted and comes into force.

## III. Penal Provisions

The corruption offences set forth in Polish law include corruption in the public sector (Art. 228 and 229 of the Penal Code<sup>5</sup>), trading in influence (Art. 230 and 230a PC), electoral corruption (Art. 250a PC), and economic corruption (Art. 296a PC). Corruption in sport has also been criminalised (Art. 46-48 of the Act on Sport<sup>6</sup>).

### 1. Criminalisation of corruptive behaviour

In Polish criminal law, active corruption in any sector is defined as “giving or promising to give” any benefit, whether material or personal, directly or through an intermediary, to another person. By contrast, the proposal for the new Directive and other international and EU anti-corruption legal acts define active corruption as “promise, offer or giving” such a benefit. The difference between the penalised forms of corruption refers to the act of “offering”. The Polish government has consistently maintained that offering is criminalised as an attempt to commit active corruption, and therefore all three forms of corruption mentioned in the international and EU law would be punished.<sup>7</sup> However, although attempt is indeed punishable under Art. 13 of the Polish Penal Code, it is usually punished with a lesser penalty than the actual commission of an offence. The legal qualification also differs. For these reasons, the catalogue of forms of active corruption in Polish law should be amended in order to include “offering” as an equal form of the commission of active corruption.

### 2. Corruption in the private sector

There is **no provision in the Polish criminal law which would criminalise corruption in the private sector** per se. Art. 296a of the Penal Code, which was introduced in 2003, criminalises active and passive corruption committed by or in relation with any person working for a business entity, irrespective of whether it is an entity operating in the private or public sector. In addition, the application of Art. 296a Penal Code has been limited to acts that are related to a distortion of competition (they constitute an act of unfair competition or an impermissible preferential act in favour of the purchaser or recipient of a good, service, or benefit) or may cause pecuniary damage to the business entity.<sup>8</sup>

As a result, Polish law implements not the EU binding provisions set forth in the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector<sup>9</sup> but a much older, already expired Joint Action of 1998 on corruption in the private sector.<sup>10</sup> Hence, the criminalisation of corruption in the private sector in Polish law will require a thorough analysis and a radical modification.

### 3. Other corruption offences

The Polish criminal law **does not provide for an offence of enrichment** from corruption offences, as set forth in Art. 13 of the proposal for the new Directive. Art. 13 would criminalise a public official who intentionally acquires, possesses, or uses property that that official knows is derived from the commission of any of the offences set out in the proposal, irrespective of whether that official was involved in the commission of that offence or not.

Art. 292 of the Polish Penal Code only provides for the offence of criminal fencing, which punishes a person who, on the basis of the surrounding circumstances, can reasonably believe and is able to suspect that an item has been obtained by means of a criminal offence, acquires or assists in the disposal of an item, or accepts or assists in its concealment. Such an act is punishable with a fine, limitation of liberty or deprivation of liberty for up to two years, and, in the event that the item is of a significant value (i.e., over 200,000 PLN, which is equal to approximately €45,000), with a penalty of deprivation of liberty from three months up to five years.

The scope of criminalisation differs significantly between the Penal Code and the proposal for the new Directive. In particular, the use of property is not criminalised in Polish law, although it may be considered as a type of behaviour after the actual commission of a corruption offence and, as such, be penalised together with the commission of the offence (but in such event, the offence of corruption must have been committed by the public official using the property). In addition, the Polish law refers to "items", whereas the proposal uses the much wider notion of "property" (as defined in Art. 2 (2) of the proposal, property means "funds or assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets"). In fact, a new offence would have to be established in Polish law in order to be able to implement the discussed provision.

### 4. Liability of legal persons

Modern Polish criminal law has always been very firmly based on the principle of guilt. This principle implies that guilt can only be assigned to an individual. Therefore, criminal liability has been tied with natural persons only and excluded with regard to legal persons and other collective entities. Said position was to a large extent confirmed by the adoption of a new Penal Code in 1997, which expressly referred to natural persons.

The situation in this regard had to change when Poland applied for membership in international organisations, in particular the OECD and EU, once these organisations began adopting anti-corruption legal instruments providing for liability of legal persons. The necessity of implementing this anti-corruption legal framework contributed to the adoption of a new statutory act in 2002, which established the liability of collective entities for prohibited acts. Due to the theoretical considerations mentioned above, related to the notion of guilt in criminal law, this liability was neither set forth in the Penal Code, nor was it constructed as criminal, even though it was clearly very close to criminal liability.

A year after its adoption, the new Act "on Liability of Collective Entities for Acts Prohibited under a Penalty" entered into force on 28 November 2003,<sup>11</sup> but it was almost immediately referred to the Constitutional Tribunal for review. In 2004, the Tribunal found the act partially unconstitutional (based on insufficient procedural guarantees for collective entities and the repressive nature of liability), which resulted in amendments adopted in 2005 (hereinafter: "the Act").

## a) Notion of a collective entity

Pursuant to Art. 2 of the Act, a collective entity within the meaning of the Act is a legal person and an organisational unit without a legal personality, to which separate regulations grant legal capacity, with the exclusion of the State Treasury, local government units, and their associations. A collective entity is also a commercial company involving the participation of the State Treasury, a local government unit or an association of such units, a capital company in an organisation, an entity in liquidation, and an entrepreneur who is not a natural person as well as a foreign organisational unit. The group of entities subject to liability under the Act is therefore broader than that usually set out in international and EU legislation, which imposes an obligation on states to prosecute only legal persons, i.e., entities with a legal personality under national law.

In the proposal for the new Directive, a legal person is defined as any entity having a legal personality under the applicable national law, except for states or public bodies in the exercise of state authority and except for public international organisations. In this regard, the Polish law goes beyond the requirements of the proposal, as it covers a wider group of organisational entities.

## b) Conditions for liability

The model of collective entity liability set out in the 2002 Act is based on **four requirements** – three substantive and one procedural. With regard to the substantive law prerequisites, it should be pointed out that, under Art. 3 of the Act, a collective entity may only be held liable for a criminal act, i.e., conduct by a natural person associated with the entity that has benefited or could have benefited the entity, albeit non-materially.

An essential substantive element for liability is the formal **relationship between the collective entity and a natural person**. Art. 3 of the Act distinguishes in detail four possible links:

- The natural person acts on behalf or in the interest of a collective entity as part of the right or obligation to represent it, make decisions on its behalf or performs internal controls (liability is also triggered if this authority is exceeded or if this obligation is not fulfilled);
- The natural person has been allowed to operate as a result of exceeding the powers or failure to fulfill obligations by the person in a managerial position;
- The natural person acts on behalf or in the interest of a collective entity, with the consent or knowledge of the person in a managerial position;
- The natural person is an entrepreneur who directly interacts with a collective entity in the implementation of a legally permissible goal.

The second substantive condition is the **establishment of a lack of due diligence** on the part of the collective entity. A collective entity is held liable if the following occurs:

- If there was at least a **lack of due diligence in the selection** of a natural person who has been allowed to operate as a result of exceeding the powers of or failure to fulfill obligations by the person in a managerial position or a natural person acting on behalf or in the interest of a collective entity, with the consent or knowledge of the person in a managerial position, or at least a **lack of due supervision of that person**, on the part of an authority or a representative of the collective entity;
- If the **organisation of the activities of the collective entity** did not ensure that the commission of the criminal act by a person acting on behalf or in the interest of a collective entity as part of the right or obligation to represent it, make decisions on its behalf, or perform internal controls or by an entrepreneur who directly interacts with a collective entity in the implementation of a legally

permissible goal could have been avoided, when it could have been ensured by the due diligence required in the circumstances by the authority or the representative of the collective entity.

The third substantive element relates to an **offence committed by an individual to the benefit of a collective entity**. Under the current statutory regulation, a collective entity is not liable for every conduct of an individual that constitutes a criminal act but only for such conduct that is an offence falling into one of the categories listed in Art. 16 of the Act. Beyond other economic offences, **corruption** is listed in Art. 16(1) of the Act as conduct by an individual that triggers the liability of the collective entity.

Art. 16 of the Commission proposal for the new Directive links the liability of legal persons to acts committed to their benefit by any natural person, acting either individually or as part of an organ of the legal person and having a leading position within the legal person, based on one or more of the following:

- A power of representation of the legal person;
- The authority to take decisions on behalf of the legal person;
- The authority to exercise control within the legal person.

It can be concluded that the Polish provisions are in line with the proposal and cover all three requirements of liability.

The proposal for a new Directive does not contain any provisions referring to the procedural aspects of the liability of legal persons, aside from the provision stating that this liability of legal persons does not exclude criminal proceedings against natural persons who are perpetrators, inciters, or accessories in the criminal offences (Art. 16(3)). However, Art. 4 of the Polish Act sets out a **procedural prerequisite for the liability of collective entities**. Accordingly, a collective entity is liable if the fact that a criminal act was committed by a natural person associated with the collective entity in the manner described above has been confirmed by the following:

- A final judgment convicting that person;
- A judgment conditionally discontinuing criminal proceedings or proceedings for a fiscal offence against that person;
- A judgment granting that person permission to voluntarily submit to liability;
- A court decision discontinuing proceedings against that person due to circumstances excluding the punishment of the perpetrator.

This provision constitutes a main hinderance in the practical application of the Polish Act. Proceedings against natural persons take up to several years in Poland, and after their conclusion no one is required to hold collective entities liable. Art. 4 of the Polish Act does not contradict any provision of the Commission Proposal as such; however, since it hinders the application of liability to collective entities, it prevents them from being held liable and from being subjected to sanctions. For this reason, the provision in question in the Polish law needs to be put under revision once the Directive is adopted.

### c) Sanctions

The proposal for the new Directive generally states that legal persons held liable for criminal offences are punishable by **effective, proportionate and dissuasive sanctions**.<sup>12</sup> These sanctions include criminal or non-criminal fines, the maximum limit of which should be no less than five percent of the total worldwide turnover of the legal person, including related entities, in the business year preceding the decision

imposing the fine. **Additional measures** against legal persons held liable pursuant to Art. 16 (cf. supra) can include the following:

- The exclusion of that legal person from entitlement to public benefits or aid; the temporary or permanent exclusion from public procurement procedures;
- The temporary or permanent disqualification of that legal person from the exercise of commercial activities;
- The withdrawal of permits or authorisations to pursue activities in the context of which the offence was committed;
- The possibility for public authorities to annul or rescind a contract with them, in the context of which the offence was committed;
- The placing of that legal person under judicial supervision; the judicial winding-up of that legal person;
- The temporary or permanent closure of establishments which have been used for committing the offence.<sup>13</sup>

Interestingly, Art. 18 of the proposal provides for a list of aggravating<sup>14</sup> and mitigating circumstances applicable to offenders, both natural and legal persons. What seems particularly pertinent is that one of the mitigating circumstances applicable to legal persons refers to compliance – a novelty in an EU criminal law instrument: A mitigating circumstance shall be acknowledged if the offender is a legal person and it has implemented effective **internal controls, ethics awareness, and compliance programmes** to prevent corruption prior to or after the commission of the offence.<sup>15</sup>

In Polish law, the **main repressive measure applied against collective entities is a fine**. Pursuant to Art. 7 of the Act, this fine can range between PLN 1000 to PLN 5,000,000;<sup>16</sup> however, it may not exceed three percent of the revenue generated in the financial year in which the offence giving rise to the collective entity's liability was committed. Moreover, an obligatory forfeiture is to be ordered against the collective entity. This forfeiture can concern objects originating, at least indirectly, from the prohibited act or which were used or intended to be used to commit it; a financial benefit originating, at least indirectly, from a prohibited act; and an equivalent of objects or financial benefits originating, at least indirectly, from a prohibited act (Art. 8 of the Act).

Lastly, various **additional penalties** may also be imposed on the collective entity under Polish law. Pursuant to Art. 9 of the Act, the catalogue of these measures includes the following:

- A ban on the promotion or advertising of the conducted activity, manufactured or sold products, provided services or provided benefits;
- A ban on the use of grants, subsidies, or other forms of financial support with public funds;
- A ban on access to EU funds in cases related to employment of persons residing illegally on the territory of the Republic of Poland;
- A prohibition on using the assistance of international organisations of which the Republic of Poland is a member;
- A prohibition on applying for public procurement;
- Publication of the judgment against the legal person.

The abovementioned bans/prohibitions are imposed in years, for a period from one to five years.

The Act mentions only one mitigating circumstance that may result in imposing a forfeiture, a prohibition, or making the judgment public instead of a fine. Such a decision may be taken in particularly justified cases, where the offence giving rise to the liability of the collective entity has not conferred a benefit on that entity. Conversely, recidivism on the part of a collective entity constitutes the only aggravating circumstance provided in the law.

Furthermore, Polish law does not mention compliance programmes in the context of the liability of legal persons, which obviously does not encourage legal persons in Poland to adopt compliance policies. I believe that the lack of legislative incentives in this regard in the current Polish legal framework is deplorable; a modification of Polish provisions in this regard is highly recommended. However, the ultimate coming-into-effect of the Commission proposal will certainly provide a strong and much needed push toward Polish companies adopting or reinforcing compliance measures.

#### d) Procedural issues and enforcement

Under Polish law, the collective entity is entitled to certain procedural rights in the course of proceedings against an individual whose act has benefited or could have benefited the collective entity. Looking at the liability proceedings against the collective entity, Art. 27 of the Act provides that these proceedings, which may take place only after a final decision on the proceedings against the individual, are initiated at the request of the public prosecutor or the wronged party. Additionally, in cases in which the collective entity's liability is based on a prohibited act recognized by law as an act of unfair competition, proceedings can moreover be initiated at the request of the President of the Office of Competition and Consumer Protection.

The provisions on the liability of collective entities for acts prohibited under a penalty started being effectively enforced in 2006. In fact, there are remarkably few rulings on the liability of collective entities in Poland. In the period from 2006 to 2020, there have been 85 rulings on the liability of a collective entity in total. None of these cases referred to corruption. Once Poland implements the provisions of the new EU directive in this matter, it is expected that these numbers will increase dramatically.

## IV. Conclusions

At first glance, the Polish law implements requirements of the EU's anti-corruption legislation currently in force as well as those enshrined in the Commission proposal of May 2023 for a new Directive on combating corruption. In reality, however, the devil is in the details. Even the brief analysis of the Polish provisions conducted within the scope of this article inevitably leads to the conclusion that significant legislative loopholes hinder the effective prevention and fight against corruption in Poland.

There are certainly glimpses of hope for improvement. One can be cautiously optimistic with regard to the liability of legal persons in particular. In 2022, a set of new provisions referring to offences against the environment was introduced into the 2002 Act on Liability of Collective Entities for Acts Prohibited under a Penalty.<sup>17</sup> These provisions provide that, in the case an offence is committed against the environment by an individual acting for the benefit of a collective entity, the collective entity is subject to liability irrespective of the verdict or judgment terminating the proceedings against the natural person. This approach radically breaks with the hitherto maintained position that the liability of the collective entity can only be dependent on the liability of the natural person.

At the same time, the principle that the amount of the fine imposed on a collective entity depends on the amount of revenue generated in the financial year in which the criminal act giving rise to the collective

entity's liability was committed was changed. The new Art. 7a of the Act now stipulates as follows: if a collective entity is held liable for the act of an individual against the environment, the court shall impose a fine on the collective entity to the amount of PLN 10,000 to PLN 5,000,000<sup>18</sup>, regardless of whether and how much revenue the collective entity earned at all in the year in which the act was committed. The determination of the amount of the fine is at the discretion of the court.

Although one should recommend a thorough modification of the model of liability of collective entities in Poland, the amendments adopted in 2022 in relation to environmental crime could easily be applied to corruption offences if the Polish parliament sees fit to do so.

The implementation of other elements of the Commission proposal for the new Directive will require further amendments to Polish law and Polish administrative practice. These are the main challenges lying ahead for the new Polish parliament and the new Polish government in the coming years, provided that the Commission's proposal for a new anti-corruption Directive will be adopted in this or a similar form.

1. Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council (COM(2023) 234 final). For a summary, see T. Wahl, "Commission Proposes New Anti-Corruption Directive", (2023) *eucrim*, 140-141; see also the articles by Clementucci and Miekina, "The Commission Proposal for a Directive on Combating Corruption" and L. Zoli "The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption", both in this issue. ↵
2. Art. 3(2) and 3(3) of the Commission proposal. ↵
3. Art. 4 of the Commission proposal. ↵
4. G. Makowski, "Specialized anticorruption authorities", in: G. Makowski, C. Nowak, A. Wojciechowska-Nowak, *Implementation of Selected Provisions of the United Nations Convention Against Corruption in Poland*, Warszawa 2015, p. 41 ff. (available at: <[https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/UNCAC\\_ang.pdf](https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/UNCAC_ang.pdf)> accessed 4 January 2024). ↵
5. Act of 6 June 1997, unified text published in the Official Journal of the Republic of Poland 2022, item 1138, as amended, hereinafter referred to as "PC". ↵
6. Act of 25 June 2010, unified text published in Official Journal of the Republic of Poland 2023, item 2048. ↵
7. OECD Phase 1 Report on Poland. Review of implementation of the Convention and 1997 Recommendation, 2001, p. 3, <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2020928.pdf>> accessed 4 January 2024. ↵
8. C. Nowak, "O potrzebie rzeczywistej kryminalizacji korupcji w sektorze prywatnym", (2021) *Przegląd Ustawodawstwa Gospodarczego*, No 3, 10-16. ↵
9. Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, 54. ↵
10. Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ L 358, 31.12.1998, 2. ↵
11. The Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under a Penalty, originally published in OJ No 197, item 1661, unified text published in Official Journal of the Republic of Poland 2023, item 659. ↵
12. For the sanctions on legal person, cf. Art. 17 of the Commission proposal, *op. cit.* (n. 1). ↵
13. Cf. Art. 17(2) of the Commission proposal, *op. cit.* (n. 1). ↵
14. The aggravating circumstances are stipulated in Art. 18(1) of the proposal and are as follows: the offender is a high level official; the offender has previously been convicted of an offence referred to Arts. 7 to 14; the offender gained a substantial benefit or the offence caused substantial damage; the offender committed the offence for the benefit of a third country; the offender exercises investigation, prosecution, or adjudication functions; the offence was committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA; and the offender is an obliged entity within the meaning of Art. 2 of Directive (EU) 2015/849 of the European Parliament and of the Council, or an employee of an obliged entity, or has the power, whether individually or as part of an organ of the obliged entity, to represent that entity or has the authority to take decisions on behalf of that entity or to exercise control within the obliged entity, and has committed the offence in the exercise of his professional activities. ↵
15. Cf. Art. 18(2)(b) of the proposal. Pursuant to Art. 18(2)(a) and (c), other mitigating circumstances include situations where the offender provides the competent authorities with information that they would not otherwise have been able to obtain, helping them to (i) identify or bring to justice other offenders or (ii) find evidence, and where the offender is a legal person and has, once the offence has been discovered, rapidly and voluntarily disclosed the offence to the competent authorities and taken remedial measures. ↵
16. Equivalent to approximately €250 to €1,250,000. ↵
17. The Act of 22 July 2022 on amending certain laws to combat environmental crime, Official Journal of the Republic of Poland 2022, item 1726. ↵
18. Equivalent to approximately €2,500 to €1,250,000. ↵

## \* Author statement

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