

***The assessment of the model of
criminal corporate liability in Poland***

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Introduction

The subject of criminal corporate liability is one of the most important for the doctrine of criminal law. A huge contribution which in social life have different types of companies, corporations or organizations and the permanent presence of risk as a permanent element of our civilization causes that significant number of offences are committed in the course of the activities of those entities. Corporate entities have an increasingly important role in legal transactions, which comes from steady growth of its number. Thus, their functioning is more and more frequent actual cause of breach of the standards of criminal law.

Today's reality requires to revise the old principle *societas delinquere non potest*, according to which the criminal liability suppose to be limited only to individuals. Corporate entities' activity is often, in fact, threat for a peaceful and secure society greater than the unlawful behavior of individuals. The pursuit of profit, competition can motivate people running companies to unlawful conducts threatening or devastating environment, launching goods creating risk to health, circumventing import bans dictated by health security reasons, or tax evasion, duties to employees, customs duties. Enterprises or other corporate entities can also be cover for illegal activities like money laundering, drug trafficking, human trafficking, production of pornographic videos and items, and so on. Traditionally understood criminal law, focusing on the liability of natural person, is unable to adequately describe the entire contents of the criminal offences, or to respond to it appropriately. Natural person is often only a part of the defective system and contributes only to a certain extent to caused evil. Bearing by individual liability is without much impact on the functioning of that system, since without much difficulty punished for example with prevention from performing function may be replaced by another.

The road to liability of corporate entities in the Polish legal system

In Poland the issue of criminal corporate liability is not new, in fact, already in Interval Period (the twenty-year period between the world wars) discussions about the possibility of holding to criminal liability of legal persons took place. As a first this question was raised by J. Makarewicz, who realized that the community in which the natural persons joined, may as an artificial legal entity perpetrate to crime, which the essence would be in disobedience against orders and prohibitions aimed to this collectivity¹. For a long time there had been discussion going whether the corporate entities can and should bear criminal liability. It was pointed out that terms such as eg. quilt, act may relate only to a natural person. However, on the other hand the fact was pointed that imposition of a financial penalty on the basis of administrative provisions is some oppressiveness for the entity, however, it does not have such stigmatizing nature as criminal sanction, and the ailment is less. In the criminal code some poor substitute for liability of the corporate entities was the article 52 of Criminal Code. According to the regulation if an offender is sentenced for an offence bringing material benefits to an individual, a company or an organisational entity without legal personality, where the offence was committed on its behalf or in its interest, the court will order the party that acquired the material benefit to return all or part of it to the State Treasury; this does not apply to a material benefit to be returned to another party².

It should be noted that Polish criminal law for several years has been changing under the influence of international instruments belonging both to international criminal law and transnational criminal law and undergo to internationalization. Criminal law has been largely internationalized. The standards developed at the international level within international organizations or in the field of criminal law *sensu stricto*, or in the sphere of the protection of human rights have begun to determine constituting and practicing national substantive criminal law, procedural criminal law and executive criminal law³.

¹ J. Makarewicz, *Prawo karne. Wykład porównawczy z uwzględnieniem prawa obowiązującego w Rzeczypospolitej Polskiej*, Lwów-Warszawa 1924, pp. 111.

² This provision has been repealed by the Act of 20 February 2015, *The Official Law journal* 2015, No 396.

³ C. Mik, *Europeizacja prawa karnego gospodarczego*, [w:] A. Adamski (red.) *Przestępczość gospodarcza z perspektywy Polski i Unii Europejskiej. Materiały konferencji międzynarodowej (Mikołajki, 26 września 2002)*, Toruń 2003, pp. 95; see. M. Królikowski, *Pojęcie "europejskiego prawa karnego"*, [w:] A. Grzelak, M. Królikowski, A. Sakowicz, *Europejskie prawo karne*, Warszawa 2012, pp. 25.

When seeking for justification for introduction of the penal criminal corporate liability, we should point out on technological progress, globalization, the emergence of new forms of crime i.e. so-called corporate crime, taking very often trans-border dimension, as well as the fact that the existing administrative-law sanctions have proven to be ineffective. The need to introduce into the Polish system of law the criminal corporate liability resulted also from the international obligations of the Republic of Poland, in particular associated with efforts of getting membership in the European Union. In the course of implementation of international documents Poland faced the need to introduce liability of legal persons for criminal offences. This obligation was fulfilled by adopting the Act of 28 October 2002 on the criminal corporate liability for acts prohibited under penalty⁴ (hereinafter referred to as Act). This law is one of the examples of the impact that international instruments had on the Polish legal system. For particularly important documents, in which it was clearly expressed about the need for the introduction of penal criminal corporate liability should include the Recommendation of the Council of Europe from 1988, considered by many commentators as the “milestone” in this regard. In accordance with the provisions contained in the Recommendation of Council of Europe, criminal liability should be borne by both private and public companies, for offences committed when performing their activities even if the activity is not within the activities of the company⁵.

We can say that the Act was adopted by Polish doctrine and practice quite critically, although generally the need to enact such law was not negated. This criticism was connected with the interpretative problems encountered in the practical application of this Act. This Act was overruled in large part by the judgment of the Constitutional Tribunal of 3 November 2004⁶, and then amended to adapt to the requirements arising from the aforementioned judgment.

In the current legal state the Act applies to the following entities: – corporate entities – the conceptual scope of the corporate entities is designated by the Article 33 of the Civil Code⁷ (there are these entities to whom specific provisions confer legal personality such as State-owned enterprises, municipal legal entities, cooperatives, private limited companies);

⁴ The Official Law journal 2012, No 768, consolidated text with further changes.

⁵ O. Górniok, *Problemy przestępczości gospodarczej w świetle zaleceń Rady Europy*, “Państwo i Prawo” 1991, no 9, pp. 53; G. Rejman, *Odpowiedzialność karna osób prawnych*, “Edukacja Prawnicza” 1995, no 2, pp. 28.

⁶ Judgment of Constitutional Tribunal from 3rd November 2004, files no K 18/03.

⁷ The Act of 23 April 1964 the Civil Code, The Official Law journal 2017, No 459, consolidated text.

- organizational units without legal personality, whom separate provisions confer legal capacity (e.g. partnerships, housing communities);
- commercial companies: with the participation of the State and local government units, the unions of the units,
- private limited companies in the organization,
- entities in liquidation,
- entrepreneurs not being natural persons,
- foreign organizational units (e.g. branches and agencies of foreign entrepreneurs).

The Act does not apply to the following entities: Treasury and local government units and unions.

The legal nature of criminal corporate liability

The legal nature of the criminal corporate liability for acts prohibited under penalty is ambiguous and difficult to classify. This is not an administrative liability, this is not a civil liability, and it is not a classic criminal liability. Criminal liability has its own characteristics and from other types of liability is different in that way, that it is the liability of individuals for their own reprehensible behavior, based on individual guilt of moral character and consist in applying to the offender afflictions of personal nature. The criminal corporate liability specified in the Act of 28 October 2002, undoubtedly has repressive form. It is evidenced by the condition of this liability, and above all repressive purpose and functions of adjudicated to corporate entities penalties and criminal measures. The omission by the legislator in the title of the Act and its content direct indication on the criminal corporate liability can be explained on the legislative grounds, because using of such expression would oblige to use directly the general part of the criminal code due to the Article 116 of Criminal Code⁸. We cannot have doubts that the corporate entities liability in Polish law is not criminal liability *sensu stricte*. It can be assumed that we are dealing with criminal liability described in the Article 42 of the Constitution of the Republic of Poland, which can be described as criminal liability *sensu largo*. The term “of criminal nature” is intended to distinguish between the criminal corporate liability based on commented act from criminal liability in *sensu stricte* referring to a natural person and for-

⁸ The Act of 6 June 1997 the Penal Code, The Official Law journal 2017, No 2204, consolidated text.

mulated in the criminal code. However, this allows to refer selected institutions known to criminal law and achievements of doctrine in terms of criminal liability referred to in the criminal code.

The conditions of the liability of the collective entity

The main concept of system of the collective entities liability is presented on Fig. 1.

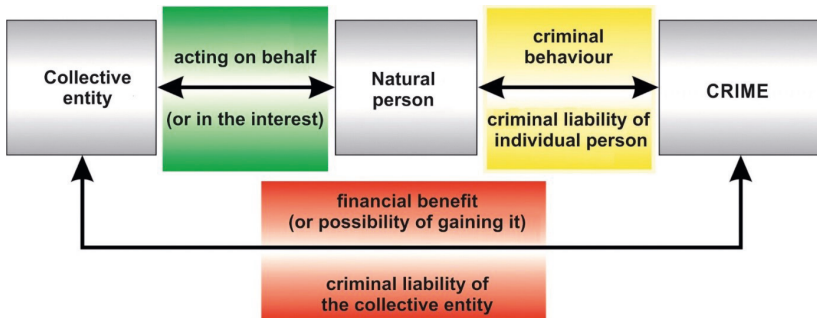


Fig. 1. The concept of system of the collective entities liability

To punish the collective entity for the acts expressly listed in the Article 16 of the Act, which were committed by the indicated entities, the Court must determine that the following conditions for liability have been fulfilled cumulatively:

1. Existence of a specified subject relation between the natural person who is a perpetrator of the crime and the collective entity – the Article 3 of the Act.
2. If there is any increased economic or non-economic benefit for the collective entity or even there is a possibility of such benefit as a result of a criminal act. Economic benefit for the collective entity is any increment in its estate i.e. the increase of its assets or reduction of liabilities. Non-economic benefit is not associated directly with the change of the material status of the entity, it can be e.g. acquirement of a potential customer, obtainment of specific information.
3. The fact of performing a forbidden act by the natural person has been confirmed by a final and enforceable court decision finding such person guilty, a court decision conditionally cancelling criminal proceedings against them or criminal proceedings in the case of tax offence, decision on granting such liability or decision of the court cancelling further proceedings due to circumstances excluding punishment.

4. If the forbidden act has been committed following at least by the lack of due diligence in choice of natural person (fault in the choice) or by at least lack of adequate supervision over such person⁹ (fault in the supervision) – on the part of the body or the representative of the entity, organization of activities of the collective entity has not provided support to avoid commission the forbidden act by the person referred to in the Article 3 paragraph 1 or 3a.

Fault in choice (*culpa in eligendo*) is the lack of diligence in choice of the person who performs the action. Fault in the supervision (*culpa in custodiendo*) is failure to perform on the natural person the adequate supervision¹⁰. Organizational fault is the wrong organization of activities of the collective entity, which causes failure of the required precautions in the behavior of the people mentioned in the Article 3 paragraph 1 or 3a.

The liability of the corporate entities for acts prohibited under penalty is restricted under the Article 16 of the Act. Collective entity is in fact under the liability only for selected acts, in particular for basically all fiscal offences and such crimes, which can be typically associated with the activities of legal persons. The catalogue of offences, for which the collective entity is subject to liability under the Act, is very extensive, contains dozens of different typification, which are constantly changing. Therefore, this provision was repeatedly reviewed. It should be noted however, that the legislator has formulated this catalogue quite arbitrarily, not avoiding, however, imperfections of the editorial nature. The principal disadvantage is that the Article 16 of the Act does not cover all economic crimes and fiscal offences. The position presented in professional literature about lack of consistence of legislator about which offences should be included and which not to the catalogue from the Article 16 of the Act should be considered as accurate.

The main penal measure applied to collective entities is a financial penalty. For the act determined in the Act may be imposed on the collective entity a fine in the amount from 1000 to 5 000 000 PLN, but not more than 3% of revenue achieved in the fiscal year in which the for-

⁹ See more, D. Habrat, *Ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary. Komentarz*, Warszawa 2014, pp. 36-37; M. Słupska, T. Sroka, Głosa do wyroku z 3.XI.2004, K 18/03, "Państwo i Prawo" 2005, no 8, p. 123-124, T. Razowski, *Odpowiedzialność podmiotów zbiorowych po nowelizacji*, "Prokuratura i Prawo" 2006, no. 9, pp. 132-133.

¹⁰ B. Mik, *Charakter prawny odpowiedzialności podmiotów zbiorowych w świetle ustawy z dnia 28 października 2002 r.*, "Przełęcz Sądowy" 2003, no 7-8, pp. 57; B. Namysłowska- Gabrysiak, *Odpowiedzialność o charakterze karnym podmiotów zbiorowych w najnowszym ustawodawstwie polskim i orzecznictwie Trybunału Konstytucyjnego* [w:] L. Gardocki, M. Królikowski, A. Walczak-Zachowska (red.), *Gaudium in Litteris Est. Księga jubileuszowa ofiarowana Pani Profesor Genowefie Rejman*, Warszawa 2005, pp. 277.

bidden act constituting the basis for the liability of the collective entity, was performed. Against the collective entities may be foreclosed:

1. objects resulting, even indirectly, from forbidden acts or which served or were designated for performance of forbidden acts;
2. economic benefits resulting, even indirectly, from a forbidden act;
3. the equivalent value of objects or material benefits resulting, even indirectly from forbidden acts.

Against the collective entities may be adjudicated:

1. prohibition of promotion or advertisement of commercial activities, production or sale of goods, performed services or consideration tendered;
2. prohibition of use of subsidies, benefits, or other form of financial support from public sources;
3. prohibition of the access to sources determined in the Act on the public finance;
4. prohibition of use of the aid of international organizations, of which the Republic of Poland is member;
5. prohibition of participate in public tenders;
6. publishing the decision.

The practice of applying the provisions of the Act

When it comes to practice of applying of the provisions of the act on criminal corporate liability for acts prohibited under penalty, it is worth noting that in the literature expressed concerns about the practical effectiveness of the Polish model of liability based on the rule of a separate fault of collective entity, which has ancillary nature¹¹. The accessory of liability of the collective entity is based on a prior recourse to action of a natural person, culpable and unlawful. This act of natural person is necessary condition of liability of the corporate entity. According to available statistics¹², Poland recorded very few judgments finding of criminal corporate liability¹³. On the basis of available stati-

¹¹ More about premises of the collective entities liability D. Habrat, *Materialnoprawne aspekty odpowiedzialności podmiotów zbiorowych w polskim prawie karnym*, Toruń 2008, pp. 84-102; M. Filar (red.), Z. Kwaśniewski, D. Kala, *Komentarz do ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, Toruń 2006, pp. 41-57; B. Namysłowska-Gabrysiak, *Ustawa o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary. Komentarz*, Zakamycze, 2004, pp. 59-132; J. Warylewski, J. Potulski, *Odpowiedzialność podmiotów zbiorowych w prawie polskim i europejskim. Komentarz*, Bydgoszcz-Gdańsk 2007, p. 43-71; A. Bartosiewicz, *Przesłanki odpowiedzialności podmiotu zbiorowego – aspekty praktyczne*, "Przegląd Prawa Handlowego" 2004, no. 2, pp. 40.

¹² <https://isws.ms.gov.pl/baza-statystyczna/>.

¹³ More on this topic, see. C. Nowak, *Odpowiedzialność podmiotów zbiorowych – praktyka stosowania prze-*

stical data, we can conclude that Polish Act on criminal corporate liability, in practice, does not work. The number of cases and judgments about finding of the liability of the corporate entities is at national level basically zero, which makes it practical significance and impact on the operation of legal persons as unnoticeable. The Act is only occasionally used by prosecutors¹⁴. We should positively evaluate the fact of entry into the Polish legal regulations relating to the criminal corporate liability. In this way, as a State we have completed formal obligation under international law and the European Union law. The Act on criminal corporate liability will remain on paper, if the model of corporate entities liability is not changed. The Ministry of Justice is working on a new law on criminal corporate liability. The current rules, although in effect already for 15 years, are rated as obsolete and ineffective.

Since the beginning of the validity of the act on liability of collective entities, pointed out that accepted collective entities liability model could cause that it would not be applied in practice. In fact, there are recorded cases of its application, although they are rare. The first judgments on liability of collective entities are from 2006. According to available statistic data, in Poland there are very few judgments indicating collective entities liability (Fig. 2)¹⁵.

pisów, [w:] *Rola urzędów administracji państwowej w identyfikowaniu nieprawidłowości w zamówieniach publicznych*, Warszawa 2014, pp. 36-47.

¹⁴ C. Nowak, *Odpowiedzialność podmiotów zbiorowych – ewolucja rozwiązań ustawowych, praktyka orzecznicza*, [w:] *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego*, red. A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska, Warszawa 2013, pp. 740.

¹⁵ D. Habrat, *Criminal Law Instruments to Counter Corporate Crimes in Poland*, "International Journal of Social, Behavioral, Educational, Economics, Business and Industrial Engineering" 2015, no 6, Vol 9, pp. 2159.

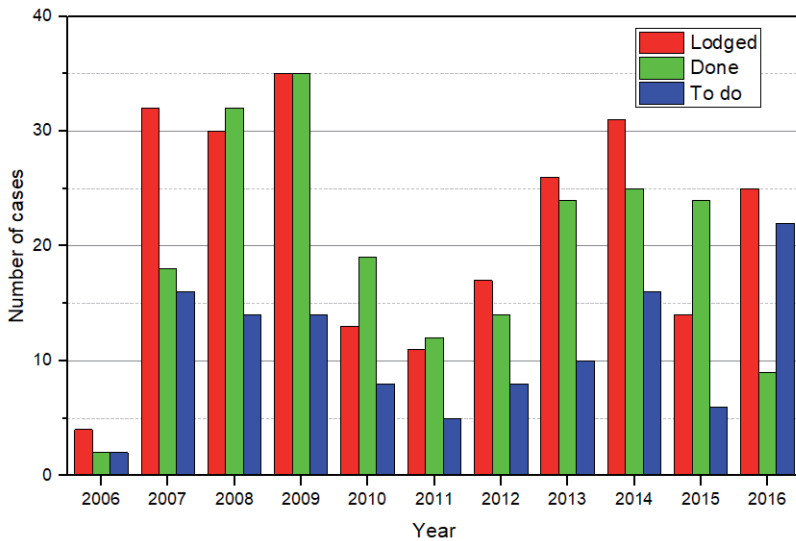


Fig. 2. Summary of the number of cases filed to the courts and solved on the basis of the act on liability of collective entities for actions prohibited under penalty in particular years of the Act being in effect

Conclusion

In conclusion it must be stated that the adoption of the act on criminal corporate liability was justified, even necessary. It contains interesting, often original legal solutions. The law may be regarded as a kind of summary of longstanding discussion in the doctrine of criminal law about the possibility and consequences of introduction to the system of Polish law criminal liability of non-natural persons. This Act has pioneering and comprehensive nature. Collective entity is not in fact the perpetrator of the crime, but only the entity which is simultaneously and alternatively liable for individual, and thus the essence of liability is not assigning to collective entity a crime, but an indication of the correct link between a crime of a natural person and related with that criminal corporate liability. We cannot have doubts that the collective liability of Polish law is not liability *sensu stricto*. We can assume that we are dealing with criminal liability *sensu largo*.

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