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Criminal Law Instruments to Counter Corporate Crimes in Poland

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***Abstract*—**The aim of study was to analyze the functioning the new model of criminal corporate responsibility in Poland. The need to introduce into the Polish legal system liability of corporate (collective entities) has resulted, among others, from the Polish Republic's international commitments, in particular related to membership in the European Union.

The study showed that responsibility of collective entities under the Act has a criminal nature. The main question concerns the ability of the collective entity to be brought to guilt under criminal law sense. Polish criminal law knows only the responsibility of individual persons. So far, guilt as a personal feature of action, based on the ability of the offender to feel in his psyche, could be considered only in relation to the individual person, while the said Act destroyed this conviction. Guilt of collective entity must be proven under at least one of the three possible forms: the guilt in the selection or supervision and so called organizational guilt. In addition, research in article has resolved the issue how the principle of proportionality in relation to criminal measures in response of collective entities should be considered. It should be remembered that the legal subjectivity of collective entities, including their rights and freedoms, is an emanation of the rights and freedoms of individual persons which create collective entities and through these entities implement their rights and freedoms.

The whole study was proved that the adopted Act largely reflects the international legal regulations but also contains the unknown and original legislative solutions.

***Keywords*—**Criminal corporate responsibility, Polish criminal law.

I. Introduction

THE criminal liability of legal persons is a matter in which the doctrine of criminal law has many doubts. The recognition that not only natural person is capable of incurring criminal liability is completely opposite, even revolutionary, in respect of basic assumptions of the traditional criminal law. In Polish law, the idea of the introduction of corporate responsibility for crimes is becoming more popular and creates a lot of questions. Introduction to Polish law a criminal nature liability of corporations (legal persons) has resulted in a lot of controversy and lack of acceptance from both the scientific community as well as the judiciary. In Poland, the issue of criminal liability of collective entities is not new, because in the twenties of the last century discussions about the possibility of holding legal persons to the criminal liability has already taken place [1]-[3].

Traditional institutions of civil, administrative and penal-fiscal law have proven to be inadequate to combat the phenomenon, which can be described as a crime of enterprises. For offences committing on behalf of the collective entities carrying out business activity only individuals could have been liable so far. Civil measures related to compensation for the injury are alleged not apply in a situation where the damage cannot be established, and the behavior of company brings threat, e.g. for environment, consumers, economic interests of the public. Administrative measures are alleged, among other things, to be in the hands of bodies which do not have the status of independent authorities, which creates danger of subjecting various external repercussions [4]-[6].

A need to introduce collective entities liability law into Polish legal system has resulted also from the international obligations of the Republic of Poland, in particular related to applying for membership in European Union. From the date of accession to the European Union Poland has been obliged to accept the objectives of *acquis communataire* that is the legal achievement of the European Union, which was associated with the necessity to adapt Polish law to the Community law. Act of 28 October 2002 on liability of collective entities for acts prohibited under penalty (hereinafter: ALCE) [7] is an example of adaptation of the Polish law to the Community law. It is undoubtedly related to Poland's accession to the European Union and causes in the Polish law system inevitable changes aimed at Europeanization of law.

The Act on liability of collective entities for activities prohibited under threat of penalty introduced to Polish law new category of entities which are subject to legal liability for criminal offences or tax offences. To collective entities liable includes legal persons and organizational units without legal personality, which separate provisions confer legal capacity, with the exception of State Treasury, local government units and their relationships. In addition, collective entity within the meaning of the ALCE is also commercial company with the participation of State Treasury, local government units or their relationships, Capital Company in organization, entity in liquidation and entrepreneur which is not natural person, as well as foreign organizational unit.

Undoubtedly the activity of specific collective entities e.g. companies or corporations can bring on the massive scale threat of legally protected goods in many areas of life. We witness repeatedly how various financial operations, often having fraud stamps, lead to bankruptcy of many businesses, unemployment of employed persons, and even the global economic crisis. Polluting of the environment as a result of unlawful business activities could bring loss incomparably greater than the losses caused by the activities of individuals

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against environment. Therefore, more and more countries introduce now to their legal systems criminal responsibility for collective entities.

II. Collective Entities' Liability Model

Making a decision about introducing to current legal system institution of collective entities' criminal liability required adoption of particular model of such liability. The task was extremely difficult. In doctrine lack of transparency in the area of legal bases governing the liability of collective entities is rightly pointed out. In Polish doctrine supporters of introduction of collective entities' criminal liability basically agree that the optimal solution is to regulate this issue in a separate act other from the Criminal Code Act.

Criminal liability is a consequence of committing by a man act which is prohibited at the time it was committed. Although there are a lot of similarities of collective liability to the criminal liability of natural persons, we should take the position that the offence in the Polish legal system can be committed only by a natural person. Collective liability is dependent on committed criminal act by a natural person and has in this context-dependent nature. This is not collective entity that commits criminal act, because of its nature is not capable to act. The collective entity bears repressive liability for an act committed by a natural person on behalf of the collective entity and in conditions likely to bring benefit to the entity, even if non-material benefits. The accepted position does not exclude that in relation to collective entities' liability some of criminal rules should be applied. We are dealing with repression demanding, as in the case of criminal liability, to complete by the Constitution and a statue of guarantee function [8].

The basic issue is that the liability provided by the ALCE is secondary to the criminal liability of natural person. Collective entity shall be liable for an offence, which is the behavior of a natural person acting on behalf of or in the interest of collective entity, in the framework of the power or duty to represent it, to make decisions on behalf of it or to perform internal audit or by crossing this permission or non-fulfillment this obligation; authorized to act as a result of exceeding powers or failure to fulfill the obligations by the above mentioned person; acting on behalf of or in the interest of the collective entity, with the consent or knowledge of the aforementioned natural person, being an entrepreneur, that directly interacts with the collective entity to accomplish legally acceptable objective (article 3 of ALCE)

To conduct the proceedings against the collective entity, what is characteristic and necessary, prior final judgment sentenced a natural person, or an order of conditional discontinuance criminal proceedings or proceedings in case of tax crimes, judgment of issuance for that person a permission to assume voluntary responsibility or a court judgment of discontinuance of proceedings against that person because of the circumstances excluding the offender's punishment. Depending collective entity's liability on a prior final determination of a natural person's liability states about secondary and derivative nature of this responsibility.

The question of the nature of legal liability of collective entities entered in the ALCE caused many opposing positions in doctrine. The main factor that influenced on such polarity was the change of liability's character in the Act, which occurred at the stage of parliamentary works. A seemingly non – significant correction gave an incentive to make statements that the proposed collective liability law for acts prohibited under penalty has no criminal liability character, but it is the " *sui generis* liability (of one's own right)", which is close to criminal liability but it is not in fact [9].

The legislator enacting the act of liability of collective entities for activities prohibited under penalty aimed to create separate grounds of liability. The legislator did not accept the formula proposed in the Bill: "the act of the criminal liability of collective entities" and defined independently substantive law rules of the liability of collective entities and rules of procedure.

The essential for determination of the legal nature of liability introduced by the ALCE is to define the nature of adopted in the act criminal liability. We have to distinguish between the liability *sensu largo* set out in the Constitution of the Republic of Poland and criminal liability *sensu stricte*, which grounds have been defined in the Criminal Code [10]. The scope of using the article 42 of the Constitution includes not only the criminal liability in its strict sense, so liability for crimes, but also other forms of legal liability related to imposing penalties to individuals [11].

The concept of criminal liability of collective entities is associated with complex organizational structure of such entities as well as relevant difficulties in finding the person liable for committing a crime which is connected with the activities of the collective entity, as well as with difficulties in bringing to the conviction such directly responsible person. It concerns in particular medium – sized and large collective entities, in which decision – making power is not accumulated to one person, because often to take a specific decision few people are authorized simultaneously. Such division of tasks within the framework of the collective entity can cause serious difficulties in assignment of the behavior to specific person.

III. Collective Entity Fault

Polish criminal law is based on the principle of guilt. The perpetrator of the offence bears therefore criminal liability only when it can be charged with committing a criminal act. Basic condition for personal accusation is mental bond existing between the perpetrator and the act. Article 1 § 3 of the Penal Code, expressing the principle of guilt, states: "the perpetrator of a prohibited act does not commit an offence if guilt cannot be attributed to him at the time of commission of the act". Aforementioned mental bond cannot be attributed neither to a legal person nor organizational units without legal personality. Liability of collective entities for acts prohibited under penalty is detached from the criminal concept of natural person's fault and based on the concept of fault in the choice or supervision, or organizational fault.

The fault in choice (*culpa in eligendo*) is a lack of diligence in selection of the person by whom the act is performed. Who,

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in fact, for performing activities uses another person should make a choice carefully and with due diligence, in particular, verify whether a person has sufficient professional qualifications. Diligence in making the choice should rely on verifying whether the person concerned does not have such predispositions and habits that can expose third parties to detriment. Diligence is also taking into account life and work experience, education, physical and mental fitness, other characteristics of the persons, who are assigned to perform activities, providing to that person necessary guidance and teachings. The main questions that arise in the context of the conditions for lack of due diligence in the choice focus around establishing standards according to which this premise could be assessed and cases of choices made by collegial body.

Fault of supervision (*culpa in custodiendo*) is associated with determination whether a specific person acting on behalf of or in the interest of the collective entity within the framework of powers or obligation to represent it, taking on its behalf decisions or perform internal control or by crossing this permission or non - fulfillment of this obligation, was obligated to exercise supervision, which involves indication of lack of due diligence on the side of the supervisory body and indication of existence of causal connection between the lack of supervision and supervised behavior [12].

When it comes to so-called fault in organization, this is an issue that caused and still causes a lot of controversy in the literature [13]-[15]. The so-called fault in organization, briefly speaking, is inappropriate organization of collective entities' activities that causes failure of required precautions in the behavior of the persons mentioned in the article 3 point 1 or 3a. One of the reasons supporting the collective organizational fault may be the situation that functioning of the collective entity was not based on any formal basis, which would mean the activities of that entity, as it were, on an ad hoc basis. The second kind of situation could, in turn, rely on the fact that although there are some formal frameworks for the functioning of the collective entity, or at least there is some kind of accepted practice, however, they are so general that they leave too wide range of decision-making clearance [16], [17]. The behavior of due diligence by the authority or representative of the collective entity can lead to release the collective entity from liability.

IV. Practice in Applying of the ALCE Provisions

We can say that ALCE was critically accepted in Poland by both doctrine and practice, although generally need to enact such act was had not been denied. The criticism was connected with interpretative problems and other inaccuracies about the ALCE.

Even before entering into force of the act (10th April 2003) Polish Confederation of Private Employers filed a motion to the Constitutional Tribunal to examine the conformity of certain provisions of the ALCE with Constitution of the Republic of Poland. The result was a judgment of 3rd November 2004 [18], in which the Tribunal declared that certain provisions of ALCE are contrary to Constitution of the Republic of Poland. These provisions lost their power on 30th June 2005. Since that date, due to the loss of legal capacity by the provisions of the ALCE regarding to collective liability basis, the whole Act in fact could not be applied.

Loss of power by the legal provisions in question after the judgment of the Constitutional Tribunal constitutes an incentive to take works on an amendment to the ALCE The idea was to introduce regulations consistent with the provisions of the Constitution, which would not cause interpretation doubts. The Government has taken action, which resulted in drafting amendments to the ALCE and enacting the act from 28th July 2005 of changing the Act of liability of collective entities for acts prohibited under penalty [19].

Article 5 of the ALCE, among other things, was amended, in which, however omitted the premise of own liability of collective entity for actions of persons referred to in article 3 point 1 of the ALCE, which resulted in the inability to render this category persons to liability for acts prohibited under penalty. Only changes made to the ALCE by the act of 29th July 2011 on amendments of the act - The Penal Code, The Criminal Proceedings Code and the act on liability of collective entities for acts prohibited under penalty [20], removed the legislator's error. The indicated legal loophole caused considerable difficulties in practice.

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.

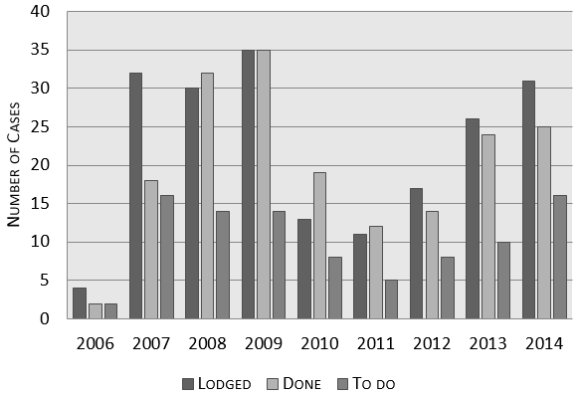


Fig. 1 Summary of the number of cases filed to the courts and solved on the basis of the act on liability of collective entities for actions prohibited under penalty in particular years of functioning of the Act [21]

On the basis of statistical data concerning number of cases filed and handled by district courts (Fig. 1) we can see that after the first period (2007-2009) of greater participation of lodged to courts, currently (2010-2014), although the share is smaller, gradual and steady increase is visible. This is probably due to the improvement of the quality of the act as a

result of the amendment, and experience of the first phase of application. Awareness of this kind of responsibility among representatives of the practice and resume writing has been increased as well.

V. Conclusions

Law is subject of constant evolution, trying to keep up with the evolution of social, political and economic life. The problem concerns in particular criminal law. Conventional methods of fighting crime are becoming more and more often ineffective against its new manifestations. The legislator must therefore seek effective instruments to combat emerging phenomena of socially harmful, moving away from the existing traditional principles of criminal law. With such situation we have to deal with in case of repressive liability of collective entities in the form of commercial law companies, businesses, foundations, associations, etc., which can be used by persons representing them as an instrument of criminal activities or placing the profits coming from crimes. Therefore, the idea of entry into the Polish law system the criminal liability of collective entities that is close to criminal liability of natural persons shall be considered as the most desirable.

Adopted in the act collective liability model leads to a paradoxical situation in which conviction and punishment of a person will be (in practice) much easier and more frequent than punishment of a collective entity.

Enacted Act, though it is largely reflection of international regulations, contains also unknown and original legislative solutions. Such venture, as the introduction to the Polish legal system liability of collective entities under criminal law, had to be accompanied by the appearance of discussion issues and requiring improvement.

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