
LIABILITY OF COLLECTIVE ENTITIES

We indicate that on 08.01.2019 the government adopted a bill on the liability of collective entities^[1] for acts prohibited under penalty prepared by the Ministry of Justice and then submitted it to the Sejm (Polish Parliament). The bill is intended to replace the existing ineffective law regulating the liability of collective entities.

The basic objectives on which the proposed regulation is based, which at the same time constitute a fundamental difference to the existing solutions, are:

- extending the liability of collective entities – to include behaviors recognized as the own behavior of collective entities that fulfils the elements of the prohibited act,
- the liability of a collective entity for all acts prohibited under penalty as a crime or fiscal crime, excluding offences triable on private prosecution,
- resignation from the requirement to obtain a preliminary ruling (judgment sentencing a natural person).

The bill also provides for regulations protecting persons reporting irregularities in the functioning of a collective entity that have led or may lead to or may facilitate the commission of a prohibited act - the so-called whistleblowers.

A new aspect is the possibility under the bill to hold liable a collective entity not having its registered office in Poland.

In the case of at least medium-sized entrepreneurs^[2], the bill provides that the irregularity, which may determine liability, is, among others, the lack of properly structured division of responsibilities and competences within the organization between its bodies, individual organizational entities and employees, or the failure to appoint a person or an organizational unit supervising compliance with the provisions and rules regulating the activities of an entity. The above means that in many cases the Compliance Management Systems (CMS) will become an indispensable element of the organization, and not just an optional tool as they have been so far.

A collective entity will not be held liable for an irregularity if it proves that all the bodies and persons authorized to act on its behalf or in its interest have observed due diligence required by the given circumstances in the organization of the entity's activity and in the supervision of this activity. The burden of proof in this matter has been transferred to the company, i.e. the company will have to prove that it had an effective compliance management system.

The bill provides for several sanctions, including:

- the possibility to apply a preventive measure, e.g. in the form of a ban on promotion and advertising, or a prohibition of concluding contracts of a specific

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type – in order to secure the proper course of proceedings regarding the liability of a collective entity,

- the possibility of establishing a compulsory administration,
- a financial penalty in the amount from PLN 30,000 to PLN 30,000,000. The financial penalty will not depend on the revenue earned by the company. Owing to this fact, it will be possible to punish entities that have assets and do not show revenues.

Regulations are modeled on solutions already used in the European Union countries, including France, the Netherlands, Denmark and Italy. In Germany, the works on introduction of similar changes are still underway.

We recommend each entity to check the rules and principles already in force and to adapt them to the new, abovementioned requirements. The above rules and principles should cover all areas of the organization's activity and should be tailored to its specificity and needs. Each compliance system must be a reflection of the risk of non-compliance, existing in a given specific organization, and not just an abstract one. The ISO standards, e.g. ISO 37001 Anti-Bribery Management Systems, may be helpful in this regard, but only as one of the tools.

Should you have further questions, we remain at your disposal.

[1] Collective entities are, for example, limited liability companies or limited partnerships.

[2] The bill refers to the definition of a medium-sized entrepreneur within the meaning of art. 7 sec. 1 point 3 of the Act of March 6, 2018 - Entrepreneur law.

* *This Newsletter does not constitute legal or tax advice.*