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Harmonizing Corporate Duties:

Corporate reporting and prosecutorial
discretion in Poland.

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Introduction

The question in the title is one of the most frequently asked by clients who face the possibility of an ongoing criminal activity involving their company. Often, this question includes concerns about the consequences of criminal proceedings - not only regarding the liability of individuals and the company but also concerning the company's reputation, business interests, loss of control over the matter, and the predictability and costs - including financial ones, associated with the entire process.

In Poland, these concerns are particularly justified, especially today, and any decision to report to law enforcement requires careful thought and strategic planning. Below, I will explain what factors should be taken into account in this regard.

LEGAL CONSIDERATIONS

There are several issues that significantly differentiate Polish criminal procedure from those of Western European countries and Anglo-Saxon states. One of these is the leading role of the prosecutor in initiating criminal proceedings, often with limited regard for the victim's wishes or interests. Most criminal offenses are prosecuted 'ex officio', meaning that credible information about suspected commission of a crime - regardless of its source - may serve as a basis for opening an investigation. The victim's position does not matter; in fact, they may not even be aware that proceedings are ongoing in which they are a victim. The same applies to decisions regarding the conclusion of proceedings; how the case is finalized depends on the prosecutor or court. Furthermore, the possibilities of plea bargaining have been significantly restricted in recent years.

Most economic and financial crimes involving property of any kind are prosecuted "ex officio."

Polish criminal law draws a distinction between a 'social' obligation to report a crime and a 'legal' obligation. The first relates to an ethical, socially responsible attitude that involves informing law enforcement about any justified suspicion of a crime, for the public, common good. The second

applies strictly to certain categories of serious criminal and political offenses (such as murder, aircraft hijacking, attacks on state institutions, pedophilia, etc.) and is subject to sanctions. Having credible information about the second category of offenses and failing to report them can result in conviction and imprisonment. Economic and financial crimes are not subject to a legal obligation to report, and there is no penalty for failing to notify criminal enforcement authorities.

Public institutions are required to report to law enforcement authorities (prosecutors or police) whenever they learn of a crime that is prosecuted ex officio. In complex economic cases involving various legal regimes and regulatory authorities overseeing the market, it can be assumed that such institutions, upon discovering the crime incidentally, will automatically report it to law enforcement authorities.

False reporting of a crime is a crime in itself and is punishable.

An investigation is initiated when the authorities have reasonable suspicion of a crime. Suspicion alone is not enough; the report must be supported by rational arguments or evidence that can be verified. There is no requirement that the report be made by a professional lawyer.

Finally, an important issue for many - namely, corporate criminal liability.

In Poland, the criminal liability regime primarily concerns individuals. In practice, people bear the main risks, such as the pretrial detention as a preventive measure. The law on corporate criminal liability exists but is rarely applied in practice, and the penalties imposed are often very low. This has various reasons, including the requirement of a final conviction of a company's representative to initiate proceedings against the company (except in environmental crimes), the lack of specialized units/prosecutors dealing with such cases, and the absence of political will to establish real criminal responsibility regime for companies.

Therefore, when asked about the impact that initiating criminal proceedings might have on a company's criminal liability, the answer is that, in theory, it could, but in practice it is limited.

REALITIES OF CRIMINAL PROCEEDINGS IN ECONOMIC CASES

Recently, during an informal conversation with a young but experienced prosecutor, we found that it is difficult to contact the 'guardian' of your case, you don't know when it will be resolved, and whether the same 'guardian' will handle it in a month or if a new one will be assigned who will have to learn the case from scratch. The volume of unnecessary documents, formalism, and hierarchical structures that limit the independence and autonomy of prosecutors are completely out of step with modern private sector organizations. If the prosecutor's office were a business, it would not last long.

The justice system in Poland has been in crisis for years, which has been widely reported in the international press and within European courts' rulings (ECHR, ECJ). Political changes since 2015 aimed at subordinating the prosecutor's office to the executive branch (previously, the positions of the Prosecutor General and Minister of Justice were separate), and influencing the selection and promotion of judges, have led to a collapse, - felt by anyone who interacts with the justice system today. Legal reforms over the past decade can clearly be characterized as populist aimed at automating procedures and reducing judicial discretion, tightening penalties, and limiting solutions that facilitate settlements between parties. These changes have made criminal law less adapted to economic realities.

Investigations and court proceedings last years. Despite the existence of dedicated departments for economic and tax crimes, staffing shortages are significant, and the quality of procedural decisions often raises justified doubts. The interests of victims are not a primary focus in these proceedings.

Despite these shortcomings, there are still strong arguments supporting the decision that a company should pursue its interests in criminal cases by utilizing the instruments of criminal law and notifying law enforcement authorities.

WHAT SHOULD COMPANIES AND COUNSEL CONSIDER WHEN MAKING A DECISION TO REPORT?

To accurately assess the risks and legal implications for a company arising from a suspicious event, it is necessary to establish the facts. In large organizations, the process used for this purpose is conducting an internal investigation. Such investigations, except for specific guarantees related to whistleblower protections, are not regulated in Poland. There are no universally applicable rules guiding how internal investigations should be conducted. It is more of a practical approach, supported by, among others, international practice, the ISO 37008 standard on Internal Investigations of Organizations, which overlaps to some extent with other legal regimes (such as labor law, trade secrets, data protection).

When considering the source of information about irregularities, the whistleblower protection regime comes into play. Poland implemented the provisions of the EU directive, commonly called the 'Whistleblower Directive', only in the second half of 2024. These rules prohibit retaliatory actions against whistleblowers and introduce the concept of 'follow-up actions'; the employer's actions in response to a report of irregularities made by a whistleblower. Follow-up actions include registering and analyzing the report, activities aimed at investigating the information contained in it, communication with the whistleblower, and ultimately, closing the case and informing the whistleblower about the outcome. Follow-up actions are essentially internal investigations initiated by the whistleblower's report.

In this context, it is important to remember that information about irregularities may not always come from the whistleblower, and internal investigations may not always occur in the employer-employee relationship. Another key point is that the whistleblower protection provisions provide additional safeguards; they enable external reporting. This includes informing central authorities (in Poland, the Office of the Commissioner for Human Rights) and other appropriate institutions about discovered irregularities. Practically, this prevents cases from being simply 'swept under the carpet'. The law both authorizes and contains external reporting and offers protection to the Whistleblower.

Once the facts are established, the next step is to consider whether the behavior in question could be deemed a crime and whether the company has been harmed.

Harm is recognized when any legally protected interest has been violated. Within an organization, many situations may occur that are irrelevant from the company legal interest perspective. From my recent professional experience, examples include finding child pornography materials on devices possessed by an employee, theft in the office, etc.

In such cases, when considering reporting to law enforcement, the company must remember that it will act as the reporting party, not as the injured party. This status significantly limits procedural rights, such as the right to access information from the investigation.

On the other hand, if injury to the company has occurred as a result of a crime, the management is obliged to react. According to the Commercial Companies Code, the management's duty is to take care of the company's assets and to increase their value. At the same time, this requires taking actions to repair the damage caused to the company. Failure to act in this regard will be seen as neglect of management duties.

To make appropriate decisions about how to remedy the damage, the management must assess the extent of the loss, the costs of corrective actions, the time required to achieve results, and the likelihood of success. And therefore, criminal proceedings can be significantly helpful.

One of the fundamental principles of criminal proceedings is redressing the harm caused by a crime. The victim in a criminal case may submit a claim for compensation, and the court determining the defendant's guilt must also decide on the issue of damages. Making such a claim involves no court fees. The extent (value) of the damage is one of the elements used to define different types of economic crimes, which means that law enforcement authorities will carry out evidence collection, often with the help of court-appointed experts.

Criminal proceedings also offer the broadest opportunities for evidence collection. Law enforcement agencies can use coercive measures such as searches, and witnesses may refuse to answer questions in exceptional situations.

Finally, when charges are brought against a suspect, the prosecutor can impose temporary measures, e.g. freeze the assets of the person charged (sometimes not only), by accessing public registers, bank accounts, etc. This provides a tangible source for satisfying compensation claims of the harmed company.

I have also encountered cases where the estimated value of damages was lower than the costs of pursuing recovery, which led management to make a conscious decision to refrain from reporting the incident to authorities or to abandon active pursuit of claims, leaving enforcement solely to law enforcement agencies.

ADDITIONAL CONSIDERATIONS FOR MANAGEMENT

When management considers reporting other circumstances also play a critical role.

Primarily, the ethical and reputational implications for the company and its management are key. It can be said that each case has a particular weight and media potential. Acting in accordance with the organization's values and principles often equates to fulfilling the aforementioned social obligation to report a crime. In terms of reputation, practical questions arise: what will be the perception if we report the matter to authorities, versus if we do not? Will we need to justify why we chose not to hand the case over to law enforcement? How?

It is also important to note the growing role of an internal stakeholder. For example, an employee who values organizational integrity and alignment with declared values may express their dissatisfaction on social media within seconds.

Another issue concerns the costs associated with handling the proceedings, which can be burdensome for the company, for persons performing managerial functions and other employees. Participation in criminal investigations, generating necessary information for law enforcement, is a time-consuming and often intimidating process.

A separate, and highly important, issue requiring legal coordination and consistency involves the reporting duties arising from other legal regimes. Some examples include the following:

1. In the case of a personal data breach, the data controller (company) is obliged to notify the Data Protection Office (UODO) about the incident. If a crime is suspected, the UODO may notify law enforcement agencies.
2. For public companies, there is an obligation to disclose price sensitive information. In certain situations, this may require reporting to law enforcement, especially if shareholders expect explanations regarding potential criminal acts harmful to the company.
3. Entities required to report suspicious transactions - money laundering (obliged institutions) to the General Inspector of Financial Information (GIIF) must be aware that a credible suspicion and subsequent report to GIIF can lead to the initiation of criminal proceedings.

CHANGES, DEVELOPMENTS

In the face of political obstruction, the crisis of the domestic justice system, and declining legislative quality, positive changes in the legal system are being driven by the need to implement or harmonize regulations with those in other EU countries. This was the case, for example, with the previously mentioned whistleblower protection directive; only the penalties imposed by the European Court of Justice (ECJ) for lack of implementation forced the Polish government to introduce the relevant law.

Regarding the subject of this article, hope is associated with the draft EU directive on the fight against corruption (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0234>). According to press reports, EU authorities have recently intensified discussions on harmonizing rules aimed

at preventing and combating corruption (<https://baselgovernance.org/blog/eus-anti-corruption-directive-enters-critical-juncture>).

Although, corporate criminal liability is not really operative at the present time in Poland as noted earlier, it remains a fundamental risk in the decision-making process, regarding whether or not companies should report suspected criminal activity to law enforcement authorities.

The draft EU directive assumes, at the member state level, the harmonization of corruption offenses and the unification of rules governing corporate liability for corruption. This includes making procedural mechanisms more realistic, as well as introducing effective and transparent processes for non-trial resolutions that can be used to settle corruption cases involving legal entities. The flexibility of proposed solutions aims to encourage companies to report to authorities and to engage in settlement solutions that, under court supervision, will resolve cases. The directive is also intended to strengthen the rights of entities harmed by corruption, which will undoubtedly influence the risk assessment and the decision-making process regarding whether to report a crime to law enforcement authorities.

Once the directive is adopted, it is difficult to predict when EU member states will implement it and when the corresponding national laws will actually be enacted.

AUTHOR



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[Janusz Tomczak](#) is an expert and partner at Raczkowski law firm, specializing in business crime, compliance, and investigations, explains the factors that a company operating in Poland should consider when deciding whether to report a suspected crime to law enforcement authorities.