

JDP

Newsletter

LEGAL REFORMS



Latest changes to the Polish Criminal Code

October 2023

jdp-law.pl/en



On 1 October 2023, the amendment to the Criminal Code came into force. From the perspective of business transactions, the new regulations will entail far-reaching changes, forcing managers to act more cautiously. Despite critical voices of most of the academic environment², the act has been adopted, signed and enacted.

Below you will find an overview of the changes – crucial from the managers' point of view – which may be described as a radicalisation of the risk of criminal liability for white collar crimes. The amended provisions apply to events that occurred after the entry into force of the amendment, i.e. 1 October 2023. Therefore, it should be considered whether there is a way to prepare for these changes in advance and mitigate the risk of personal liability.

I. Drastically increased penalties for white collar crimes

The legislature toughened penalties for the most serious crimes against property and business transactions. Aggravated types of certain crimes have been introduced, in case of which the punishability is determined based on the value of the property that the crime relates to:

- property value exceeds **PLN 5,000,000** – imprisonment between **3 and 20 years**
- property value exceeds **PLN 10,000,000** - imprisonment between **5 and 25 years**.

In this way, the legislature has introduced the economic indictable crime into the legal regime. So far, the penalty for most of the crimes affected by the amendment was a maximum of between 1 and 10 years of imprisonment.

An indictable crime is a prohibited act punishable by imprisonment for at least 3 years or by a more severe penalty.

The changes regard, but are not limited to, the following crimes:

- **mismanagement (acting to the company's detriment)** – Article 296(1) and (2) of the Criminal Code
- **manager corruption** – Article 296a(1) and (4) of the Criminal Code
- **money-laundering** – Article 299(1), (2), (5) or (6) of the Criminal Code
- **causing property damage by documenting a business activity in an unreliable manner** – Article 303(1) of the Criminal Code (in this case, the current maximum penalty was imprisonment for between 3 months and 5 years)
- **theft** – Article 278(1), (1a), (2), (3a), (5) of the Criminal Code
- **appropriation** – Article 284(1) and (2) of the Criminal Code
- **fraud** – Article 286(1) of the Criminal Code

¹ Act of 7 July 2022 to amend the Criminal Code and certain other acts (Journal of Laws of 2022 item 2600).

² <https://karne24.com/wp-content/uploads/2022/11/apelnowelizacja2022.pdf>.

³ An indictable crime is a prohibited act punishable by imprisonment for at least 3 years or by a more severe penalty.

Is it possible to prepare for these changes?

Conducting criminal proceedings does not necessarily lead to the conclusion that a crime has been committed. However, the mere conduct of such proceedings, the commitment of an organisation's time and resources, and the accompanying fear for the personal safety of managers that criminal proceedings entail is a significant inconvenience.

In addition, white collar crimes usually involve complex facts and economic events. In these types of cases, there is a high risk that the circumstances of the case will be misunderstood by law enforcement authorities, who are not involved in economic transactions on a daily basis. Such risk increases if there is insignificant documentary evidence in the case. The findings are then based on witness testimonies which may differ significantly from actual events (inter alia, due to the passage of time).

Moreover, the change in the risk of criminal liability for white collar crimes, by drastically increasing the possible imprisonment sentences, will not be without an impact on the way law enforcement authorities proceed. By providing for such severe penalties, the legislature has assigned a very significant social harm (assessed theoretically) to these crimes. So far, such penalties were generally reserved only for crimes against life or health and against the system. This, clearly, will translate into law enforcement activity in the economic area and the intensity of the procedural measures taken.



From now on, the advice "if you haven't committed a crime, you have nothing to worry about" no longer applies.



The risk of criminal proceedings is inherent in business operations and, like any other risk, can be identified and mitigated.

How to reduce the severity of criminal proceedings and the risk of law enforcement authorities misjudging business events?

Prepare your organisation for criminal proceedings by implementing criminal compliance tools in your organisation:

- **Procedure in case of inspection or search:**
 - prepares those on the so-called front line to respond appropriately to a visit by authority representatives
 - enhances the security of the organisation with regard to confidential information (e.g. business secrets)
 - protects the organisation against infringement of its rights in the course of the activities
 - ensures the peace of mind and personal safety of employees and managers

- **Anti-corruption policy:**
 - reduces the risk of the organisation and its employees being involved in corruption offences
 - substantiates the exercise of due care by management board members in case of corruption crimes committed by employees
 - enhances the security of organisations from the perspective of the liability of collective entities
- **KYC and contractor selection procedure:**
 - reduces the risk of entering into a business relationship with a dishonest counterparty
 - reduces the risk of managerial corruption (Article 296a of the Criminal Code)
 - substantiates the exercise of due care by management board members in case of corruption crimes committed by employees
 - enhances the security of organisations from the perspective of the liability of collective entities
- **Defence file** (documenting the economic rationale behind business decisions – **business judgement rule**)
 - significantly reduces the risk of allegations of mismanagement (acting to the company's detriment)
 - hedges the risk of personal liability of management board members for the occurrence of a loss in the company's operations

II. Each shareholder will have the right to file for prosecution against mismanagement without harm

From 1 October 2023, each shareholder who holds at least 1 share of the company will have the right to file a motion for prosecution for the crime of mismanagement without harm (Article 296(1a) of the Criminal Code).

This crime involves failure to perform a duty or abuse of powers by members of the company's management board that led to a direct danger of significant (exceeding PLN 200,000) property damage. The conduct of the perpetrators therefore did not ultimately lead to harm to the company, but the harm was almost certain.

This crime is prosecuted upon a motion, so for criminal proceedings to be conducted, a declaration of the relevant entity's willingness to prosecute the offender is required. In the case of Article 296(1a) of the Criminal Code, this has so far been exclusively the harmed party, i.e. the company itself.

⁴ The crime of mismanagement causing significant property harm to the company (exceeding PLN 200,000) is punishable under Article 296 § 1 of the Criminal Code and does not require a motion for prosecution.

A motion for prosecution should be distinguished from a report of a suspected crime. The report may be filed by any person, e.g. by a minority shareholder or a person unrelated to the company.

In the case of crimes prosecuted upon a motion, such as, e.g., the crime against Article 296(1a) of the Criminal Code, a report of a suspected crime triggers an action by the prosecutor's office to collect a statement from the harmed person as to whether he or she is willing to prosecute the offenders.

The absence of a motion for prosecution is a ground for the refusal to initiate criminal proceedings or their discontinuation.

Given the principles of company representation, in practice, this meant that a motion for prosecution depended on the decision of the persons as to whose conduct such criminal proceedings would be brought and, for obvious reasons, such motion (despite a report of a suspected crime being filed by, for example, a minority shareholder) was not submitted. Only in the case of changes in the shareholding structure and changes in the management composition, it was possible to initiate proceedings against former members of the management board.

Following the amendment of the Criminal Code which came into force on 1 October 2023, **the power to file such a motion has been granted to every shareholder of the company.** However, the right to file a motion is not equivalent to granting these persons the status of the harmed parties. The harmed party will still be the company itself and therefore the company will have the right to take actions in the proceedings.

On the one hand, this amendment will better protect minority shareholders who demand that the prosecution investigate certain irregularities in the company. Nevertheless, the amendment will certainly be used as a tool in corporate disputes to force concessions from the disputing party.

III. New type of crime – evasion of a compensatory measure

As of 1 October 2023, failure to implement a compensatory measure in the form of redress of damage, compensation of harm or payment of punitive damages ordered by the court in criminal proceedings will constitute a crime prosecuted upon a motion of the harmed party, punishable by imprisonment of between 3 months and 5 years.

Accordingly, in the case of, for example, a person convicted of a crime whom the court ordered to redress the damage in addition to the penalty, groundless evasion of fulfilling this obligation will constitute a separate crime for which this person may also be convicted.

IV. New catalogue of penalties

Along with toughening penalties for some crimes, as mentioned in **section I** above, the legislature also amended the catalogue of penalties that can be imposed on convicted persons. Previously, the penalty of imprisonment could be imposed for between 1 month and 15 years, and beyond that range – for 25 years⁵. Regardless of this, life imprisonment could be imposed for the most serious crimes. In practice, this meant that the court could impose a maximum sentence of e.g. 15 years' imprisonment for crimes punishable by, for example, 3 or more years of imprisonment. However, it could not impose a sentence of, for example, 17 or 23 years' imprisonment.

This will change significantly in the case of crimes committed after 1 October 2023.

Needless to say, the penalty is limited by the risk provided for the crime.

The distinction between imprisonment of up to 15 years and 25 years has been abolished. Both penalties will be replaced by a single one – **imprisonment for up to 30 years**. In practice, this means that sentences ranging from 1 month to 30 years can be imposed.

In addition, the legislator has provided for **life imprisonment without parole**.

On the basis of Article 77(3) and (4) of the Criminal Court, the court can prohibit the application of parole in the case of persons who have been sentenced to life imprisonment. This solution is criticised on the grounds that it is contrary to the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms⁶.

If you have any questions, feel free to contact our expert directly.

Contact



Arkadiusz Górski

Senior Associate, Attorney-at-law
White Collar Crime

arkadiusz.gorski@jdp-law.pl

⁵ Needless to say, the penalty is limited by the risk provided for the crime.

⁶ See the position of the Commissioner for Human Rights - <https://bip.brpo.gov.pl/pl/content/rpo-bezwzglesne-dozywocie-uchylenie-ms-odpowiedz>.