

Criminal liability of managers - changes



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Introduction

On 9 June 2011, the Parliament adopted the Act Amending the Criminal Code and Certain Other Acts (the "Act"), which amends, among other things, the Criminal Code and the Commercial Companies Code in relation to the criminal liability of persons managing commercial companies, co-operatives or insurance companies and acting to the detriment of such entities. On 16 June 2011, the Senate approved the Act without corrections. It will now be presented to the Polish president, who has 21 days to either sign or veto it, or to refer it to the Constitutional Tribunal for it to establish whether the Act is constitutional.

If you would like to know more about the subjects covered in this publication or our services, please contact:

Bartosz Krużewski +48 22 627 11 77

Marcin Ciemiński +48 22 627 11 77

To email one of the above, please use
firstname.lastname@cliffordchance.com

Clifford Chance, Norway House, ul.
Lwowska 19, 00-660 Warsaw, Poland
www.cliffordchance.com

Existing legal status

Presently, the liability of persons who manage commercial companies and act to their detriment is regulated in Article 585 of the Commercial Companies Code and Article 296 of the Criminal Code.

The former Article provides for the offence of "acting to the company's detriment" by persons who participate in the creation of a commercial company, by members of its management and supervisory boards, audit committee or liquidators. The offence is perpetrated if there is a genuine threat of damage, but it is not necessary for damage as such to actually occur.

However, the offence under Article 296 of the Criminal Code (also referred to as the offence of breach of trust) requires that actual significant property loss (i.e. with a value exceeding PLN 200,000) occur. This offence may be committed by anyone who pursuant to an act of law, decision of a competent relevant authority or under an agreement is obliged to attend to the financial affairs or business activity of a natural or legal person or other organisational entity. The scope of Article 296 of the Criminal Code is therefore broader than in the case of the offence of "acting to the company's detriment" because it also applies to partners in partnerships who are obliged to manage out the partnership's affairs.

Works on amendments

The present regulation of the liability of managers of commercial companies who act to the detriment of the company has been criticised both by the market participants and legal theorists. Reservations were expressed with respect to, for instance, unclear conditions for liability under Article 585 of the Commercial Companies Code, the *ex officio* procedure under which the said offences are prosecuted, differentiation between the protection afforded to partnerships and capital companies, and the partial overlapping of the afore-mentioned Articles.

The Draft Act Amending the Commercial Companies Code and Other Acts was tabled before the Parliament on 17 March 2011 by the Parliamentary "Friendly State" Committee. In its original version, the Draft Act provided for an amendment to Article 585 of the Commercial Companies Code by clarifying that criminal liability for committing the offence may be incurred by persons holding a post and not, as has been the case to date, only persons that are members of specific authorities of the company. Hence, the provision would also apply to persons who actually manage the company's affairs. What is more, the Draft Act provided for prosecution of the offence under Article 585 of the Commercial Companies Code based on a motion by the injured party. Under the initial wording of the Draft Act, Article 296 of the Criminal Code was to remain unchanged.

As a result of the works of the Parliamentary committee that ended on 24 May 2011, the Draft Act was considerably changed. The Draft Act no longer aimed at modification of Article 585 of the Commercial Companies Code, but repealed it. Instead, the Draft Act did provide for material amendments to Article 296 of the Criminal Code. In addition to abuse of trust resulting in damage, the new §1a that has been added to the Article introduced criminal liability for action that causes a direct risk of significant damage. The draft also provided that the offence of breach of trust shall be prosecuted on a motion by the injured party (unless an injured party is the State Treasury).

During the subsequent meeting of the Parliamentary committee on 8 June 2011, the final wording of the Draft Act was agreed. Prosecution on a motion was limited to a situation where the perpetrator causes a direct risk of significant property damage to the company. Where damage has been inflicted on a company, an *ex officio* prosecution was retained. Subsequently, the Draft Act, with the content described above, was put to the vote during the Parliament's plenary session and was adopted on 9 June 2011.

Scope of changes

The entry into force of the above-mentioned amendments will mean, first of all, the following:

- introducing the requirement of causing a "direct risk of significant property loss that the company may suffer" for the possibility of bringing someone to criminal account in situations where no damage was caused;
- limiting *ex officio* prosecution of the offence of breach of trust; the offence shall be prosecuted on a motion by the injured party, but only in cases where damage has not been actually caused (additionally, prosecution on a motion does not apply if the State Treasury is the injured party); the procedure under which the offence may be prosecuted (*ex officio* or on an application) shall depend on the effect of the perpetrator's action (actual significant property loss incurred by the company or a direct risk of such a loss being incurred); and
- introducing criminal liability of the partners of partnerships who are obliged to manage the partnership's affairs, for causing a threat of damage to the partnership.

Opinion of the amendments

It should be assessed positively that an attempt has been made to ensure comprehensive regulation of criminal liability for acting to the detriment of a company in one provision – Article 296 of the Criminal Code – and the removal of the criminal provision from the Commercial Companies Code, and also that the

offence shall be prosecuted on a motion of the injured party if there was only a risk of damage.

However, the fact that other forms of acting to the detriment of a company may be persecuted *ex officio* and that action which does not result in damage is still an offence (although, at present, such offence shall, as a rule, be prosecuted only upon the injured party's motion) should be assessed negatively.

Affect of the amendments on pending criminal proceedings

The Act has no interim provisions, therefore it is unclear which rules – the existing ones or the new ones – should be applied to criminal proceedings instituted and not closed, or to the offences perpetrated, before the Act enters into force. Theoretically, two options are possible:

- the provisions of the Act could be applied directly from the date it enters into force (which means that the prosecution procedure must be changed and the injured party must file a motion to prosecute so that the criminal proceedings could continue);
- the hitherto existing provisions could be applied until the end of the proceedings or until the end of a given instance of the proceedings (which means that the existing procedure of prosecution would be maintained).

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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