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CHANGES IN THE MODEL OF PENAL LIABILITY OF COLLECTIVE ENTITIES IN THE POLISH LEGAL SYSTEM – A REAL BREAKTHROUGH OR A MANIFESTATION OF OPPORTUNISM?

Abstract

The model of liability of collective entities for acts prohibited under penalty, introduced into the Polish legal system by the Act of 28 October 2002 (consolidated text, Journal of Laws of 2020, item 358, as amended), which entered into force on 28 November 2003, was criticized from the beginning. Time has shown that the scepticism of the representatives of the legal commentary regarding the solutions adopted at that time was fully justified. After nearly 20 years of this act being in force – systemically important yet playing a marginal role in practice – the time has come for radical changes in the model of penal liability of collective entities. The model of the so-called consequential liability of a collective entity, which depends on a preliminary ruling, i.e. on prior confirmation by a final judgment that an offense or a fiscal offense has been committed by a specific natural person, is replaced by direct liability. This was reflected in the changes introduced to the Act of 2002, which entered into force on 1 September 2022. An analysis of these changes will be used to assess the new model of criminal liability of collective entities for acts prohibited as offenses against the environment, in the normative and practical aspect.

KEYWORDS

collective entities, legal system, penal liability, prohibited act, an offense

SŁOWA KLUCZOWE

podmioty zbiorowe, system prawny, odpowiedzialność penalna, czyn zabroniony, przestępstwo

INTRODUCTION

Liability of collective entities for acts prohibited as offenses and fiscal offenses[1] was introduced into the Polish legal system by the Act of 28 October 2002 on the liability of collective entities for acts prohibited under penalty[2]. The act standardized the basics of liability of a collective entity for enumerated acts prohibited under penalty as offenses or fiscal offenses, the extent of such liability, as well as the rules of procedure for its imposition. This liability was given the form of consequential liability, dependent on a prior legally binding decision in criminal or criminal fiscal proceedings that declare the commission of a criminal or a criminal fiscal offense. Legal scholars and commentators refer to this liability as derivative, accessory or secondary[3].

Regulations of the Act on liability of collective entities (the Act) do not explicitly determine the legal nature of liability incurred by collective entities that follows their committing of a prohibited act as an offense or a fiscal offense. However, it unquestionably constitutes criminal liability within the meaning of Article 42(1) of the Constitution, i.e., the so-called criminal liability *sensu largo*[4].

The need to respect, on the grounds of the Act of the standards set forth in Article 42 – not only substantive under Article 42(1), but also the right of defense under Article 42(2), which belongs to the canon of guaranteeing procedural stand-

[1] Hereinafter – penal liability of collective entities.

[2] Dz. U. (Journal of Laws) of 2023, item 659.; introduced on 27 November 2003, hereinafter – the Act or the Act on liability of collective entities.

[3] L. Wilk, *Szczególne cechy odpowiedzialności za przestępstwa i wykroczenia podatkowe*, Katowice 2006, p. 292; Gałęski and Królikowski define this model as "cascade" – see also: M. Gałęski, M. Królikowski, *Komentarz do art. 1,* (in:) M. Królikowski, R. Zawłocki (eds), *Kodeks karny,* Vol. I, *Komentarz art. 1-116,* 5th edition, Warsaw 2021.

[4] This is also assumed in: M. Błaszczyk, M. Zbrojewska, *Kodeks karny skarbowy*, Warsaw 2011, p. 29 and in: M. Błaszczyk, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione jako przestępstwa skarbowe*, (in:) B. E. Bieńkowska, Z. Jędrzejewski (eds), *Problemy współczesnego prawa karnego. Część pierwsza*, Warsaw 2016, p. 20.

ards – also follows directly from the Constitutional Tribunal's (CT) judgment of 3 November 2004. It recognizes that the model of liability of collective entities for prohibited acts adopted by the Polish legislator is repressive, as evidenced by "the premises of this liability, and above all the repressive purpose and function of the penalties adjudicated against collective entities"[5]. After making the indispensable revisions and additions to the Act, which were required as a follow-up of the CT judgement referred to above[6], the regulation of liability of collective entities has essentially met the constitutional canon of requirements for penal liability.

Through the Act the condition of statutory determination of its basis has been fulfilled *(nullum crimen sine lege*), it introduced the premise of culpability of the collective entity (*nullum crimen sine culpa*) and properly specified related sanctions (*nulla poena sine lege*). And yet the model of penal liability of collective entities adopted by the Polish legislator has been and continues to be criticized by legal scholarship and moreover – does not function as intended.

The Polish legislature recognized the need to radically change the model a few years ago. It resulted with a new Act by the Ministry of Justice in 2018[7], which was poorly received by legal commentators[8] and did not change the law. Since then, the Ministry of Justice has declared that it is working on amendments to the Act, and even referred a major amendment to the Act to the government legislative process, based on the draft new act of 2018[9]. However, the work on the

[5] Paragraph 2 of the explanatory memorandum to the CT judgment of November 3, 2004, K 18/03, OTK-A 2004, No. 10, item. 72.

[6] Amendments to the Act after the CT judgment were introduced by the Act of 28 July 2005 on amending the Act on the liability of collective entities for acts prohibited under penalty*,* Dz. U. (Journal of Laws) of 2005, No. 180, item 1492. This amendment, unfortunately, was also not free of shortcomings, but they were eventually corrected – On this subject see: K. Łakomy, *Rozdział 11. O potrzebie nowego modelu odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, skierowane przeciwko środowisku naturalnemu, § 3. Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary na gruncie prawa polskiego,* (in:) M. Pająk, K. Urbanowicz, R. Zawłocki (eds), *Odpowiedzialność prawna o charakterze penalnym za delikty przeciwko środowisku naturalnemu*, Legalis, 2020 [online].

[7] In May 2018, a government legislative process was initiated on a draft of a brand new law on liability of collective entities, developed by the Ministry of Justice. This draft was referred to the Sejm in January 2019; however, it did not receive a Sejm print number, and the legislative process on it was interrupted due to the end of the term of the Sejm. The text of draft and its explanatory memorandum are available on the archived pages of the Eighth Term, at: http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf (accessed 21.07.2023).

[8] See: *Babicz M., Gałęski M., Karlik P., Zawłocki R.*, *Opinia o rządowym projekcie ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary,* Poznań 2019 https://www.adwokatura.pl/admin/wgrane_pliki/file-odpowiedzialnoscpodmiotow-26545.pdf (accessed 21.07.2023).

[9] The Draft of the Act on amendments to the Act liability of collective entities for acts prohibited under penalty*,* together with an explanatory memorandum, was published on the pages of the Government Legislation Center on 2 September 2022, under the number UD421.

draft of this amendment lacks momentum, and it will probably share the fate of the draft of the 2018 new law.

However, this does not imply that there were no changes at all in the model of liability of collective entities. They however occurred not directly, but as part of a change in the law aimed at increasing environmental protection provided by penal law, developed by the Ministry of Climate and Environment. No special attention was given to them in legal writings, when – in my opinion – they deserve it. As of 1 September 2022, under the Act of 22 July 2022, on amending certain Acts to prevent environmental offenses[10], a new model of penal liability of collective entities for acts prohibited as offenses against the environment was introduced. It is an alternative model to the current model of criminal liability of collective entities, without prejudice to the existing regulations. The analysis of these new solutions – against the background of the model of consequential liability maintained in the law and still dominant – will serve to answer the question of whether they are a real breakthrough in this field of criminal law *sensu largo*[11], or whether they are just another opportunistic *ad hoc* legislative initiative.

THE MODEL OF PENAL LIABILITY OF COLLECTIVE ENTITIES INTRODUCED ORIGINALLY BY THE ACT

The discussion about the newly introduced model of liability of collective entities for acts prohibited as offenses against the environment must be preceded by a presentation of the model of this liability which was introduced under the Act (the base model). It remains in force as the only model for other prohibited acts covered by the scope of this Act and as an alternative for acts prohibited as offenses against the environment[12]. In fact, the new solutions have been limited to only three provisions, which is why in other cases this new model of liability of collective entities for prohibited acts under penalty as environmental offenses is consistent with the base model.

Under the Act, a legal person (e.g., a joint-stock company or a limited liability company) and organizational unit without legal personality, to which sepa-

[10] Dz. U. (Journal of Laws), item 1726; hereinafter referred to as the amendment.

[11] I use the term "criminal law *sensu largo*" to mean all the statutory regulations in the system of Polish law which must meet the guarantee standard expressed in Article 42(1) of the Polish Constitution. This is the broadest understanding of the term.

[12] This original model of penal liability of collective entities was extensively discussed by me, in the context of liability for prohibited acts as fiscal offenses, in the study: *Odpowiedzialność podmiotów zbiorowych za czyny zabronione jako przestępstwa skarbowe,* (in:) B. E. Bieńkowska, Z. Jędrzejewski (eds), *Problemy współczesnego prawa karnego. Część pierwsza*, Warsaw 2016. In this paper I will limit myself to a synthetic presentation of its assumptions.

rate regulations grant legal capacity (e.g., a general partnership or a partnership), excluding the State Treasury, local government units and their associations, as well as commercial companies with Treasury shareholding, local government units or an association of such units; capital company in organization; an entity in liquidation; an entrepreneur who is not a natural person, as well as a foreign organizational unit (e.g., a branch or representative office of a foreign entrepreneur) (Article 2(1) of the Act) may be liable for an act prohibited under penalty as an offense or a fiscal offense.

The condition for imposing this liability on a collective entity is the commission of one of the acts prohibited as an offense or a fiscal offense, indicated in a closed catalogue (Article 16 of the Act) by an individual associated with the collective entity in the manner required by this law (Article 3 of the Act), which will then be declared by a final judgement, the so-called preliminary finding (Article 4 of the Act). In addition, the prohibited act must involve a benefit or an option of benefit, even non-economical[13], to the collective entity (Article 3 of the Act *in fine*). The commission of such an act must occur through the fault of the collective entity (Article 5 of the Act).

The perpetrator of a specific prohibited act, the commission of which may result in liability of a collective entity under the provisions of the Act, must be a natural person who is a representative of the entity, authorized to deal with its affairs. A collective entity may also incur liability following the commission of a specific prohibited act on its behalf by an individual who is an entrepreneur who directly cooperates with the collective entity in the realization of a legally permissible objective (an associate of the collective entity)[14].

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[13] "Economic benefit" is a well-established concept, encompassing any gain in property and the absence of loss. A non-economic benefit is more difficult to define. It should be assumed that it is any benefit to the collective entity that cannot be converted into money and may involve "[…] gaining favor with potential counterparties of the collective entity, gaining special knowledge by the collective entity of the realities and customs of the operation of a certain market segment, disavowal of the value, level and quality of services of potential competitors operating in that market, etc."– Z. Kwaśniewski, (in:) M. Filar (ed.), *Komentarz do ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, Toruń, 2006, p. 87.

I am of the opinion that non-economic benefits in the area of corporate offenses always translate into profits of an economic nature, although it is not always possible to precisely "measure" them, i.e., determine the value in money and link them to a specific non-economic benefit.

[14] Article 3 of the Act identifies perpetrators as persons who:

1) acts on a behalf of or in the interest of collective entity under a power or duty to represent it, to make decisions on its behalf or to exercise internal review or who exceeds such power or fails to fulfill such duty (Article 3(1) of Act);
2) is permitted to act as a result of overstepping of authority or failure to fulfill a duty by a person referred to in item 1;
3) acts on behalf of or in the interest of the collective entity with the consent or knowledge of the person referred to in item 1 (Article 3(3) of the Act);
4) who is an entrepreneur who directly interacts with a collective entity in the realization of a legally permissible purpose (Article 3(3a) of the Act).

In doing so, the fact that a prohibited act has been committed must be confirmed by a final judgment convicting the offender, a judgment conditionally discontinuing a criminal proceeding or a fiscal crime proceeding against them, granting the person permission to voluntarily surrender to liability or a court decision discontinuing proceedings against them due to circumstances excluding the punishment of the offender (Article 4 of the Act).

A collective entity is culpable when the commission of a prohibited act occurred as a result of at least a lack of due diligence in the selection of a person referred to in Article 3(2) or (3) (culpability in the selection), or at least a lack of due supervision of that person by an authority or representative of the collective entity (culpability in the supervision), or such organization of the collective entity's activities which did not ensure the avoidance of the commission of a penal act by a person referred to in Article 3(1) or (3a), while it could have ensured this with the exercise of due diligence required under the circumstances by the authority or representative of the collective entity (organizational fault) (Article 5 of the Act)[15].

The court shall adjudicate a fine on a collective entity in the amount of PLN 1,000 to 5,000,000, but no more than 3% of the revenue generated in the fiscal year in which the prohibited act that is the basis of the collective entity's liability was committed (Article 7 of the Act). A fine is the principal penal measure imposed against a collective entity. In addition to it, there is mandatory forfeiture of objects derived, even indirectly, from a prohibited act ("fruits") or which were used or intended to be used to commit a prohibited act ("tool"); economic benefit derived, even indirectly, from a prohibited act or the equivalent value of objects or economic benefit derived, even indirectly, from a prohibited act (Article 8 (1) of the Act). However, the possibility of ruling on the forfeiture of objects and economic benefit or its equivalent is excluded if it is subject to return to another authorized entity (Article 8 (2) of the Act).

A number of other penalty measures can also be ruled against a collective entity optionally, such as, but not limited to: a ban on promoting or advertising their business activity, products manufactured or sold, services rendered or benefits provided; a ban on receiving grands, subsidies or other forms of support from public funds or a ban on bidding for public contracts (Article 9(1) of the Act).

When imposing a fine and additional penal measures indicated in Article 9 of the Act, the court is obliged to take into account the directives of the judiciary (Article 10 of the Act). Consequently, when imposing a fine, prohibitions or making a judgment public, the court considers, in particular, the degree of culpability of the collective entity, i.e., the seriousness of irregularities in selection or supervision, as referred to in Article 5 of the Act; the extent of the actual or possible benefit to the collective entity as a result of the commission of the act; the

[15] On the premise of culpability with respect to the act of an individual as defined in Article 3(1) of the Act, see: the decision of the Supreme Court of 5 May 2009, file number IV KK 427/08.

financial situation of the collective entity; the social consequences of the punishment and the impact of the punishment on the further functioning of the collective entity (Article 10 of the Act).

Proceedings for liability of a collective entity under the provisions of the Act are initiated by the court at the request of the prosecutor or the victim and in cases under the Act on Combating Unfair Competition – also at the request of the President of the Office of Competition and Consumer Protection (Article 27 of the Act). In practice, the prosecutor is the initiator of these proceedings.

The provisions of the Code of Criminal Procedure, unless otherwise provided by statutes, shall be applied *mutatis mutandis* to proceedings on liability of a collective entity[16]. "Appropriate application" means the application of provisions without modification, possibly with the necessary adaptive changes (the most common variant), or the lack of its application, due to its irrelevance or contradiction with other provisions of the Act[17]. The provisions of the CCP do not apply to a private prosecutor, civil plaintiff, community representative, pre-trial proceedings, special proceedings and criminal proceedings in cases subject to the jurisdiction of military courts (Article 22 of the Act). Reference to the appropriate application of the provisions of the CCP in proceedings on the liability of a collective entity is a guarantee of a judicial process in accordance with the standards envisaged for a criminal trial.

The following may participate in the court hearing: the initiator, the victim admitted in the proceedings alongside the prosecutor, the representative of the collective entity and its defense counsel, while the unexcused failure of a party to appear does not halt the examination of the case (Article 34 of the Act). Evidence is taken upon request, and in justified cases the court may also take evidence *ex officio*. Evidence obviously aimed at prolonging the proceedings is inadmissible (Article 35 of the Act). The court independently decides on matters of fact and law within the limits of the application. The rulings referred to in Article 4 of the Act – preliminary findings – are, however, binding for the court (Article 36 of the Act).

For the settlement of the collective entity's penal liability, the key factors are the evidentiary findings made in criminal or criminal fiscal proceedings, in

[16] Law of 6 June 1997 – Code of Criminal Procedure, consolidated text, Dz. U. (Journal of Laws) of 2022, item 1375; hereinafter: CCP.

[17] See also: J. Nowacki, *"Odpowiednie" stosowanie przepisów prawa*, 'Państwo i Prawo' 1964, No. 3, pp. 370 ff.; A. Błachnio-Parzych, *Przepisy odsyłające systemowo (wybrane zagadnienia)*, 'Państwo i Prawo' 2003, No. 1, pp. 43 ff.; D. Kala, (in:) M. Filar (ed.), *Komentarz do ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, Toruń, 2006, pp. 145–146. In practice, a number of provisions of the CCP, despite the absence of a formal exemption, will not be applicable to proceedings on the liability of collective entities. On this subject see: W. Grzeszczyk, *Wątpliwości proceduralne związane ze stosowaniem ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, 'Prokuratura i Prawo' 2004, No. 1, p. 72.

which a preliminary finding is issued. Due to the subsequential nature of the collective entity's liability in the Act, no pre-trial proceedings are provided. *De facto*, it is the criminal proceedings or the criminal fiscal proceedings that performs the function of pre-trial proceedings in relation to the proceedings on the liability of the collective entity[18]. Thus, to implement the collective entity's right of defense, opportunities were provided for the collective entity to participate in criminal or fiscal criminal proceedings as a *quasi*-party[19]. However, the collective entity may notify the participation of its representative only in the proceedings before the court, no later than before the conclusion of the court proceedings in the first instance (Article 21 (1) of the Act).

A collective entity may file an appeal against a first-instance judgment (Article 39 of the Act) and a cassation complaint against a final judgment (Article 40 of the Act).

The provisions of the Criminal Executive Code[20] regarding the enforcement of fines, forfeitures, prohibitions, and public disclosure of the judgment apply accordingly to the enforcement of fines, forfeitures, and other penal measures adjudged against collective entities, with the fine being payable from the collective entity's income (Article 42 of the Act).

CHANGES IN THE MODEL OF PENAL LIABILITY OF COLLECTIVE ENTITIES FOR PROHIBITED ACTS AGAINST THE ENVIRONMENT

The amendment to the Act, which brought a new model of liability of collective entities for acts punishable as offenses against the environment was introduced by the Act of 22 July 2022 on amending certain laws to prevent environmental crime, and came into the force on 1 September 2022. This Act, according to the declaration of its drafters, is intended to lead to strengthening of environmental protection through criminal legal instrumentation[21]. It was assumed that one of the areas requiring such strengthening is precisely the liability of collective enti-

[18] This is also assumed in: M. Błaszczyk, 2016, *op. cit*., p. 28.

[19] Such a possibility was not provided for in the original text of the Act on liability of collective entities under penalty. It was introduced by an amendment of 28 July 2005, in response to a 3 November 2004 Constitutional Tribunal ruling that "preventing a collective entity – in a proceeding leading to a ruling that may have the character of a prejudicial decision – from defending its interests is incompatible with Article 42(2) of the Constitution."

[20] Act of 6 June 1997, Executive Penal Code, consolidated text, Dz. U. (Journal of Laws) of 2023, item 127, as amended.

[21] The draft law on amending certain laws to prevent environmental offenses, together win an explanatory memorandum – prepared by the Ministry of Climate and Environment – was pub-

ties for acts prohibited as offenses against the environment. The changes introduced into the Act by this amendment affect only three articles. Quantitatively, therefore, they are not significant, but through them a new model of liability of collective entities for acts prohibited under penalty as offenses against the environment has been *de facto* introduced.

Until 31 August 202, such liability could only be imposed following penal liability for environmental offenses, enumerated in Article 16(1) (8) of the Act, of a specific individual, as indicated in Article 3 of that law, who acts on its behalf or in its interest, but also indirectly as a business partner – an individual entrepreneur who indirectly interacts with the collective entity in pursuit of a legally permissible objective. The condition for the liability of a collective entity for any act prohibited under a penalty included in the catalogue in Article 16 of the Act, not only for an offense against the environment, was the preliminary finding in a criminal case. *De lege lata*, a preliminary finding is no longer necessary to hold collective entities liable for acts prohibited as offenses against the environment. This is because the amendment introduced an exception to the principle adopted in the Act, according to which the commission of a specific offense or fiscal offense by a perpetrator who meets the conditions indicated in Article 3 of the Act must be established by a final judgment (preliminary finding), in particular – a conviction or a judgment conditionally discontinuing criminal proceedings. At present, in the case of the commission of any of the offenses indicated in Article 16(1) (8) of Act, i.e., the offenses against the environment listed, by a person referred to in Article 3 of the Act, the collective entity is subject to liability regardless of the issuance of a judgment or ruling referred to in Article 4 of that law (Article 4 of the Act).

By virtue of this amendment, the scope of Article 16(1)(8) of the Act was also expanded, which now includes all types of offenses from Chapter XXII of the Polish Penal Code, as well as selected offenses against the environment defined in provisions of other acts of law (not in code form). Because of the introduction of Article 4a to the Act, it should therefore be assumed that a preliminary finding is not necessary for a petition initiating proceedings to the court for liability of a collective entity for a prohibited act as an offense against the environment. At the same time, the wording of Article 4a of the Act does not exclude the possibility of attaching it to such an application; in that case, the court adjudicating the liability of a collective entity for an act prohibited as an offense against the environment will be bound by the ruling of the preliminary finding, in accordance with Article 36 of the Act.

No additions or changes were made to the procedural provisions of the Act under the amendment, not even such as to exclude the application of selected

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provisions of the Act if the prosecutor refers to the court an application initiating proceedings for liability of a collective entity for a prohibited act as an environmental offense, which is not accompanied by a preliminary finding.

If the public prosecutor initiates proceedings on the liability of a collective entity for an act prohibited as an environmental offense and does not attach a preliminary finding to the request, then it is up to the court to determine on its own whether the person referred to in Article 3 of the Act has committed a specific environmental offense. Ultimately, however, it will rule only on liability of the collective entity and the penal liability of the perpetrator will be the subject of separate criminal proceedings.

The explanatory memorandum of the draft amendment reads: "Despite the elimination of the requirement of preliminary finding in the case of commission of offenses against the environment, the present draft does not assume the initiation and conduct of pre-trial proceedings on the liability of collective entity. The evidentiary proceedings in this regard are – in principle – to be held in the court. Relevant determinations, allowing for the submission of an application for liability of a collective entity, will be made as part of pre-trial proceedings pending for a given prohibited act (*in rem*) or against the perpetrator of such act (*in personam*)".

This change also involves an increase in the size of the statutory threat of fine assessed against a collective entity for acts prohibited as offenses against the environment. Considering the newly added Article 7a of the Act, a collective entity – subject to liability following the commission on its behalf of a prohibited act fulfilling the elements of a crime against the environment, included in the catalogue contained in Article 16(1)(8) of the Act – shall be subject to a fine of PLN 10,000 to PLN 5,000,000. For other cases, the basic sanction remains a fine of PLN 1,000 to PLN 5,000,000, but no more than 3% of the revenue generated in the fiscal year in which the prohibited act giving rise to the liability of the collective entity was committed.

The amendments to the Act, introduced by the amendment, are clearly calculated to tighten the regime of liability of collective entities for acts prohibited under penalty as offenses against the environment.

EVALUATION OF THE TWO MODELS OF PENAL LIABILITY OF COLLECTIVE ENTITIES REGULATED IN THE ACT

The model of liability of collective entities, originally adopted by the Polish legislator and still in force as basis, deserves criticism, as it does not solve the basic problem it should serve to solve – it does not provide a response to those acts, committed in corporate structures, which cannot be attributed to specific

individuals[22]. At the same time, it should be stipulated that the problem of identifying the perpetrator of an act or holding an already-identified person criminally liable, is more applicable to ordinary offenses, including especially economical offenses and those against the environment. The peculiarities of fiscal offenses make it easier to identify the perpetrators of violations, and the commonly used extended perpetration clause in fiscal criminal law, introduced in Article 9(3) of the Fiscal Penal Code[23], makes it possible to hold accountable those who could not be considered perpetrators without it. This is, moreover, reflected in the statistics of proceedings on the liability of collective entities for acts prohibited under penalty, which, although conducted very rarely[24], as a rule relate precisely to acts prohibited as fiscal offenses.

However, the newly introduced changes to the Act, calculated to strengthen the criminal protection of the environment, cannot be considered a panacea for this problem, as the liability of a collective entity for an act prohibited as an environmental offense remains dependent on the identification of the perpetrator of that act. Only the condition of a preliminary finding has been abolished, which deserves credit, since making the penal liability of a collective entity dependent on the prior final termination of a criminal/criminal fiscal proceedings is a completely dysfunctional and uneconomical solution.

However, the regulation of liability of a collective entity for an act prohibited as an environmental offense cannot be considered a qualitatively satisfactory solution that can serve as a reference point for further work on a comprehensive, holistic reconstruction of the model of penal liability of collective entities. This is determined primarily by the lack of a procedural combination of recognition of the case of liability of the collective entity and the case of penal liability of the perpetrator of an offense against the environment. The abandonment of the preliminary finding should, in my opinion, result in carrying out single proceedings, which – from the beginning – from the stage of pre-trial proceedings, would concern both the penal liability of the perpetrator and the liability of the collective entity. Such a two-in-one solution would be the most guaranteeing in terms of the right to defense, both against the perpetrator of the prohibited act and against the collective entity, and at the same time economically sound.

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[22] B. Namysłowska-Gabrysiak, *Odpowiedzialność karna osób prawnych*, Warsaw 2003, pp. 192–193.

[23] Act of June 6, 1997, Fiscal Penal Code, consolidated text, Dz. U. (Journal of Laws) of 2023, item 654.

[24] In the explanatory memorandum of the next version of the draft amendment to the Act, published by the Government Legislation Center on 3 November 2022 (lost no. in RCL – UD421), it is stated that in 2016-2021, the court issued a total of 54 rulings in cases from motions on the liability of the collective entity, including those on the recognition of motions from previous years; 33 cases were ruled on the liability of the collective entity (the largest number of rulings was made in 2017 – 16, in other years there were between 1 and 9 such rulings).

I am critical of the lack of pre-trial proceedings in the new model of proceedings for liability of a collective entity for a prohibited act as an environmental offense. Such a peculiar pre-trial procedure in these proceedings, which are conducted after obtaining a preliminary finding, is the entire criminal/criminal fiscal procedure, within which – in the judicial phase – the collective entity has the status of a *quasi*-party, giving it procedural rights that are important for the exercise of the right of defense in the subsequent proceedings on its liability for this act. The change of the model of liability of a collective entity for a prohibited act as an environmental offense to one independent of the preliminary finding, does not involve depriving the collective entity of the possibility to join the legal proceedings conducted against the person accused of committing this offense. In this model, however, this entitlement does not have such a significant bearing on the collective entity's right of defense. Proceedings – criminal and on the liability of the collective entity – can be conducted in parallel. There may even be a situation in which the former is still pending, after the final judgement on the liability of the collective entity. No formal or substantive links have been laid down in the Act between these proceedings. For decisions on the liability of a collective entity for a prohibited act as an environmental offense, conducted without the preliminary finding, the evidentiary findings in the pre-trial proceedings conducted in the criminal offense case will be crucial. This is now *de facto* "double" pre-trial proceedings – both on liability for the offense and on the penal liability of the collective entity for committing an offense. However, this status of these proceedings has not been formalized in law, without providing the collective entity with the opportunity to take part in it. This gives the prosecutor, being the initiator of the proceedings on the liability of a collective entity for a prohibited act as an environmental offense, a huge procedural advantage and significantly limits the collective entity's right of defense.

SUMMARY

The analysed amendments to the Act can be seen as a specific declaration of a change in the entire model of penal liability of collective entities to direct liability, independent of the preliminary finding. However, they cannot be considered exemplary.

The newly introduced model of collective entities' liability for acts prohibited as offenses against the environment reinforces the conviction that the development of a qualitatively satisfactory and effective regulation of penal liability of collective entities has been and undoubtedly still is a major challenge for the Polish legislator. The basic problem, on the solution of which success in this field depends, is the due development of qualitatively satisfactory and effective rules

of penal liability of collective entities. This is a big problem, especially in view of "the need to implement the principles of penal liability to non-physical persons[25]". This is a task that the Polish legislator has not solved, and neither the latest amendments to the Act, nor the currently underway draft of a major amendment to this law, indicate that it is close to success. In my opinion, the reason for this situation lies in the *modus operandi* adopted. All work on the model of penal liability of collective entities, both done initially, at the stage of shaping the original content of law currently in force, and undertaken later, after the law came into force, were and are, based on the assumption of the need to transpose what has already been developed in the science of criminal law into a law regulates the penal liability of collective entities. I believe, that accomplishing this task requires that the legislator step out of their "comfort zone" – to move away from working solely on the basis of what we already have – and attempt to develop their own, proprietary tools – exclusive to this area of criminal law in the broadest sense – that will achieve a new result that is qualitatively and practically satisfying.

Without going into a detailed discussion of this topic, because this is not the subject of this paper, it must be clearly emphasized, however, that the model of penal liability of collective entities cannot be based on the need to identify the physical perpetrator of the prohibited act. This fails where such responsibility is most needed, precisely because there is no way to identify the perpetrator of the prohibited act. If the physical perpetrator can be identified, it would be sufficient to revise the existing basis of penal liability and supplement it, notably, with a commonly used basis for a special form of committing offenses, along the lines of Article 9(3) of the Penal Code, especially in the provisions of the broader economic criminal law, including those that statue offenses against the environment. At the same time, an attempt should be made to develop a model of direct penal liability of collective entities for "their own" acts, amounting to – generally speaking – organizationally culpable failure to prevent certain serious abuses in their activities. Such a model cannot be a "simple" reflection of the model of penal liability of individuals, based on the personification of the collective. For the purpose of developing it, the canon of guarantee principles (achievements of the science of criminal law) both substantive and procedural should be used. However, detailed solutions must be sought by navigating the areas of collective activity, which is never a simple sum of the actions of the individuals to comprise it. Ultimately, a collective entity should be held criminally liable for its own culpable prohibited act as long as its commission is established after the state authorities have conducted proceedings for this liability and where

[25] K. Girdwoyń, B. Namysłowska-Gabrysiak, *Odpowiedzialność podmiotów zbiorowych w świetle nowego projektu ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, (in:) M. Błaszczyk, A. Zientara (eds), *Interdyscyplinarność – w nauce najciekawsze rzeczy dzieją się na styku różnych dziedzin. Księga jubileuszowa Profesor Małgorzaty Król-Bogomilskiej*, Warsaw, 2021, p. 59.

such proceedings consist of a preparatory and judicial phase, guaranteeing the "suspect"/"accused" the presumption of innocence, the right to defense and resolution of the case by an independent court, within a reasonable time. I believe that success is possible when we develop such solutions for the "penal" liability of collective entities, the application of which will not involve the need to take concepts used in this field in quotation marks[26]. In my opinion, it is still far from that.

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[26] It is significant that in the discourse on penal liability of collective entities, the rule is to operate with concepts from the area of criminal law, taken in quotation marks. – see, e.g., M. Królikowski, M. Gałęski, 2021, *op. cit.* I read this as a confirmation of the existence of the need to develop a conceptual apparatus and a canon of principles exclusive to the regulation of penal liability of collective entities.

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