Draft Act on the Liability of Collective Entities

**A new draft of the Act on the Liability of Collective Entities (ALCE) was published on 5 September 2018. It imposes further obligations on collective entities and tightens up the rules for their liability under the new provisions.**

What entities and actions does the Act concern?

The new Act will apply to all legal persons, commercial companies, capital companies, commercial companies with state participation, local authorities, and entities in organisation and liquidation.

A collective entity will be liable for all offences committed in connection with the activity it conducts due to the actions and omissions of its bodies or a member of its bodies, or failure by the same to observe the required precautions. A collective entity will also be liable for all offences committed in connection with the activity it conducts by: (i) persons authorised to represent it, and for decisions taken or supervision exercised on its behalf; (ii) persons authorised to act by a body or a member of a body of the collective entity, and (iii) its employees in connection with performance of an employment contract.

Additionally, if a collective entity, even indirectly, gains a financial benefit from an offence, it will also be liable for the actions of its subcontractors, employees, and persons authorised to act on its behalf and in its interests.

How to prepare?

When lability is assigned to a collective entity, its due care will be broadly assessed. Due care should also be taken in appointing persons authorised to act, in supervising these persons, and in the internal organisation of the activity of the collective entity.

The draft also stipulates what irregularities can lead to liability for a collective entity in organisation. These are: (i) failure to specify internal rules of procedure in areas where offences could be committed; (ii) failure to specify the scope of liability of the collective entity’s bodies, organisational units, employees, and persons authorised to act on its behalf, and also, in the case of at least medium enterprises, (iii) failure to specify the persons or organisational units supervising legal compliance, i.e. compliance officer.

In this context, internal rules take on key importance, as they lay down the division of liability in the organisation and how to identify and react to risks. This means that an effective compliance system is required in an organisation, as the draft does not contain a closed list of solutions that should be implemented, but only gives examples.

Can a company be protected by an audit?

The draft introduces a previously unknown concept – that of risk and compliance audit**.** An audit should be carried out at least once every two years by an audit firm, in terms of internal procedures ensuring that the entity operates in compliance with the law and in terms of an assessment of the risk of offences being committed in connection with the activity conducted by the entity. Provided the requirements laid down in the draft are met, i.e. audit reliability and professionalism, and a body is set up in the collective entity to supervise compliance with the law and internal rules, an audit can ensure that a collective entity will not bear fault-based liability.So it will be importantto have not only a compliance system, but also proper mechanisms to monitor its functioning.

Whistleblowing – what role will it play?

The draft also comprehensively regulates the problem of reporting internal irregularities in a company. Collective entities will be obliged to implement an effective system for reporting irregularities and rules of procedure for dealing with irregularities reported. The risk posed by not having this system is high, as if an entity does not conduct a procedure in the event of irregularities or does not remove irregularities disclosed, the statutory penalty may be doubled. Moreover, knowing of irregularities in an organisation that enabled or facilitated the commission of an offence may be treated as an irregularity, constituting a fault in the organisation.

Procedural changes – what should we look out for?

The new version of the draft details how proceedings should be conducted against a collective entity. Proceedings can be started both *ex officio* and on a request. The draft also introduces, inter alia, the concept of retribution application, which the prosecutor sends to the court at the end of preparatory proceedings if the evidence compiled in the case demonstrates that, actually, in the circumstances the collective entity does not bear liability, but there are prerequisites for any benefit gained from an offence to be either forfeited or returned.

A particular novelty is the introduction of the possibility for the entity to avoid liability, which, in connection with an act carrying the penalty of imprisonment for up to five years, after it is committed, informs the law enforcement authorities and discloses its key circumstances and redresses damage, returns a benefit gained from the act or its equivalent value, if the information reaches the law enforcement authorities before they learn of it by other means.

What penalties can be imposed on collective entities?

The draft imposes a financial penalty of up to PLN 30 million, with the possibility of this amount being doubled. It also provides for a strict list of preventive measures in the form of a ban on advertising, a ban on competing for public contracts, and a ban on using grants or subsidies. These measures can be applied before judgment is passed in a case, which could seriously impede or even prevent business activity.

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