



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

## Anti-bribery & corruption: the fight goes global

### Commercial Fraud Commission

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#### National Report of Poland

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# 1 THE LEGAL FRAMEWORK

## 1.1 What criminal and/or civil/administrative law(s) exist in your jurisdiction which are specifically targeted at bribery & corruption?

### a. a brief summary of the offences

Corruption and commercial bribery are defined in the Polish Criminal Code (“PCC”) (articles 228, 229 and 296a).

**Corruption** is defined as an offence against state and local government institutions. It involves giving or promising to give material or personal benefits to a person performing public functions in connection with his/her public duties. The main function of penalizing this lies in protecting the regular functioning of public institutions and trust in their employees. Active corruption is a so-called “common crime”, meaning that it can be committed by everybody. The Polish Criminal Code created a few forms of active corruption – regular form and two qualified forms. For each is provided other penalty, but generally penalty for active corruption is imprisonment for up to 12 years and/or fines.

**Commercial bribery** (formerly called “management bribery”) is defined in art. 296a of the Polish Criminal Code, offence was introduced to Polish legislation as an implementation of binding acts of international law and obligations connected with Poland’s accession to the European Union. In contrast to the active corruption, it can only be committed by persons who perform management functions, so this is only an individual crime. This article of Criminal Code also specifies privileged and qualified types of bribery. Penalties for this crime included fines and imprisonment for up to 8 years.

### b. any affirmative defenses that are available

The rules provide the possibility of avoiding penalties by the person who gave a bribe. The perpetrator of this crime is not punishable if he/she fulfilled the following conditions:

- the offender gave or promised to give a personal benefit (e.g. a promise to employ somebody’s relative) or economic advantage (i.e. a specific sum of money); and
- at the same time the offender informed a prosecution body and revealed all details about the offence before it is detected (voluntary disclosure) – but the perpetrator should reveal all facts and circumstances, not conceal others.

This defenses are available for crimes described in articles 229 § 1-5, 230a § 1 and 2, 296a § 2 or § 3 of the PCC.

The person who gave the bribe can also be defended by all countertypes described in the PCC (necessary self-defense, protective force, experiment, mistaken circumstances, mistake over the exclusion of guilt, mistake over the exclusion of guilt and insanity and diminished sanity) and low level of social consequences of an act.<sup>1</sup>

### **c. the penalties that may be imposed upon offenders**

#### **For accepting bribes (article 228 of the PCC)**

- Anyone who commits this crime is liable to imprisonment for between 6 months and 8 years. In cases of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to 2 years.
- Anyone who, in connection with performing a public function accepts a material or personal benefit, or a promise thereof, in return for unlawful conduct and anyone who, in connection with his or her official capacity, makes the performance of official duties dependent upon receiving a material benefit, or a promise thereof, or who demands such a benefit is liable to imprisonment for between one and 10 years.
- Anyone who, in connection with performing a public function, accepts a material benefit of considerable value, or a promise thereof, is liable to imprisonment for between two and 12 years.

#### **For offering bribes (article 229 of the PCC)**

- Anyone who commits this crime is liable to imprisonment for between 6 months and 8 years. If the act is of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to 2 years.
- Anyone who gives a material or personal benefit to a person performing a public functions in order to induce him to disregard his official duties, or provides such a benefit for disregarding such duties is liable to imprisonment for between 1 and 10 years.
- Anyone who gives or promises to give a material benefit of significant value to a person performing a public function is liable to imprisonment for between 2 and 12 years.

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<sup>1</sup> [http://cba.gov.pl/ftp/mp3/Poradnik\\_antykorupcyjny\\_2\\_.pdf](http://cba.gov.pl/ftp/mp3/Poradnik_antykorupcyjny_2_.pdf)

## For management bribery (article 296a of the PCC)

- Anyone who commits this crime is liable to imprisonment for between 3 months and 5 years. If the offence is of lesser significance, the offender is liable to the penalty of restriction of liberty or imprisonment for up to 2 years.
- If the offender does significant damage to property, he or she is liable to imprisonment for between 6 months and 8 years.

### 1.2 Does your jurisdiction outlaw “private” bribery/corruption (i.e. transactions between two or more private entities or persons) as well as “public” bribery/corruption? If so, please explain how the distinction is drawn between private and public bribery/corruption.

Polish law provides private bribery (“the managerial bribery”) which is regulated by the PCC, Article 296a – offences against economic circulation. Managerial bribery is defined as demanding, accepting or offering financial or personal benefits or a promise thereof, in exchange for abusing the rights granted to a manager or a person employed in any form by a company/entity, or for failing to fulfil an obligation for which he/she is responsible for, which leads to possible damage to this entity, an act of unfair competition, or inadmissible preferential act for a purchaser or customer of goods or services.<sup>2</sup>

In contrast to “public” bribery/corruption “private” bribery/corruption (as mentioned above) is only an individual crime, because it can only be committed by persons who perform management functions. Also private bribery only applies to people in a managerial position in an organisational unit performing business, or in an employment relationship, a service contract or a contract for a specific task, when public bribery regulated in articles 228 and 229 PCC is connected with people, who performs a public function. Article 115 Section 19 of the PCC defines a person who performs a public function as a public official, a member of the local government, a person employed in an organisational unit provided with public funds, unless exclusively a service employee, and any other person whose rights and obligations in terms of public activity are defined or recognised by law or international agreement binding Poland.

### 1.3 Is your law extra-territorial? If so, in what circumstances can it be enforced if the relevant acts/omissions of bribery/corruption occur outside your jurisdiction?

Yes, Polish law is extra-territorial.

This is regulated by article 109 of the PCC, which provides that Polish criminal law applies to Polish citizens who have committed an offence abroad, but for an act committed abroad to be considered an offence, it must be considered an offence by the law in force where it was committed. This condition does not apply to a Polish public official who, while performing his duties abroad, has committed an offence there in

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<sup>2</sup> <http://globalcompliancencnews.com/anti-corruption-poland/>

connection with performing his duties, or to a person who committed an offence in a place not under the jurisdiction of any state authority.

If there are differences between Polish criminal law and the law in force where an offence is committed, when applying Polish law the court may take these differences into account in favour in the offender (Article 111 of the PCC).

**1.4 Are there any “safe harbours” or exemptions in relation to transactions that might otherwise be regarded as bribes, such as “facilitation payments”, which are expressly excluded from being illegal? If so, is this determined by statute/codified law, by case law or otherwise?**

In Poland facilitation payments are illegal. Poland has rejected the facilitation payments exception in OECD Anti-Bribery Convention.<sup>3</sup>

In court judgments are only accepted financial benefits that only symbolically express gratitude to the donors and have a monetary value which does not exceed such symbol. Exclusion of liability can take place on the basis of custom countertype. This situation concerns mainly the giving or receiving gifts by health care professionals and teachers.<sup>4</sup>

**1.5 Does the financial regulatory system (i.e. the law and regulations governing the operation and conduct of banks and other financial institutions) in your jurisdiction address the topic of bribery & corruption? If so, please provide a brief summary of the obligations (including systems/controls and reporting obligations) that are imposed on banks and other financial institutions in this regard.**

The Polish financial regulatory system does not address directly the topic of bribery & corruption.

## **2 CORPORATE CRIMINAL LIABILITY**

**2.1 In the context of bribery/corruption, does your law recognise the concept of corporate criminal liability? E.g. can a corporate entity be found guilty of bribery?**

Yes, corporate criminal liability in Poland is regulated by the Act on the Liability of Collective Entities for Acts Prohibited Under Penalty (the "**Liability Act**"), which came into force in 2003. In general, under the Liability Act, a corporate entity may be liable if a specified offence is committed by a specific person and his/her conduct has resulted or may have resulted in a benefit for the corporate entity.

**2.2 If the answer to 2.1 above is “yes”, please provide a brief explanation of the legal theory of corporate criminal liability (i.e. what circumstances must be established for corporate liability to arise and what form does**

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<sup>3</sup> <http://www.fcpablog.com/blog/2012/6/13/facilitating-payments-demystified-part-ii.html>

<sup>4</sup> M. Iwanski, *Custom as a circumstance excluding the unlawfulness of giving or receiving gifts by health care professionals and teachers*, CzPKiNP 2009, No 1, p. 193 and next, A. Barczak-Oplustil, [in:] Zoll, *Penal Code*, Vol. II, 2008, p. 970

**that liability take) as well as the penalties that may be imposed upon a corporate offender.**

The Liability Act in article 16 section 3 provides that the corporate entity is liable under the Act if the person referred below has committed a bribery & corruption described in Articles 228-230a, 250a and 296a of the PCC.

A collective entity may be held liable for offences committed by:

- an individual acting in the name or on behalf of the collective entity under the authority or duty to represent it, make decisions in its name, or exercise internal control, abusing the authority or neglecting the duty;
- an individual being allowed to act as the result of abuse of the authority or neglect of the duty of the person referred to in point 1 above;
- an individual acting in the name or on behalf of the collective entity with the knowledge and consent of the person referred to in point 1; and
- an individual being "an entrepreneur" (a sole trader) who is involved in a business relationship with the collective entity.

- if such an offence brought or might have brought material or immaterial advantage to a collective entity.

According to the Article 4 of the Liability Act the collective entity is liable only if the offence was confirmed by a final judgment.

The penalty for offences committed by corporate entities is a fine ranging from PLN 1,000 to PLN 5,000,000 (approx. EUR 233.00 to EUR 1,166,187.00). However, the fine may not exceed 3% of the entity's revenue earned in the financial year in which the offence was committed.

**2.3 Are there any pending or expected changes to the law of corporate criminal liability in your jurisdiction? If so, please explain the proposed changes and the expected timeframe for implementation.**

Yes, in July 1, 2015 the Liability Act will change. This changes concern articles 21a, 18 and new article 26a. The most important is that after July 1, 2015 a court will be able to impose preventive measure in the form of a prohibition of a merger, division or transformation on collective entity during the conduct of the proceedings against it.

### 3 MUTUAL LEGAL ASSISTANCE/ CO – OPERATION

#### 3.1 Is your jurisdiction a signatory to any bi – lateral or multi – lateral treaties or other instruments regarding mutual legal assistance / co – operation in the context of bribery & corruption? If so, which ones?

Poland is a party to the following treaties:

- Convention on combating bribery of foreign public officials in international business transactions (Paris, December 17, 1997);
- Criminal law convention on corruption (Strasbourg, January 27, 1999);
- Civil law convention on corruption (Strasbourg, November 4, 1999) and
- United Nations Convention against Corruption (October 31, 2003).

#### 3.2 Are the regulatory / prosecution authorities in your jurisdiction parties to any formal or informal co – operation arrangements with equivalent authorities in other jurisdictions (e.g. a memorandum of understanding, etc.)? If so, please provide a brief summary of the arrangements and the other authorities / jurisdictions.

- Pursuant to Resolution No. 168/2003 of the Council of Ministers on 1 July 2003 on the tasks resulting from the membership of the Polish Organisation for Economic Cooperation and Development (OECD) and the Annex to the Resolution, the Ministry of Justice is responsible for co-operation in the framework of the **OECD Working Group Bribery in International Business Transactions**. In accordance with Article 12 of the Convention - the parties agree to cooperate with each other in order to monitor compliance with its provisions, inter alia, in the form of reviews of individual countries in the forum OECD Working Group Bribery in International Business Transactions.<sup>5</sup>
- Poland is also member of **The Group of States against Corruption (GRECO)** which was established in 1999 by the Council of Europe to monitor States' compliance with the organisation's anti-corruption standards. GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.<sup>6</sup>

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<sup>5</sup> <http://www.mg.gov.pl/node/7483#>

<sup>6</sup> [http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/general/3.%20What%20is%20GRECO_en.asp)



## 4 CASES

4.1 Please describe in brief three (3) cases in bribery / corruption in (or involving) your jurisdiction which illustrate the trend towards cross – border / global investigation and enforcement of anti – bribery laws. For example, cases where:

- a. your jurisdiction’s law(s) were enforced on an extra – territorial basis;
- b. there was a degree of cooperation / assistance provided by your jurisdiction to another jurisdiction, or vice versa; and/or
- c. penalties were imposed by your jurisdiction as well as by other jurisdictions, in relation to the same set of facts.

- **Hewlett – Packard (HP) case**

Computing multinational Hewlett-Packard (HP) has agreed to pay US regulators \$108m to settle a corruption scandal involving employees at subsidiaries in three countries who were charged with bribing government officials to win and retain lucrative public contracts.

Corruption was unearthed in relation to contracts worth \$40m to install IT equipment at the national police headquarters in Poland, €35m of work for government prosecutors in Russia, and a deal to supply Mexico's state-owned petroleum company. The investigation has involved regulators in Poland and Germany, the US Department of Justice (DoJ), its Securities and Exchange Commission (SEC), and the FBI.

According to an agreed statement of facts, in Poland, from 2006 through at least 2010, HP Poland falsified HP books and records and circumvented HP internal controls to execute and conceal a scheme to corruptly secure and maintain millions of dollars in technology contracts with the Komenda Główna Policji (KGP), the Polish National Police agency. HP Poland made corrupt payments totaling more than \$600,000 in the form of cash bribes and gifts, travel and entertainment to the KGP’s Director of Information and Communications Technology. Among other things, HP Poland gave the government official bags filled with hundreds of thousands of dollars of cash, provided the official with HP desktop and laptop computers, mobile devices and other products and took the official on a leisure trip to Las Vegas, which included drinks, dining, entertainment and a private tour flight over the Grand Canyon. To covertly communicate with the official about the corrupt scheme, an HP Poland executive used anonymous email accounts, prepaid mobile telephones and other methods meant to evade detection.

US regulators have launched a wide-ranging probe into the behaviour of US IT companies abroad. IBM said last year it was under investigation in Poland and four other countries, and the company paid \$10m, also in 2013, to settle a corruption case involving

China and South Korea. Cisco said last month the company and its resellers in Russia, eastern Europe and central Asia were investigated.

Poland has been pursuing allegations of corruption against a group of multinational IT companies, covering a period from 2007 to 2009. 41 people, including IT company executives, government officials and former police officers, had been charged with almost 70 offences.

Under the US's Foreign and Corrupt Practices Act, which makes it illegal to bribe foreign government officials, HP or individuals involved in the case could be subject to penalties of up to \$725,000 per violation and the company could be forced to hand back any profits. If found guilty of criminal offences, the penalty could rise to \$25m per violation.<sup>7</sup>

- **IBM case** (*pending*)

International Business Machines Corp. (IBM) is being probed over corruption allegations in Poland, Argentina, Bangladesh and Ukraine, an investigation that comes on the heels of bribery charges from the Securities and Exchange Commission. The US Justice Department investigated whether IBM violated the Foreign Corrupt Practices Act.

A U.S. judge in July, 2013 signed off on IBM's 2011 settlement with U.S. regulators over charges of foreign bribery, wrapping up the latest case that questioned U.S. authorities' aggressiveness in investigating corporate misconduct. U.S. District Judge Richard Leon approved the settlement between International Business Machines Corp (IBM.N) and the Securities and Exchange Commission after IBM agreed to a two-year reporting requirement on accounting fraud or bribery as well as federal investigations.

IBM in March 2011 agreed to pay some \$10 million to resolve SEC charges over improper gifts to government officials in South Korea and China. The Department of Justice investigated allegations of illegal activity by a former IBM employee in Poland as well as transactions in Argentina, Bangladesh and Ukraine, according to IBM's April 30 filing with the SEC.

Polish prosecutors and CBA agents cooperate with US prosecutors and FBI. In the end of 2014 they met in United States and Polish side gained new evidence in IBM case. The Poles questioned in the US five IBM employees responsible for Poland and our part of Europe – managers who approved all prices, discounts and margins.

CBA and the prosecution suspect that some operating in Poland international IT companies maintained a special fund to bribe Polish officials. There were special credit lines allocated for this purpose.

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<sup>7</sup> <http://www.theguardian.com/business/2014/apr/09/hewlett-packard-108m-corruption-government-it-us-bribery>

Thanks to, inter alia, materials collected by Polish authorities, the US recently succeeded in getting another US company - HP - to admit to corrupt practices and pay a \$ 108 million penalty.<sup>8</sup>

- **Johnson & Johnson case**

According to official documents, Johnson & Johnson subsidiaries paid bribes to Greek doctors who chose the company's surgical implants, and to state doctors in Poland and Romania in exchange for contracts and agreements to prescribe its drugs. The company also made illegal payments to Iraqi officials to win contracts under the U.N. oil-for-food program.

J&J used slush funds, sham contracts and off-shore companies in the Isle of Man to carry out the bribery. Public health system doctors and administrators who ordered J&J products such as surgical implants or prescribed the company's drugs were rewarded in a variety of ways, including with cash and travel.

Without admitting or denying the SEC's allegations, J&J has consented to the entry of a court order permanently enjoining it from future violations of some Sections of the Securities Exchange Act of 1934; ordering it to pay \$38,227,826 in disgorgement and \$10,438,490 in prejudgment interest; and ordering it to comply with certain undertakings regarding its FCPA compliance program. J&J voluntarily disclosed some of the violations by its employees and conducted a thorough internal investigation to determine the scope of the bribery and other violations, including proactive investigations in more than a dozen countries by both its internal auditors and outside counsel.<sup>9</sup>

The District Court in Kielce considered that the assistant director of hospital in Skarżysku – Kamiennej took bribes from representatives of the pharmaceutical company Johnson & Johnson and sentenced him to one year and ten months imprisonment conditionally suspended for four years. He had to also pay fine in the amount of PLN 22.5 thousand.

The court also sentenced three co-defendants who received sentences ranging from 10 to 18 months in prison with a conditional suspension for two to three years and a fine ranging from PLN 1 to 8 thousand. The fourth co-defendant was punished by the fine.

- **Eli Lilly case**

The Securities and Exchange Commission charged Eli Lilly and Company with violations of the Foreign Corrupt Practices Act (FCPA) for improper payments its subsidiaries made to foreign government officials to win millions of dollars of business in Russia, Brazil, China, and Poland.

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<sup>8</sup> <http://www.rp.pl/artykul/1154002.html>

<sup>9</sup> <http://www.sec.gov/news/press/2011/2011-87.htm>

Lilly's subsidiary in Poland made eight improper payments totaling \$39,000 to a small charitable foundation that was founded and administered by the head of one of the regional government health authorities in exchange for the official's support for placing Lilly medical pills on the government reimbursement list.

Lilly agreed to pay disgorgement of \$13,955,196, prejudgment interest of \$6,743,538, and a penalty of \$8.7 million for a total payment of \$29,398,734. Without admitting or denying the allegations, Lilly consented to the entry of a final judgment permanently enjoining the company from violating the anti-bribery, books and records, and internal controls provisions of the FCPA. Lilly also agreed to comply with certain undertakings including the retention of an independent consultant to review and make recommendations about its foreign corruption policies and procedures.<sup>10</sup>

- **Stryker Corporation case**

The company used third parties to make payments to strategically influential personnel as a way of doing business in Argentina, Greece, Mexico, Poland and Romania. The scheme allegedly violated both the Foreign Corrupt Practices Act and the Securities Exchange Act of 1934.

Stryker Corporation's subsidiaries in Argentina, Greece, Mexico, Poland, and Romania made illicit payments totaling approximately \$2.2 million that were incorrectly described as legitimate expenses in the company's books and records. Descriptions varied from a charitable donation to consulting and service contracts, travel expenses, and commissions. Stryker made approximately \$7.5 million in illicit profits as a result of the improper payments.

The SEC's investigation also found that Stryker's subsidiaries bribed foreign officials by paying their expenses for trips that lacked any legitimate business purpose. For example, in exchange for the promise of future business from the director of a public hospital in Poland, Stryker paid travel costs for the director and her husband in May 2004.

Stryker Corp. had to pay \$13.3 million to settle Securities and Exchange Commission charges that it paid millions of dollars in bribes to obtain or maintain medical device sales in five foreign countries.

The District Court in Olsztyn sentenced Bozena W., former director of the city hospitals Jonscher and Jordan in Lodz, for two years imprisonment conditionally suspended for five years.

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<sup>10</sup> [http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116#.VK\\_VbyuG\\_uN](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116#.VK_VbyuG_uN)