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Implementation of the PIF Directive into Polish Criminal Law – Selected Issues

Implementacja dyrektywy PIF do polskiego prawa karnego – wybrane zagadnienia

ABSTRACT

The article refers to Polish law and Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. The aim is to analyse selected Polish provisions currently in force in light of this Directive. Against the background of the EU legal instrument, the author points out the selected most significant loopholes in Polish law hindering an effective fight against crime detrimental to the financial interests of the Union. The analysis carried out in the article indicates, among others, that there is a high need to modify the Polish legal framework as regards the liability of collective entities for offences, as well as provisions on fraud.

Keywords: criminal law; PIF crimes; EU law; Polish law

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INTRODUCTION

The protection of the financial interests of the European Union constitutes one of the issues currently debated in Poland, mainly because of the decision of the new Polish government to join the enhanced cooperation in the establishment of the European Public Prosecutor's Office.[1] However, these discussions focus on institutional and procedural issues, whereas the substantive aspects of the protection of the financial interests of the Union are less likely to stimulate such debates. This is probably due to the fact that the adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law[2] drew virtually no attention in Poland[3] – no harmonizing measures and no legislative changes were adopted.

The article aims at a comprehensive presentation of the provisions of the PIF Directive in order to get the readers acquainted with this important legal act. Furthermore, the article is based on a thesis that the Polish law is not fully in compliance with the PIF Directive, and therefore its second purpose is to point out to the selected loopholes identified by the author through a comparative analysis of the Polish and EU provisions, which effectively hinder the harmonisation of the Polish law with the PIF Directive.

THE PROVISIONS OF THE PIF DIRECTIVE

As stated in Article 1 of the PIF Directive, its aim is to establish minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests, with a view to strengthening protection against criminal offences which affect those financial interests, in line with the *acquis* of the Union in this field. The PIF Directive thus sets out the scope for a minimum regulation of the criminalisation and liability regime for acts detrimental to the EU financial interests, with Member States being able to tighten this standard in their national systems, either in terms of criminalisation or sanctions, but not to lower it, e.g., by providing for more lenient sanctions or introducing narrower criminalisation than recommended in the PIF Directive.

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[1] Ministerstwo Sprawiedliwości, *Polska częścią Prokuratury Europejskiej*, 29.2.2024, https://www.gov.pl/web/sprawiedliwosc/polska-czescia-prokuratury-europejskiej (access: 25.3.2024).

[2] OJ EU L 198/29, 28.7.2017, hereinafter: the PIF Directive.

[3] See I. Sepioło-Jankowska, *Wpływ prawa unijnego na polskie rozwiązania w zakresie prawno-karnej ochrony interesów finansowych w Unii Europejskiej*, "Prokuratura i Prawo" 2020, no. 11–12; C. Nowak, *Ochrona interesów finansowych Unii Europejskiej w świetle polskiego prawa karnego*, Warszawa 2023.

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Pursuant to Article 16, the PIF Directive replaced the Convention on the protection of the European Communities' financial interests of 26 July 1995, including the Protocols thereto of 27 September 1996, of 29 November 1996 and of 19 June 1997, with effect from 6 July 2019. The Directive is therefore currently the only applicable legal act in the EU governing the substantive aspects of criminal liability for acts detrimental to the EU's financial interests.

The EU legal framework in the PIF area refers to a variety of legal tools of administrative and penal character. The PIF Directive has been adopted, as mentioned in Recital 3 of the Preamble, to continue to approximate the criminal law of the Member States by complementing the protection of the Union's financial interests under administrative and civil law for the most serious types of fraud-related conduct in that field, whilst avoiding inconsistencies, both within and among those areas of law. The significance of the Directive therefore lies to a large extent in the fact that it complements the already existing system for the protection of the EU's financial interests, within which administrative measures and sanctions still play an important role, as confirmed by Recitals 30 and 31 of the Preamble.

The PIF Directive contains quite a number of provisions that were already known under the third pillar legislation, namely the PIF Convention and its protocols, but it also brings new elements to the system of protection of the EU financial interests. A novelty is undoubtedly the obligation for Member States to criminalise the misappropriation of funds by an official, as well as the explicit extension of the definition of the offence of fraud to include the most serious VAT-related behaviours. In addition, the PIF Directive introduces provisions relating to the limitation period for acts detrimental to the EU's financial interests.

The scope of criminalisation provided for in the PIF Directive overlaps with the scope known from the 1995 PIF Convention and protocols thereto. The Directive obliges the Member States to criminalise in their national law four types of offences against the financial interests of the Union. The most important one is fraud affecting the Union's financial interests (Article 3). The three other criminal offences affecting the Union's financial interests are: money laundering, passive and active corruption and misappropriation (Article 4).

As mentioned in Recital 4 of the Preamble, the protection of the Union's financial interests calls for a common definition of fraud falling within the scope of this Directive, which should cover fraudulent conduct with respect to revenues, expenditure and assets at the expense of the general budget of the European Union, including financial operations such as borrowing and lending activities. Such a broad scope of criminalization is reflected in Article 3, which describes the offence of fraud as a multifaceted crime, covering a wide spectrum of criminal behaviours. The basic classification of subtypes of the crime of fraud refers to the affected side of the EU budget and covers expenditure on the one hand, and revenue on the other. Furthermore, the subtypes of the offence of fraud are separated out depending on whether

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they affect procurement-related or non-procurement-related expenditure, or whether they refer to revenue arising or not arising from VAT own resources. The result are twelve forms of offence, which together have been labelled as fraud against the EU's financial interests, some defined in a more complicated manner than others.[4]

Concerning revenue arising from VAT own resources, after a long negotiation the Member States agreed to penalize only serious offences against the common VAT system, that is offences against the common VAT system where the intentional acts or omissions are connected with the territory of two or more EU Member States and involve a total damage of at least 10 million EUR,[5] and have been committed in cross-border fraudulent schemes.[6]

The PIF Directive penalizes three forms of behaviours: (1) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (2) non-disclosure of information in violation of a specific obligation, with the same effect; (3) the misapplication of such funds or assets for purposes other than those for which they were originally granted, or with regard to VAT – misapplication of a legally obtained benefit, with the same effect, as well as the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

All forms of penalized behaviours are for the effect a damage to the EU budget or budgets managed by the Union, or on its behalf – except for the VAT-related fraud which is aimed at protecting the EU budget only, not the budgets managed by or on behalf of the Union.

The first form of penalized behaviour consists in using or presenting false, incorrect or incomplete statements or documents, which should be understood as any documents or statements (certificates, etc.) that contain information contrary to the truth, contrary to the requirements in a given situation or not containing all required information. The second form of penalized behaviour consists in criminal omission, where the perpetrator violates their specific duty to disclose a piece of information. Information in this context should be understood as any piece of data relevant in a given situation (in case of VAT fraud, the information must relate

[4] W. Geelhoed, *Categorising the Offence of Fraud against the Financial Interests of the European Union: A Law and Cognition Perspective*, [in:] *The Future of EU Criminal Justice Policy and Practice*, eds. J. Ouwerkerk, J. Altena, J. Öberg, S. Miettinen, New York 2019, p. 156.

[5] The notion of total damage, pursuant to Recital 4 of the Preamble, refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties.

[6] See A. Juszczak, E. Sason, *The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive): Laying Down the Foundation for a Better Protection of the Union's Financial Interests?*, "Eucrim" 2017, no. 2, p. 83.

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to VAT). The third form of penalized behavior refers to using the funds or assets improperly, which means contrary to their purpose. When it comes to VAT fraud, the behaviour is essentially identical, but it refers to the presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds.

The criminalization related to procurement-related expenditure is conditioned upon the fact that the perpetrator committed the act in order to make an unlawful gain for themselves or another by causing a loss to the Union's financial interests. Such a requirement is not provided for with regard to other types of expenditure.

Also, it must be emphasized that the transnational (cross-border) nature of the fraud is only required with regard to VAT frauds, all other forms of fraud affecting the EU financial interests may take place nationally and still fall under the scope of the PIF Directive.

Concerning the possible perpetrator of the PIF fraud, the Directive does not specify any details which imply that anyone can commit the fraud. Moreover, the commission of PIF fraud requires intention in any form, as defined in national legal system. Pursuant to Recital 11 of the Preamble, the notion of intention must apply to all the elements constituting those criminal offences and the intentional nature of an act or omission may be inferred from objective, factual circumstances. Unintentional acts do not constitute PIF offences.

Other criminal offences affecting the Union's financial interests are, as mentioned above, money laundering, corruption and misappropriation.

As provided for in Article 4 (1) of the PIF Directive, the EU Member States are obliged to take the necessary measures to ensure that money laundering as described in Article 1 (3) of Directive (EU) 2015/849 involving property derived from the criminal offences covered by this Directive constitutes a criminal offence (so-called AMLD IV).

Money laundering is an intentional offence. The perpetrator of this act can be any person, not only the perpetrator of the acts referred to in the PIF Directive. In contrast, punishability under this legislation applies only to acts that are "related to property derived from the offences covered by the PIF Directive", that is, to the four crimes set out in the PIF Directive. This appears to mean that the acts of the PIF Directive are intended to constitute predicate offences of money laundering, which only then can be punished under the PIF Directive.

The other two criminal offences defined in the PIF Directive, namely corruption and misappropriation, may only be committed by or in relation to a public official. Article 4 (4) of the PIF Directive contains a very extensive definition of the notion of a public official. It covers two categories of persons: first, officials of the Union[7]

[7] As stated in Article 4 (4) (a) (i) of the PIF Directive, the notion of "Union official" means a person who is: an official or other servant engaged under contract by the Union within the meaning of the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the Eu-

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or national officials,[8] and second, any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

This provision reflects a very pragmatic and commendable approach taken by the European Union, expressed in Recital 10 of the Preamble, providing that private persons are increasingly involved in the management of Union funds and therefore, the definition of "public official" needs to cover persons who do not hold formal office but who are nonetheless assigned and exercise, in a similar manner, a public service function in relation to Union funds, such as contractors involved in the management of such funds.

The PIF Directive obliges the Member States to criminalise both passive and active forms of corruption. Passive corruption means the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests, whereas active corruption means the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests. The features of these offences reflect the definitions of corruption set forth in earlier EU legal instruments, with the one, though notable exception – the notion of "breach of duty" has been deleted from the definitions of crimes, thus expanding the scope of criminalization.[9]

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ropean Union laid down in Council Regulation (EEC, Euratom, ECSC) No. 259/68, or seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants. Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies shall be assimilated to Union officials, inasmuch as the Staff Regulations do not apply to them.

[8] Pursuant to Article 4 (4) (a) (ii) of the PIF Directive, the term "national official" shall be understood by reference to the definition of "official" or "public official" in the national law of the Member State or third country in which the person in question carries out his or her functions. Nevertheless, in the case of proceedings involving a national official of a Member State, or a national official of a third country, initiated by another Member State, the latter shall not be bound to apply the definition of "national official" except insofar as that definition is compatible with its national law. The term "national official" shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional or local level shall be assimilated to a national official.

[9] D. Benito Sánchez, *The Directive on the Fight against Fraud to the Union's Financial Interests and Its Transposition into the Spanish Law*, "Perspectives on Federalism" 2019, vol. 11(3), p. 132.

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The PIF Directive mentions "advantage of any kind" which means that the bribe may take any form imaginable, provided it constitutes an advantage for a public official or for any third party.

Both forms of corruption are intentional offences. Passive corruption may only be committed by a public official, directly or through an intermediary, while active corruption is a common offence, which may be committed by any person. Both forms of corruption are defined as acts committed with regard to the public official's duty or in the exercise of the public official's functions. Furthermore, they must damage or must be likely to damage the Union's financial interests. Other types of corruptive behaviours, in particular corruption in the private sector, remains outside the scope of application of the PIF Directive at hand.

The last type of criminal offence detrimental to the Union's financial interests is misappropriation. Recital 8 of the Preamble explains that the Union's financial interests can be negatively affected by certain types of conduct of a public official who is entrusted with the management of funds or assets, whether he or she is in charge or acts in a supervisory capacity, which types of conduct aim at misappropriating funds or assets, contrary to the intended purpose and whereby the Union's financial interests are damaged. There is therefore a need to introduce a precise definition of criminal offences covering such conduct.

The offence of misappropriation is defined in Article 4 (3) of the PIF Directive as the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests.

It is clearly an individual offence, which may be committed not by any public official, but only a public official "directly or indirectly entrusted with the management of funds or assets". The penalized behaviour must be intentional and consists in committing or disbursing funds or appropriate or using assets contrary to the purpose for which they were intended. Only behaviours damaging the EU's financial interests are criminalized.

According to the PIF Directive, all natural persons are to be held criminally liable, as well as legal persons are to be held accountable for the acts criminalized in the Directive. As mentioned in Recital 15 of the Preamble, in order to ensure equivalent protection of the EU's financial interests throughout the Union by means of measures which should act as a deterrent, Member States should provide for certain types and levels of sanctions when the criminal offences defined in this Directive are committed. The levels of sanctions should not go beyond what is proportionate for the offences. For this reason, the Directive in Article 7 provides that the criminal offences referred to in Articles 3 and 4 are punishable by a maximum penalty of at least four years of imprisonment when they involve considerable damage or advantage. Otherwise, individuals who committed these acts, are to be

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punished by effective, proportionate and dissuasive criminal sanctions, specifically by a maximum penalty which provides for imprisonment.

The provisions of the PIF Directive are less detailed with regard to sanctions applicable to legal persons. Article 9 mentions only that these sanctions must be effective, proportionate and dissuasive.

DISCUSSION

The deadline for the implementation of the PIF Directive expired on 6 July 2019. As mentioned above, Polish authorities did not undertake any harmonizing activities, maintaining that the Polish law remained in full compliance with the Directive.

Yet, in fact, Polish law is not in line with all the PIF Directive's provisions.[10] Below are presented the three selected most important deficiencies of the Polish legislation which need urgent modification in the light of the PIF Directive.

Concerning the criminalization in Polish law, the most glaring loophole refers to the lack of criminalization of the misapplication of EU funds or assets for purposes other than those for which they were originally granted, which is one of the three main forms of commission of an EU fraud, as provided for in Article 3 (2) of the PIF Directive.

The Polish law knows Article 82 of the Fiscal Criminal Code,[11] which stipulates that any undue payment, collection or misuse of a grant or subsidy is subject to a penalty. The prohibited conduct of the perpetrator consists in exposing public finances to depletion. The *modus operandi* of the perpetrator consists in the undue payment of a grant or subsidy, the undue collection of a subsidy or subvention or the use of a subsidy or subvention obtained contrary to its intended purpose.

The notions of grant or subsidy had been present in the text of the provision since the entry into force of the Fiscal Criminal Code in 1999, but it was only since the need for criminal law protection of the EU's financial interests emerged in 2004, after the accession of Poland to the European Union, that Article 82 of the Fiscal Criminal Code began to be identified as a provision for their protection. However, the problem that now arises concerns the way in which the notions of grant or subsidy are to be understood.

Pursuant to Article 124 (1) (1) of the Public Finance Act,[12] grant and subsidy are the basic types of expenditure from the state budget. A subsidy is a non-re-

[10] Detailed analysis of the amendments required is presented in C. Nowak, *Ochrona interesów…*, p. 125 ff.

[11] Act of 10 September 1999 – Fiscal Criminal Code (consolidated text, Journal of Laws 2023, item 645). The Act entered into force on 17 October 1999.

[12] Act of 27 August 2009 on public finance (consolidated text, Journal of Laws 2023, item 1270).

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fundable benefit from the state budget to which, e.g., local government units (on the basis of Article 167 (2) of the Polish Constitution) and higher education and science entities are entitled. A subsidy is a form of redistribution of public funds, a public-law benefit of the state to other entities. It constitutes a form of expenditure from the state budget and, unlike grants, is not directed to strictly defined purposes. On the other hand, in accordance with the legal definition contained in Article 126 of the Public Finance Act, grants are funds from the state budget, budget of local government units and state purpose funds allocated on the basis of any statutory act or international agreements, for financing or co-financing of the implementation of public tasks, subject to specific settlement rules. The Public Finance Act distinguishes between purpose-specific, object-specific and subject-specific subsidies.

Two views have emerged in the criminal justice literature on how to understand the notion of grants and subsidies on the basis of Article 297 of the Criminal Code,[13] where these terms are also used. The first, earlier, view assumes that when interpreting these terms, one should rely on their colloquial meaning, i.e. their broad meaning, and as a result cover the protection of "present and future non-refundable monetary benefits, granted from public funds, serving various public purposes".[14] The second, later and more restrictive view, holds that such a broad interpretation of the provision of Article 297 of the Criminal Code contradicts the principles of the criminal law and is therefore inadmissible and, moreover, does not take into account the object of protection of the offence of financial fraud, which is economic turnover, understood as related to economic activity.[15]

Both of these views do not appear to be accurate. Taking into account the protective function of criminal law, I am of the opinion that narrowing the scope of protection offered by Chapter XXXVI of the Criminal Code only to behaviour related to economic activity is inexpedient. For example, money laundering, after all, does not necessarily take place within the framework of economic activity, and undoubtedly constitutes a socially harmful act and is in practice subject to prosecution regardless of whether it is carried out by a professional entity carrying out economic activity. On the other hand, however, in my view, both concepts discussed here cannot be understood differently in criminal law than in other areas of law in which they are regulated in detail. For, as R.A. Stefański aptly states, "in linguistic interpretation, the rules of legal language take precedence by reference to legal definitions, and in their absence to words and expressions uniformly understood in science and juris-

[13] Act of 6 June 1997 – Criminal Code (consolidated text, Journal of Laws 2024, item 17). The Act entered into force on 1 September 1998.

[14] See O. Górniok, *Przestępstwa gospodarcze. Rozdział XXXVI i XXXVII Kodeksu karnego*, Warszawa 2000, p. 29.

[15] See M. Klubińska, *Przestępstwo oszustwa gospodarczego z art. 297 k.k.*, Warszawa 2014, p. 256.

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prudence".[16] Therefore, if we have legal definitions of the concepts of grant and subsidy, and in the process of interpretation the way in which they are understood in the legal system is easy to determine on the basis of the laws on public finance, it is difficult to consider that the intention of the legislator as to their meaning is unclear.

Assuming, therefore, that the notions of grant and subsidy should be understood on the grounds of criminal law in the same way as they are defined in public finance law, it remains to be determined whether funds originating from the EU budget and other budgets managed by the Union or managed on its behalf, distributed in Poland, constitute a grant and subsidy within the meaning of Article 297 of the Criminal Code, and thus of Article 82 of the Fiscal Criminal Code. It appears that the answer to this question must be essentially in the negative. With regard to subsidies, there is no doubt – for although EU funds are part of Polish public funds, they are not transferred to other entities in the form of a subsidy. On the other hand, the only type of subsidy that relates to EU funds are targeted subsidies anticipating financing of the Common Agricultural Policy, referred to in separate regulations, in the part subject to refund from European Union funds (Article 127 (2) (6) of the Public Finance Act).

The distribution of EU funds takes place in Poland through a number of institutions and under various procedures, which, however, are not the same as grant procedures in the meaning given to this concept under the Public Finance Act. Therefore, it should be concluded that the elements of the act under Article 82 of the Fiscal Penal Code relate to EU funds only to a very limited extent, i.e. only in relation to targeted subsidies in advance of the financing of the Common Agricultural Policy, in the part subject to reimbursement from EU funds.

Furthermore, the misapplication of EU funds or assets for purposes other than those for which they were originally granted is also not criminalised in the Criminal Code, although some point to Article 286 of the Criminal Code, stipulating the offence of simple fraud, and Article 297 of the Criminal Code, providing for an offence of financial fraud. However, in my view, both of these provisions are not relevant for the purpose of criminalising misapplication of EU funds or assets for purposes other than those for which they were originally granted, as Article 286 of the Criminal Code refers to obtaining funds fraudulently, whereas the PIF Directive covers legally obtained funds being used in a different purpose, and Article 297 of the Criminal Code protects funds in an abstract manner, by criminalising presentation of false documents. Therefore, in general, Polish criminal law does not penalize the misapplication of EU funds or assets for purposes other than those for which they were originally granted.

In Article 4 (2) (b) of the PIF Directive active corruption is defined as "promise, offer or giving" any benefit, whether material or personal, directly or through an

[16] R.A. Stefański, *Wykładnia przepisów prawa karnego*, [in:] *System Prawa Karnego*, vol. 2: *Źródła prawa karnego*, ed. T. Bojarski, Warszawa 2011, p. 498.

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intermediary, to a public official for himself or for a third party. By contrast, in Polish criminal law, active corruption is defined as "giving or promising to give" any benefit, whether material or personal, directly or through an intermediary, to a public official for himself or for a third party. The difference between the penalised forms of corruption in Polish law and the PIF Directive refers to the act of "offering". Under the Polish law, offering is criminalised as an attempt to commit active corruption. Although it may be argued that criminalization of offering as an attempt does not differ functionally from criminalization of offering as a form of commission of the act of corruption, the issue lies not so much with the criminalization, but with the requirement set forth in Article 7 of the PIF Directive to punish criminal offences detrimental to the financial interests of the Union by "effective, proportionate and dissuasive criminal sanctions". This is due to the fact that when it comes to imposing the penalty by the court, an attempt to commit an offence is usually punished with a lesser penalty than the actual commission of an offence.[17] Therefore, Polish law does not comply with the PIF Directive with regard to the effectiveness of penalties for all three forms of active corruption of public officials enumerated in Article 4 (2b) of the PIF Directive. In consequence, the catalogue of forms of active corruption in Polish law should be amended in order to include "offering" as a form of the commission of active corruption.

The same problem with sanctions applies to the liability of legal persons for offences in Poland. Historically, liability of legal persons for crimes had not been provided in the Polish legal system. However, a necessity of implementing international anti-corruption legal framework contributed to the adoption of a new statutory act in 2002, which established the liability of collective entities for prohibited acts. Due to the theoretical considerations, related to the notion of guilt in criminal law, this liability was neither set forth in the Criminal Code, nor was it constructed as criminal, even though it was clearly very close to criminal liability.

A year after its adoption, the new Act on liability of collective entities for acts prohibited under a penalty entered into force on 28 November 2003.[18] The provisions on the liability of collective entities for acts prohibited under a penalty started being enforced in 2006. It is enforced highly ineffectively, as there are remarkably few rulings on the liability of collective entities in Poland: in the years 2006–2020, there have been 85 rulings on the liability of a collective entity in total.

A collective entity may only be held liable for a criminal act, i.e. a conduct by a natural person associated with the entity that has benefited or could have benefited the entity, albeit non-materially. The model of collective entity liability set out in the

[17] As confirmed by the Supreme Court in the judgment of 6 February 1976, Rw 45/76, LEX no. 19119.

[18] Act of 28 October 2002 on liability of collective entities for acts prohibited under a penalty (Journal of Laws 2002, no. 197, item 1661; consolidated text, Journal of Laws 2023, item 659).

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2002 Act is based on four requirements – three substantive and one procedural.[19] The procedural prerequisite for the liability of collective entities, set forth in Article 4 of the 2002 Act, means that a collective entity is liable if the fact that a criminal act was committed by a natural person associated with the collective entity in the manner described above has been confirmed by the following: (i) a final judgment convicting that person; (ii) a judgment conditionally discontinuing criminal proceedings or proceedings for a fiscal offence against that person; (iii) a judgment granting that person permission to voluntarily submit to liability; (iv) a court decision discontinuing proceedings against that person due to circumstances excluding the punishment of the perpetrator. This provision constitutes a main hinderance in the practical application of the Polish Act, as proceedings against natural persons take up to several years in Poland, and after their conclusion no one is required to hold collective entities liable, thus effectively the liability of collective entities is not being imposed in practice.

In the context of Article 9 of the PIF Directive, Article 4 of the 2002 Act completely prevents the collective entities from being held liable and consequently – from being subjected to sanctions, therefore it should be amended. The same recommendation has been formulated by the European Commission which in its report emphasized that corporate liability should not be made dependent on the final conviction of a natural person, because this undermines the possibility to impose "effective, proportionate and dissuasive" sanctions on legal persons.[20]

CONCLUSIONS

The decision to join the enhanced cooperation in the establishment of the European Public Prosecutor's Office, of 29 February 2024,[21] constitutes an important step towards improvement of the protection of the financial interests of the European Union in Poland, although the actual implementation of this decision takes a lot of time, as the European Prosecutor for Poland has not been appointed and the European Public Prosecutor's Office (EPPO) is still not operational in Poland as of November 2024. There is however a need to follow up that step with harmonisation of the Polish substantive law with the PIF Directive, as only a proper

[19] More on this topic, see C. Nowak, *Liability for Corruption in Poland in Light of the Commission Proposal for a New Directive on Corruption: The Devil Is in the Details*, "Eucrim" 2023, no. 3.

[20] Second report on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, Brussels, 16.9.2022, COM(2022) 466 final.

[21] Commission Decision (EU) 2024/807 of 29 February 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ EU L 2024/807, 29.2.2024).

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transposition of the rules set forth in the Directive will enable the EPPO to conduct effective investigations and prosecutions.

The analysis carried out in this article allows to positively verify the thesis set forth in the introduction that Polish law is not fully in compliance with the PIF Directive. Therefore, *de lege ferenda*, the Polish legislator should mend the identified loopholes, in particular change the model of liability of collective entities, extend the scope of criminalization of the Polish law to include the misapplication of EU funds or assets for purposes other than those for which they were originally granted, and provide for effective sanctions for all forms of active corruption. These changes will ensure both the compliance of Polish law with the PIF Directive and an effective prosecution of offences detrimental to the EU's financial interests.

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ABSTRAKT

Artykuł odnosi się do prawa polskiego oraz dyrektywy Parlamentu Europejskiego i Rady (UE) 2017/1371 z dnia 5 lipca 2017 r. w sprawie zwalczania za pośrednictwem prawa karnego nadużyć na szkodę interesów finansowych Unii. Celem jest analiza wybranych obecnie obowiązujących polskich przepisów w świetle tej dyrektywy. Na tle unijnego instrumentu prawnego autorka wskazuje wybrane najistotniejsze luki w polskim prawie, które utrudniają skuteczną walkę z przestępczością na szkodę interesów finansowych Unii. Przeprowadzona analiza wskazuje m.in. na potrzebę modyfikacji polskiego porządku prawnego w zakresie odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary, a także przepisów dotyczących oszustw.

Słowa kluczowe: prawo karne; przestępstwa na szkodę interesów finansowych Unii; prawo unijne; prawo polskie