Judgment of 3rd November 2004, K 18/03

LEGAL PERSON'S LIABILITY FOR A NATURAL PERSON'S OFFENCE

Type of proceedings:	Composition of Tribunal:	Dissenting opinions:
Abstract review Initiator: Polish Confederation of Private Employers	5-judge panel	0

Legal provisions under review	Basis of review
Certain provisions regulating the bases of liability of legal persons and other "collective entities" for punishable acts committed by natural persons linked to them; the penalty levels applicable to collective entities and court proceedings in such cases [Collective Entities' Liability for Prohibited Acts Subject to Penalty Act 2002: Article 3; Article 4, read in conjunction with Article 36(1); Article 5, in so far as it concerns Article 3 point 4; Articles 7, 17, 18, 20, 21, 23, 33, 40 and 48]	Rule of law Principle of proportionality Principle of equality Requirement for acts prohibited under criminal law to be defined by statute Right to defence in criminal proceedings Presumption of innocence [Constitution: Articles 2, 31(3), 32, 42]

The classical concept of criminal liability, involving the imposition of a penalty (a burden of a repressive nature) for the culpable commission of a prohibited act, perceived such liability as being applicable only in respect of natural persons. The situation was, and is, different as regards civil liability, whose essence is constituted by the obligation to compensate for damage caused by the obliged person or another person: such liability may apply to both natural and legal persons. However, the contemporary legal systems of some countries also envisage the imposition of criminal liability as regards certain legal persons and similar organisational entities – either within criminal codifications or on the basis of different statutes. An incentive to expand this approach within Europe has been provided by the Convention on the Protection of the European Communities' Financial Interests, adopted by the Council of the European Union on 26th July 1995, together with the First and Second Protocol thereto (dated 27th September 1996 and 19th June 1997, respectively). At the time the judgment summarised herein was delivered, procedures were underway in respect of Poland's ratification of this Convention.

The aforementioned legislative tendency is expressed in the Collective Entities' Liability for Prohibited Acts Subject to Penalty Act 2002. In the judgment summarised herein, the Tribunal found that some of its provisions failed to conform to the Constitution. The following summary of provisions contained in the Act concerns the version reviewed by the Tribunal.

"Collective entities", within the meaning of the Act, are legal persons and organisational units lacking legal personality, with the exception of the State Treasury, units of local self-government and the unions thereof. Nonetheless, companies whose shares are held by the State Treasury, or a local self-government legal person, also constitute "collective entities". The following entities are also included within this category: companies in organisation, entities in liquidation, non-natural-person entrepreneurs and foreign organisational units.

On the basis of the 2002 Act, the liability of a collective entity for one of the offences or fiscal offences listed in Article 16 of the Act is derivative in nature, being related to the criminal liability of a natural person linked to this entity. The fact that a natural person has committed a punishable act must be confirmed by one of the final judicial decisions or prosecutor's decisions mentioned in Article 4. Such a decision may concern the imposition of a penalty (sentence), voluntary acceptance of liability, conditional discontinuance of the proceedings or discontinuance of the proceedings due to circumstances preventing prosecution of the perpetrator. A court considering an application against a collective entity is bound by the aforementioned decision only insofar as regards the fact that a natural person has committed a punishable act; fulfilment of other preconditions for liability of the collective entity (mentioned below) is determined independently by the court.

In order for the collective entity's derivative liability to be established, it is necessary that the unlawful activity of the natural person remains in a certain connection with the functioning of the collective entity, as specified in Article 3 of the Act. This condition is met, for example, when a natural person acts in the name or interest of a collective entity, or when a natural-person entrepreneur is tied to the collective entity by an economic relationship. The second necessary condition is that the natural person's unlawful behaviour "led to, or could lead to, benefits for the collective entity, even where such benefits are of a non-proprietary nature".

The nature of a collective entity's liability for a natural person's act is specified precisely in Article 5 of the Act. Liability is dependent upon the type of ties between the two. Without delving into too many details, it may be noted that the legislator created the following bases for such liability: absence of due diligence in the selection of a natural person; absence of due supervision over such a person; or the failure to ensure**,** within the collective entity's organisational frameworks**,** that a natural person does not commit a prohibited act, where this was possible to ensure by providing that such a person exercises due diligence, as appropriate in the given circumstances.

The principal penalty imposed by the courts upon collective entities is pecuniary in nature and consists of a specified percentage of the entity's revenue from the tax year preceding imposition of the penalty, or expenditures incurred during that year – depending on the offence committed by the natural person and the surrounding circumstances. Such a penalty may not be lower than 5,000 Polish *zloty* and, concomitantly, may not exceed 10% of the entity's revenue or expenditure. Where the entity's revenue for the tax year preceding imposition of the penalty was below one million Polish *zloty*, the entity's expenditure, as opposed to its revenue, shall form the basis for calculating this penalty.

Certain obligatory or discretional additional penalties may also be imposed upon a collective entity by the court, such as the forfeiture of objects obtained in consequence of the prohibited act, a prohibition on advertising or a prohibition on exploiting public sources of financial support.

Court proceedings take place within a two-instance system. The Prosecutor General, or the Commissioner for Citizens' Rights, may bring a cassation against the second instance court's decision to the Supreme Court. The right to cassation is not vested in the parties but they may, nevertheless, petition one of the aforementioned entitled subjects to bring the cassation.

A series of provisions of the 2002 Act (cf. below) was challenged before the Tribunal by the Polish Confederation of Private Employers, who alleged that they failed to conform to the Constitution.

RULING

I

1. Article 3 of the challenged Act (the relationship between a natural person having committed a prohibited act and a collective entity, constituting a precondition for liability of the latter; conditioning liability of the collective entity upon it obtaining benefits, or the possibility of obtaining such benefits, from the natural person's activity) conforms to Article 2 of the Constitution.

2. Article 4 of the Act (the types of decisions confirming the commission of a punishable act by a natural person), read in conjunction with Article 36(1) (the binding nature of such decisions on the court adjudicating on the collective entity's liability):

a) does not conform to Articles 2 and 42(2) of the Constitution,

b) is not inconsistent with Article 42(3) of the Constitution.

3. Article 5 of the Act, insofar as it concerns Article 3(4) of this Act (the collective entity's liability for a punishable act committed by a natural-person entrepreneur, by virtue of the failure, by the collective entity's organisation, to ensure that a natural person does not commit a prohibited act, where this was possible to ensure by providing that such a person exercises due diligence), does not conform to Articles 2 and 42(1) of the Constitution.

4. Articles 7, 17, 18 and 20 of the Act (the level of penalty imposed upon a collective entity constituting a specified percentage of its revenue or expenditure for the tax year preceding imposition of the penalty), as well as Article 21 (a similarly determined level of penalty for non-compliance with certain prohibitions additionally imposed upon the collective entity) do not conform to Article 2 of the Constitution.

5. Article 23 of the Act (attributing the burden of proof to the party submitting evidence) conforms to Article 42(3) of the Constitution.

6. Article 33 of the Act (representation of a collective entity before a court by a member of its organ and the right to a defence counsel, being an advocate or a legal advisor) does not conform to Articles 2 and 42(2) of the Constitution.

7. Article 40 of the Act (limiting to the Prosecutor General and Commissioner for Citizens' Rights the right to bring a cassation against the judgment of a second instance court) conforms to Articles 31(3) and 32 of the Constitution.

8. Article 48 of the Act (a *vacatio legis* of 12 months) conforms to Articles 2 and 42(1) of the Constitution.

II

The Tribunal ruled that the loss of binding force of the provisions indicated in points I.2, I.3, I.4 and I.6 shall be delayed until 30th June 2005.

PRINCIPAL REASONS FOR THE RULING

1. It is not the Constitutional Tribunal's task to adjudicate on the substantive appropriateness of the legislator's solutions. The legislator is empowered to enact legislation fulfilling the desired political and economic goals and to adopt such legal solutions as, in its opinion, will best serve to realise those goals. The Tribunal is permitted to interfere solely when the legislator exceeds the limits of discretion vested therein, by virtue of infringing a specified constitutional principle or value.

2. When reviewing the constitutionality of statutes, the Constitutional Tribunal operates on the presumption that the reviewed provisions conform to the Constitution. The burden of proof rests upon the party challenging the constitutionality of a statute.

3. The enactment of vague and ambiguous provisions conflicts with the constitutional principle of the rule of law (Article 2) and, possibly, also with the requirement to specify by statute any limitations placed upon the exercise of constitutional rights and freedoms (Article 31(3)). The ambiguity of a provision may justify a finding that it does not conform to the Constitution where it reaches the point that the interpretative divergences stemming therefrom may not be removed by ordinary measures to eliminate ambiguities in the application of law. According to the Constitutional Tribunal's jurisprudence, the deprivation of a certain provision's binding force as a result of the ambiguity thereof is to be viewed as an ultimate measure, utilised only where alternative methods for removing the effects of the provision's vague content, in particular by means of interpretation, prove insufficient.

4. The requirement for criminal law provisions to be sufficiently precise constitutes one of the constitutional standards as regards repressive law. This requirement stems both from Article 42 of the Constitution and from the principle of protecting trust in the State and its laws, as stemming from the rule of law clause (Article 2 of the Constitution). The requirement of specificity concerns both the material elements of the Act and the constituent elements of the penalty, so as to ensure that the foreseeability requirement is fulfilled, allowing an individual to accurately discern the potential criminal-legal consequences of their actions in advance.

5. The constitutional concept of "criminal liability" (Article 42 of the Constitution) has a broader meaning than that contained within the Criminal Code. The applicable scope of Article 42 of the Constitution encompasses not only criminal liability *stricto sensu* (i.e. liability for committing offences), but also other forms of legal liability related to the imposition of penalties upon individuals. In consequence, the constitutional standards of repressive law also apply to the liability of collective entities, as envisaged in the challenged Act.

6. Article 42(1) of the Constitution applies directly to natural persons. However, this does not signify that the imposition of repressive measures upon collective entities is beyond the scope of constitutional guarantees and is subject to the legislator's discretion. It should be borne in mind that rights and freedoms vested in legal persons constitute manifestations of the rights and freedoms of the natural persons creating such collective entities and exercising their rights and freedoms through such entities. Therefore, a sanction imposed upon a collective entity does not concern an abstract property collective or organisational structure but, ultimately, limits the rights and freedoms of natural persons (in particular, rights and freedoms relating to property).

7. The type of liability envisaged in the reviewed Act in not by nature *stricto sensu* criminal liability. The substantive basis for liability is not based on the performance of an act by the liable entity, containing all of the statutory ingredients specified in the criminal law norm describing the offence or fiscal offence. Such a norm is not infringed by the collective entity itself, but rather by a natural person. The liability of a collective entity is, therefore, of a secondary and derivative nature: the substantive basis thereof is fulfilled by the final conviction (or other decision mentioned in Article 4 of the Act) of a natural person (fulfilling the conditions stipulated in Article 3) for an offence or fiscal offence (specified in Article 16). Such liability constitutes an expression of repressing unlawfulness arising from a failure to adhere to the legal order itself (the so-called objective concept of liability, i.e. not fault-based). In consequence, classical institutions of substantive criminal law are inapplicable to resolving issues concerning the liability of collective entities on the basis of the Act.

8. The *ne bis in idem* principle is one of the fundamental principles of criminal law and, furthermore, represents an element of the rule of law principle. Infringement of this principle would occur, in particular, where an organ of public power was authorised to apply a repressive measure twice in respect of the same entity for having committed the same act.

9. The applicant's interpretation of Article 3 of the reviewed Act, according to which this provision envisages the liability of a civil partnership, is unfounded. Since such liability is conditional upon the criminal liability of the partners, and since a civil partnership lacks legal personality within civil law, such an interpretation would justify an allegation that the *ne bis in idem* principle was infringed. The allegation that this provision lacks sufficient precision also remains unproven.

10. Article 4 of the reviewed Act, read in conjunction with Article 36, contains contradictions which may lead to various interpretations, amounting *per se* to an infringement of the principle of trust in the State and its laws, as well as the requirement of sufficient specificity within repressive law, as derived from Article 2 of the Constitution. Moreover, denying a collective entity the right to protect its interests within criminal proceedings against a natural person, resulting in delivery of a judicial decision which could later have the characteristic of a preliminary decision in proceedings against the collective entity itself – does not conform to the constitutional guarantee of the right to defence (Article 42(2)).

11. Each instance of repressive liability must respect the prerequisite for imposition of such liability; namely, the possibility of acting in compliance with the law (i.e. liability may not be imposed for having done an unavoidable act). This is also true as regards the imposition of liability upon legal persons. The verdict reached following conclusion of proceedings against a natural person does not determine the liability of the collective entity. Final decisions, mentioned in Article 4 of the Act, constitute merely one of the preconditions for initiating proceedings, alongside the prerequisites enumerated in Article 5. Neither the presumption of guilt nor the presumption of innocence stems from the reviewed provision and, accordingly, Article 42(3) is an inadequate basis of review of Article 4 (cf. point I.2 letter b of the ruling).

12. Whilst Article 42(1) of the Constitution does not directly express the principle of guilt as a prerequisite for criminal liability (*nullum crimen sine lege culpa*), it should be

concluded, both from the procedural principle of the presumption of innocence (Article 42(3) of the Constitution) and the nature of repressive liability *per se*, that criminal liability ought not to be imposed upon entities which were incapable of avoiding commission of a prohibited act or incapable of preventing the commission thereof. In other words, the application of measures that are repressive (penal) in nature is impermissible in respect of entities against which no allegation of infringing the law may be made, even where such an allegation relates to the failure to undertake obligatory actions to prevent the commission of a prohibited act.

13. Article 5 of the Act, insofar as challenged by the applicant (cf. point I.3 of the ruling), also envisages liability of a collective entity where such entity failed to influence the actions of a natural person who, as an entrepreneur, committed a prohibited act. The basis for attributing liability to a collective entity in this case is, inter alia, the entrepreneur's failure to exercise due diligence which could prevent commission of a prohibited act. However, it is impossible to organise the activities of a collective entity so as to completely ensure that prohibited acts are not committed by external entities. For these reasons, Article 5, insofar as challenged, does not conform to constitutional requirements (cf. point 12, read in conjunction with point 6, above).

14. The aforementioned statutory provision also fails to conform to the constitutional requirement that legal provisions shall be sufficiently precise, since a decisive element in determining the collective entity's liability is the criterion of its organisation "failing to ensure that a natural person does not commit a prohibited act". Repressive liability may not be linked to an infringement of the obligation to ensure that the entity's activities are pursued in an appropriate manner. Furthermore, it is unfounded to suggest, as did the Sejm representative in proceedings before the Tribunal, that the conditions contained in Article 5 of the reviewed Act are derived from civil law (e.g. the concept of "organisational fault") and therefore indicate the constitutionality of the reviewed provision, on the basis that the principles specified in the Act regarding the liability of collective entities have the nature of "mixed, civil-criminal norms". No such term is recognised in Polish law and, accordingly, the cited expression fails to explain anything.

15. Pursuant to Article 4 of the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, adopted on 19th June 1997, each Member State shall undertake actions necessary to ensure that a legal person held liable is punishable by means of "effective, proportionate and dissuasive sanctions". A pecuniary penalty should, therefore, remain appropriately proportionate to the economic potential of the perpetrator. The aim of the penalty imposed on the basis of the reviewed Act should not be the annihilation of the collective entity.

16. The provisions of the Act indicated in point I.4 of the ruling raise concerns from the aforementioned perspective and, moreover, fail to comply with the requirement of sufficient specificity. The use of imprecisely specified, and inherently contradictory, criteria to determine the limits of imposing high pecuniary penalties, and the establishment of a connection between the level of pecuniary penalty and the revenue or expenditure of the collective entity for the year preceding imposition of the penalty, deserve a negative assessment. The determination of a penalty in such a manner completely severs the link between the act committed and the level of penalty imposed. The level of penalty is unrelated to the economic situation of the collective entity at

the moment the act was committed and is dependent upon future economic developments, thereby making it impossible to foresee the consequences of unlawful behaviour.

17. The presumption of innocence (Article 42(3) of the Constitution) constitutes one of the elements of the right to defence. This presumption signifies that it is necessary to prove that a prohibited act was committed in a culpable manner, i.e. this must be demonstrated in a convincing way to the organ adjudicating on the penalty. The burden of proof as regards commission of a prohibited act rests on the party making these allegations. This is the so-called formal burden of proof, signifying that a party making allegations exclusively bears the burden of proving their statements, otherwise they will be rejected.

18. It is unjustified for the applicant to allege that Article 23 of the Act, attributing the formal burden of proof to the party submitting evidence, obliges the collective entity to undertake actions to prove its innocence. This rule does not relieve the prosecutor of the burden of proving fulfilment of the conditions specified in the Act for liability of a collective entity including, in particular, those specified in Article 5. Proceedings concerning the liability of collective entities are conducted in accordance with the provisions of the Act and the Criminal Procedure Code, and respect all standards guaranteeing the rights of the accused, including those stemming from the presumption of innocence principle.

19. Article 33(2) of the Act specifies, in a general manner, the right to appoint a defence counsel. This provision does not, however, regulate the number of defence counsels that the collective entity is entitled to appoint. As regards the latter issue, Article 22 of the reviewed Act applies, read in conjunction with Article 77 of the Criminal Procedure Code. Article 33(2), conceived in such a manner, does not give rise to concerns from the perspective of the constitutional right to defence (Article 42(2) of the Constitution).

20. Nevertheless, the possibility, envisaged in Article 33 of the Act, of cumulating the procedural functions of a person being a member of the collective entity's organ, does give rise to concerns. A member of the collective entity's organ, authorised to represent it, may participate in proceedings on behalf of the collective entity. However, no provision exists to prevent the appointment of such a person as a witness. There are also no particular restrictions concerning the permissible scope of testimony of such persons (in particular, the possibility to refuse to answer a question, given the fear that this may worsen the collective entity's procedural situation). The Act fails to resolve the issue of the appropriate person in whom the accused's procedural rights should be vested: whether in the collective entity itself, in the person representing the collective entity in proceedings instituted under the Act, or in each person being a member of the collective entity's collegiate organ. Such a lacuna justifies the allegation that the constitutional right to defence (Article 42(2)) is infringed by virtue of the insufficiently precise specification of the procedural guarantees allowing realisation of this right.

21. The Constitution guarantees a two-instance system of judicial proceedings (Article 176(1)). The right to cassation, as a measure of appealing against judicial decisions issued at second instance, is not a right of a constitutional nature. The legislator may, therefore, limit the scope thereof, restricting the possibility to bring cassations to cer-

tain proceedings or certain types of cases and, in particular, to "moderate" the right to cassation depending upon the level and nature of the sanction. The Constitution does not indicate any substantive criteria from which one ought to conclude that the legislator is obliged to introduce cassation. In particular, from the perspective of the Constitution, such criterion need not be the seriousness of the case, although it may be more appropriate to justify cassation in more serious cases. The assessment of such appropriateness, however, lies within the legislator's domain. The latter has discretion as regards both the choice of the model of cassation proceedings and the possible modification of the criteria concerning access to ordinary cassation, provided that the adopted criteria fall within the constitutional order (cf. point I.7 of the ruling).

22. The principle of equality before the law, as expressed in Article 32 of the Constitution, requires identical treatment of all addressees of a legal norm remaining in the same or similar legally relevant situation. A determination as to whether the principle of equality has been infringed in a particular case requires specification of the class of addressees to whom the given legal norm refers, and an indication of the legally relevant elements concerning the addressees' legal situation. Concomitantly, the principle of equality before the law requires a justified criterion, on the basis of which the situations of particular entities are differentiated.

23. In reviewing Article 40 of the Act from the perspective of the principle of equality, account should be taken of similarities between the procedural situations of a natural person being an accused within criminal proceedings and a collective entity in proceedings instituted under the Act. In case SK 32/03, the Constitutional Tribunal found that the criterion contained in Article 523 § 2 of the Criminal Procedure Code, permitting an accused having been sentenced to the most severe penalty (i.e. an absolute deprivation of liberty) to challenge the criminal judgment directly before the Supreme Court (the so-called ordinary cassation), conformed to the Constitution. Concomitantly, the Tribunal stated that the institution of extraordinary cassation (i.e. cassation brought by the Prosecutor General or the Commissioner for Citizens' Rights) against any judicial decision concluding the proceedings in a given case, complements the institution of ordinary cassation. The cassation envisaged in the reviewed Article 40 of the Act resembles extraordinary cassation in criminal cases. Each of the two entities entitled to bring an extraordinary cassation may, in the lodging thereof, act either upon their own initiative or upon the basis of a petition from an interested party. However, such entities are not bound by the assessment contained in that party's application for bringing a cassation: their statutory duties and competences indicate sufficiently that, in the event that they find the proceedings to have been defective, they shall take advantage of their entitlements. For these reasons, Article 40 of the reviewed Act does not infringe Article 32(1) of the Constitution.

24. From the general principles of inter-temporal law stems a presumption of non-retroactivity of new legal norms. This concerns repressive law in particular – provided that a provision realising the *lex mitior retro agit* principle is not simultaneously introduced. The lack of retroactivity need not be indicated *expressis verbis* in the statute's introductory provisions.

25. It stems from Article 48 of the reviewed Act, interpreted so as to take into account the aforementioned assumption, that a collective entity is liable for the enumerated actions of a natural person committed following the entry into force of this Act (28th Novem-

ber 2003). It is, accordingly, unjustified to claim that the prohibition of retroactivity of a criminal statute, as derived from Articles 2 and 42(1) of the Constitution, is infringed by Article 48 of the Act.

26. It is necessary to delay the loss of binding force of the unconstitutional provisions of the reviewed Act, in order to allow an amendment thereof.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 31. […] 3. Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 42. 1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally liable. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.
2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.
3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

Art. 176. 1. Court proceedings shall have at least two stages.

Art. 190. […] 3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.