sciendo

Ius Novum

2025, vol. 19, no. 1, pp. 59–80

ENTITIES ENTITLED TO FILE A REQUEST FOR PROSECUTION OF THE CRIMINAL OFFENCE OF PUNISHABLE MISMANAGEMENT WITHOUT DAMAGE – ASSESSMENT OF THE AMENDMENT TO ARTICLE 296 § 4A OF THE PENAL CODE

ŁUKASZ PILARCZYK*

DOI 10.2478/in-2025-0005

Abstract

This article analyses the amendment to Article 296 § 4a of the Penal Code, which broadened the circle of entities that may file a request for prosecution of the criminal offence of punishable mismanagement without damage. Prior to the amendment, only the aggrieved party had such a right, but now it is also available to a partner, shareholder, or stockholder of the aggrieved company or a member of the aggrieved cooperative. The purpose of this analysis is to assess whether this amendment was actually necessary and whether its introduction aligns with the principle of subsidiarity in criminal law. In the author's opinion, there is insufficient justification for this amendment, and its introduction appears to be the result of a faulty identification of the reasons for the rare application of the provision sanctioning the criminal offence of mismanagement without damage. The legislator has identified the limited circle of persons who may file a request for prosecution as the primary reason for its lack of practical application. However, in fact, the lack of application of this provision lies in its construction, which significantly limits the range of factual circumstances that can be qualified under its statutory elements. Furthermore, the introduced solution does not seem reconcilable with the principle of subsidiarity in criminal law, as it constitutes excessive interference of criminal law in corporate relations, increasing the risk of abuse of this institution.

Keywords: criminal law, criminal proceedings, request for prosecution, shareholder, punishable mismanagement

* LLD, Assistant Professor at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań (Poland), e-mail: lukasz.pilarczyk@amu.edu.pl, ORCID: 0000-0002-7278-9210

1. INTRODUCTION

The extensive amendment of the Penal Code of 7 July 2022[1] also included Article 296 § 4a of the Penal Code within its scope. To date, it read as follows: 'If the aggrieved is not the State Treasury, the prosecution of a criminal offence stipulated in § 1a shall take place at the request of the aggrieved party.' However, the amendment changed the wording of this provision to: 'If the aggrieved party is not the State Treasury, the prosecution of the criminal offence stipulated in § 1a shall take place at the request of the aggrieved party, partner, stockholder, or shareholder of the aggrieved company, or a member of the aggrieved cooperative.'

This provision refers to the prohibited act stipulated in Article 296 § 1a of the Penal Code, which consists in bringing about, as a result of abuse of granted powers or non-fulfilment of a duty, a direct threat of substantial property damage to a natural or legal person or an organisational unit without legal personality, by a person obliged, under a provision of law, a decision of a competent authority, or a contract, to deal with property affairs or business activities of one of the listed entities. The legislator considered it unjustifiable that only the aggrieved party – and therefore the entity that was in imminent danger of significant property damage – could file a request for prosecution for this prohibited act. As a result, the group of entities that can file this request was broadened to include a partner, stockholder, or shareholder of the aggrieved entity, or a member of a cooperative.

It is also worth noting at the outset that the method of initiating the prosecution of this prohibited act has, to date, generally not raised major questions.[2] For instance, P. Dębowski justified this by 'the lesser gravity of criminal offences of concrete exposure to danger than criminal offences of infringement of a legal interest'.[3] Furthermore, I. Sepioło even postulated that the entire Article 296 of the Penal Code should be covered by the procedure of prosecution at the request of the aggrieved party, arguing that it is justified that the right to initiate criminal proceedings concerning prohibited

---

[1] Journal of Laws of 2022, item 2600 of 13 December 2022.

[2] A different view was taken by J. Giezek (in: Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021, p. 1391), who argued that the provision in that wording did not resolve doubts as to whether a request for prosecution could be filed by the partners or creditors of a given entity – an issue partially addressed in the present amendment. However, it should be noted that these entities simply could not file a request for prosecution under the previous legal framework, and it is difficult to speak of any doubt in this regard, as they clearly could not be considered the aggrieved by a criminal offence under the definition in Article 49 of the Code of Criminal Procedure. The author's objection therefore appears unfounded in this respect. The following also spoke negatively about this solution: M. Ligęza-Turlakiewicz, G. Turlakiewicz, 'Granice kreatywnego zachowania menedżerów w kontekście art. 296 § 1a kodeksu karnego', *Prokuratura i Prawo*, 2016, No. 5, pp. 73–74. These authors advocated for a solution analogous to the one currently introduced in this provision.

[3] P. Dębowski, 'Działanie na szkodę spółki w świetle wprowadzonych zmian w kodeksie karnym wraz z uwagami prawnoporównawczymi na gruncie prawa niemieckiego', in: Gil D. (ed.), *Problemy nowelizacji prawa sądowego*, Lublin, 2013, p. 55. Positive opinions on this way of regulating the mode of prosecution were also expressed, for example, by A. Korzeniewski, 'Przestępstwa menedżerskie po liftingu', *Rzeczpospolita*, 14 July 2011, p. C7; and R. Zawłocki, 'Nowe przestępstwo niegospodarności bezszkodowej z art. 296 § 1a Kodeksu karnego', *Monitor Prawniczy*, 2011, No. 18, p. 973.

acts indicated in this provision should be vested in an entity that is then actually able to exercise the rights of the aggrieved party in the course of criminal proceedings.[4] Moreover, the aggrieved entity itself 'is in the best position to determine the amount of loss it has suffered as a result of the perpetrator's conduct, as well as the benefits it might have obtained had it not been for the perpetrator's conduct'.[5] In the author's view, it is not always necessarily in the interest of the aggrieved entity to initiate criminal proceedings against the perpetrator. It should, therefore, be up to the aggrieved party alone to decide whether it demands the prosecution of the perpetrator.

However, the legislator has not only refrained from departing from the principle of *ex officio* prosecution for other types of the criminal offence of punishable mismanagement beyond that provided for in Article 296 § 1a of the Penal Code, but has also extended the possibility of initiating criminal proceedings for this act by granting it to entities other than the aggrieved party. On the other hand, a certain argument (although not cited in the explanatory memorandum for the amendment, which is discussed further below) for broadening the group of entities that can file a request for prosecution of this prohibited act could potentially be the fact that this provision is partly equivalent to Article 585 of the Commercial Companies Code. This provision was repealed, and Article 296 § 1a[6] (and, incidentally, the related Article 296 § 4a), which is a modified version, was introduced into the Penal Code. Meanwhile, Article 585 of the Commercial Companies Code did not provide for the possibility of its prosecution upon request at all. One may therefore get the impression that the amendment in question partly returns to the solution that previously existed in relation to the provision to which Article 296 § 1a of the Penal Code is a counterpart.

This line of thinking, however, would be a major simplification, as it is difficult to consider Article 296 § 1a of the Penal Code as a regulation analogous to the former Article 585 of the Commercial Companies Code.[7] First of all, it should be noted that Article 585 of the Commercial Companies Code simply penalised 'acting to the detriment of the company'. Article 296 § 1a of the Penal Code defines the causative act in much more specific terms[8] – as bringing about a direct danger of

---

[4] I. Sepioło, *Przestępstwo niegospodarności z art. 296 KK*, Warszawa, 2013, pp. 194–196. Analogously: R. Zawłocki, 'Przestępstwo niegospodarności', in: Zawłocki R. (ed.), *System prawa karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa, 2015, p. 491.

[5] I. Sepioło, *Przestępstwo…*, op. cit., p. 196.

[6] Pursuant to the Act of 9 June 2011 amending the Act – Penal Code and certain other acts (Journal of Laws of 2011, No. 133, item 767).

[7] See R. Zawłocki, 'Nowe przestępstwo…', op. cit., pp. 969–970 and 973. Similarly: A. Domarus, 'Skutek przestępny na gruncie przestępstwa nadużycia zaufania – zagadnienia wybrane', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2012, No. 3, p. 16, who admittedly points to the possibility of using the views of the doctrine and the theses of case law concerning Article 585 of the Commercial Companies Code when interpreting the elements of Article 296 § 1a of the Penal Code, but at the same time acknowledges that: 'It is not possible, however, to simply translate that every behaviour once penalised on the basis of a provision of the Commercial Companies Code could now be punished on the basis of Article 296 § 1a of the Penal Code.'

[8] At this point, it is worth noting that the doctrine has emphasised the very broad scope of application of Article 585 of the Commercial Companies Code. As stated by A. Cimarno, 'This norm was undoubtedly one of the most synthetic regulations, concerning economic criminal offences committed within commercial companies.' See A. Cimarno, 'Artykuł 296 KK jako karnoprocesowy instrument ochrony podmiotów gospodarczych przed nadużyciami ze strony kadry

causing significant property damage to a natural or legal person or an organisational unit without legal personality (thus, no longer only to a company), by abusing granted powers or failing to fulfil a duty. Only partially, therefore, is the scope of the causative act criminalised by Article 585 of the Commercial Companies Code consistent with the scope of criminalisation in Article 296 § 1a of the Penal Code. It would therefore appear that great caution should be exercised in drawing any analogies between the two provisions.

The explanatory memorandum for the amendment provides an extensive explanation of the reasons for this change, which it is reasonable to cite:

> 'The draft removes the dysfunctionality of the current provision of Article 296 § 4a of the Penal Code, which provides for the procedure of prosecution upon request regarding a criminal offence in the form of damage caused to business. (…) The idea is that such proceedings can be initiated by any interested party in terms of its property interest within the particular organisational structure. A formal expression of the will to prosecute by the competent statutory body of the aggrieved will therefore not be required, but such a will occurring on the part of an entity forming part of the aggrieved's organisational structure shall suffice. Such a regulation shall both contribute to the simplification of the proceedings on the subject of the formulation of the will to prosecute by the entitled entity and will ensure protection and subjectivity in this respect for all entities even indirectly exposed to the consequences of causing significant property damage to the aggrieved.'[9]

In the legislator's opinion, the current practice of applying Article 296 § 1a of the Penal Code is 'dysfunctional', and a legislative change is therefore necessary. It is possible that the reason for this decision – although not explicitly expressed in the explanatory memorandum for the amendment – was the extremely rare use of this provision in jurisprudential practice. Indeed, as can be seen from statistics,[10] the number of convictions for committing this criminal offence between 2011 and 2020 was as follows:[11]

– 2014: 1 person convicted;
– 2016: 1 person convicted;
– 2018: 1 person convicted;
– 2019: 1 person convicted, but on the basis of Article 296 § 2 of the Penal Code in conjunction with Article 296 § 1a of the Penal Code;
– in the years 2011–2013, 2015, 2017, and 2020, no convictions under Article 296 § 1a of the Penal Code were recorded.

---

menedżerskiej', in: Bienkowska B.T., Jędrzejewski Z. (eds), *Problemy współczesnego prawa karnego. Część pierwsza*, Warszawa, 2016, p. 38. Similarly, for example, J. Giezek, P. Kardas, 'Odpowiedzialność karna za działanie na szkodę spółki – o potrzebie zmian', *Przegląd Prawa Handlowego*, 2011, No. 8, pp. 27–28.

[9] The draft is available at https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=2024 [accessed on 4 May 2023], p. 92 of the draft.

[10] Study *Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l. 2008–2020*, available at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [accessed on 5 May 2023].

[11] This act was only introduced into the Penal Code by a law that entered into force on 13 July 2011 (Act of 9 June 2011 amending the Act – Penal Code and certain other acts, Journal of Laws of 2011, No. 133, item 767); therefore, data from 2008–2010, also included in this study, were not taken into account.

This therefore means that, in almost a decade since it entered into force, only four people have been convicted on the basis of this provision. The legislator apparently considered this to be an indication of the ineffectiveness of this regulation, believing that this results from the fact that only the aggrieved party may file a request for the prosecution of the prohibited act stipulated therein. In practice, therefore, for example, in relation to a limited liability company, this can only be done by the company's management board,[12] as the body authorised to represent it and exercise the company's rights as the aggrieved party in the criminal offence. If, on the other hand, the management board itself had made a risky business decision that may have caused damage to the company, it is, for obvious reasons, unlikely that the management board members would be eager to request their own prosecution as perpetrators of this criminal offence. This could only happen as a result of the dismissal of the management board, but if the majority shareholders approve of the actions taken by the management board, this is unlikely to happen. A minority shareholder who wished to file a request for prosecution for this criminal offence, in the face of the management board's risky business decisions, was thus deprived of this opportunity in this situation.

Thus, it seems that, in the legislator's opinion, the elements of the offence under Article 296 § 1a of the Penal Code are met in many cases, but criminal proceedings are not initiated only because of the unjustified limitation of the group of entities that may file a request for its prosecution.

From this perspective, the amendment may at first glance seem reasonable. However, this conclusion can be challenged by pointing to another reason for the rare convictions under this provision – namely, the lack of practical usefulness of Article 296 § 1a of the Penal Code, the elements of which are extremely rarely met. This is the actual reason for the negligible number of convictions under it. If it is assumed that this second reason for such rare application of this provision is true, the amendment in question can hardly be considered justified, since it does not solve the problem inherent in the very construction of this prohibited act. It is therefore advisable to verify whether the restrictions on the application of Article 296 § 1a do not arise from the very wording of this provision, and whether this amendment does not unduly interfere with corporate relations.

2. DOUBTS ABOUT THE CONSTRUCTION AND VALIDITY OF ARTICLE 296 § 1A OF THE PENAL CODE

The introduction of the analysed prohibited act into the Penal Code was, in fact, met with numerous objections from representatives of the doctrine. Focusing only on the most important ones, it is appropriate to begin with the observation made by

[12] Alternatively, the entity managing the company in the course of restructuring or bankruptcy proceedings, such as an administrator, interim court supervisor or trustee in bankruptcy. Case law also allows for the possibility of a commercial proxy holder to exercise the rights of the aggrieved where that party is a legal person – as stated by the Supreme Court in its decision of 26 November 2003, I KZP 28/03, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 2004, No. 1, item 2.

A. Michalska-Warias,[13] which is difficult to dispute, that the scope of criminalisation under this provision covers situations where the perpetrator consciously undertakes, abusing their powers, highly risky actions, but which ultimately turn out to be accurate, and the managed entity obtains a benefit as a result.

This provision, therefore, criminalises the taking of risky actions, while, as A. Mucha quite rightly points out, 'the process of management is that sphere of human activity which is immanently connected with risk.'[14] Therefore, T. Oczkowski concludes that questioning certain transactions as, for example, economically irrational is a highly debatable practice and requires looking at the totality of economic activities undertaken by an entity, rather than verifying only one questionable transaction. Meanwhile, there is no uniform standard for considering certain investments as successful[15] – this is particularly evident in the context of Article 296 § 1a of the Penal Code, where no concrete damage appears at all, which could potentially be a relatively measurable indicator of the lack of legitimacy of a given transaction.

This author further stated, in the context of Article 296 § 1a of the Penal Code, that in practice, this act will cover cases of attempting to cause damage to a given entity by a person managing it (and thus falling within the scope of Article 296 § 1 of the Penal Code).[16] At the same time, it is difficult to refrain from the observation that, in a situation where the perpetrator did not cause any damage to the managed entity, it will be easier to attribute responsibility for committing an act under Article 296 § 1a than for attempting to commit an act under Article 296 § 1 of the Penal Code, as it will not be necessary to prove that the perpetrator's intent included causing damage.[17] This finding, however, makes it questionable to differentiate the functioning of these two prohibited acts in criminal law, serving as an argument for the redundancy of the regulation of Article 296 § 1a of the Penal Code.

It is worth recalling at this point the view that, in the case of a risky action, no intentional action can be imputed to the person taking it, but only unintentional action.[18] Acceptance of this view would make the presence of Article 296 § 1a in

---

[13] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 892.

[14] A. Mucha, *Struktura przestępstwa gospodarczego oraz okoliczności wyłączające bezprawność czynu w prawie karnym gospodarczym*, Warszawa, 2013, p. 268. For more on the concept of economic risk in a criminal law context: A. Zientara, *Przestępstwo nadużycia zaufania z art. 296 Kodeks Karnego*, Warszawa, 2010, pp. 147–176; T. Oczkowski, *Nadużycie zaufania w prowadzeniu cudzych spraw majątkowych*, Warszawa, 2013, pp. 161–172.

[15] T. Oczkowski, *Nadużycie zaufania…*, op. cit., pp. 120–121.

[16] To a certain extent, A. Domarus agrees with this view. While she clearly distinguishes between attempting an act under Article 296 § 1 of the Penal Code and committing an act under Article 296 § 1a of the Penal Code, she also acknowledges that § 1a will be applied primarily when the perpetrator cannot be attributed the effect specified in § 1 or § 3 of Article 296. In doing so, the author concludes that 'it is difficult to construct even abstractly a situation in which the criminal offence in question would be perpetrated'. See A. Domarus, 'Skutek przestępny…', op. cit., p. 19. Serious practical problems in distinguishing between these two prohibited acts are also pointed out by T. Pietrzyk, *Odpowiedzialność karna menedżerów spółek handlowych*, Warszawa, 2020, p. 79.

[17] See, for example, M. Dąbrowska-Kardas, P. Kardas, in: Wróbel W., Zoll A. (eds), *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363*, Warszawa, 2021, p. 612.

[18] H. Popławski, 'W kwestii rozwiązania zagadnienia ryzyka w płaszczyźnie winy', *Nowe Prawo*, 1969, No. 5, pp. 712–714. His concept was referred to by A. Zientara, who stated: 'If the

the Penal Code completely unjustified, since it can only be committed intentionally and is based precisely on the criminalisation of risky activities. However, even if this view is rejected, and it is accepted that it is possible to take – with conditional intent – a risky action that fulfils the elements of a criminal offence,[19] this does not change the fact that the way in which the subjective elements of this act are defined may create difficulties in its application. Indeed, since this criminal act can only be committed intentionally, it must be considered to apply only if the perpetrator acted with conditional intent. It is difficult to imagine a situation in which the perpetrator's aim was only to cause a danger of damage to the economic entity and not to cause the damage itself. This act appears to relate to a factual situation in which the perpetrator takes risky actions, accepting that they may lead to damage to the assets of the managed entity. However, such situations tend to occur far less frequently than inadvertent management errors leading to decisions that, as it ultimately turned out, were excessively risky. This is because, usually, managers either – in an extreme situation – act with the intention to cause concrete damage to the managed entity (which, however, will be qualified as attempting or committing an act under Article 296 § 1 of the Penal Code), or – more commonly – act with the intention to obtain a benefit for the managed entity but fail to achieve this benefit due to their own mistakes (which may be criminalised under Article 296 § 4 of the Penal Code when causing damage to the managed entity). However, none of these situations falls within the scope of Article 296 § 1a of the Penal Code, as it refers to a situation in which a manager takes certain actions with a view to potential profit for the company, accepting that these are excessively risky and cause real danger to the company's property interests, but does not ultimately cause damage to the company in this way.

It appears that such situations are extremely rare in practice, and this, above all, is a fundamental limitation in the application of the prohibited act in question. Indeed, far more often than not, managers take excessively risky actions as a result of misjudgment rather than intentional conduct. The decision to include only intentional conduct within the scope of this criminal offence has significantly reduced the number of cases to which it can be applied.

It is also legitimate to ask on what basis an action can be considered excessively risky if it did not ultimately result in damage to the assets of the entity concerned. Since the entity has made a profit as a result of a certain action of the manager, this action must, in principle, be considered justified. Article 296 § 1a of the Penal Code therefore only refers to a situation where a manager (by abusing his/her powers or failing to fulfil his/her duty) takes an action that s/he knows to be excessively

---

manager foresees the possibility of a loss, it cannot be said that he or she accepts this possibility, that he or she is indifferent to whether they make a profit or a loss. Indeed, he or she undertakes activities with the direct intention of increasing the value of the assets under management. If the limits of acceptable risk are exceeded, we are therefore only dealing with recklessness, i.e., an unfounded assumption that the fulfilment of the elements of the prohibited act will be avoided'. See A. Zientara, *Przestępstwo*…, op. cit., pp. 170–171.

[19] See also T. Oczkowski, *Nadużycie zaufania*…, op. cit., pp. 154–155; M. Bojarski, *Dozwolone ryzyko gospodarcze w polskim prawie karnym*, Wrocław, 1977, p. 55; K. Rozental, 'W sprawie karnoprawnego charakteru tzw. ryzyka zwykłego', *Państwo i Prawo*, 1991, No. 4, pp. 65–66.

risky and agrees to it in order to make a profit, and where his/her action does not lead to damage to the managed entity merely as a result of some event beyond his/her control and unlikely to occur. It is difficult not to conclude that situations of this kind are, however, extremely rare. For this reason alone, therefore, it seems reasonable to conclude that it is in the construction of Article 296 § 1a of the Penal Code, and not in the too limited circle of entities that may file a request for its prosecution, that the reasons for its rare application should be seen.

It should also be noted that, according to A. Cimarno, the introduction of this prohibited act into the Penal Code has created significant evidentiary difficulties, as proving the fulfilment of its elements requires the use of an expert opinion, not even so much in the field of accounting as in the theory of economic behaviour.[20] It is difficult to disagree with this view, seeing this issue as a further limitation on the application of the provision. As T. Oczkowski stated on the provision in question:

> 'I do not see any chance of applying this provision in practice, since in most cases it is practically impossible to establish that, as a result of the perpetrator's act, significant property damage was real and almost certain, without any doubt, especially if we take into account that the so-called almost certain damage must amount to at least PLN 200,000.'[21]

A further complication in the application of this provision may also lie in the fact – rightly pointed out by A. Domarus[22] – that Polish criminal law does not use anywhere else a regulation identical to the notion of 'direct threat of property damage', and although one may refer to the interpretation of similar elements found in Articles 160, 164, or 174 of the Penal Code, the prohibited acts stipulated therein have only an analogous, and not an identical set of elements.

3. AMENDMENT OF ARTICLE 296 § 4A OF THE PENAL CODE IN THE CONTEXT OF THE PRINCIPLE OF SUBSIDIARITY OF CRIMINAL LAW

The advisability of broadening the circle of entities that may file a request for prosecution of the criminal offence under Article 296 § 1a of the Penal Code also appears rather questionable in light of the fact that there are many other legal remedies available to a partner, stockholder, shareholder, or member of a cooperative

---

[20] A. Cimarno, 'Artykuł 296 KK…', op. cit., p. 54. An analogous view was expressed by J. Potulski (R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa, 2020, p. 1827). The need to refer in many cases of suspected commission of this act to an expert's opinion was also pointed out by J. Giezek in: idem, *Kodeks karny…*, op. cit., p. 1386; and R. Zawłocki in: idem, 'Nowe przestępstwo…', op. cit., p. 969. Evidentiary problems as to proving the fulfilment of the elements of this prohibited act were also pointed out by I. Sepioło: idem, *Przestępstwo…*, op. cit., p. 155.

[21] T. Oczkowski, *Nadużycie zaufania…*, op. cit., p. 187. A similar view was expressed by J. Potulski who stated: 'The legislator has imposed an almost impossible obligation on the procedural authorities to establish the effect of exposure to damage of a significant size.' Cf. R.A. Stefański (ed.), *Kodeks karny…*, op. cit., p. 1827.

[22] A. Domarus, 'Skutek przestępny…', op. cit., p. 13.

when persons managing a given entity take actions that create a state of imminent danger of causing significant property damage to it.

With reference primarily to commercial law companies, which in practice will most likely be affected by the applicability of the discussed regulation, it should be noted that, first and foremost, if the shareholders of, e.g., a limited liability company conclude that the management board of the company undertakes actions that are extremely risky in managing the company's assets, they have the possibility to adopt a resolution dismissing the members of the management board from their function, thus securing the property interests of the company.

When making the amendment, the legislator, however, seems to have primarily aimed at safeguarding the interests of minority shareholders or stockholders, who may have doubts about the actions of the management board, but which are not shared by the majority shareholders. However, such an entity also has the ability to block and challenge what it considers to be harmful actions of the management board (supported by the majority shareholders). Examples of some of their powers of this kind (in terms of a limited liability company) are:

– bringing an action for dissolution of the company pursuant to Article 271 of the Commercial Companies Code, if the achievement of the company's objective has become impossible or if there are other important reasons caused by the company's relations; such an action may be combined with a request to secure a claim by prohibiting the management board from taking certain actions that could harm the company;
– bringing an action to annul a shareholders' resolution that is contrary to the articles of association or good practices, and that harms the interests of the company or is intended to harm a shareholder (Article 249 § 1 of the Commercial Companies Code);
– challenging a resolution of the management board, supervisory board, or audit committee by means of an action for establishment (Article 189 of the Code of Civil Procedure in conjunction with Article 58 of the Civil Code), as is apparent, *inter alia*, from the resolution of seven judges of the Supreme Court of 18 September 2013[23] (also concerning a joint-stock company);
– making use of the institution of *actio pro socio* provided for in Article 295 § 1 of the Commercial Companies Code, consisting of the possibility for each shareholder to bring an action for remedying damage caused to the company, if the company itself does not bring an action for remedying the damage caused to it within a year from the date of disclosure of the act causing the damage;
– a request for the convening of an extraordinary general meeting of shareholders pursuant to Article 236 § 1 of the Commercial Companies Code by a shareholder or shareholders representing at least one-tenth of the share capital;
– a request for the inclusion of specific matters on the agenda of the next shareholders' general meeting by a shareholder or shareholders representing at least one-twentieth of the share capital (Article 236 §1[1] of the Commercial Companies Code).

[23] III CZP 13/13, *Orzecznictwo Sądu Najwyższego. Izba Cywilna*, 2014, No. 3, item 23.

Commercial law thus provides a rich catalogue of actions that can be used by a minority shareholder concerned about the actions of the company's managers when they do not lead to financial damage to the company.[24] Despite this, the legislator decided to grant these entities another right – this time, however, of a criminal law nature – to defend their interests, which is the possibility of submitting, in this situation, a request for prosecution of the perpetrators of an act under Article 296 § 1a of the Penal Code.

At this point, it is appropriate to cite the view of R. Zawłocki,[25] assessing the legitimacy of granting the possibility to file a request for prosecution of an act under Article 296 § 1a of the Penal Code only to the aggrieved party and not to a shareholder of the company or its unsatisfied creditor. In the author's opinion, the solution limiting the group of entities having such a right only to the aggrieved party is correct, as it corresponds to the *ultima ratio* principle of criminal law. Taking this into account, the departure from the solution endorsed by the author, made in the amendment, must be regarded as questionable in the context of the principle of subsidiarity of criminal law. Although a thorough discussion of the assumptions of this principle would exceed the framework of this study,[26] it is reasonable to synthetically recall its most important postulates, especially in the context of the interaction between criminal law and commercial law.

For example, A. Mucha characterised this principle as follows:

> 'In accordance with the subsidiarity directive, the measures that should primarily be used in the process of combating and preventing negative economic phenomena are instruments from the field of civil, administrative, and commercial law in the broadest sense. It is only as a complementary and, in a way, reinforcing element of the range of possible regulations that criminal law should appear in the management process.'[27]

Elsewhere, the author points out that criminal law should be regarded as 'a measure of last resort, in the sense that it is used only where it is necessary, and only when the regulation of a given section of economic relations cannot be fully functionally carried out by means of the rules of the area of civil, administrative, or commercial law'.[28] In this context, it is worth noting that the explanatory memorandum for the amendment does not refer at all to the fact that the civil law instruments that a minority shareholder could use to protect their interests are ineffective. Thus, it seems that the legislator did not consider at all whether the

---

[24] In turn, under the provisions of the Act of 16 September 1982 – Cooperative Law (Journal of Laws of 2021, item 648, consolidated text), a member of a cooperative also has the right to challenge the actions of the cooperative's bodies. For example, pursuant to Article 42 § 4 of the Act, any member of the cooperative may bring an action to annul a resolution of the general meeting.

[25] R. Zawłocki, 'Nowe przestępstwo…', op. cit., p. 973.

[26] A wider discussion of this principle has been presented, for example, in the following studies: S. Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warszawa, 2009, in particular, pp. 94–135; A. Zientara, *Przestępstwo…*, op. cit., pp. 254–260; O. Górniok, 'Znaczenie subsydiarności prawa karnego w jego interpretacji', *Państwo i Prawo*, 2007, No. 5, p. 50.

[27] A. Mucha, *Struktura…*, op. cit., pp. 49–50.

[28] Ibidem, pp. 55–56.

introduction of this solution was actually necessary due to the ineffectiveness of the solutions protecting the shareholder and provided for under commercial law.

It is worth noting that the filing of a request for prosecution is generally simpler to apply than some of the solutions described above, which often require the filing of a formalised lawsuit combined with the payment of a court fee. It may therefore appear as a more attractive option for a minority shareholder to influence the actions of the company's managers. In addition, by risking criminal prosecution of the company's managers, filing a request for prosecution and thus initiating criminal proceedings may have a greater impact on the company's management and majority shareholders than using the civil law route. Since the act under Article 296 § 1a of the Penal Code concerns matters that are usually difficult to assess unequivocally and the criteria for its application are very vague (as indicated in the previous section of this work), even if the company's management board is convinced that the management actions were lawful, in practice it can be expected that the risk of potential criminal liability will lead the management board and majority shareholders to negotiate with the shareholder filing a request for prosecution to withdraw the request in exchange, for example, for a change in the company's investment plans in line with the shareholder's suggestion.

The danger of the instrumental use of criminal law in corporate relations, above all by those who do not have a decisive influence on the management of the company, which has already been highlighted earlier, therefore arises here. S. Pawelec pointed out, for example, that:

> 'Preparatory proceedings concerning the commission of a criminal offence under Article 296 § 1 of the Penal Code (…) or a more particularised property criminal offence from the sphere of economic relations may be initiated on the basis of information obtained by the judicial authority from any source. Hence, notifications on suspicion of such a criminal offence are often made by people who play a marginal role in the company, but who have access to inside information and use the possibility of reporting as one element of corporate blackmail. If one adds to this the fact that many of the decisions taken by members of the management board to impose significant financial obligations on the company are not based on easily verifiable *ex post* indications, but are based on their expertise, their sense of the market, and their subjective assessment of the benefits and risks of a particular transaction adopted at a particular point in time, it is easy to create a divergence of judgment between categorising certain behaviour as criminal activity to the detriment of the company or, on the contrary, as acting in its best interests.'[29]

Until now, this type of corporate blackmail was effectively difficult to carry out in the context of a notification concerning the possibility of committing an offence under Article 296 of the Penal Code, as a necessary prerequisite for establishing that

---

[29] S. Pawelec, *Spółka kapitałowa jako pokrzywdzony w procesie karnym*, Warszawa, 2011, p. 112. The threat of instrumental use of Article 296 of the Penal Code in corporate relations was also pointed out by M. Romanowski, 'Kto ma decydować o interesie spółki: menedżer czy prokurator?', *Rzeczpospolita*, 16 June 2011, p. C9. On the other hand, the instrumental use of Article 585 of the Commercial Companies Code, due to the fact that the criminal offence was prosecuted *ex officio* and not upon request, was highlighted by E. Hryniewicz, 'Karalne działanie na szkodę spółki', *Prokuratura i Prawo*, 2012, No. 10, p. 82.

its elements had been fulfilled was demonstrating that the company had suffered significant as a result of the actions of its managers. If this harm did not exist, the person subjected to this type of blackmail could treat the threat of criminal liability on this basis as purely hypothetical. In such a situation, the blackmailer would be able to rely on Article 296 § 1a as a basis for notification, but they would not be able to file a request for prosecution for this act if they was not acting on behalf of the aggrieved entity. Blackmail concerning the filing of a notification of committing this act was therefore also of little effect, since it could not lead to criminal proceedings against the blackmailed person. In practice, therefore, if the financial situation of the entity in question was good, it was unlikely that the blackmailed persons could be effectively influenced in this way.

Now, however, the legislator is facilitating this kind of corporate blackmail by allowing criminal law instruments to be used for actions that are difficult to defend from an ethical point of view.

It also appears – as evidenced by the cited passage in the explanatory memorandum for the amending act – that the legislator intended to place greater emphasis on the interests of the company's shareholders rather than the interest of the company itself. Indeed, if a company does not file a notification of a criminal offence under Article 296 § 1a of the Penal Code, it evidently sees no basis for doing so or even considers the filing of such a notification, together with a request for prosecution, to be detrimental to its interests. Following the amendment, however, the company's interest in refraining from filing a request for prosecution becomes arguably less relevant than the interests of the shareholders, who are now entitled to file such a request – acting, in effect, fundamentally against the company's interest.

Naturally, such competence is already available to the shareholders under Article 296 § 1 of the Penal Code, where they can file a notification of a criminal offence regardless of the fact that the company did not consider it advisable to do so. However, in that case, the primacy of the interests of the shareholders over the interests of the company is justified by the fact that there is significant property damage to the company, which is also property damage (even if indirect) to its shareholders – after all, damage to the company's property reduces its value, and this reduces the value of the property of its owners, who are the shareholders. Intentionally causing damage to the company's assets is therefore an exceptional situation that justifies the possibility for a shareholder to initiate criminal proceedings, even if the company itself has no interest in doing so.

However, on the basis of Article 296 § 1a of the Penal Code, this argument cannot apply, since only an imminent danger of such damage is involved. The property interests of the company's shareholders have not suffered any loss, so it does not appear that their interest in initiating criminal proceedings should take precedence over the company's interest in not initiating them. It is worth bearing in mind that the initiation of criminal proceedings, even if they do not lead to the formulation of an indictment or other complaint by the public prosecutor, can have a destabilising effect on the operations of the company. This may involve, for example, the application of preventive measures, such as a ban on leaving the country against members of the company's management board, making it difficult for them to

conduct business cooperation with foreign entities. Additionally, it may lead to the suspension of members of the management board (or supervisory board) from their duties under Article 276 of the Code of Criminal Procedure, which would, of course, make it impossible for the company's existing management board to function – a potential primary objective of the person submitting the notification of a criminal offence. Even if no charges are brought against anyone during these proceedings, it is likely that company records will be seized, often as a result of a search of the company. Such litigation may not only hinder the company's operations (since some of its original documentation will be secured by law enforcement authorities) but may also trigger a highly negative reaction from the company's employees and counterparties if they become aware of it. Such extremely negative consequences for the functioning of the company may therefore result from granting minority shareholders or stockholders the right to file a request for the prosecution of an act under Article 296 § 1a of the Penal Code.[30]

The legislator therefore *de facto* places the interests of shareholders or stockholders – including minority ones – above the interests of the organisation as a whole. Meanwhile, as S. Pawelec points out, the reverse principle is generally accepted in Polish law: 'The company's interest is that initial category behind which the interests of other actors can only hide, cross, and clash.'[31] This is also confirmed by R. Stefanicki,[32] who states that 'A person exercising their shareholding rights in a company must take into account the fact that the scope of their rights in the company depends on the proportion of their share in the company's capital.'[33] However, the solution in question appears to depart from this principle by conferring powers on the designated entities that do not correspond to the size of their shareholding.

The principle of the primacy of the company's interests over those of the partners or shareholders is obviously weaker in partnerships, which could justify the application of the amended Article 296 § 4a of the Penal Code to companies of this type. On the other hand, however, in a general partnership, pursuant to Article 29 of the Commercial Companies Code, each partner has the right to represent the

---

[30] At the same time, it is unlikely that shareholders or stockholders will be deterred from the instrumental use of this provision by the threat of liability under Article 238 of the Penal Code for filing a false notification of a criminal offence. Indeed, if they present objective facts in the notification and express the opinion that, in their view, the action may have caused negative business consequences for the company, it will be difficult to pursue charges under this prohibited act.

[31] S. Pawelec, *Spółka kapitałowa*…, op. cit., p. 214. It is also worth noting that the resolution of the Supreme Court, in which the Court stated that, for the purposes of criminal law, the property of a limited liability company is not the property of its shareholders, remains valid (resolution of 20 May 1993, I KZP 10/93, *Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa*, 1993, No. 7–8, item 44). This further calls into question the legitimacy of shareholders filing a request for prosecution under Article 296 § 1a of the Penal Code, as the offence concerns the creation of a danger of damage to the company, not to the shareholders themselves.

[32] R. Stefanicki, *Należyta staranność zawodowa członka zarządu spółki kapitałowej*, Warszawa, 2020, p. 59.

[33] In doing so, the author points out that the shareholders of a capital company have, at least to some extent, a duty of loyalty towards the company, and that it is unlawful, as well as contrary to principles of good conduct, for minority shareholders or stockholders to block resolutions of the ownership body. See R. Stefanicki, *Należyta staranność*…, op. cit., pp. 82–84.

company anyway,[34] hence they would be entitled to file a request for prosecution in the case of an act under Article 296 § 1a regardless of the amendment. An analogous principle applies in a professional partnership.[35] Thus, in those types of companies where the interests of the partners are most closely aligned with the interests of the company itself, they still have the right to represent the company in principle, hence in many situations, the amendment will not change anything regarding their competence to file a request for prosecution.

On the other hand, however, in a joint-stock company, for example, the situation is quite different, and it is difficult to consider that the object of protection in Article 296 of the Penal Code, in the context of acting to the detriment of a joint-stock company, is the property interest of the stockholders rather than the company itself. As S. Pawelec rightly points out:

> 'Extending the direct object of protection in joint-stock companies beyond the company itself would constitute a departure from (…) the characterisation of these entities as pure capital companies, i.e., legal persons basing their asset structure on stockholders' contributions from a wide and variable range of entities in their composition, who are excluded from direct management of the company and not liable for its obligations.'[36]

In general, an analogous view is also expressed by the author regarding limited liability companies.[37] It is therefore difficult to conclude that Article 296 of the Penal Code protects the interests of the shareholders or stockholders above all, rather than the interests of the company itself. However, this seems to be precisely the effect of the amendment, as it allows shareholders or stockholders to file a request for prosecution, even against the interests of the company itself.[38]

As a result of the amendment, minority shareholders or stockholders may gain significant, albeit informal influence over the operations of the company – informal because it does not reflect the size of their shareholding or the number of shares they hold. The solution introduced by the legislator therefore appears to contradict the principle of subsidiarity of criminal law, not only because the legislator has introduced a criminal law model for the reaction of minority shareholders to what

---

[34] Although the articles of association may provide that a partner is deprived of the right to represent the company or that he or she is entitled to represent the company only jointly with another partner or a proxy (Article 30 § 1 of the Commercial Companies Code).

[35] An analogous situation applies to a professional partnership where, pursuant to Article 96 § 1 of the Commercial Companies Code in conjunction with Article 97 § 1 CCC, each partner has the right to represent the partnership independently, unless the articles of association provide otherwise or management of the company's affairs has been entrusted to the management board.

[36] S. Pawelec, *Spółka kapitałowa*…, op. cit., p. 216. In doing so, the author notes that also in the doctrine of civil law, the prevailing view is that a tort committed against a joint-stock company does not imply that its stockholders are also deemed to be harmed by this tort (ibidem, pp. 218–220 and the literature cited therein).

[37] Ibidem, pp. 216–217.

[38] S. Pawelec also notes that sometimes, even in the event of damage to the company's assets, there is no actual damage to the assets of its shareholders or stockholders, for example, due to insurance coverage against such occurrences or the mobilisation of a loss reserve (ibidem, p. 218, fn 534).

they consider undesirable actions of the management board, in a situation where alternative solutions provided by commercial law are possible. This is because the amendment of Article 296 § 4a of the Penal Code allows these entities to interfere further in the management of the company than the provisions of commercial law, using this institution in a manner completely contrary to its assumptions. The amendment, therefore, does not merely allow minority partners, shareholders, or stockholders to exercise their rights under civil law more efficiently – it even grants them powers beyond their role in companies, as designated by civil law. In the light of the above-mentioned opinions on the principle of subsidiarity of criminal law, it is therefore difficult to consider that the solution under consideration is compatible with this principle.

As a side note, irrespective of the amendment in question, that doubts may arise as to whether the very validity of Article 296 § 1a of the Penal Code is compatible with the principle of subsidiarity.[39] A. Zientara is of the opinion that an expression of the principle of subsidiarity with regard to commercial criminal law provisions is the requirement that behaviour prohibited by commercial criminal law must also be prohibited by another branch of law. If it is not unlawful under another branch of law, then the unlawfulness of the perpetrator's action is also excluded under criminal law.[40] Meanwhile, even if a general obligation of proper management of a collective entity can be derived from acts other than the Penal Code, there is no provision explicitly prohibiting the taking of unjustified economic risks that do not cause damage.[41] The only provision of this kind, it would seem,

---

[39] The position on the lack of such compliance was taken, for example, by R. Zawłocki, 'Nowe przestępstwo…', op. cit., p. 967; T. Oczkowski, *Nadużycie zaufania*…, op. cit., p. 188.

[40] I. Sepioło, *Przestępstwo*…, op. cit., pp. 258–260. Similarly, for example: R. Zawłocki, *Podstawy odpowiedzialności karnej za przestępstwa gospodarcze*, Warszawa, 2004, p. 322; J. Skorupka, *Prawo karne gospodarcze. Zarys wykładu*, Warszawa, 2005, p. 47; I. Sepioło, *Przestępstwo*…, op. cit., p. 29; S. Żółtek, *Prawo karne*…, op. cit., p. 177.

[41] However, it is worth noting that, in general, in the context of Article 296 of the Penal Code, there is some doubt as to whether, when assessing a manager's actions as regards their criminal liability, we should rely solely on formalised criteria for evaluating such actions, or whether it is also permissible to apply non-formalised criteria, such as, for example, the concept of a 'good host' (more extensively, see M. Gałęski, G. Grupa, 'Karnoprawna ocena decyzji menedżerskich', *Monitor Prawa Handlowego*, 2014, No. 1, pp. 7–17 and the literature cited therein; R. Zawłocki, *Przestępstwo niegospodarności*…, op. cit., pp. 480–483). In the context of Article 296 § 1a of the Penal Code, this dispute appears to lose some of its relevance, as the key question becomes whether commercial criminal law can criminalise actions that are not sanctioned at all by civil or commercial law. Nevertheless, it is necessary to agree with R. Stefanicki that 'The requirements of professionalism in the management of a company by members of the management board would be difficult to enclose within the normative framework of actions understood strictly (statutory orders and prohibitions).' See R. Stefanicki, *Należyta staranność*…, op. cit., p. 192. Acceptance of this view, however, must lead to the conclusion that criminal liability under Article 296 of the Penal Code will often – if not always – be based on the perpetrator's failure to observe a standard of diligence not expressly set out in the law. While in the context of mismanagement resulting in damage, such liability may still be justified by the harm caused to the managed entity (even if the soundness of this concept remains debatable), in the context of mismanagement without resulting damage, the question arises whether it makes sense to criminalise behaviour that has not caused damage and merely fails to meet a certain standard of conduct, which is not, however, reflected in statutory provisions. This would amount to criminal

could be Article 209[1] § 1 of the Commercial Companies Code,[42] which states that a management board member should, in the performance of their duties, exercise the diligence resulting from the professional nature of their activities and maintain loyalty to the company.[43] However, this provision does not introduce the possibility of holding a company's management board financially liable if their actions violated this principle but did not lead to damage to the managed entity. It is therefore difficult to identify a legal basis for awarding damages to a company from a member of its management board who takes excessively risky and unjustified decisions concerning the management of its assets, if these decisions have not resulted in any damage.[44]

Criminal law, in penalising such behaviour, therefore introduces criminal liability where sanctions are not provided for under commercial law. From this perspective, there is no axiological justification for the validity of Article 296 § 1a, which makes all the more critical an amendment that could lead to an increase in the frequency of initiating proceedings concerning this criminal offence, while at the same time increasing the risk of criminal law interfering with corporate relations in this way.

---

liability for a person who neither directly violated any provision of the law nor caused damage through their actions.

[42] In the Commercial Companies Code, the provision with similar content is Article 293 § 3 (its counterpart with regard to a joint-stock company is Article 483 § 3 of the Commercial Companies Code, and, as regards a simple joint-stock company, Article 300[125] § 2 of the Commercial Companies Code). According to this provision, a member of the management board, supervisory board, audit committee, or a liquidator does not breach the duty to exercise due care arising from the professional nature of their activity if, acting loyally towards the company, they act within the limits of reasonable business risk, including on the basis of information, analyses, and opinions which, in the given circumstances, should be taken into account when making a careful assessment. However, this provision expressly refers to paragraph one of the same article, which concerns the liability of, *inter alia*, a management board member towards the company for damage caused by an act or omission contrary to the law or the company's articles of association, unless they are not at fault. Paragraph three, therefore, appears to indicate when a management board member is not at fault for the damage caused to the company, and thus cannot serve as a basis for reconstructing the correct standard of conduct for a management board member when discussing the criminalisation of mismanagement without damage.

[43] Although some doubts may arise as to whether a provision formulated in such general terms can serve as the basis for defining the duties of an administrator – the failure to fulfil which could result in criminal liability – this concern becomes particularly relevant if one accepts the view of R. Zawłocki, who states: 'The perpetrator of an economic crime can only be attributed with the violation of those conditions of proper activity which arise directly and simply from the content of the specific authorisation and duty.' See R. Zawłocki, 'Karalna niegospodarność', in: Pohl Ł. (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009, p. 639.

[44] It is even more difficult to identify such grounds in the case of persons performing management functions in a given entity on a basis other than the provisions of the Commercial Companies Code, for example, on the basis of a contract which would have to impose on them an obligation not to undertake risky actions that could result in a danger of property damage to the company.

4. THE UNIQUENESS OF A REQUEST FOR PROSECUTION SUBMITTED BY A PARTNER, SHAREHOLDER OR STOCKHOLDER OF THE AGGRIEVED COMPANY OR A MEMBER OF THE AGGRIEVED COOPERATIVE

It is also worth noting that the new wording of Article 296 § 4a of the Penal Code introduces a unique solution in Polish criminal law. This becomes apparent when analysing which entities are entitled to file a request for prosecution for criminal offences prosecuted upon request as provided for in the Penal Code. Leaving aside the military part of the Code, where a request for prosecution can be filed by, for example, the commander of a military unit, as a general rule, whenever the Penal Code provides that a request for prosecution is necessary to initiate criminal proceedings, the only subject entitled to submit the request is exclusively the aggrieved entity. This is the case in 24 instances where the specific part of the Code provides for prosecution upon request. It follows that, as a general rule, a request for prosecution under Polish law can only be submitted by the aggrieved party.

The only exception to this rule is Article 209 § 2 of the Penal Code, according to which the prosecution of the criminal offence of non-maintenance, in both its basic and aggravated forms, takes place at the request of: the aggrieved party, a social welfare body, or a body taking action against the maintenance debtor. This exception, however, is more apparent than real. This is because the social welfare body and the body taking action against the maintenance debtor are state bodies (governmental or local government administration bodies). The possibility for these entities to initiate criminal proceedings for the criminal offence of non-maintenance effectively means that the state itself decides whether to proceed. Thus, the principle of prosecution upon request is severely limited for this criminal offence, as the state is always in a position to initiate criminal proceedings, even if the aggrieved party does not file a request for prosecution. This is indirectly confirmed by the content of Article 209 § 3 of the Penal Code, which states that if the aggrieved party has been granted appropriate family benefits or cash benefits paid in the event of ineffective enforcement of maintenance, the prosecution of the criminal offence of non-maintenance is already carried out *ex officio* and not on request.[45]

With this one specific exception, if the legislator makes the initiation of criminal proceedings for a prohibited act from the special part of the Penal Code conditional on a request from an authorised person, the entity authorised to initiate such proceedings is the aggrieved party. The request for prosecution is, therefore, generally an institution closely linked to the rights of the aggrieved in the course of a criminal trial. This is confirmed by M. Kurowski, who states: 'The legitimacy to file

[45] An analogous view was expressed by T. Grzegorczyk, in: P. Hofmański (ed.), *System prawa karnego procesowego. Tom I. Zagadnienia ogólne. Część 2*, Warszawa, 2013, pp. 346–347, who indicated that there are four groups of criminal offences prosecuted upon request in Polish criminal law, divided according to who can file such a request: (1) only the aggrieved; (2) the aggrieved or another body (which is precisely what Article 209 § 2 of the Penal Code refers to); (3) only the military commander; (4) the aggrieved or the military commander. The solution introduced by the legislator, therefore, clearly does not fall into any of these categories.

a request for prosecution of the perpetrator rests, in principle, with the aggrieved.'[46] Similarly, J. Skorupka makes it clear that this authority 'is an independent, personal right of the aggrieved'.[47] The solution under discussion deviates from this principle, as entities other than the aggrieved are now also entitled to submit a request for prosecution. However, the question arises as to whether such a solution contradicts the nature of criminal offences prosecuted upon request, where it is the aggrieved party who is supposed to decide whether to initiate criminal proceedings. In justifying the idea of prosecution upon request, the primacy of the aggrieved party's interest over the public interest, as well as protection from the phenomenon of secondary victimisation, is strongly emphasised.[48] Meanwhile, the solution introduced by the legislator here entirely disregards the interests of the aggrieved, who may not wish to prosecute the perpetrator of the criminal offence, and yet another entity is granted the right to initiate criminal proceedings, ignoring the aggrieved party's preference. From this perspective, the solution introduced by the legislator appears to contradict the fundamental assumptions underpinning the institution of prosecution upon request as a mode of initiating criminal proceedings.

As a consequence of this solution, those who are not formally the aggrieved party will be partially granted the rights to which the aggrieved party is entitled. This is because they will be able to file a request for prosecution of the perpetrator, and in the event of a refusal to initiate criminal proceedings or their discontinuation, they will likely be entitled to lodge a complaint about this decision pursuant to Article 306 § 1 (3) CCP or Article 306 § 1a (3) CCP.

It should also be noted that granting the right to submit a request for prosecution to an entity other than the aggrieved party may lead to practical problems previously unknown in Polish criminal law. Indeed, one has to wonder how the situation should be treated when a shareholder of a company files a request for prosecution and then sells their shares in the company. Such a situation does not seem to affect the effectiveness of a filed request for prosecution, although this is not regulated in any way by law. However, the opposite situation may also raise questions: a shareholder disposes of their shares and only later learns that the company's management has taken irresponsible actions that may have led to significant financial damage to the company. Can they file for prosecution then? They are no longer a shareholder, but they were at the time the criminal act was committed. Assuming that the purpose of the institution in question is to protect minority shareholders from actions that could potentially jeopardise their interests, they should have this power. However, such a solution does not derive from the law in any way. Another question arises: can a new shareholder who has only recently acquired shares in the company file a request for prosecution for a criminal offence committed before they became a shareholder? According to the assumption made above – that the purpose of this institution is to protect the property interests of

---

[46] D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424*, Warszawa, 2022, p. 100.

[47] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 59.

[48] This is pointed out by A. Sakowicz, in: A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018, p. 75.

minority shareholders – it would seem that they should not have such competence, given that the criminal act occurred before they acquired the shares. On the other hand, however, one could argue that the amended Article 296 § 4a of the Penal Code does not differentiate between shareholders based on the time of acquisition – it simply states that a shareholder has the right to file a request for prosecution.

Further complications may arise in relation to a shareholder's ability to withdraw a request for prosecution. Assuming that the shareholder is also the person who submitted a notification of a criminal offence, they will be notified of the sending of the indictment to the court in accordance with Article 334 § 3 CCP. However, they will not be further informed about the proceedings of the first-instance court hearing, as they do not have the status of the aggrieved party. They will therefore have no way of knowing when their opportunity to withdraw the request for prosecution will expire – which, according to Article 12 § 3 CCP, is possible until the closing of the judicial examination at the first-instance court hearing. There is also the question of whether a shareholder who has disposed of shares after the request has been filed will be able to withdraw the request. It is difficult to see any analogy here with situations involving, for example, an aggrieved creditor who has disposed of a claim after a request for prosecution has been filed. The aggrieved party's entitlement to file a request for prosecution was based on the fact that its legal interest has been infringed or threatened, which does not apply in this case to a shareholder of the company. If the shareholder loses the right to withdraw the request after the transfer of shares, does the person acquiring the shares from them acquire the right in question as well? After all, the right to file a request is strictly dependent on the ownership of shares in the company – hence, perhaps the right to withdraw the request should also be linked to this fact?

Unfortunately, the fact that so many questions arise from the amendment suggests that it cannot be regarded as the result of fully considered legislative reflection.

5. CONCLUSION

When assessing the legitimacy of the introduction of the discussed amendment, it is worth remembering the opinion of R. Zawłocki that 'The criminalisation of harmless or unintentional economic behaviours should be the result of absolute certainty as to its practical necessity.'[49] Meanwhile, it is difficult to conclude that the amendment to Article 296 § 4a of the Penal Code – facilitating, ultimately, the initiation of criminal proceedings for harmless economic behaviours – was indeed necessary. Its introduction appears to be the result of a faulty definition of the reasons for the poor application of Article 296 § 1a of the Penal Code, which the legislator identified as the excessively limited circle of persons who may file a request for prosecution of this criminal offence.

[49] R. Zawłocki, 'Nowe przestępstwo…', op. cit., p. 967.

Meanwhile, in fact, the lack of practical application of this provision lies in its construction, which significantly limits the range of factual circumstances that can be qualified under its statutory elements. The legislator should therefore first consider amending Article 296 § 1a of the Penal Code rather than the provision concerning the initiation of its prosecution. Worse still, this solution does not seem to be reconcilable with the principle of subsidiarity of the criminal law, since minority shareholders or stockholders have a number of rights under commercial law to defend their interests. Granting them the right to file a request for prosecution for the criminal offence of mismanagement without damage therefore does not seem in any way necessary for the defence of their rights and constitutes an excessive interference of criminal law in corporate relations, threatening to abuse this institution for purposes not covered by Article 297 § 1 CCP.[50]

At the very end, it is only appropriate to hint at an issue that goes beyond the scope of this thesis, namely the legislator's recently increased interest in regulating corporate relations by means of criminal law norms. Indeed, it should be noted that under the Act of 9 February 2022 amending the Act – Commercial Companies Code and certain other acts,[51] Articles 587^1 and 587^2 were added to the Commercial Companies Code. These provisions criminally sanction inadequate cooperation of the company's management board (as well as, for example, commercial proxy holders) with the supervisory board. The legislator therefore apparently considered that the threat of a criminal sanction was a necessary element to stabilise relations between company bodies. On the other hand, the amendment of Article 296 § 4a of the Penal Code constitutes a criminal law interference in the relationship primarily between minority and majority shareholders and the company's management board or commercial proxy holders. Meanwhile, it is difficult to identify reasons

[50] In this context, a certain inconsistency on the part of the legislator in introducing the solution in question should be considered a less significant drawback. Even in the case of other criminal offences, a minority shareholder of a company may be indirectly harmed by the conduct of the company's governing body, yet still will not be able to initiate criminal proceedings, as such a request can only be filed by the aggrieved company. An example of such a situation is the criminal offence under Article 300 § 1 of the Penal Code (frustrating or depleting the satisfaction of one's creditor in the event of the debtor's threatened insolvency or bankruptcy), which can only be prosecuted upon request of the aggrieved party (unless the State Treasury is the aggrieved). Meanwhile, a situation may arise in which a capital company is a creditor of a debtor disposing of its assets, and the management of that company does not take all possible steps against the debtor due to business or personal ties between the management board and the debtor. A dissatisfied minority shareholder could, in such a case, file a notification that the company's management has committed a prohibited act under Article 296 § 1 or 1a of the Penal Code, but this will only be justified if the company's claim is significant enough to speak of substantial financial damage. If there is no risk of significant financial damage, the only criminal law action available to the minority shareholder would be to report the unreliable debtor under Article 300 § 1 of the Penal Code. However, this will not be possible, as only the company, as the aggrieved party, may file such a request – and this will not occur due to the connections between the company's management board and the debtor. As can be seen, therefore, also with regard to other criminal offences, in order to protect the interests of the minority partner, stockholder, shareholder, or member of a cooperative, it would be justified to broaden the group of entities entitled to file a request for prosecution. It is therefore incomprehensible why such a possibility has been limited solely to the offence under Article 296 § 1a of the Penal Code.

[51] Journal of Laws of 2022, item 807.

for the necessity of such intense interest of the legislator in regulating these issues by means of criminal law. This situation can therefore be seen as a manifestation of the legislator's disbelief that commercial law is capable of adequately regulating intra-corporate relations and, therefore, that a broader intervention of criminal law norms is necessary in this respect. However, this can hardly be regarded as a fully accurate assessment of the prevailing economic situation and is rather an expression of the dangerous belief that criminal law is the best way to safeguard the correctness of social relations.

BIBLIOGRAPHY

Bojarski M., *Dozwolone ryzyko gospodarcze w polskim prawie karnym*, Wrocław, 1977.
Bojarski T. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016.
Cimarno A., 'Artykuł 296 KK jako karnoprocesowy instrument ochrony podmiotów gospodarczych przed nadużyciami ze strony kadry menedżerskiej', in: Bieńkowska B.T., Jędrzejewski Z. (eds), *Problemy współczesnego prawa karnego. Część pierwsza*, Warszawa, 2016.
Dębowski P., 'Działanie na szkodę spółki w świetle wprowadzonych zmian w kodeksie karnym wraz z uwagami prawnoporównawczymi na gruncie prawa niemieckiego', in: Gil D. (ed.), *Problemy nowelizacji prawa sądowego*, Lublin, 2013.
Domarus A., 'Skutek przestępny na gruncie przestępstwa nadużycia zaufania – zagadnienia wybrane', *Czasopismo Prawa Karnego i Nauk Penalnych*, 2012, No. 3.
Gałęski M., Grupa G., 'Karnoprawna ocena decyzji menedżerskich', *Monitor Prawa Handlowego*, 2014, No. 1.
Giezek J. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa, 2021.
Giezek J., Kardas P., 'Odpowiedzialność karna za działanie na szkodę spółki – o potrzebie zmian', *Przegląd Prawa Handlowego*, 2011, No. 8.
Górniok O., 'Znaczenie subsydiarności prawa karnego w jego interpretacji', *Państwo i Prawo*, 2007, No. 5.
Hofmański P. (ed.), *System prawa karnego procesowego. Tom I. Zagadnienia ogólne. Część 2*, Warszawa, 2013.
Hryniewicz E., 'Karalne działanie na szkodę spółki', *Prokuratura i Prawo*, 2012, No. 10.
Korzeniewski A., 'Przestępstwa menedżerskie po liftingu', *Rzeczpospolita*, 14 July 2011.
Ligęza-Turlakiewicz M., Turlakiewicz G., 'Granice kreatywnego zachowania menedżerów w kontekście art. 296 § 1a kodeksu karnego', *Prokuratura i Prawo*, 2016, No. 5.
Mucha A., *Struktura przestępstwa gospodarczego oraz okoliczności wyłączające bezprawność czynu w prawie karnym gospodarczym*, Warszawa, 2013.
Oczkowski T., *Nadużycie zaufania w prowadzeniu cudzych spraw majątkowych*, Warszawa, 2013.
Pawelec S., *Spółka kapitałowa jako pokrzywdzony w procesie karnym*, Warszawa, 2011.
Pietrzyk T., *Odpowiedzialność karna menedżerów spółek handlowych*, Warszawa, 2020.
Popławski H., 'W kwestii rozwiązania zagadnienia ryzyka w płaszczyźnie winy', *Nowe Prawo*, 1969, No. 5.
Romanowski M., 'Kto ma decydować o interesie spółki: menedżer czy prokurator?', *Rzeczpospolita*, 16 June 2011.
Rozental K., 'W sprawie karnoprawnego charakteru tzw. ryzyka zwykłego', *Państwo i Prawo*, 1991, No. 4.
Sakowicz A. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2018.
Sepioło I., *Przestępstwo niegospodarności z art. 296 KK*, Warszawa, 2013.

Skorupka J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020.
Skorupka J., *Prawo karne gospodarcze. Zarys wykładu*, Warszawa, 2005.
Stefanicki R., *Należyta staranność zawodowa członka zarządu spółki kapitałowej,* Warszawa, 2020.
Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2020.
Świecki D. (ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424*, Warszawa, 2022.
Wróbel W., Zoll A. (eds), *Kodeks karny. Część szczególna. Tom III. Komentarz do art. 278–363*, Warszawa, 2021.
Zawłocki R., 'Karalna niegospodarność', in: Pohl Ł. (ed.), *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca*, Poznań, 2009.
Zawłocki R., 'Nowe przestępstwo niegospodarności bezszkodowej z art. 296 § 1a Kodeksu karnego', *Monitor Prawniczy*, 2011, No. 18.
Zawłocki R., *Podstawy odpowiedzialności karnej za przestępstwa gospodarcze*, Warszawa, 2004.
Zawłocki R., 'Przestępstwo niegospodarności', in: Zawłocki R. (ed.), *System prawa karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa, 2015.
Zientara A., *Przestępstwo nadużycia zaufania z art. 296 kodeksu karnego*, Warszawa, 2010.
Żółtek S., *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warszawa, 2009.

Cite as:

Pilarczyk Ł. (2025), *Entities entitled to file a request for prosecution of the criminal offence of punishable mismanagement without damage – assessment of the amendment to article 296 § 4a of the Penal Code*, Ius Novum (Vol. 19) 1, 59–80. DOI 10.2478/in-2025-0005