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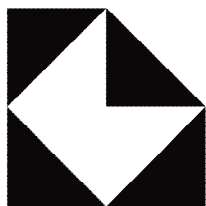
Krakow, June 16, 2019

**Statement  
regarding the allegations of the Ministry of Justice  
from the 15th of June 2019.**

The news release issued on the 15<sup>th</sup> of June 2019 by the Ministry of Justice addressing the expert legal analysis from the 9<sup>th</sup> of June 2019 by the Cracow Institute of Criminal Law contains untrue, thus misleading statements and allegations which misrepresent the content of the analysis.

The content of the news release in question is not just about making groundless statements about our analysis. The Ministry of Justice also puts forward and repeatedly makes the allegation of using "lies" (e.g. "a lie", "it is a lie", "they lie", "they have lied"), as well as directly suggests the existence of ostensible ulterior motives of the authors of the analysis (quote: "The Ministry of Justice does not know the reasons why professors and doctoral students of the venerable Cracow university lied in their opinion"). It also depreciates the academic status of the authors of the analysis, all of whom hold academic degrees, addressing them as merely "Ph.D. candidates/students."

It is in the public interest to emphasize that the news release of the Ministry of Justice as originally issued, constitutes an unacceptable form of suppression of freedom of expression, an attack on academic liberty, an interference with the autonomy of research conducted at the University, and an attempt to limit the participation of the civil society in the opinion-making process with regards to projects of the future laws of the Republic of Poland. Due to the institutionalized form of the news release, issued by the official state authority, it shall be deemed that the actions of the Ministry of Justice interfere with constitutionally provided freedoms and civil rights – namely, the citizen's relationship with the state.



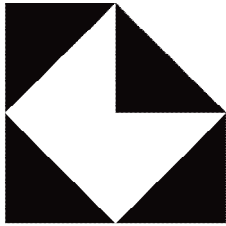
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Moreover, in its detailed content, the news release of the Ministry of Justice violates the personal rights of the authors of the expert legal analysis and undermines the trust for non-governmental institutions that is so necessary in the implementation of academic research.

The personal rights of the authors of the analysis have been additionally violated by the official statement of the Ministry of Justice spokesperson on Twitter, subsequently retweeted by the official Ministry of Justice account, accusing us of "ordinary lies" and using "fake news" (quote: "enough with #fakenews"), and ascribing to us the statement that the bill's drafters changed the law to "protect their own" (<https://twitter.com/JanKanthak/status/1139848430484955136>, accessed on the 16<sup>th</sup> of June 2019 at 12:55). There is no such allegation anywhere in the expert legal analysis, nor have we ever made such an allegation in the subsequent public debate.

Therefore, together with this statement, we issue the following analysis of the Ministry of Justice's news release, pointing out the untrue and thus misleading statements and allegations which misrepresent the content of the original expert legal analysis.

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Krakow, June 16, 2019

## **Analysis**

**of the news release by the Ministry of Justice**

**from the 15<sup>th</sup> of June 2019**

1.

In its news release published on the 15<sup>th</sup> of June 2019 on the website of the Ministry of Justice (originally titled "The Ministry of Justice sues professors of the Jagiellonian University for lying," at the following address: <https://www.gov.pl/web/sprawiedliwosc/ministry-justice-suing-professor-university-jagiellonian-for-a-lie>, and reissued after modification (the previous URL has become inactive) under the new title: "The Ministry of Justice will file a civil lawsuit to defend its reputation in connection with the lies regarding criminal law reforms," at the new address: <https://www.gov.pl/web/sprawiedliwosc/ministerstwo-sprawiedliwosci-wytoczy-proces-cywilny>, as of the 16<sup>th</sup> of June 2019, at 12:55) the Ministry of Justice announces that "they will sue the professors and doctoral students of the Krakow University for lying" — the authors of the legal opinion issued on the 9<sup>th</sup> of June 2019 addressing the resolution of the Senate of the Republic of Poland from the 24<sup>th</sup> of May 2019 on the statute amending the Criminal Code and some other statutes, adopted by the Parliament of the Republic of Poland at its 81<sup>st</sup> session on the 16<sup>th</sup> of May 2019 (the legal opinion in Polish is available at [https://kipk.pl/dokumenty/opinia2\\_nowelizacja2019.pdf](https://kipk.pl/dokumenty/opinia2_nowelizacja2019.pdf)).

In the news release, the Ministry of Justice states that (original spelling and editing retained):

"(...) two professors and five Ph.D. students of the Cracow University wrote that the new provisions on bribery would

not apply to the heads of the largest strategic companies with the participation of the State Treasury, naming the President of the ORLEN as an example, which thus it would lead to his impunity for corruption.

This opinion is not true. It is a lie. In fact, the changes make the law more severe. The CEOs of private companies and those with a minority share of the State Treasury will be subject for acts of bribery - pursuant to the art. 296a par. 1 - to the penalty of 5 years in prison — the same as today. But the president of a company in which the Treasury has more than half of shares, for the acts of corruption

- pursuant to the art. 228 par. 1 - will go behind bars for 8 years. No provision, no paragraph of the new law, **contrary to what the** professors of the Jagiellonian University claim, excludes the presidents of state-owned companies from being punished for bribery. "

In the news release, we may also read that:

"Their opinion that the new law allegedly gives impunity to a specific group of criminals undermines social trust in the state and strikes at the foundations of democracy."

According to the Ministry of Justice, the expert legal analysis is a "lie" and its authors "lie" / "have lied."

## 2.

The alleged "lie" is the claim about the abolition of criminal liability of the presidents of management boards of commercial companies with a minority share held by the Treasury for acts of **bribery in the public sector** (article 228 § 1 CC), in connection with the new definition of a person holding a public function and the corresponding amendment of the Senate, from the 16<sup>th</sup> of May 2019 (article 115 § 19 CC).

We hereby state in this context that the allegations provided in the news release of the Ministry of Justice are entirely groundless.

The main statement of the Ministry of Justice — that (original spelling and editing retained): "No provision, no paragraph of the new law, **contrary to what the** professors of the Jagiellonian University claim, excludes the presidents of state-owned companies from being punished for bribery" — is incorrect and misrepresents the actual content of our analysis.

The Ministry of Justice accusation concerns the alleged statement that the provisions of the new law provide for the exclusion of the presidents of state-owned companies from being punished for bribery. Note that the language of the release discusses in very general terms the exclusion from being punished "for bribery" — which may erroneously suggest that we have claimed that the new law entirely excludes the punishment "for bribery." The problem is that the Ministry talks generally about "bribery," without making the necessary

distinction between the different legal forms of bribery provided for in the Criminal Code.

The content of the expert legal analysis previously prepared by us confirms the inaccuracy of the above Ministry allegations. In the analysis from the 9<sup>th</sup> of June 2019, regarding the statute from the 16<sup>th</sup> of May 2019, in the context of the Senate amendments adopted on the 24<sup>th</sup> of May 2019, we clearly indicated that (see the entire analysis, at page 65):

**"The Senate amendments have the effect that provisions on bribery in the public sector (article 228 CC, Article 229 CC) may not apply to the persons managing the largest strategic commercial companies with the shareholding participation of the State Treasury, which then leads to gross inequalities in the law and unjustifiably privileges certain business entities.**

The use solely of the criterion of the number of shares held by a public entity is substantively incorrect and may lead to impunity for managers of the largest strategic companies with the participation of the State Treasury (such as KGHM Polska Miedź S.A. or Polski Koncern Naftowy Orlen S.A. - in both of these companies, the State Treasury is a minority shareholder).

**Pursuant to the amendment introduced by the Senate,** the CEO of PKN Orlen S.A. could not, therefore, be punished **for bribery in the public sector**, whereas such responsibility will be attributed for example, to the

management of a municipal waste disposal company in a small rural town."

The above analysis is unambiguous, precise, and leaves no room for doubt about the specific point being made.

First of all, we referred to the amendment introduced in point 15 of the resolution of the Senate of the Republic of Poland from the 24<sup>th</sup> of May 2019, providing that:

"15) in art. 1 in pt 36 in letter c, in § 19 in pt 4 letter b is replaced by the following: "b) a commercial company in which the share of the State Treasury, a local government or a state legal entity exceeds total or for each of these entities, 50% of the share capital or 50% of the number of shares."

Secondly, we have clearly emphasized that our **analysis concerns "crimes of bribery in the public sector," i.e., a specific form of bribery, additionally indicating the specific provisions covered by our analysis: "art. 228 CC, art. 229 CC" — so we were clearly referring only to the corruption in the public sector, not the so-called corruption in the private sector.**

Thirdly, illustrating the discussed interpretative issues with the specific example of one of the petroleum companies (as also brought up in the release of the Ministry of Justice), we underlined that "pursuant to the amendment introduced in the Senate" the president of this company "could not, therefore, be



criminally responsible for bribery in the public sector." The phrase „in the public sector," was not only placed in **bold** in the analysis but also underlined. In addition, we emphasized that we were talking about the analysis of the case "pursuant to the amendment introduced in the Senate," as clearly stated in the above-quoted sentence.

The necessity of distinguishing between the indicated forms of bribery is actually confirmed by the Ministry itself, when in the news release it lists the provisions of the Criminal Code and describes various sanctions for committing corruption in the public sector and economic corruption ("The CEOs of private companies and those with a minority share of the State Treasury will be subject for acts of bribery - pursuant to the art. 296a par. 1 - to the penalty of 5 years in prison — the same as today. But the president of a company in which the Treasury has more than half of shares, for the acts of corruption - pursuant to the art. 228 par. 1 - will go behind bars for 8 years.). The Ministry, however, remains silent about this very same distinction when it accuses us of a "lie" without justification, despite the fact that we write in our analysis about the crime of corruption **in the public sector**, as discussed above. The above-indicated circumstances disprove all of the allegations made against us in the Ministry of Justice news release. In fact, it is the Ministry's release that actually contains untrue and misleading insinuations.

It should be emphasized that we have not indicated, or even suggested in any way, that the described consequences related to corruption in the public sector will lead to the complete impunity of the indicted persons. This issue — of possible alternative crimes and punishments that might apply — was unrelated to the amendment and the new definition of "a person holding a public function," and thus played no role in our analysis. Of course, those individuals may be still subject to a penalty — but for the separate crime of corruption **in the private sector** (art 296a § 1 CC).

In this regard, and given the consistently repeated thesis of the Ministry of Justice that the changes in criminal law implemented by the Senate's amendments make criminal liability for corruption more severe, it is worth noting that:

1. not all of the acts penalized in art. 228 CC (the provision affected by the Senate's amendment no. 15) are prohibited under penalty by art. 296a CC to an identical extent,
2. the provision of art. 296a § 1 CC is drafted in a narrower way than in art. 228 § 1 CC, so it is much more difficult to prove all the elements of that crime as compared with the prohibited act under art. 228 CC.
3. the offense involving the private sector is subject to a much lower statutory penalty — up to 5 years imprisonment, as compared to the 8-year maximum imprisonment in the case of corruption in the public sector under art. 228 § 1 CC.

### 3.

Referring in a more detailed manner to the groundless allegations contained in the news release of the Ministry of Justice, one also needs to consider the current state of affairs.

Currently, the personal scope of corruption in the public sector is very broad. According to the predominant case law of the Supreme Court and common courts, companies with a State Treasury share are "organizational units utilizing public funds," and therefore people employed in them are "persons holding public functions." This interpretation was constantly criticized in the doctrine of criminal law, among others by the aforementioned authors from Krakow University — but it remains the leading case law.

As a consequence, people employed in these companies are currently subject to the provisions governing corruption in the public sector, which is more severely punished (Article 228 § 1 CC: from 6 months to 8 years of deprivation of liberty) than the more general crime of economic corruption (Article 296a § 1 CC: from 3 months to 5 years deprivation of liberty). In addition, corruption in the public sector has a much more general normative description than economic corruption, which means that it is much easier to prove its perpetration.

The statute on amending the Penal Code adopted by the Sejm from the 16<sup>th</sup> of May 2019 introduced the new definition of "person holding a public function" — including, among others, a new excerpt regarding "presidents of the boards of directors of

commercial companies with the participation of the State Treasury, local self-government or state legal persons". Under the influence of criticism, at the stage of Senate work, an amendment to the above provision was adopted. This amendment had the effect of recognizing the chairman of the board of directors as a "person performing a public function" if the share of the Treasury, local government or state legal entity should exceed 50% in its share capital. **A purely mathematical criterion was used in the amendment, ignoring the fact that there are a significant number of strategic companies in which the State Treasury, despite having a minority of shares, exercises — both de facto and de iure — full control.** The use of this criterion was criticized in our analysis from the 9<sup>th</sup> of June 2019, wherein we indicated that it would lead to the lack of responsibility for **public** corruption (i.e., more severely punished) of the chairmen of certain companies.

At the stage of parliamentary works on the 13<sup>th</sup> of June 2019 (the 82<sup>nd</sup> Sejm session), considering the Senate's amendments from the 24<sup>th</sup> of May 2019, the Ministry of Justice did not protest against the Senate's amendment (paragraph 15 of the Senate resolution). In the Sejm's speech, the representative of the Ministry of Justice himself indicated, in response to the MP's inquiry, that the consequence of adopting the Senate's amendment would be the recognition of some acts of corruption committed within the companies co-owned by the State

Treasury as crimes of corruption in the private sector under art. 296a CC.

However, the representative of the Ministry of Justice did not add that classifying these acts as economic corruption de facto means a reduction of the upper limit of the penalty provided for this type of behavior, as compared to the original bill, and leads to a more complicated process of proving the elements of a crime. Beforehand, the Senate's amendment was also recommended by the Legislative Committee of the Sejm, in which efforts representatives of the Ministry of Justice participated (on the 11<sup>th</sup> of June 2019).

**To sum up: The amendment introduced by the Senate has reduced the scope of liability for “public” corruption, not only in relation to the bill as originally passed by the Sejm, but also in relation to the current case law.**

For example, it can be pointed out that after the statute as amended by the Senate enters into force, the acceptance of a financial gain for employing a specific individual in a company co-owned by the State Treasury, or for donating or sponsoring another entity, will no longer be a crime of “public” corruption if the State Treasury's share in the relevant company is less than 50%. Moreover one of the conditions for establishing that this type of behavior constitutes the so-called economic corruption (i.e., the more mildly punished crime of “private” corruption) is proving that the employment or sponsorship "may inflict material damage upon such entity or constitute an act of unfair

competition” with respect to other companies. In the typical example often encountered in business, this would be almost impossible to prove.

We would face a similar situation when an entrepreneur consistently provides material benefits to the president of a joint-stock company, in which 49% of the shares belong to the State Treasury, and by doing so, he desires to secure the president's favor for an indefinite period — in particular, regarding a potential contractor intending to apply in the future to conclude a contract with him. At that stage, it would be impossible to prove the possibility of causing material damage to the company, or an act of unfair competition, or to indicate the existence of a specific inadmissible preferential activity.

The amendment also increases the gap between the liability for public corruption and for economic corruption. For example, if the president of a joint-stock company whose majority shareholder is a local commune accepts a material benefit of great value (from PLN 1,000,000) — but not more than PLN 5,000,000, according to the new law, namely the art. 228 § 5a CC — he would be punished by deprivation of liberty for 3 to 20 years. If the same benefit would be accepted by the president of a large petroleum company, in which the State Treasury holds 49% of the shares, then his behavior would be punished by 3 months up to 5 years imprisonment (for corruption in private sector).

Finally, it should be noted that the Ministry of Justice did not respond in any way to other, similarly troubling examples regarding corruption crimes that were raised in both opinions of the Krakow Institute of Criminal Law.

It is worth stressing that the scope of liability for corruption in the public sector was in fact broadened to cover activities of the presidents of “national organizations”, i.e., associations, foundations, trade unions, employers' organizations, and other organizations in the third sector (NGOs), even if they do not utilize any public funds. Also, the effective instruments to combat bribery of significant volume in the public sector has been severely impaired (due to the lack of an impunity clause for active bribe perpetrators cooperating with law enforcement agencies, such as a large crown witness).

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Once again, it should be noted that the above analysis leads to the inescapable conclusion that there are simply no valid grounds for describing the theses provided in our previous legal analysis as “lies.” We regret that instead of providing a meritorious response to serious concerns of criminal liability, the public authority has decided to emotionally discredit the diligent scholars who provided an expert opinion within the appropriate bounds of the legislative process.