

A Gloss on the Report by the Supreme Audit Office on the "supervision of special services" (Poland 2014)

Main Points of the Report

On 26 August 2014 the President of the Supreme Audit Office (SAO) presented the main points of the Report “on the supervision of special services” in Poland. It is difficult to address the content of the report in general, since the detailed results of the audit are classified. Still, one can address the main points of the report, for these have been publicized by the SAO President. Among the main problem areas associated with the supervision of special services the SAO reckons the following:

- a negative influence of the binding regulations on the limited possibility for effective supervision of special services by the President of the Council of Ministers
- the President of the Council of Ministers is not equipped with appropriate supervisory tools (i.e. full knowledge of the internal procedures in effect within special services; as well as control over the correctness of the investigative operations in specific cases [1]).

The SAO emphasizes that the executive, which is responsible for the supervision of special services, is devoid of effective tools, which in turn results in a lack of possibility of verifying the conveyed information as far as its content and mode of acquisition are concerned. Therefore, a number of areas are lacking in civil supervision of services.

The other main problem area referred to by the President of the SAO is the operational inefficiency of the body which by definition is supposed to monitor the activity of the Polish special services – essentially – on the executive authority level, that is the Collegium for the Affairs of Special Services. Still, it must be pointed out that this body functions in a consultative and advisory capacity as far as programming, supervision and coordination of the special services activity are concerned. For that matter the Collegium is in fact lacking in any “direct instruments”.

A Commentary on the Points of the Report

Particular attention should be directed to the context and the points made by the SAO President (formerly an activist of the incumbent Civic Platform). In 2013 work on the amendment to the Act on the Internal Security Agency and Foreign Intelligence Agency was begun, and in 2014 the Bill on the Internal Security Agency drafted by the government was forwarded to the Sejm Committees (the Special Services Committee and Internal Affairs Committee). The Bill was nevertheless returned to the Subcommittee on account of a ruling by the Constitutional Tribunal, which addressed the use of operational control by all the Polish services, as well as the willingness to introduce other amendments [2]. By no means is it possible here to relate to the essence of the whole Bill on the ISA, and yet the low legislative quality of the first Bill put forth in 2013 is noteworthy. Furthermore, the Bill forwarded to the Sejm committees in 2014 still contained a number of ambiguities. This can only be indicative of the poor legal culture afflicting the legislative process on the level of the entities responsible for the drafting of the Bill (the Ministry of the Interior headed by Bartłomiej Sienkiewicz).

Another problem is the concurrence of the report with the emergence of new information on the so-called "wiretapping scandal" ("Vistulagate"). The affair was concerned with the illegally made recordings of prominent politicians and public figures. One of the most notoriously headline-hitting tapes was the recording of Bartłomiej Sienkiewicz – the Minister of the Interior himself (incidentally, a former special services officer and adviser to the Head of the Office for State Protection, a predecessor to the Internal Security Agency). Currently, Bartłomiej Sienkiewicz himself is coordinating the

special services proceedings undertaken to investigate his own case – that is, the endeavours to clarify the illegal practice of wiretapping.



The publicly available points of the SAO report appeared the day after the new information about the wiretapping scandal had emerged. According to some press coverage one of the persons involved in the recording practice was a secret collaborator of the Central Bureau of Investigation (a special police unit), and the person facing the prime charge with commissioning the recordings (for the time being treated by the prosecutors as a suspect) had informed two special services a year before the affair concerned with the politicians of the incumbent Civic Platform being recorded. If these accounts prove to be true, then that will be a huge disgrace of the Polish special services, which structurewise are in no position to take care of the State's security [3].

Referring back to the point in the SAO report, concerned with the President of the Council of Minister's limited capability for the supervision of the "internal procedures in effect within special services" and of "control over the correctness of the investigative operations in specific cases", one should adopt a polemical stance. The same can be stated with reference to the capability of the President of the Council of Ministers himself for the scope of the investigative operations undertaken by the police in specific cases. For it is not legitimate to grant the executive a direct insight into investigative operations engaged in by any special service whatsoever.

At any rate, the President of the Council of Ministers himself "ceded" the supervision of special services to the Minister of the Interior (which in itself is debatable given the constitutional law). Furthermore, the very lack of control over – say – the Internal Security Agency was in 2014 included in the Bill on the Internal Security Agency, literally and in favour of the Minister of the Interior (bar some exceptions). Such a move is motivated by the willingness to create a buffer protecting the President of the Council of Ministers against direct political accountability for potential "excesses" in the activity of the ISA. However, it must be pointed out that heads of special services will still be appointed "on political grounds", which in itself is a control mechanism favouring the executive, but not necessarily benefitting the political opposition or the transparency in public life in Poland.

"The external control mechanism", advocated by the SAO, is provided for – for instance – in the Bill on the Committee for the Control of Special Services of 2013. This

body would monitor all special services. Special attention should be drawn to the provision made by the Bill, whereby a wide material scope of control is to be wielded by the Committee – that is, a lack of objective or subjective limitations as for the issues of civil rights and liberties; investigative operations; data collected by special services; statements and certificates of security; and complaints lodged against the operations undertaken by special services [4]. In 2014 the Ministry of the Interior announced that this year the Bill will not be sent to the Sejm, which is to result from a number of defects of the draft [5]. Some basic legislative errors were pointed to by, inter alia, the National Council of the Judiciary; the main objections were: the infringement of the tripartite separation of powers; an overlap with the purview of other bodies; and granting the Committee a capacity of the Constitutional Tribunal [6].

Besides, the Bill on the ISA provided for the establishment of the Security Committee (“an intragovernmental subsidiary authority”), which would be instituted with the directive by the President of the Council of Ministers, and presided over – for no apparent reason – by the chief of the Chancellery of the Prime Minister of Poland. In its capacity, the Committee might boil down to the forum exchanging information on the activities of special services; thereby it would be another “collective body” allowing for the blurring of political responsibility should any specific problems arise.

References:



- [1] *Supervision of Special Services* (press information released by the Supreme Audit Office, 26 August 2014), [in:] <http://www.nik.gov.pl/aktualnosci/bezpieczenstwo/nadzor-nad-sluzbami-specjalnymi.html> (28.08.2014).
- [2] *Draft Amendments to the Act on the Internal Security Agency Returns to the Sejm Subcommittee*, [in:] <http://prawo.rp.pl/artukul/756571,1136313-Projekt-zmian-w-ustawie-o-ABW-wraca-do-sejmowej-podkomisji.html> (28.08.2014).
- [3] *The Inside Story Behind the Wire-tapping Scandal. What Does Marek Falenta Know?*, "Do Rzeczy" No. 35, 2014.
- [4] *Bill on the Committee for the Control of Special Services*, (2013).
- [5] Polish Press Agency, 29.05.2014r.
- [6] *Opinions of the National Council of the Judiciary on the subject of the Bill on the Committee for the Control of Special Services, 19 December 2013*, (2013).