

ARTICLE

The counterintelligence shield in Poland. Definitional issues in the context of the tasks and powers of authorities

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Abstract

The analysis presented in the paper pursues two primary research objectives. The first is to establish an understanding of the meaning of the term ‘counterintelligence shield’ in Poland by demonstrating the differences and similarities associated with its use in the fields of security sciences, sociological sciences, economic sciences and legal sciences. The second is to assess the current legal state of affairs in Poland, in particular the tasks and powers of authorities, in order to resolve whether it corresponds to current threats of an intelligence nature to the most important persons in the state, and above all whether it allows for effective counteraction to these threats. Additionally the author puts forward legislative postulates to minimise the imperfections of the system identified during the analysis.

Keywords

counterintelligence shield, internal security, protection of information, legal protection organs, special services

The case of Tomasz Szmydt, a former judge, who has fled to Belarus has sparked journalistic, politic and legal debate in Poland on the need for changes to the procedures for granting access to classified information to persons holding positions such as judge¹. This topic is a part of the issue of counterintelligence shield, which, up to the publication of this article, has unfortunately not received a wider scientific and research analysis. Undertaking a consideration of this issue is therefore an interesting and in a peculiar way, pioneering task, which, in the author's opinion, boils down to the need to confront the current legal situation, in particular that which determines the tasks and competences of legal protection bodies in Poland, with the network of threats for the most important persons in the state, identified within the framework of security sciences. Properly carrying out these considerations, however, requires going beyond the area outlined by the two disciplines mentioned above and reaching out to the achievements of other disciplines, that also use the concept of counterintelligence shield in their research, mainly sociological sciences, to take into account the social context of the understanding of this concept shaped by the views presented in the mass media and economic sciences to look at its economic context.

In a research area outlined in this way, which is clearly interdisciplinary in nature, the primary aim of the study is, firstly, to demonstrate the differences and similarities between the understanding of counterintelligence shield concept in security sciences, sociological sciences, economic sciences and legal sciences; secondly, to indicate whether the current legal state of affairs corresponds to current threats of an intelligence nature to the most important persons in the state and, above all, whether it allows for effective countering of these threats.

The assertions presented in the article have been established by means of a formal-dogmatic analysis of the normative material relating to the issue under examination, in particular the competence laws of the legal protection authorities, and on the basis of an analysis concerning the views of the law doctrine and the judicature. Moreover, an important element of the research carried out was to go beyond the field of legal sciences in order to confront by comparative method the relevant issues with the literature of security sciences, sociological sciences and economic sciences.

¹ M. Kobyłański, *Polskie sądownictwo należy lepiej zabezpieczyć przed działaniami obcych służb* (Eng. Polish judiciary needs to be better protected from foreign services), Rzeczpospolita, 27 V 2024, <https://www.rp.pl/prawnicy/art40433651-polskie-sadownictwo-nalez-y-lepiej-zabezpieczyc-przed-dzialaniami-obcych-sluzb> [accessed: 28 V 2024]; J. Ojczyk, *Tak sędziowie dostają dostęp do informacji niejawnych. „To niedopuszczalne”* (Eng. This is how judges get access to classified information. ‘This is unacceptable’), Business Insider, 8 V 2024, <https://businessinsider.com.pl/prawo/sedzia-tomasz-szmydt-i-tajne-sprawy-nato-dlaczego-prawo-na-to-pozwala/frsp2e8> [accessed: 28 V 2024].

Counterintelligence shield in security sciences and strategic documents

At the outset, it should be emphasised that the issue of counterintelligence shield has not been widely considered in the security science literature to date. This is surprising and, at the same time, represents an important research potential, as this concept is used in documents of a strategic nature for the military security of the state. The third chapter of *the White Book on National Security of the Republic of Poland*², adopted in 2013 as a result of the recommendations of *the National Security Strategic Review*³, discusses the most important tasks of the operational subsystems of national security. Within the activities covered by the protection subsystem, it mentions counterintelligence shield. In its scope, *the White Book on National Security of the Republic of Poland* indicates:

The strategic task of counterintelligence services is to protect the constitutional order and the democratic system of the state against violations of the state's stability and to operationally identify threats to Poland's security resulting from the activities of foreign special services. The latter take, inter alia, steps aimed at gathering information in the areas of business, political, scientific and technical intelligence, which may constitute a threat to the security of the state. As far as the counterintelligence protection of the country is concerned, of utmost importance is also to safeguard the key strategic information resources, which ensure the proper functioning of the state. The main tasks of the counterintelligence service should therefore include: effective identification of potential and real threats and preventing them by means of available operational and procedural methods; continuous monitoring and analysis of identified threats to the security of the state; taking preventive actions, in particular in the field of protection of classified information; coordination of activities and cooperation with other components of Poland's national security system, as well as with foreign and international (transnational) entities, in conformity with allied obligations⁴.

A definition of counterintelligence shield, similar in type and scope, was also included in *the National Security Strategy of the Republic of Poland 2014* (in force until 2020, hereinafter: Security Strategy 2014). In its third chapter, entitled *Concept*

² *The White Book on National Security of the Republic of Poland*, https://www.bialystok.ap.gov.pl/arch/teksty/biala_ksiega.pdf [accessed: 22 III 2024].

³ *The National Security Strategic Review. Main conclusions and recommendations for Poland*, <https://www.bbn.gov.pl/download.php?s=1&id=12574> [accessed: 28 V 2024].

⁴ *The White Book on National Security...*, pp. 170–171.

of *Strategic Actions*. *Operational Strategy*, counterintelligence shield is listed under protective measures as an activity aimed at:

(...) the safeguard of the constitutional order and democratic system against violations of the stability of the state and on operational recognition of threats to the security of Poland resulting from the activities of foreign special services. The main tasks of counterintelligence in this domain include: effective recognition of potential and real threats and their prevention by means of available operational and procedural methods; ongoing monitoring and analysis of identified threats to the security of the state; conduct of preventive actions, in particular in the area of protection of classified information; coordination of actions and cooperation with other components of the national security system of the Republic of Poland, and with foreign and international entities, in conformity with allied obligations⁵.

It is worth to emphasise that counterintelligence shield, defined in this way, is included in the Security Strategy 2014 as an element of protection activities, the essence of which is: (...) *to ensure conditions allowing to maintain constitutional order, integral stability of the state, public security and public order, both common and individual tangible and intangible resources, as well as the functioning of the critical infrastructure*⁶. This is an important distinction, as it includes both military and special services activities in the defence sphere. In turn, the very essence of defence activities was reduced to maintaining readiness to respond effectively to threats to the independence and territorial integrity of the Republic of Poland. This is to be served by, among other things, intelligence and counterintelligence activities in the defence sphere. As can be seen from the above distinction, counterintelligence and intelligence activities can take the form of both defensive and protective activities, except that the conduct of counterintelligence shield is only an element of the latter. However, it should be borne in mind that the military nature of the Security Strategy 2014 derives from the primary piece of legislation for it, i.e. *Act of 21 November 1967 on the universal duty of defence of the Republic of Poland*, which is no longer in force. The purpose of the Act was to ensure the defence and strengthening of the defence of the Republic of Poland⁷. This can also be seen through the prism of the tasks posed to the special services in the Security Strategy 2014, which deals exclusively with the operation of military special services classified in the defence subsystem

⁵ *The National Security Strategy of the Republic of Poland 2014*, <https://www.bbn.gov.pl/ftp/SBN%20RP.pdf>, p. 34 [accessed: 22 III 2024].

⁶ *Ibid.*, p. 33.

⁷ This Act has been replaced by *the Act of 11 March 2022 on the defence of the Homeland*.

as an element necessary to ensure the direct security of its own nation and citizens, as well as the territory and structures of the state. The development of these services should be based on, among other things, the implementation of the latest computerised technical intelligence and counterintelligence systems.

It should be added, that the current *National Security Strategy of the Republic of Poland 2020*, in comparison to the previous one, did not clearly distinguish counterintelligence shield activities. In a separate section, it defines state resilience and common defence, understood as (...) *increasing the state's resilience to threats by creating a system of common civic defence, based on the efforts of the entire nation, and building an understanding for the development of the Republic of Poland's resilience and defence capabilities*, and only task 2.12 was included as a counterintelligence shield activity, consisting of continuing to strengthen (...) *counterintelligence protection of the state authorities and critical infrastructure in the way adequate to the increasing activities of foreign intelligence services - both in the military as well as in the civilian domain*⁸.

Counterintelligence shield in economic sciences

Economic sciences approach counterintelligence shield somewhat differently from strategic documents. They identify this issue with the so-called economic counterintelligence, understood as activities of economic entities aimed at protecting the most important information constituting company secrets, which are crucial for the activity and development of this entity. Counterintelligence shield understood in this way is usually an element of the information security management system implemented in an economic entity, which takes into account the related risks, expectations and processes within the organisation. This system is based on standardisation systems taking the form of universal standards, led by the global standardisation system run by the International Organization for Standardization, ISO and International Electrotechnical Commission, IEC, as well as the leading standard in this area, *ISO/IEC 27001*⁹. The main objective of implementing the standard is to create a specialised organisational structure using formalised processes and carrying out information, analysis and auditing tasks. The tasks undertaken are related to anticipating, detecting and neutralising any threats coming from two activity areas of such an economic entity: firstly, the external environment,

⁸ *The National Security Strategy of the Republic of Poland 2020*, https://www.bbn.gov.pl/ftp/dokumenty/Strategia_Bezpieczenstwa_Narodowego_RP_2020.pdf, pp. 15–16 [accessed: 22 III 2024].

⁹ At the time of publication of this article, this is standard PN-ISO/IEC 27001:2023.

mainly market competition, but also specialised business intelligence carried out by professional entities or by other states; secondly, the internal environment, aimed at identifying malfunctions in the functioning of personal and technical resources, in particular ICT, within the entity in question. The literature analysed indicates that:

(...) business counterintelligence is a deliberate set of ideas, methods, motives and ways (if only by hypothesis) of understanding the nature of the actions of potential perpetrators relating to takeovers of people/employees/managers – mainly as depositories of information, as well as procedures, practices, etc. undertaken essentially by competitors, and as an organisation and methods of activating specific effective countermeasures, including risk assessment¹⁰.

The overarching aim of business counterintelligence is therefore to prevent the uncontrolled removal of company secret or sensitive information from the company, which may jeopardise its market position, both now and in the future. The identification and collection of evidence of disloyalty and crimes committed by employees, managers and owners of the company, as well as co-operators acting to the detriment of the organisation, is set as the operational objective of business counterintelligence. Given these definitional scopes, it can be concluded that business counterintelligence functions as a de facto internal information protection service within the company structure, whose task is to ensure undisturbed operation in a competitive market.

Social understanding of counterintelligence shield

In the literature of sociological sciences, as in the security sciences, the concept of counterintelligence shield has so far not been considered more extensively. As in the case of security sciences, this proves surprising and at the same time offers similar research potential. This is because the term is used in the public debate, especially by journalists, experts or politicians, to describe the unspecified tasks of legal protection bodies, especially special services, in the area of broadly defined security of the most important persons in the state¹¹.

¹⁰ M. Kwieciński, *Wykorzystanie analizy wywiadowczej i osłony kontrwywiadowczej w ocenie zagrożeń zagranicznej ekspansji działalności przedsiębiorstwa* (Eng. The use of intelligence analysis and counterintelligence shield in assessing the risks of foreign expansion of a company's operations), "Zeszyty Naukowe Wszechnica Polska Szkoła Wyższa w Warszawie" 2019, no. 1, p. 97.

¹¹ *Jak działa osłona kontrwywiadowcza?* (Eng. How does counterintelligence shield work?), *Gazeta Wyborcza*, 16 VIII 2012, <https://wyborcza.pl/7,75398,12313525,jak-dziala-oslona-kontrwywiadowcza.html>

In journalistic, opinion-forming terms, counterintelligence shield is usually understood as a set of measures to protect the most important people in the state against various categories of threats, which include espionage, corruption, business and financial or even moral and social activities. Moreover, the journalistic use of the concept of counterintelligence shield in most cases takes the form of a post-factual negative assessment of the services actions, which – according to the authors of these statements – did not meet the expectations placed in them in a particular case and in a way are responsible for discrediting a particular person, in relation to whom it was assumed a priori that he or she should be covered due to the mere fact of holding a high state position. As Norbert Loba notes:

(...) thus, it would follow that a special service (or several institutions) is obliged and authorised to conduct, with regard to some (not specified, not legally defined) group of ‘important persons’ in the state, constant reconnaissance (monitoring) of professional, political, financial, business, social activity in order to obtain information, inter alia, about contacts, decisions, behaviour of such persons which may constitute a threat to the broadly understood ‘state security’ and, in this way, create (conduct) a counterintelligence (or other) shield/cover¹².

However, the publicist understanding of counterintelligence shield concept, outlined in this way, is ambiguous, both in terms of its subjective and objective dimensions. In the subjective aspect, there is a lack of specification of the scope of this shield, which – as it seems – could encompass several different areas, often not having much in common with classic espionage activity, but encompassing preventive actions, which de facto boil down to constant monitoring of the behaviour of these persons in the area of both public and private life. In the objective aspect, however, there is a noticeable problem of both indicating the bodies which are to apply this shield or its particular types and coordinate these activities, and of determining the catalogue of persons who should be covered by such shield. Moreover, the journalistic expectations of counterintelligence shield seem to be

[accessed: 23 III 2024]; *Eksperci: za osłonę i ochronę kontrwywiadowczą odpowiadają służby specjalne i BOR* (Eng. Experts: the special services and the Government Protection Bureau are responsible for covering and protecting counterintelligence), Puls Biznesu, 15 VI 2014, <https://www.pb.pl/eksperci-za-oslone-i-ochrone-kontrwywiadowcza-odpowiadaja-sluzby-specjalne-i-bor-758916> [accessed: 23 III 2024].

¹² N. Loba, *Ośłona kontrwywiadowcza „ważnych osób” w państwie – fakty i mity* (Eng. Counterintelligence shield for ‘important persons’ in the state – facts and myths), InfoSecurity24, 5 I 2024, <https://infosecurity24.pl/sluzby-specjalne/agencja-bezpieczenstwa-wewnetrznego/oslona-kontrwywiadowcza-waznych-osob-w-panstwie-fakty-i-mity> [accessed: 23 III 2024].

oriented towards protecting a given person from his or her own actions, which could lead to triggering a state of specific danger or even to committing a crime, since, as Loba notes, (...) *it is usually not a foreign special service that is behind a person's controversial or illegal activities and problems, but his or her mistakes, inclinations and sometimes illegal acts related to professional, political, business-financial, moral or social activities in the broadest sense*¹³.

The concept of counterintelligence shield in the legal system

The understanding of the concept of counterintelligence shield in strategic documents, in economic sciences and in the social context must be confronted with the legal understanding, the establishment of which is necessary from the perspective of indicating the possible scopes of entities actions included in the legal protection bodies. This analysis is fundamental, first of all, due to the principles of functioning of these bodies, which are related to the principle of legalism expressed by Article 7 of the *Constitution of the Republic of Poland of 2 April 1997*, ordering public authorities to act on the basis and within the limits of the law. According to this principle (...) *it is the duty of every organ of public authority to function on the basis and within the limits of the law, and the duty of the lawmaker (most often – the legislator) to define both the grounds and the limits of the authority's action*¹⁴. As emphasised by the Constitutional Tribunal, the meaning of the principle of legalism may be reduced to (...) *the directive for the interpretation of the rules of competence in a strict manner and with the rejection, with regard to public authorities, of the principle: what is not forbidden, is permitted*¹⁵. The principle of legalism thus imposes an obligation on state authorities or institutions in the broad sense to carry out only such tasks, using such tools, as remain within their competence and are legally permissible both in the general sense and in the narrow sense, i.e. in relation to specific tasks. The individual tasks and powers should be precisely reflected in a provision of generally applicable law. Indeed, a public authority cannot derive powers or jurisdiction by implication, it must have a legal basis for its actions. In this context, the assessment of the activities of the legal protection authorities in the implementation of counterintelligence shield must be made taking into account

¹³ Ibid.

¹⁴ W. Sokolewicz, *Komentarz do art. 7 Konstytucji RP* (Eng. Commentary on Article 7 of the Polish Constitution), in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I*, L. Garlicki, M. Zubik (eds.), Warszawa 2016.

¹⁵ Judgment of the Constitutional Tribunal of 27 V 2002, ref. no. K 20/01.

the competences, tasks and powers actually assigned to them in this respect, and not solely on the basis of perceptions about these elements held by society, including through opinions formed in the media.

Turning to the level of legal analysis, using the generally accepted canon of legal interpretation, it should be pointed out that the concept of counterintelligence shield is not used in the provisions of generally applicable law¹⁶. Only in the Regulation of the Council of Ministers of 27 April 2004 on the Preparation of the National Security Management System¹⁷, in its § 16(8)(e), is the organisation of counterintelligence shield made one of the duties within the framework of the preparation of the management post. At the same time, however, neither in this legal act nor in any other, has this concept been clarified by the legislator by way of a legal definition. Moreover, the concept is also not used in legal language, both in the texts of decisions to apply the law and in their justifications and by legal doctrine. This finding could lead to the rather radical thesis that counterintelligence shield as an element of the legal system does not exist. However, such a view does not seem justified, as the expression counterintelligence shield itself undoubtedly has a specific range of meaning in the Polish language, which may be analysed from the perspective of the competences, tasks and powers of legal protection authorities in order to determine the scope of their tangency. This will be the subject of a further part of this analysis.

Accepting this assumption, the meaning of the expression ‘counterintelligence shield’ should be sought, referring to linguistic interpretation in the directive of colloquial language, by analysing the semantic meaning of the words used in it. According to *the Polish Language Dictionary*, the term shield in its basic meaning is understood as ‘covering, security, protection (against something, from something)’¹⁸, the concept of counterintelligence, on the other hand, means primarily ‘activities aimed at countering espionage, sabotage and diversionary actions carried out by foreign intelligence’¹⁹. In view of this, the expression ‘counterintelligence shield’ should be translated as an action consisting in safeguarding or protecting against espionage, diversionary or sabotage activities carried out by foreign intelligence. It should be noted that the colloquial understanding of counterintelligence shield thus established focuses on the rather classical understanding of the concept

¹⁶ However, it should be pointed out that the concept of “counterintelligence shield” is used in internal acts, in particular those of the Minister of Defence.

¹⁷ The regulation shall expire on 29 March 2025 pursuant to article 831(1) of the *Act of 11 March 2022 on the defence of the Homeland*.

¹⁸ *PWN Dictionary of the Polish Language*, vol. 2., M. Szymczak (ed.), Warszawa 1999, p. 529.

¹⁹ *PWN Dictionary of the Polish Language*, vol. 1., M. Szymczak (ed.), Warszawa 1999, p. 939.

of anti-espionage activities²⁰, as a kind of correlation of opposing intelligence and counterintelligence activities, i.e. espionage – anti-espionage activities.

It should be noted that the described semantic understanding of the concept of counterintelligence shield is similar to the understanding outlined earlier found in strategic documents, in economic sciences or in the social context, and encompasses the entirety of counterintelligence activities aimed at identifying and neutralising all espionage activities, in their broad sense. However, while such a definition is justified from the perspective of the above-mentioned sciences, its implementation in legal sciences causes significant problems. They are connected both with the scope of criminalisation of the crime of espionage in Poland and the determinacy of the elements of this criminal act covered by Article 130 of *the Act of 6 June 1997 – Criminal Code*, as well as the possibilities of action of legal protection authorities in Poland, which competencies, tasks and powers, in accordance with the constitutional principle of legalism, should be precisely defined in the Act. Indeed, the absence of such a determinacy prevents these bodies from taking action, even if it is required by strategic documents, assumed by public opinion or permitted in a private entity.

Counterintelligence shield as part of tasks of legal protection authorities

In the context of the presented considerations, in further analysis it is necessary to determine the scope of tasks and powers of legal protection bodies, in particular special services, the State Protection Service and the Police, in order to specify on the normative ground the activities falling within the notion of counterintelligence shield.

Taking into account the fact that tasks of a counterintelligence nature constitute one of the elements classically differentiating special services from the remaining legal protection bodies, the analysis of the regulations in question should begin with these very entities. Mirosław Karpiuk emphasises that:

²⁰ See in more detail: P. Burczaniuk, *Przestępstwo szpiegostwa – rys historyczny, aktualne regulacje na tle doświadczeń praktycznych i analizy prawno-porównawczej wybranych państw* (Eng. The crime of espionage – historical background, current regulations against the background of practical experience and comparative legal analysis of selected countries) in: *Uprawnienia służb specjalnych z perspektywy współczesnych zagrożeń bezpieczeństwa narodowego. Wybrane zagadnienia*, P. Burczaniuk (ed.), Warszawa 2017, pp. 86–107.

(...) the basic area of activity of special services is intelligence and counterintelligence, which are performed in the sphere of ensuring state security. They can be considered at two levels: subjective and objective. Thus, they will be specialised organs of the state, statutorily endowed with specific competences, giving them a special status. In terms of the object, they will be specific activities aimed at ensuring or restoring state security²¹.

It should be emphasised that in the Polish legal system, special services are defined solely in subjective terms by Article 11 of *the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency* (hereinafter: the ABW and AW Act), which includes the Internal Security Agency (ABW), the Foreign Intelligence Agency (AW), the Military Counterintelligence Service (SKW), the Military Intelligence Service (SWW) and the Central Anticorruption Bureau (CBA). The indicated services, from the point of view of their competencies and tasks, adopt a rather classical division into: civilian counterintelligence service - ABW, civilian intelligence service - AW, military counterintelligence service - SKW, military intelligence service - SWW and civilian anticorruption service - CBA. In the context of the object of this study, it is necessary to pay attention to the tasks performed by the ABW, SKW and CBA and identify those of them that fall under the notion of counterintelligence shield.

Among the tasks of the ABW listed in Article 5 of the ABW and AW Act, there are none which would directly indicate tasks in the area of counterintelligence shield. Thus, they must be derived from the entirety of the ABW's competence provisions, structurally distributed in a dualistic manner, as tasks directed at the identification, prevention and combating of threats and the identification, prevention and detection of offences. Pursuant to Article 5(1)(1) and (2)(a) of the ABW and AW Act, the tasks of the ABW include the identification, prevention and combating of threats to the internal security of the state and its constitutional order, and in particular to the sovereignty and international standing, independence and territorial integrity, as well as to the defence of the state, and the identification, prevention and detection of, inter alia, offences of espionage, terrorism, unlawful disclosure or use of classified information and other offences detrimental to state security. Taking into account the general scope of the indicated competence provisions, the undertaking by the ABW of tasks in the field of counterintelligence shield, including the protection of the most important persons in the state, must fall within the scope interpretation of the notion of a threat detrimental to the internal

²¹ M. Karpiuk, *Zakres działania służb specjalnych* (Eng. Special services' remit), in: M. Bożek et al., *Służby specjalne w strukturze władz publicznych. Zagadnienia prawnoustrojowe*, Warszawa 2014, pp. 100–101.

security of the state and its constitutional order or constitute the performance of tasks in the field of recognition, prevention and detection of one of the crimes, especially espionage, falling within the ABW's competence. However, as Magdalena Gołaszewska points out:

(...) the legislator uses the term 'internal security', but does not define it in terms of statutory provisions. Therefore, the attempt to specify the scope of this notion requires an analysis of the literature on constitutional law, administrative law and, in particular, the literature on state security issues. (...) However, due to the complexity of the issue and a certain inconsistency in terminology, creating a comprehensive definition of the concept of 'internal security' seems to be a very difficult task²².

Theoretically, due to the Code's definition of the elements of the espionage offence, it should be a much easier task to determine its scope and the causal acts falling within it. At the same time, it should be noted that the penalisation of this offence was modified by the Polish legislator pursuant to *the Act of 17 August 2023 amending the Act – Criminal Code and certain other acts*, which not only changed the wording of Article 130 of the Criminal Code, which had been in force for over 25 years, but also introduced systemic changes in eight other acts, including the competency acts of all Polish special services. The aim of the amendments was to increase the powers of the services to combat this type of crime. As indicated in another study:

(...) the adopted changes, including, inter alia, the use in the elements of criminal acts of new notions, so far absent in the legal system, including many notions broad in meaning, susceptible to diverse interpretations, will have to be verified in terms of their effectiveness through the practice of criminal proceedings. This practice will bring an answer to the question as to the actual effectiveness of the newly adopted regulations and, in particular, whether the practical understanding of the new provisions does not consequently deprive the criminalisation of a certain spectrum of behaviours recognised by the services as hybrid threats carried out by foreign special services²³.

²² M. Gołaszewska, *Zadania ABW w zakresie zwalczania zagrożeń godzących w bezpieczeństwo wewnętrzne państwa i jego porządek konstytucyjny* (Eng. Tasks of the ABW in combating threats to the internal security of the state and its constitutional order), in: *Prawne aspekty funkcjonowania służb specjalnych na przykładzie Agencji Bezpieczeństwa Wewnętrznego*, P. Burczaniuk (ed.), Warszawa 2021, p. 34.

²³ P. Burczaniuk, *The crime of espionage in new terms, i.e. in the light of the amendment to the Criminal Code of 17 August 2023*, "Internal Security Review" 2024, no. 30, p. 330. <https://doi.org/10.4467/20801335PBW.24.013.19615>.

The described problems with establishing the meaningful scope of the tasks of the ABW in the area of identification, prevention and combating threats endangering internal security, as well as identification, prevention and detection of espionage offences, translate significantly into the possibility and scope of conducting counterintelligence shield in the framework of the realisation of the basic task of the Head of the ABW, resulting from Article 18 of the ABW and AW Act, i.e. his information function, which boils down to providing the most important constitutional organs of the state with information which may be of significant importance for the protection of internal security of the state and its constitutional order. Within the framework of this task, the so-called 'wirówka' (Eng. centrifuge or drum) vetting process comes to the fore, whereby (...) *a candidate for an important state position is checked in the individual services*²⁴. 'Wirówka', although not directly regulated in the form of a legal procedure, is undoubtedly part of the tasks and at the same time of the information duties of the Head of the ABW.

The concept of information is key to understanding the activities of the special services, including the ABW, which functioning is directed at obtaining information, also using operational and reconnaissance activities, its proper processing, in particular by means of analytical and information activities, and finally its distribution to the most important persons in the state as a product of the special services used in the decision-making process. As it seems, the activity of the special services, including the ABW, in the scope of the proper conduct of counterintelligence shield should first of all focus on the proper implementation of the indicated information tasks. It should be emphasised, however, that the derivation of the ABW's scope of competence and the determination of the type of information that may be the subject of both acquisition and transfer must be done cautiously and serve the implementation of the constitutional principle of legalism.

Tasks important from the perspective of the implementation of counterintelligence shield and similar to those entrusted to the Internal Security Agency, and thus analogous to the interpretation problems described above, were assigned in the military area to the Military Counterintelligence Service. Pursuant to Article 5(1)(1)(b) of the *Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service* (hereinafter: the SKW and SWW Act), the tasks of the Military Counterintelligence Service include the identification, prevention and detection, committed by soldiers on active military duty, officers

²⁴ S. Ruskiewicz, *Slużby nie zrobiły „wirówki” Andruszkiewiczowi. Przeoczenie czy celowy zabieg?* (Eng. The services did not make a 'wirówka' to Andruszkiewicz. An oversight or a deliberate act?), *Wiadomości WP*, 11 II 2019, <https://wiadomosci.wp.pl/sluzby-nie-zrobily-wirówki-andruszkiewiczowi-przeoczenie-czy-celowy-zabieg-6348318800205953a> [accessed: 23 III 2024].

of the Military Counterintelligence Service and the Military Intelligence Service, as well as employees of the Polish Armed Forces and other organisational units of the Ministry of Defence, of a number of the listed offences, including (...) *against the Republic of Poland defined in Chapter XVII of the Act of 6 June 1997 – Criminal Code* (and in particular – espionage). According to paragraph 2a of this Act the tasks of the SKW include: (...) *the recognition, prevention and detection of events and offences of a terrorist nature detrimental to the security of the defence potential of the state, the Polish Armed Forces and the organisational units of the Ministry of Defence*. As in the case of the ABW, the SKW is also tasked with obtaining, collecting, analysing, processing and transmitting to the competent authorities information that may be of significance for the national defence, security or combat capability of the Polish Armed Forces or other organisational units of the Ministry of Defence, to the extent specified above, and with taking action to eliminate the identified threats.

Both in the case of the ABW and the SKW, it is impossible to omit one of the most important tasks ascribed to them by the legislator, which is by the way structurally inscribed in the definition scope of special services, namely the protection of classified information. In accordance with Article 5 of the ABW and AW Act, the tasks of the ABW include the identification, prevention and detection of offences, inter alia unlawful disclosure or use of classified information and the performance, within the scope of its competence, of tasks related to the protection of classified information, as well as the performance of the functions of a national security authority with regard to the protection of classified information in international relations. In turn, in accordance with Article 5(1)(1) (e) of the SKW and SWW Act, the tasks of the SKW include the identification, prevention and detection of offences committed by soldiers on active military duty, SKW and SWW officers and employees of the Polish Armed Forces and other organisational units of the Ministry of Defence, inter alia (...) *against the protection of information defined in Chapter XXXIII of the Act of 6 June 1997 – Criminal Code, if they may endanger the security or combat capability of the Polish Armed Forces or other organisational units of the Ministry of Defence, as well as such acts against foreign states which ensure reciprocity* and the performance, within the limits of their jurisdiction, of tasks specified in the provisions of *the Act of 5 August 2010 on the protection of classified information* (hereinafter: the OIN Act). The latter act introduced the principle so-called ‘need-to-know’, according to which classified information may only be made available to a person giving a guarantee of secrecy and only to the extent necessary for the performance of his or her work or service in the position held or for restricted access obtaining a security clearance, the granting of which concludes a security screening procedure (so-called vetting procedure) aimed at establishing that the person in question has a so-called guarantee of secrecy.

Given that holding the majority of the most important positions in the state requires access to classified information, the ABW and SKW's oversight of the classified information protection system becomes one of their most important powers in terms of their ability to provide counterintelligence shield. However, it should be borne in mind that the most important constitutional state positions, including the President of the Republic of Poland, the Marshal of the Sejm and the Senate, the Prime Minister, and members of the Council of Ministers, as well as deputies and senators or judges and prosecutors, were exempted under the Article 34(10) of the OIN Act. With regard to some positions, including the President of the Supreme Audit Office or the Commissioner for Human Rights, such a procedure is carried out only against the candidate for the position in question. Additionally, the Article 72 of the OIN Act introduces rules and enumerative cases for the provision, transfer and storage of investigation or control investigation files.

In the digital communication age that the 21st century is becoming, important information of interest to foreign states to acquire is not only classified information, but also other legally protected secrets and unclassified information, such as personal data, among others, which, properly aggregated, is important in the context of conducting hybrid operations such as information warfare. The main aim of these actions becomes the discrediting of individuals, particularly those in key public positions, with a view to depriving them of these positions or redirecting public interest towards topics desired by a foreign state. A certain form of protection against this type of activity should be education, first of all of those who are at risk of it, which will make them aware of the nature and importance of these threats, and the presentation of the methodologies for correct behaviour, both in terms of establishing interpersonal relations and protecting classified and unclassified information, including public and private information shared using, for example, social media. This type of prevention is carried out by, among others, ABW, which (...) *for many years, has been carrying out educational activities that aim, among other things, to make government officials aware of the scale of the threat*²⁵. However, the indicated issues must be analysed and included in a broader scope in the counterintelligence shield, as a didactic element, should not only be addressed to a narrow group of people, but also, inter alia, to sectors of strategic importance for the state's security and even form part of the educational programme conducted at various levels of education in Poland. This issue is addressed in *the Cybersecurity Strategy of the Republic of Poland for 2019-2024*²⁶, which, among

²⁵ Counterintelligence, the Internal Security Agency, <https://www.abw.gov.pl/pl/zadania/kontrwywiad/6,Kontrwywiad.html> [accessed: 23 III 2024].

²⁶ This strategy is attached to *the Resolution no. 125 of the Council of Ministers of 22 October 2019 on the Cybersecurity Strategy of the Republic of Poland for the years 2019–2024*.

the adopted specific objectives, lists the development of the national cyber security system directed, inter alia, at increasing the capacity to combat cybercrime, including cyber espionage and terrorist incidents. As indicated in the document:

(...) in terms of increasing capacities to fight cybercrime, including cyber espionage, hybrid incidents (including terrorist activities), it is important to provide support to essential service operators, digital service providers and critical infrastructure operators in detecting and combating incidents in all their phases. To this end, cooperation and coordination between law enforcement agencies is required regardless of the motives of the perpetrators, and it is particularly important that digital evidence is properly secured.

Increasing the effectiveness of procedural and operational activities requires the initiation and expansion of cooperation of law enforcement authorities with other entities that may have knowledge in determining the nature of the crime or may contribute to the identification of its perpetrator. This includes cooperation with national and international private entities, particularly in the telecommunications, banking and insurance sectors. It is also necessary to ensure the continuous exchange of information on threats and vulnerabilities at both national and international level²⁷.

In the context of the issue under consideration, pursuant to Article 1 of *the Act of 9 June 2006 on the Central Anticorruption Bureau*, the particularly important tasks of the CBA include, firstly, the identification, prevention and detection of offences against the activities of state institutions and local self-government, set out in Articles 228-231 of the Criminal Code, as well as those referred to in Article 14 of *the Act of 21 August 1997 on Limitation of Conducting Business Activity by Persons Performing Public Functions*, secondly, revealing and counteracting cases of non-compliance with the provisions of the Act on Limitation of Conducting Business Activity by Persons Performing Public Functions, thirdly, controlling the correctness and truthfulness of declarations of financial interests or declarations on conduct of business activities by persons performing public functions referred to in Article 115 § 19 of the Criminal Code, submitted on the basis of separate regulations. As Loba states:

(...) the CBA's performance of its tasks in the identification, prevention and detection of offences of a corrupt nature or other offences detrimental to the economic interests of the state (as defined by the Act) also contributes to the CBA's obtaining of information of great importance for the co-creation

²⁷ Ibid., p. 13.

of the system of securing 'important persons' in the state (security and vital interests of the state)²⁸.

Returning to the consideration of strategic documents, it should be noted that in the aforementioned *White Book on the National Security of the Republic of Poland*, after analysing the protection subsystems, it was indicated that the protection of the most important authorities and public administration is performed by the Government Protection Bureau (BOR), (...) *in relation to which the basic strategic objective was defined as 'the protection of persons and objects important for the welfare and interest of the state'. This basic task is carried out both within and outside the country - with regard to the direct protection of persons as well as objects*²⁹. In accordance with these assumptions, the State Protection Service (SOP) – the legal successor of the Government Protection Bureau (BOR) - is entrusted with protection of the following in accordance with Article 3(1) of *the Act of 8 December 2017 on the State Protection Service* (hereinafter: the SOP Act):

- a) the President of the Republic of Poland, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the Deputy Prime Minister, the minister in charge of internal affairs and the minister in charge of foreign affairs,
- b) former Presidents of the Republic of Poland (...),
- c) persons holding the status of Head of State, Head of Government and their deputies, President of the Parliament or House of Parliament or Minister of Foreign Affairs, who are members of delegations of foreign countries staying in the territory of the Republic of Poland,
- d) other persons in the interest of the state (...),

and also in accordance with Article 3(2) of this Act, the identification and prevention of offences against the Republic of Poland, offences against life or health, offences against public safety, offences against security in transportation, offences against freedom, offences against honour and physical integrity, offences against public order, assaults and active assaults directed against the above-mentioned persons, and against the security of facilities serving the President of the Republic of Poland, the Prime Minister, the minister in charge of internal affairs and the minister in charge of foreign affairs, as well as other facilities that are the seats of the members of the Council of Ministers, indicated in the decision of the minister in charge of internal affairs, excluding facilities serving the Minister of National Defence and the Minister of Justice, with the exception of offences

²⁸ N. Loba, *Ośłona kontrwywiadowcza „ważnych osób” w państwie...*

²⁹ *The White Book on National Security of the Republic of Poland...*, p. 177.

against information protection relating to these facilities, as well as the protection of these facilities.

Two issues from the cited Article 3 of the SOP Act seem particularly relevant. Firstly, the catalogue of protected persons remains open due to the wording of point d in Article 3(1) (i.e. other persons in the interest of the state), so the subjective scope of the protection carried out by the State Protection Service depends on the current situation and may include persons e.g. performing functions of other state bodies. Secondly, it is clear from the catalogue of tasks that the tasks of the State Protection Service do not focus exclusively on the so-called physical protection, but also include tasks in the field of recognition and prevention of a broad catalogue of crimes, inter alia, offences against the Republic of Poland (in accordance with the Criminal Code such as diplomatic treason, espionage or disinformation). As indicated in the explanatory memorandum to the draft SOP Act:

(...) a new task will also be added to the new security formation, consisting in the identification and prevention of certain types of offences against protected persons and offences against the security of protected objects. This task is part of the intended broadening of competences strengthening the comprehensive dimension of the formation's activity in the field of ensuring the security of entities under its protection, by granting the new security formation the right to undertake operational and reconnaissance activities³⁰.

Indeed, importantly, in accordance with Article 19(1) of the SOP Act, the State Protection Service officers have the right to carry out operational and reconnaissance activities in order to obtain information concerning threats to persons and objects they protect, but also to identify and prevent crimes within their competence. As indicated in the explanatory memorandum to the draft SOP Act:

The changing threats to the security of persons and objects of key importance for the functioning of the state, including threats of a terrorist nature, require the adaptation to them of both the tactics of protective actions and methods of carrying out reconnaissance activities. This results in the need to change the existing scope of powers and methods of operation of the security formation, including granting it the right to carry out operational and reconnaissance activities in order to obtain information concerning threats

³⁰ Explanatory Memorandum to the Government Draft Act on the State Protection Service, print no. 1916 of 10 X 2017, <https://orka.sejm.gov.pl/Druki8ka.nsf/0/77E928F50DC28E3CC12581B700310ED5/%-24File/1916.pdf>, p. 174 [accessed: 22 III 2024].

to the protected persons and objects, as well as to prevent crimes constituting a direct threat to the security of these persons and facilities³¹.

It follows that the purpose of creating the State Protection Service was, according to the legislator, to concentrate in one service all the tasks related to the protection of the most important persons in the state, both from the point of view of physical protection and preventive protection against the commission of crimes against these persons.

In the context of these considerations, it is also worth looking at the tasks of the Police, and in particular those which can be regarded as tasks of a counterintelligence shield nature. According to Article 1(2) of *the Act of 6 April 1990 on the Police*, the tasks of the Police related to the analysed issues include, in particular:

- 1) protection of the life and health of people and property from unlawful attacks infringing these goods;
- 2) protection of public safety and order, including ensuring peace and quiet in public places and in means of public transport and communication, in road traffic and on waters intended for public use (...);
- 4) detecting offences and prosecuting their perpetrators;
- 4a) protection of objects constituting the seats of members of the Council of Ministers, excluding objects serving the Minister of National Defence and the Minister of Justice, indicated by the minister in charge of internal affairs (...).

Significantly, in addition to the general tasks concerning public security and the protection of facilities that are the seats of members of the Council of Ministers, the Police are responsible for supporting the State Protection Service in case its forces are insufficient to carry out its tasks. In addition, the Commander-in-Chief of the Police is one of the bodies giving an opinion on applications for the protection of facilities serving the President of the Republic of Poland, the Prime Minister, the minister in charge of internal affairs and the minister in charge of foreign affairs, as well as other facilities constituting the seats of members of the Council of Ministers, as indicated in the decision of the minister in charge of internal affairs, excluding facilities serving the Minister of National Defence and the Minister of Justice.

³¹ Ibid., p. 161.

Conclusions

Referring to the objectives of the studies set out in the introduction, it should be pointed out that the definitional scope of the counterintelligence shield concept, as shaped in strategic documents, economic sciences and in journalistic terms, is similar and encompasses the entirety of counterintelligence activities, in their broad sense. The definition is thus multidimensional, by design – as it appears to be – underdetermined, and in a peculiar way open to both new mechanisms for carrying out espionage-like activities and counterintelligence response appropriate to them. However, while such a definition is justifiable from the perspective of general policy documents, economic sciences or social understanding, its implementation into legal sciences poses significant problems, primarily due to conceptual vagueness.

With regard to the second research objective, referring to the discussed tasks and competences of the legal protection bodies in the area of conducting counterintelligence shield, including securing the most important persons in the state, one may come to a conclusion that the system created by these bodies has a fragmentary and indeterminate character, in which the individual elements have been divided into components of different seizures assigned to individual services without clear indication of the service with leading and coordinating role. The regulation of counterintelligence shield in Poland, was critically summarised by General Zbigniew Nowek, who in an interview in 2014 indicated that (...) *in Poland counterintelligence shield is a fiction, it has been completely abandoned. We do not have a statutory operating procedure, so the standard of counterintelligence shield is set by the actual head of the services, i.e. the Prime Minister. It is him who determines how deep such shield is to go*³². More than a decade has passed since that statement, but the legal situation in this regard has changed little. This is destructive for the state, as the legal system, so shaped, becomes dysfunctional in the context of changing threats to internal and external security – in the aspect identified with those in leadership positions – making it impossible to effectively counter threats to them.

The adopted statement, resulting from the discussed shaping of the counterintelligence shield system in Poland, including the tasks and powers granted to individual legal protection bodies, also leads to a significant legal and practical problem. For, due to the universally accepted rules of the law interpretation, the tasks and powers of state bodies must, in accordance with the principle

³² *Ośłona kontrwywiadowcza najwyższych urzędników jest fikcją. Rozmowa z gen. Zbigniewem Nowkiem, byłym szefem Urzędu Ochrony Państwa* (Eng. Counterintelligence shield for top officials is a sham. Interview with Gen. Zbigniew Nowek, former head of the State Protection Office), *Dziennik Polski*, 17 VI 2014, <https://dziennikpolski24.pl/oslona-kontrwywiadowcza-najwyzszych-urzednikow-jest-fikcja/ar/3475539> [accessed: 22 III 2024].

of legalism, be interpreted narrowly, taking into account the necessity of resolving all interpretative doubts in favour of citizens' rights and freedoms. This undoubtedly translates into the scope of operational and reconnaissance, investigative or analytical and information activities undertaken by the officers of services, which by definition assume such interference. Improper assessment of a specific situation, on the grounds of the ambiguous legal status which often makes it impossible to clearly identify the tasks and powers granted, may lead to an analysis of the activities undertaken by officers from the point of view of disciplinary or even criminal liability, when their scope is assessed as fulfilling, *inter alia*, the prerequisites of the offence of power abuse by an officer referred to in Article 231 § 1 of the Criminal Code. The fragmentary and imprecise nature of the regulations under analysis generates a situation which is particularly dangerous for the effective implementation of these tasks. This is because the officers' fear of possible prosecution may translate into doubts concerning the possibility of taking action, and thus into lowering the level of fulfilment of the goal set for counterintelligence shield, *i.e.* increasing the internal security of the state. Such remarks against the services are often formulated by journalistic circles, which do not take into account the indicated limitations and legal imperfections. Thus, in the public debate, expectations are being formed by a group of people in leading state positions as to a preventive role of legal protection bodies in counterintelligence shield for these individuals, while there is a legislative omission – often on the part of the same policymakers – as to the proper tasking and coordination of these bodies in counterintelligence shield. As a consequence, this creates the need to search for competencies, tasks and, above all, powers in legal regulations of a general nature, which may – with a different interpretation of supervisory and control authorities – result in disciplinary or criminal liability of both the management of these services, as well as individual officers.

Taking into account the aspects presented, it becomes necessary to undertake discussion and legislative work aimed at:

- 1) defining at the statutory level the conceptual scope of counterintelligence shield (protection) taking into account new phenomena, in particular hybrid threats and threats in cyberspace;
- 2) creation of a catalogue of persons occupying the most important state positions, who should be subject to special counterintelligence shield (protection), or setting out the principles for drawing up such a catalogue, *e.g.* in an executive act;
- 3) clear and precise distribution of tasks in this area among individual services, with assignment of a leading and coordination function to one of them;
- 4) clarification of the powers of individual services in the area of counterintelligence shield, with a clear indication of the type of activities

- which can be undertaken by the services in this area on an obligatory and optional basis as well as determination of the principles of their undertaking, while taking into account the type of those activities which can be undertaken only with the consent of the person covered by such a protection;
- 5) updating the regulations on the protection of classified information, particularly with regard to the manner and scope of conducting security screenings, including the legitimacy of maintaining the current wide range of subject exclusions covering, inter alia, judges or prosecutors.

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