STEFAN BATORY FOUNDATION

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Implementation of Selected Provisions of the United Nations Convention Against Corruption in Poland

Report

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Stefan Batory Foundation

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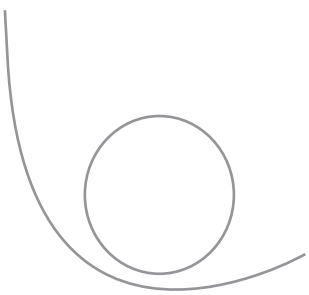

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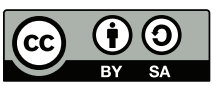

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INTRODUCTION

Poland signed the United Nations Convention against Corruption (UNCAC) in 2003 and ratified it in 2006 (O.J. 2007 no. 84, item 563). This report contains an analysis of implementation of selected articles from chapter III of the Convention (Criminalisation and law enforcement) that are crucial for anticorruption policy in Poland.

The report supplements the official assessment of implementation of UNCAC in Poland, performed by the Polish government together with the United Nations Organisation. Poland was randomly selected by the UNCAC Implementation Review Group in June 2010. The initial version of this report was sent to the Polish focal point on December 22, 2014.

Scope. Provisions of the Convention analysed in this report:

- Art. 15 Bribery of national public officials
- Art. 16 Bribery of foreign public officials and officials of public international organisations
- Art. 17 Embezzlement, misappropriation or other diversion of property by a public official
- Art. 18 Trading in influence
- Art. 19 Abuse of functions
- Art. 20 Illicit enrichment
- Art. 21 Bribery in the private sector
- Art. 22 Embezzlement of property in the private sector
- Art. 23 Laundering of proceeds of crime
- Art. 24 Concealment
- Art. 25 Obstruction of justice
- Art. 26 Liability of legal persons
- Art. 31 Freezing, seizure and confiscation
- Art. 33 Protection of reporting persons [whistleblowers]
- Art. 36 Specialised authorities

Structure of the report. The first part of the report contains its summary and main conclusions and recommendations. The chapter also contains remarks on the process of assessment of implementation of UNCAC in Poland (its transpar-

ency, availability of materials and information, contacts with the government etc.). Chapter two forms the main part of the paper, presenting the assessment of implementation of selected articles of the Convention. The next two short chapters present some statistical data on corruption crimes in Poland and cases investigated by the Central Anti-Corruption Bureau in 2011–2013 which are seen by the Bureau as important and representative for their activities: they give a picture of how provisions implementing UNCAC work in practice. In the last part of the report, we discuss proposals for supplementing and modifying legal and institutional solutions implementing UNCAC in Poland.

Methodology. The report was prepared for the Stefan Batory Foundation Public Integrity Programme, financed from the grant of the Open Society Foundations. Three persons worked on the report (see biographical notes at the end of the report) – all of them are experienced experts for long researching the problems of counteracting corruption and anticorruption policy in Poland. The main sources of information were documents, previous reports and expertise of the team preparing the report. The authors of the report did their best to obtain relevant information from the government. The initial version of the report was sent to the focal point coordinating the process of the official assessment of implementation of UNCAC.

The report was prepared according to the guidelines and the model developed by the Transparency International. Its structure reflects the model of official evaluation of implementation developed by the United Nations Office on Drugs and Crime (UNODC).

Grzegorz Makowski

SUMMARY, MAIN FINDINGS AND CONCLUSIONS

The process of assessment

Table 1. Transparency and participatory nature of the process of assessment of implementation of the Convention

Factors influencing the transparency of the process of assessment of implementation of the Convention	Yes / No
Did the government make public the contact details of the country focal point? [in Poland, that should be done by the Ministry of Justice]?	**No**
Was civil society consulted in the preparation of the self-assessment?	**Yes**
Did the government agree to a country visit?	**Yes**
Was a country visit undertaken?	**Yes**
Was civil society invited to provide input to the official reviewers?	**Yes**
Has the government committed to publishing the full country report?	**No**

Source: own materials.

Availability of information

The main problem related to the transparency of the assessment process in Poland consisted in the fact that the government failed to inform general public that such assessment was planned or performed. It is worth to dwell a bit on the issue, because the situation shows how little importance is attached by the Polish government to the problem of implementation of the provisions of the Convention. At the beginning, the team preparing the report had only general knowledge about the assessment process. More detailed information were received only during a training for non-governmental organisations, organised by the United Nations Office on Drugs and Crime (UNODC) on June 18–21, 2013 in Dakar. It was at the meeting where it was established what institution and who would be responsible for performing the assessment in Poland. Contacts

and cooperation with the person coordinating the assessment process on the part of the Polish government were good. The foundation and other organisations had access to different versions of the report and were allowed to present their remarks. There were no problems with invitation of representatives of organisations for the meeting with assessors from partner countries and UN. Also the summary version of the report was consulted. Non-governmental organisations, experts and journalists were practically fully allowed to participate in the assessment process, but they had to contact the coordinator themselves, because the information on initiating the assessment process of the implementation of the Convention was not widely publicised.

It seems that the shortcomings resulted from the fact that the process was coordinated only by one person who also had other responsibilities. Even doing his best, the person could not undertake broader and more effective information activities. The source of the problem was in fact the lack of political will on the part of the Polish government to organise the assessment process in a more effective and transparent way. The government was also not willing to declare publication of the whole assessment report.

Implementation of selected articles of UNCAC

The report is dedicated to selected articles of chapter III (Criminalisation and law enforcement) of the Convention that are seen crucial for anticorruption policy in Poland by the authors of the report. None of articles from chapter IV (International cooperation) that were also covered by the official assessment procedure was evaluated in the report. The choice of articles, i.e. provisions of UNCAC requiring criminalisation of basic types of corruption offences, protection for whistleblowers (one of the most important measures to limit negative consequences of abuse and corruption in any organisation), and creating specialised anticorruption authorities, resulted on the one hand from the decision on which solutions were, in our opinion, the most important for anticorruption policy, and on the other hand from objective conditions (e.g. budget). Having limited resources at their disposal, the report team was not able to assess all provisions of the Convention and had to focus on selected matters. However, since these are the crucial parts of the Convention, their assessment should uncover the gravest flaws in the Polish anticorruption policy.

Most importantly, as shown by the table below, only 6 out of 15 assessed provisions are deemed to be fully implemented. Reservations concerning the rest of them are sufficiently significant that they cannot be seen as fully implemented. For example, Art. 18 of UNCAC requiring criminalisation of acts consisting in trading in influence was faultily implemented in Poland, since Polish regulations fail to penalise requiring or receiving such benefits (influence) by persons not holding public functions. In this way, the regulations ignore an

important area of corruption dangers resulting from activities of persons not representing public institutions – dishonest businessmen, lobbyists or other groups of interests. Similar situation can be seen elsewhere, e.g. when creating specialised anticorruption bodies is concerned. In Poland, the Central Anti-Corruption Bureau is cited as an institution of this type. The problem is that in our opinion, the bureau is not equipped with sufficient political guarantees of independence or resources needed for fully effective activity, as mentioned in Art. 36 of the Convention.

Table 2. Evaluation of implementation of selected articles of UNCAC

No.	Article	Is the article implemented in national law?
1.	Art. 15. Bribery of national public officials	Implemented
2.	Art. 16. Bribery of foreign public officials and officials of public international organisations	Implemented
3.	Art. 17. Embezzlement, misappropriation or other diversion of property by a public official	Partially implemented
4.	Art. 18. Trading in influence	Partially implemented
5.	Art. 19. Abuse of functions	Implemented
6.	Art. 20. Illicit enrichment	Not implemented*
7.	Art. 21. Bribery in the private sector	Partially implemented
8.	Art. 22. Embezzlement of property in the private sector	Partially implemented
9.	Art. 23. Laundering of proceeds of crime	Implemented
10.	Art. 24. Concealment	Implemented
11.	Art. 25. Obstruction of justice	Implemented
12.	Art. 26. Liability of legal persons	Not implemented
13.	Art. 31. Freezing, seizure and confiscation	Partially implemented
14.	Art. 33. Protection of reporting persons [whistleblowers]	Not implemented
15.	Art. 36. Specialised authorities	Partially implemented

* UNCAC recommends only considering criminalisation of illicit enrichment. According to the Polish criminal law, such act is not an offence.
Source: own materials

Three important provisions of the Convention have not been implemented at all. Particular attention should be attached to regulations of purely repressive nature that contain totally flawed provisions concerning liability of legal persons for acts prohibited under penalty. In theory, relevant provisions exist (O.J. of 2002 no. 197, item 1661), but in reality the act provides for only a kind of "repressive" rather than criminal liability. According to its provisions, a collective entity is liable to penalty only after the person representing it was convict-

ed (and additional conditions are met). Thus, in spite of a separate regulation, it is still a kind of individual liability, so it cannot be said that Poland implemented Art. 26 of the Convention.

A significant problem is also the lack of special regulations protecting whistleblowers. As indicated in our analysis, the existing regulations, though seen as such by the government, are not sufficient – both formally, and practically. The existing provisions of the Labour Code – concerning mobbing and discrimination – that can be in theory applied in this context, cover only half of all employees, namely those who have permanent jobs. More importantly, the provisions are not used in practice, because courts are reluctant to apply the concept of discrimination to whistleblowers' cases.

Despite relatively good general assessment of implementation of chapters III and IV, important shortcomings should be noted, resulting from insufficiently careful implementation of solutions that are essential for anticorruption policy.

Main recommendations and priorities for future action

Cooperation with non-governmental organisations and access to information

Based on experiences from participation in the process of implementation of the Convention, it should be recommended that the government intensify cooperation with non-governmental organisations, researchers and experts interested in the problems of corruption and anticorruption policy, and in particular UNCAC. Further information activities concerning the Convention are needed, and in particular:

- publishing and translating into Polish of the full text of the report from the assessment of implementation of the Convention;
- creating an Internet page dedicated to the Convention;
- preparing more carefully the next stage of the assessment, creating a team focused on organising and performing the assessment, as well as cooperating with non-governmental groups.

Implementation of provisions of the Convention in national law

Based on the analysis of selected provisions important for repressive action, penalising, prosecuting and counteracting negative effects of corruption, we conclude that the following aspects require prompt action:

- **liability of collective entities** – the existing "cascade model" of criminal liability of legal persons, where first a representative of the entity must be convicted, and only then the entity itself can be held liable, as well as

inactivity of law enforcement agencies, prevent effective responsibility of legal persons for corruption offences committed for their benefit by individuals;

- **protecting whistleblowers** – the existing Labour Code regulations, indicated as the main measure to protect persons reporting irregularities (corruption) in their place of work, are insufficient – they fail to protect effectively permanent workers, and do not cover nearly a half of all people active on the job market, namely those who work based on civil law agreements, contracts or self-employed persons; the first step should be to amend the *Government Programme to Counteract Corruption for 2014–2019* by adding a point on the need to thoroughly analyse the possibilities to enhance legal protection of whistleblowers (the point was deleted from the Programme at the last stage of its preparation);
- **strengthening the Central Anti-Corruption Bureau (CBA)** – one of the main arguments for creating the Bureau was the intention to implement Art. 36 of the Convention; but the assessment of several years of the functioning of CBA shows that, despite some achievements, the institution is not properly protected from short-term political pressures and fails to receive appropriate support for effective implementation of its tasks and improvement of professional qualifications of its employees and officers; legal amendments are necessary to consolidate independence of CBA; also decisions are needed to enhance effectiveness of its activities (mainly through increasing its budget).

Specific recommendations concerning other problems related to implementation of the Convention can be found in chapters discussing implementation of particular articles.

Opinion on the process of assessment of implementation of the provisions of UNCAC in Poland

As was already mentioned, the assessment process was inclusive and relatively transparent from the moment when the focal point in the Ministry of Justice was reached. The main problem was insufficiently pro-active information policy of the government. The very launching of the process of assessment of the Convention was not announced in any way. Government, the Ministry of Justice or the Chancellery of the Prime Minister web pages contained no, even very general, information on the issue. Ironically, the need to assess the Convention was mentioned e.g. in the documents related to the *Government Programme to Counteract Corruption for 2014–2019*. Practically, only persons interested in the problems had a chance to know about the assessment process.

However, it should be emphasised that after reaching the focal point, full cooperation was offered. To mobilise non-governmental, academic and expert groups posed a bigger problem. Despite cooperation with the focal point, the Stefan Batory Foundation, acting as a promoter of the initiative, managed to engage in the consultation process only two other organisations and one researcher from the Polish Academy of Sciences specialising in implementation of the Convention who became co-author of this report. Thus, it should be noted that interest in the assessment of implementation of the Convention was not wide. On the one hand, it was a result of weak organisation of the process by the government, and lack of support for the focal point. On the other hand, non-governmental, academic and expert groups were not able to mobilise to participate in the process.

Table 3. Summary of the process of assessment of implementation of UNCAC in Poland

Assessment of transparency of evaluation of the UNCAC provisions implementation		Comments
Did the government disclose information about the country focal point?	Yes / **No**	The information was obtained from UNDOC representatives.
Was the review schedule known?	**Yes** / No	After reaching the focal point, the government made available the schedule for assessment. Non-governmental groups were also informed on the on-going basis on changes, delays and problems related to the assessment process.
Was civil society consulted in the preparation of the self-assessment?	**Yes** / No It was consulted with: × – organisations dealing with access to information × – academic circles ☐ – trade unions ☐ – women organisations × – other groups: media representatives	The Stefan Batory Foundation tried to enhance the process of consultations of the report, mobilising other organisations.
Was the self-assessment published online or presented to civil society?	**Yes** / No	–

Assessment of transparency of evaluation of the UNCAC provisions implementation		Comments
Did the government agree to a country visit?	**Yes** / No	–
Was a country visit undertaken?	**Yes** / No	–
Was civil society invited to provide input to the official reviewers?	**Yes** / No Participants of the meeting: × – organisations dealing with access to information × – academic circles ☐ – trade unions ☐ – women organisations × – other groups: media representatives	Finally, representatives of three nationwide organisations dealing with problems of corruption and anticorruption policy took part in the meeting: the Stefan Batory Foundation, the Association Social Network Watchdog Polska and the Institute of Public Affairs, and representatives of media and the Polish Academy of Sciences.
Was the private sector invited to provide input to the official reviewers?	Yes / **No**	–
Has the government committed to publish the full country report?	Yes / **No**	–

Source: own materials

Access to information necessary for preparing the report

In Poland, since 2001 access to public information is regulated by a statutory act, so most of the data needed to prepare the report could be obtained from Internet pages of public offices or through applications for public information. In addition, the team preparing the report had their own materials, results of other research and reports, including working drafts of the self-assessment report (i.e. the government report) made available by the focal point. Gathering data to assess the implementation of the Convention posed no major problems.

We only encountered some difficulties in obtaining up-to-date statistical data on corruption offences and materials helping to assess whether and how the existing solutions work in practice. To prepare reliable assessment of the issue, a deepened analysis is needed that goes beyond the scope of the report. Thus, we leave the matter, only citing general data and abstaining from

presenting far-reaching conclusions. Relatively reliable assessment of practical implementation of the Convention in the case of Art. 36 (specialised authorities) was possible based on sufficiently detailed reports on the activities of the Central Anti-Corruption Bureau.

Celina Nowak

ASSESSMENT OF IMPLEMENTATION OF SELECTED ARTICLES OF THE CONVENTION CONCERNING CRIMINALISATION OF CORRUPTION BEHAVIOURS[1]

Art. 15. Bribery of national public officials
Art. 16. Bribery of foreign public officials and officials of public international organisations

1. Were the solutions described in the UNCAC articles implemented (yes, partially, no)?
ASSESSMENT – IMPLEMENTED

Art. 15 and 16 of UNCAC are implemented in Poland in Art. 228 and 229 of the Penal Code (the Act of June 6, 1997, Penal Code, O.J. no. 88, item 553) – hereafter called "PC".

2. Implementation of the UNCAC articles

The range of corruption behaviours which are penalised based on the regulations is, in principle, in line with UNCAC requirements – since both giving and accepting bribes in the public sector are penalised. Some doubts can be raised by the lack of the notion of "offering" in the description of bribery (Art. 229 of PC). According to the Polish law, offering bribe is seen as an attempt rather than a perpetration, while the UNCAC requires the latter. Such choice of features of the offence in the Polish law can lead to more lenient punishment for persons offering bribes. It seems that it would be advisable to extend the features of the offence of bribery to cover also offering bribes.

The definition of undue advantage contained in Art. 115 § 4 of PC, saying that material or personal advantage means both advantage for the official himself or herself or another person, is sufficiently broad, especially when we

[1] Data on practical aspects of implementation of the provisions of the Convention come from statistics of the Ministry of Justice.

remember that the notion of advantage covers both material and personal (non-material) advantage, also handed over by intermediaries.

The perpetrator of the crime of accepting bribes and necessary participant of the crime of giving bribes is a person holding public function. The definition of the notion, contained in Art. 115 § 19 of PC, is very broad[2]. It covers several differentiated and not sufficiently clearly described categories of persons (as particularly imprecise can be seen the last of groups listed in Art. 115 § 19 of PC covering other persons whose powers and duties within public activity are defined or admitted by a statutory act or an international agreement binding for the Republic of Poland.). In addition, the act excludes from the category of persons holding public function persons performing "only service-type activities", while the notion is not defined in the act and remains unclear (in its judgement of September 26, 2013, I KZP 9/13, the Supreme Court gave more restrictive interpretation of the notion than the one used before).

3. Practical aspects of implementation of the UNCAC articles

In the years 2004-2012, the number of valid convictions for the offence of accepting bribes in the public sector (Art. 228 of PC) remained low. In 2004, 307 persons were convicted, in 2005 – 361, in 2006 – 447, in 2007 – 315, in 2008 – 434, in 2009 – 353, in 2010 – 364, in 2011 – 346, in 2012 – 304. In the same period of time, the number of valid convictions for giving bribes (Art. 229 of PC) initially was rising: in 2004, 1025 persons were convicted, in 2007 – 2167, and in 2009 – 2304, but in 2012 the number fell to 1644 convictions.

For both forms of bribery in the public sector, the punishment most commonly applied is imprisonment with conditional suspension of punishment.

[2] Persons holding public function are public officials, members of local government bodies, persons employed in organisational units having public resources at their disposal unless they perform only service-type activities, and other persons whose powers and duties in public activity are defined or admitted by an act of law or an international agreement binding for the Republic of Poland, and according to Art. 115 § 13 of PC public officials are: 1) the President of the Republic of Poland, 2) MPs, senators, municipal councillors, 2a) members of the European Parliament, 3) judges, jurors, prosecutors, officers of financial bodies for preparatory proceedings or bodies superior to financial bodies for preparatory proceedings, notaries, debt collectors, probation officers, receivers, court supervisors, persons sentencing in disciplinary bodies functioning based on a statutory act, 4) persons employed in government administration, other state bodies or local government bodies unless they perform only service-type activities, and other persons to the extent to which they are authorised to issue administrative decisions, 5) persons employed in state auditing bodies or local government auditing bodies unless they perform only service-type activities, 6) persons holding managerial posts in other government institutions, 7) officers of bodies protecting public safety or officers of the Prison Service, 8) persons in active military service, 9) employees of international criminal tribunal, unless they perform only service-type activities.

4. Challenges related to implementation of the UNCAC articles

Unclear and imprecise notions used in the law, such as "person holding public function" in Art. 115 § 19 of PC, create the risk that persons who should be punished for corruption can avoid being sentenced. In addition, using imprecise notions in legal provisions can raise constitutional doubts as to compatibility of the definition with the principle of legal certainty. As a result, it is hard to assess whether the regulations at hand are compatible with UNCAC. In view of that, the act should be amended to include clear and precise definitions of categories of persons that can be liable for corruption offences.

Based on Art. 228 § 6 of PC and Art. 229 § 5 of PC, for the offences of giving and accepting bribes in the public sector is "accordingly" liable also a person who commits the offences holding public function in a foreign country or in an international organisation or against a person holding public function in such country. In view of above mentioned doubts concerning the notion of person holding public function, we should be sceptical as to criminalisation of corruption of foreign officials required by Art. 16 of UNCAC.

As to the other features of the offences of giving and accepting bribes, UNCAC was implemented.

However, Art. 229 § 6 of PC should be mentioned, whereby perpetrators of the offence of giving bribes are automatically not prosecuted, if material or personal advantage, or their promise, was accepted by a person holding public function, and the perpetrator informed about it law enforcement agency and disclosed all pertinent circumstances of the offence before the agency uncovered the offence. Though Art. 37 par. 2 of UNCAC provides for mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution led by relevant authorities, and Art. 37 par. 3 of UNCAC advises considering even granting such person immunity from prosecution, some doubts in the context of UNCAC can be raised by the automatic and irreversible nature of the provisions of Art. 229 § 6 of PC which in fact mean impunity for the perpetrator of the offence of giving bribes. It is particularly controversial that the regulations fail to provide for the possibility for such cases to be reviewed by courts of justice, for example in order to assess the scope and nature of the cooperation with law enforcement agencies.

5. Recommendations

Legal sanctions for the offences of giving and accepting bribes in the public sector provided for in the Penal Code seem to be adequate to the gravity of the offences and in line with the requirements of UNCAC. But the effectiveness of sanctions can be diminished by the fact that the great majority of offenders are sentenced to imprisonment with conditional suspension of punishment. Suspended punishment is not very onerous for convicts, its oppressiveness materialises only when they break the conditions of probation. It seems that more deterrent measure, in particular in case of petty corruption, could be penalties actually oppressive for convicts, such as fines or restriction of liberty.

It should also be advisable to review the Penal Code definition of the range of persons responsible for accepting bribes in the public sector and the automatic clause of not prosecuting the perpetrators of the offence of giving bribes.

Art. 17. Embezzlement, misappropriation or other diversion of property by a public official
Art. 22. Embezzlement of property in the private sector

1. Were the solutions described in the UNCAC articles implemented (yes, partially, no)??
ASSESSMENT – PARTIALLY IMPLEMENTED

The offences that should be penalised according to Art. 17 of UNCAC (embezzlement, misappropriation or other diversion of property by a public official) in the Polish law consist in a whole range of prohibited acts.

Art. 22 of UNCAC is implemented in the Polish criminal law by Art. 284 and Art. 296 of PC. The scope of criminalisation is in general consistent with UNCAC requirements.

2. Implementation of the UNCAC articles

The Polish law has no special notion of an offence consisting in diversion of property by a public official or a person holding public function. The activities described in Art. 17 of UNCAC are criminalised in the Polish law based on several provisions of general nature. In particular, one should mention Art. 284 of PC, defining the offence of misappropriation, and Art. 296 of PC whereby abuse of trust is criminalised.

3. Practical aspects of implementation of the UNCAC articles

The assessment of practical aspects of implementation of Art. 17 of UNCAC is difficult, since available data concern all offenders and not only public officials. While the offence of misappropriation defined in Art. 284 of PC is rela-

tively often committed and uncovered (in recent years, on average about 6–7 thousand valid convictions each year), it cannot be determined how big is the category of offences committed by persons indicated in Art. 17 of UNCAC.

4. Challenges related to implementation of the UNCAC articles

When comparing the scope of criminalisation of activities described in Art. 17 of UNCAC with the scope of criminalisation of the activities in the Polish law, it should be noted that Art. 284 of PC applies only to chattel or property rights, and in the case of qualified appropriation, called embezzlement and consisting in appropriation of entrusted objects (which corresponds to the activity described in Art. 17 of UNCAC) – only chattel. Thus, this type of offence fails to cover real estate property – which is required by Art. 2 pt. d of UNCAC. So the features of the offence described in Art. 284 § 2 of PC should be extended to cover also real estate property.

In case of none of the offences the burden of proof is reversed – it remains the sole responsibility of the prosecution.

5. Recommendations

Having in mind the above indicated differences between the scope of criminalisation recommended in UNCAC and the scope of criminalisation provided for in the Polish criminal law, the features of the offence described in Art. 284 § 2 of PC should be extended to also cover real estate property.

It is also advisable that the public administration should maintain more detailed statistics, allowing to assess to what extent Polish regulations are applied to offenders being public officials mentioned in UNCAC.

Art. 18. Trading in influence

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – PARTIALLY IMPLEMENTED

Article 18 of UNCAC that requires considering criminalisation of the offence of trading in influence, was implemented in the Polish law by Art. 230 and Art. 230a of PC and Art. 48 of the Act on Sports. The scope of criminalisation provided for in Polish regulations is not fully consistent with the provisions of UNCAC.

2. Implementation of the UNCAC article

The description of the offence in the Polish law (agency in settling a matter) is, in principle, consistent with the definition of the offence contained in UNCAC – for the act of influence peddling from Art. 230 of PC consists in a sit-

uation where the offender is willing to exert influence; similarly, in the case of trading in influence described in Art. 230a of PC, advantage is given in exchange for promising to exert influence.

3. Practical aspects of implementation of the UNCAC article

The first valid convictions for the offence described in Art. 230a of PC, introduced as an amendment to the Penal Code of 2003, come from 2008. In all, in 2008 225 persons were convicted for offences described in Art. 230 and Art. 230a of PC. In recent years, the number rose by a third, to 337 convicted persons in 2012.

Like in the case of bribery, the most common punishment for the offenders is imprisonment with conditional suspension of punishment.

4. Challenges related to implementation of the UNCAC article

According to Art. 18 of UNCAC, the "solicitation or acceptance" of an undue advantage is penalised, while in the Polish law the act of "soliciting" (demanding) an advantage is penalised only in the case of persons holding public function based on Art. 228 § 4 of PC. The act of demanding an advantage by a person not holding public function presently is not penalised by the Penal Code. Thus, the scope of criminalisation should be extended.

It should also be noted that, like in the case of provisions on bribery, Art. 18 of UNCAC requires criminalisation of behaviours consisting in offering an advantage, while in the Polish law such behaviour can only be seen as an attempt to commit the offence of trading in influence.

Like in the case of offences of accepting and giving bribes in the public sector, in the provisions of Art. 230a of PC concerning trading in influence some doubts can be raised by the clause saying that the offender is not prosecuted if material or personal advantage, or their promise, was accepted by a person holding public function, and the perpetrator informed about it law enforcement agency and disclosed all pertinent circumstances of the offence before the agency uncovered the offence (Art. 230a § 3 of PC).

5. Recommendations

The scope of criminalisation of passive trading in influence (influence peddling) should be broadened to cover the feature of demanding, as well as the feature of offering an undue advantage.

In addition, it seems that – especially in the case of petty offences – in terms of deterrence, more effective could be penalties that are really oppressive for convicts, such as fines or restriction of liberty.

It is also advisable to think over the legal provisions referring to the automatic clause providing for an exemption of punishment with regard to perpetrators of the offence of trading in influence.

Art. 19. Abuse of functions

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – IMPLEMENTED

Under the Polish law, the offence of abuse of function is penalised based on Art. 231 of PC.

2. Implementation of the UNCAC article

A qualified type of abuse of function described in Art. 231 § 2 of PC consists in activity aimed at obtaining an undue advantage, which is in line with the requirements of Art. 19 of UNCAC.

3. Practical aspects of implementation of the UNCAC article

The number of valid convictions for offences described in Art. 231 of PC remained stable and relatively low in the years 2004–2012. In 2004, 174 persons were convicted; the highest number of convictions was in 2008 – 247, but in the following years it was falling – to 170 convictions in 2011 and 153 convictions in 2012; the number of persons convicted for the offence described in Art. 231 § 2 of PC oscillated around 100.

4. Challenges related to implementation of the UNCAC article

The scope of criminalisation of the offence can be limited by the requirement contained in Art. 231 § 1 of PC to determine that the perpetrator acted to the detriment of a public or a private interest. The requirement is not contained in Art. 19 of UNCAC.

But Art. 231 § 4 of PC says that Art. 231 § 2 of PC concerning abuse of function in order to obtain an undue material or personal advantage is not applied if the offence has the features of passive corruption defined in Art. 228 of PC. The offence of abuse of function is in this case consumed by the offence of accepting bribes. The behaviour covered by Art. 19 of UNCAC would rather be punished based on Art. 228 § 3 of PC concerning activities of a person holding public function constituting a breach of law.

It is also worth to note the differences between subjective scope of criminalisation of the offence of abuse of function and corruption offences in the public sector. Bribery concerns persons holding public function, and only some

of them are public officials who are liable for abuse of function according to Art. 230 of PC.

5. Recommendations

It seems advisable to establish connection between Art. 231 and Art. 228 of PC in a situation where the offender abuses function in order to obtain material or personal advantage.

Art. 20. Illicit enrichment

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – NOT IMPLEMENTED

The UNCAC recommends only to consider adopting criminalisation of illicit enrichment. Under the Polish criminal law, such act is not an offence.

Art. 21. Bribery in the private sector

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – PARTIALLY IMPLEMENTED

Article 21 of UNCAC that requires considering criminalisation of bribery in the private sector was implemented in the Polish law only partially.

2. Implementation of the UNCAC article

Art. 296a of PC penalises corruptive relationship established to the detriment of organisational unit conducting business activity by or with person who holds managerial function in the unit or is employed by the unit based on employment contract, commission contract or specific task contract.

Establishing corruption relationship in the form of giving or accepting bribes in relation with sports competitions organised by a Polish sports association or entity acting based on an agreement with the association or entity acting on behalf of the association, is punished based on separate regulations (Art. 46 of the Act of June 25, 2010 on Sports, O.J. of 2014, item 715).

3. Practical aspects of implementation of the UNCAC article

Criminalisation of offences described in Art. 296a of PC has no practical consequences. The first person was validly convicted for the offence in 2008. The

number of valid convictions for the offence throughout the country remains between 11 in 2009 and 2011 and 17 in 2012.

4. Challenges related to implementation of the UNCAC article

Only partial implementation of Art. 21 of UNCAC results from the fact that, even after amending the act, Art. 296a of PC limits criminalisation to activities broadly related to protection of free competition (behaviours that can cause material loss for the entity or being an act of unfair competition or an unacceptable preferential activity for purchaser or recipient of goods, services or benefits). Such limitation is inconsistent with Art. 21 of UNCAC that requires to prosecute every corruption activity constituting a misconduct of an employee of a private sector entity. Thus in this respect, the Polish law fails to fully implement Art. 21 of UNCAC.

Like in the case of offences of accepting and giving bribes in the public sector, also for the offences described in Art. 296a of PC some doubts are raised by the clause saying that the offender is not prosecuted if material or personal advantage, or their promise, was accepted by a person holding public function, and the perpetrator informed about it law enforcement agency and disclosed all pertinent circumstances of the offence before the agency uncovered the offence (Art. 296a § 5 of PC).

5. Recommendations

Art. 296a of PC should be amended to penalise all corruptive behaviours in the private sector related to misconduct or abuse of power on the part of persons connected with business entity, and not only behaviours related to the breach of principles of free competition.

It is also advisable to think over the legal provisions referring to the automatic clause providing for an exemption of punishment with regard to perpetrators of the offence described in Art. 296a of PC.

Art. 23. Laundering of proceeds of crime
Art. 24. Concealment

1. Were the solutions described in the UNCAC articles implemented (yes, partially, no)?
ASSESSMENT – IMPLEMENTED

In the Polish law, the catalogue of behaviours criminalised as money laundering has an open nature, so it can be said that it meets the requirements of UNCAC. Different forms of collaboration in laundering of proceeds of crime mentioned in Art. 23 par. 1 pt. b(ii) of UNCAC are also penalised.

The offence defined in Art. 24 of UNCAC is implemented in the Polish law in Art. 299 of PC concerning laundering of money and Art. 292 of PC penalising fencing. The scope of criminalisation of both offences is appropriate and consistent with UNCAC requirements.

2. Implementation of the UNCAC articles

The offence of laundering money is described in Art. 299 of PC. According to its provisions, laundering of proceeds of any crime, including corruption offences, is penalised. The Polish law contains no requirement that first the perpetrator of predicate offence must be sentenced, but it must be determined what particular type of predicate offence was committed – only to indicate in general that the proceeds come from criminal activity is not enough.

3. Practical aspects of implementation of the UNCAC articles

It is difficult to prove the offence of laundering money, which can be the reason for relatively low number of valid convictions for the offence: in recent years, about 150 persons a year were convicted (156 sentences in 2008, 176 in 2010 and 160 in 2012).

4. Challenges related to implementation of the UNCAC articles

Only the feature of "significant difficulty" in determining criminal origin can be seen as a limitation of the scope of criminalisation in the Polish law as compared with UNCAC requirements. It seems that the word "significant" should be deleted from the regulation.

Resources subject to legalisation are defined suitably broadly. Legalisation of proceeds of crime committed abroad can pose some practical problems. It seems that the Penal Code does not exclude criminalisation of such behaviours, but in view of practical, evidential problems, prosecuting such offences can be difficult.

5. Recommendations

It seems that it would be advisable to intensify efforts to uncover offences of laundering of money. Thus, it is recommended to introduce special trainings for officers of enforcement agencies and employees of the financial sector.

Art. 25. Obstruction of justice

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?

ASSESSMENT – IMPLEMENTED

Article 25 of UNCAC describes a whole set of behaviours aimed at influencing criminal proceedings concerning corruption offences. In the Polish law, such behaviours are penalised based on various regulations.

2. Implementation of the UNCAC article

First of all, offences against justice should be mentioned (Art. 232 of PC concerning illegally influencing courts of justice, Art. 233 of PC penalising testifying falsely and Art. 245 of PC penalising illegally influencing other participants of legal proceedings), as well as the general provision contained in Art. 190 of PC penalising threats (according to the provision, a person who threatens other person with committing offence to his or her detriment or to the detriment of his or her family, if the threat raises reasonable fears on the part of the threatened person that the threat will be carried out, is liable to a fine, restriction of liberty or imprisonment up to two years; the offence is prosecuted upon the motion of the threatened person). The notion of threat used in several provisions is defined in Art. 115 § 12 of PC. The threat does not have to be verbalised, it can be expressed in other way and result from the behaviour of its perpetrator (which is analogous to the notion of intimidation mentioned in Art. 25 of UNCAC).

Giving an undue advantage to induce false testimony or to interfere in the giving of testimony mentioned in Art. 25 of UNCAC is not a separate offence under Polish criminal law, but is criminalised as inducing to give false testimony based on Art. 18 of PC in connection with Art. 233 of PC.

3. Practical aspects of implementation of the UNCAC article

Assessment of practical aspects of implementation of Art. 25 of UNCAC is not easy, because the existing statistical data concerning obstruction of justice cover all such offences and not only the ones connected with corruption and regulated by UNCAC. However, it can be said that the offences are relatively common and the number of persons convicted for giving false evidence was high, though in recent years it was falling: in 2005 it was 5071 persons, in 2011 – 2476, and in 2012 – 2325. The number of persons convicted for influencing justice (offence described in Art. 245 of PC) was falling since 2004 when 861 persons were convicted, and in recent years it oscillates around 500 persons (517 in 2010, 470 in 2011, 421 in 2012).

4. Challenges related to implementation of the UNCAC article

The state of implementation of UNCAC in the Polish law is satisfactory.

5. Recommendations

If possible, more detailed statistical data should be gathered concerning corruption offences.

Art. 26. Liability of legal persons

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – NOT IMPLEMENTED

Liability of legal persons for offences was introduced in the Polish legal system by the Act of October 28, 2002 on liability of collective entities for Acts Prohibited under Penaly (consolidated text in O.J. 2014, item 1417 with amendments). Liability of collective entities is of special character – it is not a criminal liability, but repressive liability, though it is decided by criminal court in proceedings similar to criminal proceedings.

2. Implementation of the UNCAC article

According to the Act mentioned above, collective entity is liable for prohibited act being a behaviour of an individual: 1) acting on behalf or in the interest of the collective entity under authorisation or obligation to represent it, take decisions on behalf of it or conduct internal audit activities, or when the person abuses his or her powers or fails to comply with the obligation; 2) allowed to act as a result of abuse of powers or failing to comply with the obligation by the person mentioned in pt. 1; 3) acting on behalf or in the interest of collective entity, with the acceptance or knowledge of the person mentioned in pt. 1; 3a) being a businessman who directly collaborates with the collective entity in order to achieve legally allowed aims; if the behaviour benefited or could have benefited the collective entity, even not materially.

In addition, a relationship has to be determined between the prohibited act of the natural person and the collective entity itself. According to the law, collective entity is liable if the prohibited act was committed as a result of: 1) at least the lack of due diligence in selecting the natural person mentioned in Art. 3 pt. 2 or 3, or at least the lack of due supervision of the person – from a body or a representative of the collective entity; 2) such organisation of activities of the collective entity that failed to guarantee the avoidance of committing the prohibited act by the person mentioned in Art. 3 pt. 1 or 3a, while it could have been guaranteed by exercising due diligence required in the circumstances by a body or a representative of the collective entity.

Liability of a collective entity depends on establishing liability of the individual. Collective entity is liable only when the fact that a prohibited act was

committed by an individual connected with the collective entity was confirmed by a valid conviction for the person, a court sentence of conditional discontinuation of criminal proceedings or tax offence proceedings, a court sentence allowing the person to voluntarily submit to liability or court sentence on discontinuation of proceedings because of circumstances excluding punishing of the offender.

The liability of collective entities is not of general nature; collective entities are liable only for prohibited acts listed in the law, but the list includes all corruption offences.

The main sanction for a collective entity when its liability for prohibited act is established is a financial penalty in the amount from 1000 to 5 000 000 PLN, but not higher than 3% of income generated in the financial year when the prohibited act that resulted in liability of the collective entity was committed. The law also provides for obligatory confiscation in relation to collective entity, and optional additional penalties, such as e.g. prohibition of advertising and promotion and exclusion from public tenders.

3. Practical aspects of implementation of the UNCAC article

The Act on liability of collective entities is not used in practice. The available statistical data show that each year only few collective entities are sentenced – first such sentences were given in 2006, and concerned 6 collective entities. The greatest number of collective entities were convicted in 2010 – 14, in 2011 – 5, and in 2012 – 3. In all, during 6 years from coming into force of the statutory act in question, only about 50 collective entities were found liable for acts prohibited under penaly by Polish courts.

4. Challenges related to implementation of the UNCAC article

Assessing the functioning of the model of liability of legal persons in practice, it must be clearly said that the current model does not work. The need to identify the individual who committed an offence and to secure his or her valid conviction deters relevant authorities from prosecuting legal persons.

Virtually all cases when a collective entity was held liable concerned relatively petty tax offences. In addition, available data show that fines imposed on collective entities have been very low and have not exceeded 12 000 PLN.

The statutory act in question is not enforced. It plays no practical role in limiting corruption in Poland. It is not used by relevant authorities, in particular prosecutors.

In view of the situation, it cannot be said that the Polish model of liability of collective entities works in practice or that the sanctions are, as required by Art. 26 of UNCAC, effective, proportionate and dissuasive.

5. Recommendations

It is recommended to amend the relevant provisions in such a way that the model of liability of collective entities is changed and the liability of legal persons is autonomous. Also, the authorities responsible for initiating legal proceedings concerning liability of legal persons, i.e. prosecutors, should be more active in performing the tasks.

Art. 31. Freezing, seizure and confiscation

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – PARTIALLY IMPLEMENTED

In the Polish criminal law, there is no institution of confiscation, but it contains regulations concerning forfeiture.

2. Implementation of the UNCAC article

Today, the institution of forfeiture has four forms. First, the forfeiture of objects – obligatory forfeiture of objects being direct proceeds of crime (Art. 44 § 1 of PC) and optional (and in cases enumerated in the Penal Code, obligatory) forfeiture of objects used or destined for committing the crime (Art. 44 § 2 of PC). Obligatory forfeiture (Art. 44 § 1 of PC) covers objects being direct proceeds of offence, i.e. booty or objects acquired through criminal activity, and products of criminal activity or objects produced as a result of criminal activity. The optional forfeiture, described in Art. 44 § 2 of PC, covers objects used or destined for committing the offence – for example, the amount of money given as a bribe. Second, the forfeiture of the equivalent of objects – according to Art. 44 § 4 of PC, if the forfeiture described in § 1 or 2 is not possible, the court can impose forfeiture of the equivalent of the objects being direct proceeds of crime or the objects used or destined for committing offence. Third, the forfeiture of undue material advantage – according to Art. 45 § 1 of PC, if the offender, as a result of committing offence, received – even indirectly – undue material advantage not covered by forfeiture of objects described in Art. 44 § 1 or 6 of PC, the court can impose forfeiture of such advantage or of its equivalent. Fourth, the forfeiture of the equivalent of undue material advantage (Art. 45 § 1 of PC).

Provisions concerning forfeiture of objects contained in Art. 44 of PC should be interpreted in the light of Art. 115 § 9 of PC, according to which the notion of chattel or objects includes also Polish money or other legal tender and documents entitling to receiving an amount of money or containing obligation to pay out capital, interest, share in profits, or stating participation in a company.

Thus, objects covered by forfeiture are material objects that can be separated (e.g. physically moved), and exclude real estate property.

The notion of material advantage used in Art. 45 of PC should be understood as growth of assets (increase of wealth) or reducing liabilities (decrease of burdens or avoiding losses). Such advantage is covered by obligatory forfeiture if it even indirectly originated from criminal activity, and is not covered by forfeiture based on provisions concerning forfeiture of objects. The solution introduced in the Polish law allows to impose forfeiture of objects that were not directly used to commit offence, but resulted from it.

The Penal Code contains also regulations that help to impose forfeiture of property that the offender tried to conceal. First of them is the presumption of criminal origins of an advantage that is lifted only by a counter-proof presented by the offender or the new owner of the dubious property (Art. 45 § 2 of PC). The second presumption concerns the fact of belonging of the property to the offender. It requires a combination of two conditions: first, the high plausibility that the offender transferred to some individual, legal person or organisational unit without legal personality the property being an advantage obtained from criminal activity, and second, the fact that the person owned particular property. The presumption is lifted by presenting by the interested person or organisational unit a proof of legal acquisition of the property (Art. 45 § 3 of PC).

The objects or material advantage covered by forfeiture become a property of the State Treasure on the date when the court sentence comes into force.

The forfeiture of the mentioned objects is not imposed if they should be returned to the wronged person or other entitled entity. If the objects are not the property of the offender, then their forfeiture can be imposed only in cases described in the law.

3. Practical aspects of implementation of the UNCAC article

There are no statistical data on forfeiture imposed separately from other penalties. It can only be said that forfeiture as such, without any other penalty, is imposed sporadically. Thus, it is difficult to assess practical aspects of implementation of UNCAC in this field.

4. Challenges related to implementation of the UNCAC article

Procedural issues concerning security on property in order to execute a sentence imposing forfeiture are regulated in Art. 291–295 of the Act of June 6, 1997, the Code of Penal Proceedings (O.J. of 1997, no. 89, item 555). In the case of valid sentence imposing forfeiture, the body responsible for its execution is the tax office relevant for the localisation of the court of the first instance. The detailed procedure of executing a sentence imposing forfeiture is sufficiently regulated in Art. 188–195a of the Act of June 6, 1997, Executive Penal Code (O.J. of 1997, no. 90, item 557).

The issues of lifting bank secrecy are regulated in Art. 105 par. 1 of the Act of August 29, 1997 – Bank Law (O.J. of 1997, no. 140, item 393). Banks are required to disclose secret information on request from, among others, (1) a court or a prosecutor in connection with proceedings concerning offence or tax offence conducted against natural person being a party to an agreement concluded with the bank, to the extent that the information concern the individual, committed in connection with activity of legal person or organisational unit without legal personality, to the extent that the information concern the legal person or organisational unit; (2) a court or a prosecutor in connection with execution of a request for legal aid from foreign country which has the right to ask for information covered by bank secrecy based on ratified international agreement binding for the Republic of Poland; (3) the General Tax Control Inspector in connection with criminal or criminal tax proceedings conducted against individual being a party to an agreement concluded with the bank, criminal or criminal tax proceedings concerning offence committed within activities of legal person or organisational unit without legal personality, having a bank account; (4) the Internal Security Agency, the Military Counter-Intelligence Service, the Intelligence Agency, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Police, the Military Police, the Border Guard, the Prison Service, the Government Protection Bureau, and their authorised in written officers or soldiers, to the extent that the information are necessary to conduct verifying proceedings based on regulations on protection of secret information; (5) the Police, if it is necessary to effectively prevent crimes, to uncover them or to find offenders and gather evidence, in accordance with principles and methods described in Art. 20 of the Act of April 6, 1990 on the Police; (6) the head of the Central Anti-Corruption Bureau, in accordance with principles and methods described in Art. 23 of the Act of June 9, 2006 on the Central Anti-Corruption Bureau; (7) prosecutor, the Police and other bodies entitled to conduct preparatory proceedings or verifying proceedings for petty offences – as described in Art. 78 par. 4 of the Act of June 20, 1997 – Traffic Law.

However, the law indicates that banks, other institutions entitled by legal provisions to grant loans, state bodies and persons to whom information covered by bank secrecy are disclosed are required to use the information only within the limits of authorisation described in Art. 105 par. 1.

5. Recommendations

Having in mind the provisions of Art. 31 of UNCAC, it would be advisable to determine how to impose forfeiture in situations where proceeds of crime are intermingled with property acquired from legitimate sources (Art. 31 par. 5 and 6 of UNCAC). It seems that in such cases, the provisions on forfeiture of an equivalent of objects or advantages could be applied. Otherwise, Art. 31 of UNCAC has been satisfactorily implemented in the Polish law.

It seems that in theory the Polish provisions implement the requirements of UNCAC. But their practical effectiveness is hampered by the fact that the law fails to set deadlines for disclosing secret information by banks to relevant bodies. In view of that, it should be recommended to change the practice of application of the provisions in question or even to amend them in order to enhance effectiveness of the tool.

Anna Wojciechowska-Nowak

PROTECTION OF WHISTLEBLOWERS

Art. 33. Protection of reporting persons [whistleblowers]

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – NOT IMPLEMENTED

The Polish law contains no free-standing regulation devoted specifically to "reporting persons" (whistleblowers) recommended in Art. 33 of UNCAC. As a result, Polish whistleblowers who suffered from retaliation have to base their claims on general regulations, and in particular on the provisions of the Labour Code.

2. Problems resulting from the lack of implementation of the article

The lack of free-standing regulation concerning protection of whistleblowers, and in particular the lack of legal notion of whistleblower, results in important practical consequences. About half of people active on the job market are not protected at all, since they are employed based on civil law agreements, so-called self-employment, or fixed-term employment contracts that can be terminated without giving any reasons. According to Eurostat data, in the second quarter of 2014, 28.4% of the 15 mln of persons active on the job market were employed for a definite period of time, and according to estimates from Eurofund organisation, about 10% of them work based on civil law agreements (self-employed persons and persons working based on other legal agreements,

e.g. managerial contracts, should be added to the numbers). The data show that the scale of the problem of the lack of protection is significant[3].

In addition, the general provisions of the Labour Code based on which whistleblowers employed permanently (i.e. under the regulations of the Labour Code) advance their claims prove to be ineffective in courts of justice. Despite the fact, the Polish government claims that provisions of UNCAC are implemented, citing the very general regulations of the Labour Code. In our opinion though, the claim is unjustified.

No statistical data are available to assess accurately the effectiveness of the general provisions of the Labour Code, based on which whistleblowers suffering from retaliation advance their claims. The lack of such data results from the fact that during court proceedings, the main thesis is rarely that "the employer's action was a retaliation for reporting irregularities harmful for social interest". As a result, we do not know how many employees sue their employers in labour courts in connection with the fact that, as a result of reporting irregularities, they suffered retaliation, what kind of claims they advance and how often the courts accept or dismiss their claims.

But experiences gathered for years by the Stefan Batory Foundation, related to monitoring of court proceedings concerning whistleblowers (the activities are conducted since 2003[4]) and requests for help directed to the foundation by whistleblowers show that their claims are usually dismissed in labour courts.

In order to verify the observations and gather reliable knowledge on the effectiveness of Labour Code regulations in protecting whistleblowers, the Stefan Batory Foundation conducted a survey based on deepened interviews with judges from labour courts. 29 interviews were conducted in courts of the first and the second instance, and in the Supreme Court[5].

The survey aimed at establishing how the legal instruments provided for by the Labour Code to protect employees (e.g. from unjustified dismissal from work or termination of employment without notice, discrimination, mobbing) are applied in courts of justice in cases of whistleblowers.

The survey was led in 2010, but the legal environment has not changed since, so its conclusions were still valid during preparation of the report.

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[3] Data from Eurofund: http://eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/poland/poland-industrial-relations-profile and Eurostat: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsq_etpga&lang=en [access: 10.12.2014].

[4] The year when the foundation monitored the first case clearly concerning a whistleblower.

[5] A. Wojciechowska-Nowak, *Ochrona prawna sygnalistów w doświadczeniu sędziów sądów pracy. Raport z badań* http://www.batory.org.pl/doc/Sygnalisci_raport_20110415.pdf [access: 10.12.2014].

2.1. The essence of the matter remains outside the scope of legal proceedings

In cases concerning reinstatement, the whistleblower aims at proving that he or she was dismissed from work in connection with disclosing irregularities harmful for social interest. But when the employer in the declaration on termination of employment indicates other reasons, the claim of the whistleblower is not, in principle, considered during the proceedings. The proceedings concern the reasons indicated in the notice of dismissal or the declaration on termination of employment without notice. The task of the court is to verify whether the reasons given by the employer are real, specific and justified.

In practice, employers rarely indicate matters related to reporting irregularities as the reasons for termination of employment. Most commonly, they refer to other reasons, e.g. frequent sick leaves, loss of trust resulting from conflicting character of the employer, unsatisfying productivity of the whistleblower or liquidation of his or her post.

According to case-law of the Supreme Court, the scope of the court proceedings is defined by the employer's declaration on termination of employment. In practice, some courts of justice that rigorously apply the principle refuse to examine the above mentioned matters. Thus, the essence of the matter is not discussed at all during court proceedings.

In one of the cases monitored by the Stefan Batory Foundation, the court stated in its sentence: "It should be noted that during the proceedings the court made findings as to reality of the reasons for termination of employment indicated in the notice of termination of employment. The finding that the indicated reasons are not real is sufficient to decide the case. The issue what were the underlying reasons, and in particular, whether these were the reasons indicated by the plaintiff, was not relevant in the court case, so it was not examined"[6].

The cases where it is particularly hard to show the underlying reasons for termination of employment are situations where the post of a whistleblower is liquidated. According to many case-law rulings of the Supreme Court, labour courts of justice are not competent to examine economic or organisational reasons for liquidation of a post. It is assumed that real liquidation of a post, being a justified reason for termination of employment, is the one that really took place, no matter what was the motivation of the employer.

The results of the above mentioned survey leave no doubts that employers can use various pretexts to get rid of problematic employees. Be it frequent absence from work or some shortcomings in his or her work, even if previously

[6] The verdict of District Court in Gorzów Wielkopolski of November 20, 2007, file ref. no. IV P 610/07.

tolerated, if only the pretexts used as reasons for termination of employment are real, then the whistleblower is usually helpless during court proceedings.

2.2. General clauses: are the actions of employer consistent with the letter of the law also consistent with the principles of community life?

Some solution for the situation could be the general clause from Art. 8 of the Labour Code (hereafter called LC) that prohibits to use law in a way that is inconsistent with the principles of community life or its socio-economic aims. Though the employer is entitled to dismiss an employee from work, he or she abuses his or her right in the meaning of Art. 8 of LC, if he or she does it for reasons consisting in a desire of retaliation against an employee who took action in order to protect social interest.

But the general clauses are rarely applied in the practice of court proceedings. The law-maker introduced the institution as an exception limiting exercising the rights which are *expressis verbis* provided for in the statutory act. Thus, in practice the use of Art. 8 of LC is limited to exceptionally grave and evident abuses of law. It is used more commonly in situations where no other unambiguous regulation or case-law exist.

Thus, to refer to Art. 8 of LC is generally accepted in situations where employer selected employee for dismissal in a way that is inconsistent with the principles of community life, while a proposal to question on the same basis the right of employer to terminate fixed-term employment without giving any reason is objected. Finally, also opinions of judges who question applicability of Art. 8 of LC in cases concerning reinstatement should be mentioned. They indicated that if the employee wanted to contest the termination of employment, he or she should focus mainly on proving that reasons given by employer are not real, treating the principles of community life only as additional supporting argument.

2.3. Labour Code antidiscrimination regulations in court cases of whistleblowers

The situation with antidiscrimination regulations is similar to the general provisions of Art. 8 of LC. Though at a first glance it seems that the principle of equal treatment of employees should be helpful in cases of whistleblowers, more detailed analysis raises doubts whether whistleblowers can use it to support their claims.

The first problem concerns a reference group for a situation of a whistleblower. Was he or she treated worse than all other employees? Or should co-workers having the same knowledge as the whistleblower be seen as a point of reference for comparisons, and maybe employees with similar professional qualifications?

The second problem is the catalogue of reasons for discrimination contained in the Labour Code. The catalogue is open, but many respondents were not sure whether reporting irregularities can be effectively claimed to be one of such reasons.

2.4. Burden of proof in court cases of whistleblowers

Judges participating in the survey indicated that in court cases of whistleblowers the most problematic thing is to prove their claims, and in particular that the reason for termination of employment given by employer was not real one, or that the disclosed irregularities in fact took place. Whistleblowers have limited access to sources of evidence, e.g. witnesses still employed by the employer or documents being at his or her disposal.

Some participants of the survey indicated that solutions favourable for whistleblowers related to the issue of burden of proof, recommended by the Council of Europe and used in other countries, are not available in Poland. In the opinion of judges, the existing solutions which are particularly unfavourable for whistleblowers in court cases concerning mobbing make it very difficult for them to prove their claims.

2.5. Lack of preventive protection

The surveyed judges indicated that the law should guarantee protection of personal data of whistleblowers as a preventive measure to protect the employee from ostracism in his or her professional environment.

The regulations contained in the Polish law fail to clearly indicate whether an employer who intends to introduce an internal system of reporting irregularities may guarantee anonymity to employees being whistleblowers. The doubts are raised by the Act of August 27, 1997 on personal data protection (O.J. of 1997, no. 133, item 883) and by the Act of September 6, 2001 on the access to public information (O.J. of 2001, no. 112, item 1198).

3. Recommendations

In addition to barriers resulting from gaps in the existing regulations or from the accepted court practice, differences of opinions are visible on almost every issue discussed during the interviews. To some extent, such differences of opinions are natural, but they are amplified by the fact that the issues related to protection of whistleblowers are new. On the one hand, judges gave conflicting answers to questions whether a particular legal argumentation would be effective in court proceedings. On the other hand, the judges say that the issue is new, and thus has to be thoroughly thought over and practical answers to the problems have to be developed.

To sum up, it can be said that the Polish law fails to provide satisfactory protection for whistleblowers. Whistleblowers can use the general measures protecting all employees from termination of employment, discrimination or mobbing, but in court practice such instruments face significant barriers and seem to be not suited to the specific situation of whistleblowers.

An important problem is the lack of legal concept of a whistleblower and a protected disclosure. Courts of justice, legal representatives and whistleblowers appearing in courts without legal representatives have no legal instruments to use when either presenting or verifying the claims. The interviews show a significant gap between so-called law in books and law in practice as far as whistleblower protection is concerned.

It should also be remembered that in Poland the percentage of persons employed based on contracts other than permanent employment is one of the highest in Europe. Employment of such persons is not protected. These are the so-called flexible employment forms where both parties, including employer, may terminate employment without giving any reasons.

Thus, we recommend that there should be enacted a free-standing law that would:

- introduce into the Polish law the legal concept of a whistleblower and his or her protected activities,
- regulate in a complex way all issues related to reporting irregularities harmful for social interest, and
- provide protection for possibly broadest range of people active on the job market.

In addition to the above recommendations, the issues of legal protection of whistleblowers should be re-introduced in the Government Programme to Counteract Corruption for 2014–2019. The issue was deleted from the final version of the programme despite the fact that it plays crucial role in counteracting pathological behaviours in public life. Thus the issue of whistleblowing should be reintroduced into the programme in view of its relevance in promoting transparency in public life.

Grzegorz Makowski

SPECIALISED ANTICORRUPTION AUTHORITIES

Art. 36. Specialised authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

1. Were the solutions described in the UNCAC article implemented (yes, partially, no)?
ASSESSMENT – PARTIALLY IMPLEMENTED

Poland has many institutions prosecuting corruption offences, authorised also to uncover and combat corruption crimes. These are the typical authorities, such as the police and prosecutors, but also specialised institutions – the military police, the General Inspector of Financial Information or the Railway Protection Service. Corruption cases are also dealt with by the Supreme Audit Office, tax audit offices, and until recently (before the reform of 2014) also the counterintelligence (the Internal Security Agency)[7]. In addition, the structures of the police and public prosecutor offices have specialised units dealing with corruption crimes, e.g. voivodeship police departments to combat corruption and economic crime, departments for organised crime and corruption in appellate public prosecutor offices, or the Central Investigative Bureau (a special police unit dealing with e.g. drug crimes, organised crime, as well as economic crime).

[7] See M. Waszak, *Organy ścigania*, [in:] A. Kobylińska, G. Makowski, M. Solon-Lipiński, *Mechanizmy przeciwdziałania korupcji w Polsce. Raport z monitoringu*, ISP, Warsaw 2012, pp. 122–139.

In 2006 it was decided to create a special service to combat corruption - the Central Anti-Corruption Bureau (CBA). The government that created the institution cited Art. 36 of UNCAC[8] as one of the main reasons to do it. So analysing implementation of the provision of the Convention, we will focus on the Central Anti-Corruption Bureau.

2. Implementation of the UNCAC article

The CBA was to be a multi-function institution, implementing tasks of prosecuting corruption crimes, prevention, and information and education, as well as developing state policy in this field[9]. But in practice, the Bureau functions only as an enforcement agency.

According to the Act of June 9, 2006 on the Central Anti-Corruption Bureau (O.J. of 2006, no. 104 item 708, hereafter called the Act on CBA), the bureau is a public administration body dealing with the issues of corruption (both in public and in private sectors) and activities threatening economic interests of the state. CBA is an institution directly reporting to the Prime Minister. It is supervised (to a limited extent) by the Parliamentary Committee for Special Services and the President of the Republic of Poland who gives his opinion on candidates for the post of the head of the Bureau (but his opinion is not binding).

Organisation and detailed rules for functioning of the Bureau are defined in its charter issued by the Prime Minister. The structures of CBA include mainly units responsible for investigative, operational and analytical activities. CBA has also its regional branches.

The main tasks of the Bureau include identifying, uncovering and preventing corruption offences mentioned in the provisions of the Penal Code (e.g. bribery, influence peddling, abuse of powers etc.), as well as other acts accompanying corruption (e.g. tax offences). CBA audits e.g. finances of political parties, financial disclosures of persons holding public functions and their declarations on business activity, as well as the procedures of granting concessions, permits etc. Thus the main areas of activities of the Bureau are repressing and preventing corruption.

Based on practice rather than any legal requirements, the Bureau also conducts limited information and education activities (e.g. information portal on corruption and anticorruption policy – www.antykorupcja.gov.pl).

[8] Justification for the draft Act on the Central Anti-Corruption Bureau of January 23, 2006, Parliamentary Paper no. 275, p. 5.

[9] CBA was also to implement provisions of Art. 6 of UNCAC. Though it was not explicitly expressed by law-makers, the conclusion is substantiated by the justification for the draft Act on CBA where examples of similar institutions functioning in Hong Kong, Singapore or France are cited, see Justification to the draft Act on the Central Anti-Corruption Bureau of January 23, 2006, Parliamentary Paper no. 275, pp. 2–4.

3. Practical aspects of implementation of the UNCAC article

Below, we present data on CBA activities that will help to understand the problems faced by the institution and to assess to what extent the provisions of Art. 36 of UNCAC were implemented. We will cite some numbers illustrating the functioning of the Bureau in its main field of activities, i.e. uncovering and combating corruption crimes.

In the last three years before preparation of the report (2011–2013), each year the Bureau registered slightly above 300 typical corruption offences[10], except 2013 when the number was 281. If we remember that the total number of corruption cases registered in the period of time was almost 15 500, then we can see that the Bureau deals only with a fraction of the problem. The most commonly registered crimes were cases of venality of public officers and of abuse of powers by persons holding public functions.

In addition to the registrations, in 2013 the Bureau investigated 469 cases, out of which the greatest number (25%) concerned local government administration, business sector (13%) and healthcare sector (8%). As a result of the proceedings, only in 2013 the Bureau seized property worth over 22 mln PLN (in 2011, the amount exceeded 50 mln PLN). In the mentioned period of time, on average 45% of investigations led to indictments which can be seen as relatively good indicator of effectiveness of activities.

It is worth noting, especially if we remember that these are only optional tasks of the Bureau, that under its preventive and educational activities, the Bureau published several materials on corruption, also of academic nature. Works on building an Internet portal gathering information on corruption and preventive measures were completed. Only in 2013, CBA officers led trainings for about 5 500 persons from 81 public institutions[11].

4. Challenges related to implementation of the UNCAC article

The very creation of CBA can be seen as implementation of the first part of the UNCAC article, saying in general terms about ensuring the existence of "a body or bodies or persons specialised in combating corruption". More prob-

[10] The offences prosecuted based on Articles 228, 229, 230, 230a, 231 § 2, 250a, 296a, 296b1 and 305 of the Penal Code, and Articles 46, 47 and 48 of the Act of June 25, 2010, on sports (O.J. of 2014, item 7), as well as Art. 54 of the Act of May 12, 2011, on the reimbursement of medicines, foodstuffs intended for particular nutritional uses and medical devices (O.J. no. 122, item 696, with amendments), called "reimbursement act". These are criminal regulations describing corruption activities such as bribery (also in the private sector and in professional sports) or abuse of powers. Each year, statistical data concerning these forms of crimes are presented in the CBA publication titled *The map of corruption.* The reports are available on the page www.antykorupcja.gov.pl.

[11] Information on the results of activities of the Central Anti-Corruption Bureau in 2013, Parliamentary Paper no. 2304.

lematic is implementation of requirements of the article concerning granting to such bodies:

- necessary independence;
- appropriate training for their staff;
- resources needed to carry out their tasks.

But before we discuss problems related to the above points and assess the quality of implementation of the article, a broader context should be presented.

4.1. The problem of instrumental treatment of Article 36 of UNCAC

First of all, we have to say that to some extent the implementation of Article 36 of the Convention was treated by the Polish government instrumentally. As we already mentioned, the creation of the Central Anti-Corruption Bureau was presented as a direct implementation of Art. 36 of the Convention, while it would have been created even if Poland was not party to the Convention, for it was a political project promoted by particular political groups long before Poland ratified the convention against corruption[12]. The fact is important because the content of justification and regulatory impact assessment of the draft Act creating CBA shows that law-makers failed to analyse the issue in the context of other provisions of the Convention, and in particular its preamble which said that implementing requirements of the act of international law, state parties should take into account also the principles of "fairness, responsibility and equality before the law and the need to safeguard integrity".

4.2. Implementation of Article 36 of UNCAC and the problem of protection of human and citizen rights

Already at the stage of preparing the Act on CBA, serious objections as to consistency of proposed provisions with the constitution were raised[13], concerning in particular Art. 22 of the draft Act on CBA which allowed CBA to gather in a secret register and to process sensitive information (i.e. information concerning e.g. sexual preferences, views, state of health etc.) concerning any natural persons, even not connected with investigative activities concerning corruption[14]. In addition, the Bureau, having as one of its tasks to audit financial disclosures of persons holding public functions, according to Art. 39 of the draft was authorised to conduct inspections of assets of such persons, without the

[12] See the Draft Act of April 12, 2000, on the Central Anti-Corruption Office; D. Palacz, A. Wojtkowski, D. Woźnicki, *Korupcja i mechanizmy jej zwalczania*, the Stefan Batory Foundation, Warsaw 2001, pp. 17–18.

[13] Legal opinions on the draft act on the Central Anti-Corruption Bureau can be found at the address http://orka.sejm.gov.pl/rexdomk5.nsf/Opwsdr?OpenForm&275 [access: 20.08.2014].

[14] Draft act on the Central Anti-Corruption Bureau of January 23, 2006, Parliamentary Paper no. 275.

approval from a court or even a prosecutor, and based only on a discretionary decision of an officer. Both solutions raised fears that the powers can be abused and the citizen right to privacy can be threatened.

Objections were also raised as to unclear definition of corruption contained in the first version of the draft act and as to imprecise notion of "activities threatening economic interests of the state" that were also to be investigated by the Bureau. The notions could be liberally interpreted by the officers of CBA, and as a consequence treated as a pretext to use broad operational powers – bugging, invigilating, using provocation, arresting etc. Despite these and many other objections, the draft Act on CBA was only slightly amended at the stage of parliamentary proceedings. The act came into force in July 2006.

Unfortunately, flawed provisions of the Act on CBA resulted in grave problems in functioning of the institution. An additional problem was high politicisation of the institution during the first two years of its existence. As the first head of CBA was nominated the initiator of the act, MP from one of the then ruling political parties. All of this led to significant irregularities and abuses in activities of CBA officers. During several publicised investigations led by CBA, grave irregularities occurred, such as unjustified arrests, humiliating treatment of suspects, abuse of powers by officers, illegal use of operational techniques in a way violating the right to privacy (e.g. invigilation and controlled bribing). Some of the irregularities resulted in court judgments acquitting accused, prosecutor decisions to discontinue proceedings, and even verdicts of the European Court of Human Rights.

Example of grave abuse of human and citizen rights during activities led by CBA

The case that was very emotionally commented in the media and at the same time formed excellent illustration of all problems mentioned above was arresting of an MP of the then opposition political party just before general elections of 2007. Supposedly, together with a local politician and in return for material advantage she helped in selling building plots in one of the most attractive seaside regions in Poland. Both parties to the transaction were caught red-handed as a result of provocation organised by undercover agents. The then head of CBA organised a special press conference where he described the case, also adding that the case should make every voter think twice for whom he or she would vote during the imminent general elections. In this way, he showed his political engagement. But the most problematic were activities that led to arresting the MP.

The court proceedings showed that from the very beginning the Bureau conducted its activities using the most invasive investigative techniques, e.g. undercover agents, bugging, control of mail, provocations, without meeting the legal conditions for this kind of measures. According to the Polish penal law, investigation may be launched and special operational and investigative activities (in particular provocation) may be undertaken, only when an offence was already committed or when a suspicion exists that an offence can be committed. Thus, the activities of the Bureau were illegal, and conducting them the Bureau violated the basic human rights and civil freedoms guaranteed by international regulations and principles contained in the Polish constitution, in particular the right to privacy, the principle of the rule of law, the right to honest and fair consideration of the case, and many other, more detailed rights, such as the right of access to the materials of the case, the right to prepare defence or to freely question witnesses. As a result of the situation, the court of appeal found both accused not guilty, stating that the MP accepted material advantage offered to her by the CBA officer, but all evidence of her guilt, including the results of the provocation, were gathered illegally, and cannot form a basis for conviction. Justifying the verdict, the court clearly stated that *operational invigilation of citizens* [...] *is inadmissible as unlawful and illegal unless previously gathered information exist, giving rise to assumption or at least a speculation that the particular person already committed or is willing to commit a crime*. The case ended in 2014 (after seven years) when appeal of cassation from public prosecutor office was dismissed[1].

*File reference number II KK 265/13

The Act on CBA was itself contested in the Constitutional Tribunal which in 2009 ruled that some of its provisions (also those mentioned above) were unconstitutional, requiring law-makers to amend the act[15]. As a result, in 2010 the Act on CBA was amended so that to a great extent the above mentioned problems were solved. The definition of corruption and the notion of economic interests of the state were made more precise. Also the regulations concerning gathering and processing personal data by the Bureau were amended.

[15] Ruling of the Constitutional Tribunal of June 23, 2009 r. file ref. no. K 54/07, O.J. no. 105, item 880.

Enhancing the protection of human and citizen rights in the Act on CBA as a result of the ruling of the Constitutional Tribunal

Implementing the ruling of the Tribunal, in the structures of the Bureau a special post of plenipotentiary for personal data processing was created, whose one of the main tasks is to counteract any possible irregularities connected with using information on individuals covered by operational activities. The position of the plenipotentiary was additionally strengthened: though he or she is nominated by the head of CBA from among officers of the Bureau, he or she can only be dismissed with the approval from the Prime Minister and after receiving an opinion from the Parliamentary Committee on Special Services. Thus, the law-makers took into account possible threats for the right for privacy, freedom of views or dignity of human person that could result from the lack of control over personal data processing by the officers of the Bureau. Interestingly enough, the solution was adopted only in CBA - other Polish special services have no similar standards.

4.3. The problem of guarantees of independence

The amendment of the Act on CBA in 2010, resulting from the ruling of the Constitutional Tribunal, eliminated some of the gravest structural problems in the institution. But it failed to resolve problems related to the first specific requirement of the Convention, namely guarantees of political independence of CBA. The existing regulations in this field are still controversial. Art. 7 of the Act on the Central Anti-Corruption Bureau, describing requirements concerning persons holding top posts in the Bureau (the head and his or her deputies), states in par. 1 pt. 3 that he or she should show flawless moral, civil and patriotic attitudes. Added to hard and clear criteria for a person holding the post (e.g. Polish citizenship, university education, lack of criminal record, being allowed to have access to secret and top secret information), the mentioned requirement is imprecise, and its interpretation can be discretionary. Art. 7 par. 4 of the Act on CBA also states that the head of CBA and his or her deputies may not be members of political parties or participate in activities led by political parties or for their benefit. The provision is absolutely insufficient to secure de-politicisation of the Bureau. As we already mentioned, the first head of CBA was nominated just after resigning his seat in the parliament and leaving his political party which he represented in the Parliament. Formally, he met the condition from the act of which he himself was co-author, but it was obvious that there was no guarantee that his political views would not influence the way of exercising his new function (as witnessed by his behaviour in connection with the already mentioned case of MP arrested before general elections in 2007). The head of CBA was dismissed in politically tense atmosphere, based on the already mentioned Art. 7 par. 1 pt. 3 of the Act on CBA[16].

To sum up, it can be said that the case of the first head of CBA shows that the regulations on the Central Anti-Corruption Bureau can be relatively easily

[16] T. Pietryga, E. Olczyk, *Przychodzi szef CBA do premiera i*..., Rzeczpospolita 6.10.2009 r.

manipulated for short-term political purposes, by influencing the choice of the head of the institution. Thus, it cannot be assumed that the Bureau is sufficiently independent from political influence, and thus fully effective in implementing its tasks.

4.4. The problem of appropriate training and resources

The level of practical implementation of the requirements of the Convention concerning appropriate trainings for members of anticorruption bodies and appropriate resources for the institutions that would let them function properly and perform their tasks is also objectionable. According to the provisions of the act (in particular Art. 4, Art. 90 of the Act on CBA), activities of CBA are financed from the state budget, and salaries of its officers are regulated each year by the budget act. The Bureau has no guaranteed level of financing and is not allowed to raise resources from its activities (e.g. from the property originating from crimes uncovered during investigations – such solutions are present in some countries), except participation in some programs financed by the European Union – but they are not a significant source of financing and remain outside the main fields of activities of the bureau. So the CBA budget is determined separately each year, and its amount fully depends on political will of the government and the parliamentary majority (which also is not supportive for political independence of the institution).

There are not too much available information on the Bureau which is a secret service, but based on open reports presented to the Parliament, it can be concluded that the service has no guarantees of appropriate conditions of functioning. Let's compare the results of the activities of the Bureau from 2007 (it was created in mid – 2006, so the results for the year are not too representative, but it can be assumed that the bureau reached its full operational capacity a year later) with data from 2013.

Table 4. Basic data on the functioning of CBA in 2007 and in 2013

No	Heading	2007	2013	Change
1.	CBA budget	119,9	111,5	- 8%
2.	Budget spending (in mln PLN)	91,9	111,5	18%
3.	Total employment (officers and civil employees)	607	883	31%
4.	Number of cases conducted (operational activities and preparatory proceedings)	387	964	60%
5.	Number of control proceedings	38	251	85%
6.	Estimated number of audited financial disclosures of persons holding public functions (no precise number available)	702	535	- 31%
7.	Number of charges presented	387	2233	83%
8.	Number of persons charged	169	550	69%

Source: the Central Anti-Corruption Bureau

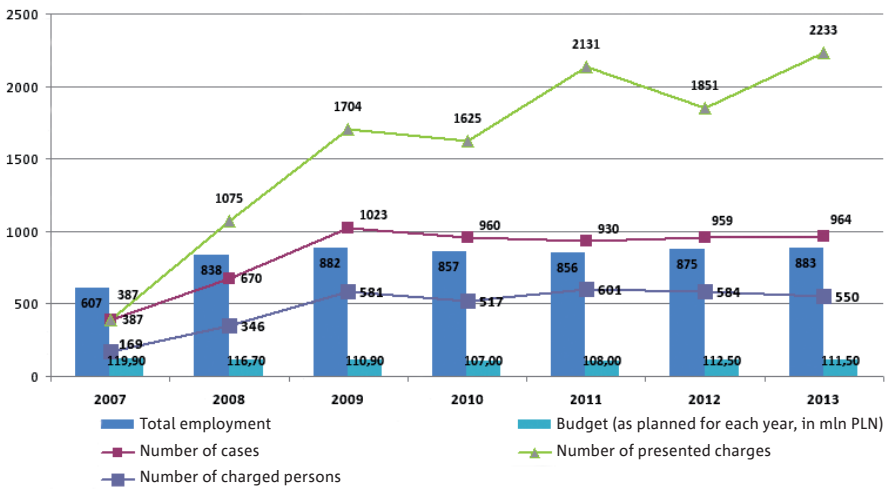
The simple compilation of data shows that during less than seven years from the moment when the Bureau reached its full operational capacity, its budget fell, while its budget spending and the number of conducted cases and control proceedings (i.e. the main activities of the Bureau) rose. Also the number of charges presented and of persons charged rose significantly. In the same period of time, the number of employed officers and civil workers also rose. On the one hand, the data can be seen as a sign of higher effectiveness of the Bureau: much higher number of cases are conducted and much more charges are presented, while the level of financing is lower and the employment rose only moderately. But at the same time, it is hard not to conclude that it was done by cutting costs: analysing the data for seven years, we can see that the number of cases conducted, as well as the number of CBA employees and the budget of the institution, remain practically unchanged since 2009.

In 2009, CBA probably reached its maximum capacity in the existing institutional and legal conditions. It is worth noting that the number of audited financial disclosures of public officials decreased. And we should remember that auditing financial disclosures is, along with uncovering and prosecuting corruption crimes, one of the main tasks of CBA. The decrease of the number of audited financial disclosures from 1581 in 2008 to 156 in 2009, and in the following years more or less stable number of 500–600 financial disclosures audited each year can be seen as rationalisation and systematisation of this function of the Bureau – in Poland, each year financial disclosures are filed by almost 600 thousand persons holding public functions. Of course, CBA cannot audit all of them, but planning random audits, probably it can effectively audit exactly 500–600 of them each year. On the other hand, the decrease in already

relatively low number of audited financial disclosures (as compared with their total number) can indicate that in this field of its activities the Bureau made savings, in order to focus on its operational tasks.

Graph 1. Selected indicators of activities led by the Central Anti-Corruption Bureau in the years 2007–2013

Source: the Central Anti-Corruption Bureau



But the general conclusion from the reports on CBA activities in the recent years, having in mind their nature and aims, is obvious – the institution is underfinanced. The available funds are not sufficient for its effective functioning. The Bureau cannot also be expected to systematically improve qualifications of its officers and civil employees, though basic training activities are conducted, as shown by the reports. The limited resources for CBA activities are not sufficient to significantly improve the quality of work of its officers[17]. In our opinion, Poland fails to implement Art. 36 of the Convention also in its part concerning granting to specialised anticorruption bodies resources needed to carry out their tasks and providing their officers with appropriate training.

[17] This and some of the other recommendations concerning CBA were already presented in the past, e.g. in G. Makowski, *Centralne Biuro Antykorupcyjne*, [in:] A. Kobylińska, G. Makowski, M. Solon-Lipiński, *Mechanizmy przeciwdziałania korupcji w Polsce. Raport z monitoringu*, ISP, Warsaw 2012, pp. 187–210.

5. Recommendations

The Central Anti-Corruption Bureau was created as the main instrument of implementation of the United Nations Convention Against Corruption. But the analysis of the provisions of the Act on the Central Anti-Corruption Bureau and of the practice of its functioning shows that Poland fails to fully implement Art. 36 of the Convention. The problematic issues are: (1) insufficient guarantees of political independence of the institution and (2) providing its officers with appropriate trainings and granting to the institution resources needed to carry out its tasks. The same conclusions were already presented in previous reports on anticorruption policy in Poland and CBA[18].

5.1. Strengthening the independence of CBA

a. **When the guarantees of independence are concerned, first of all the provisions concerning nominating and dismissing the head of CBA should be changed.** Art. 7 par. 1 pt. 3 of the Act on CBA, stating that the head of CBA and his or her deputies should show flawless moral, civil and patriotic attitudes, should be deleted, because it introduces an unclear criterion that can be abused (as shown by the past practice).
b. **Requirements for candidates for the post of the head of CBA** and his or her deputies should be tightened. In particular, using as a model the provisions of the Act of November 21, 2008 on civil service (O.J. of 2008, no. 227, item 1505), a new requirement should be introduced – candidates for the post of the head of CBA may not be members of political parties or participate in their activities during the period of five years before taking the function.
c. In view of the special nature of CBA and its tasks, **a deeper reform of its organisation should be considered** and return to the solution presented during preparation of the draft act, namely **electing the head of CBA by the Parliament** (as in the case of the head of the Supreme Audit Office) rather than by one-person decision of the Prime Minister[19].

[18] See *ibidem*.

[19] On the matter, constitutional lawyers disagreed whether the head of an institution that is not directly rooted in the provisions of the Constitution, and so is in principle a government administration body, should be in fact elected by the Parliament. Opponents of the solution indicated that it would undermine the division of power between legislative and executive bodies. But other experts, including renowned constitutional lawyer, professor Piotr Winczorek, argued that no such problems would occur, because the division of competencies between the government and the Parliament would not be endangered. The head of CBA could be elected by the Parliament, and after taking the office he or she could report solely to the Prime Minister (see Winczorek, *Niekonstytucyjność powoływania szefa CBA przez Sejm – dyskusyjna*, Puls Biznesu, 22.03.2006 r.)

d. Another solution supporting political independence of the Bureau concerns the budget of CBA. **Like in the case of the Supreme Audit Office, draft budget could be prepared in cooperation between the head of CBA and the Council for Special Services (government advisory body affiliated to the Prime Minister) and the minister of finance.** The budget agreed between the three parties would be binding mainly for the government, but it would be also hard to change it during parliamentary proceedings. In this solution, the head of CBA would have greater and more direct influence on the budget.

5.2. Strengthening CBA capacities

To provide the employees of the Bureau with appropriate conditions for improving their qualifications and to grant resources for effective carrying out of its tasks, a simple solution is needed – the Bureau should have bigger funds at its disposal. Making the spending for CBA more appropriate would be easier if the budget was prepared in the way described above. But political will, and thus time, is needed to introduce the changes, and the CBA budget should be reformed after deepened analysis of its functioning. As already mentioned, even a simple review of publicly available reports on CBA activities shows that the budget of the institution is too small.

Grzegorz Makowski

PRACTICAL FUNCTIONING OF THE PROVISIONS OF THE CONVENTION

In the first part of the report, we already presented statistical data on committed offences for relevant provisions of UNCAC. To some extent, they illustrate the level of implementation of the provisions of the Convention. To present its reliable assessment, a deeper analysis would be needed that exceeds the scope of this report. As we already indicated, the report was prepared based on the knowledge and works of experts, and after analysing available materials. No field research was conducted. But to follow the model of report proposed by Transparency International and UNCAC Civil Society Coalition, as an example we will present several official statistics and particular cases showing how the Convention works.

The compilation of data and descriptions of cases presented below come from materials of the Ministry of Justice, prosecutor offices, and the paper *Map of Corruption. The state of corruption crime in Poland in 2013* prepared by the Central Anti-Corruption Bureau, as well as from available materials, expert opinions and literature[20].

[20] Since 2004, CBA prepares statistics on corruption crimes. Reports on the matter are available at the address http://www.antykorupcja.gov.pl/ak/wydawnictwa-cba [access: 10.12.2014].

Table 5. Number of registered corruption offences and convictions for selected provisions of UNCAC

UNCAC provision	Provisions of the Polish law	Number of registered offences			Number of valid convictions		
		2011	2012	2013	2011	2012	2013*
Art. 15. Bribery of national public officials Art. 16. Bribery of foreign public officials and officials of public international organisations	Art. 228 of PC (accepting bribes)	3676	4128	6124	346	304	340
NOTE! Available data did not allow to give separate number for bribery of foreign public officials	Art. 229 of PC (giving bribes)	3605	3235	2881	1975	1644	1666
Art. 18. Trading in influence	Art. 230, 230a of PC	1171	1226	1106	330	340	212
Art. 21. Bribery in the private sector	Art. 296a	153	158	447	11	17	16
Art. 19. Abuse of functions	Art. 231 § 2 of PC	772	2083	4423	170	153	221

* Number of convictions in the courts of the first instance. The parties could appeal the decisions.
Source: the Central Anti-Corruption Bureau

The above table is based mainly on data from materials of CBA that since 2009 more thoroughly analyses the scale and the nature of corruption crimes in Poland. It contains the basic types of offences matching the analysed articles of the Convention that were at least partially implemented in the Polish legal system. The picture will be a bit more complete if we add data on the offences of laundering of proceeds of crime taken from a material prepared by a law firm analysing the problem of financial abuses[21]. They deal with slightly different categories of information, so we need to present them in a separate table.

[21] Report. Money laundering, Chmielniak Adwokaci in cooperation with Kroll Ontrack, Warsaw 2014.

Table 6. Number of preparatory proceedings conducted by law enforcement agencies and of valid convictions related to offences of laundering of proceeds of crime

UNCAC provision	Polish regulations	Number of preparatory proceedings			Valid convictions		
		2011	2012	2013	2011	2012	2013
Art. 23. Laundering of proceeds of crime	Art. 299 of PC	192	208	212	26	30	37

Source: Report. Money laundering, Chmielniak Adwokaci in cooperation with Kroll Ontrack, Warsaw 2014.

Table 6. Examples of major investigations led by the Central Anti-Corruption Bureau in 2011–2013

Corruption offence	Description of cases
Trading in influence	**Abuse of powers and attestation of an untruth in documents by local government official** In 2013, an employee of the Voivodeship Centre for Road Traffic in Lublin was arrested, who invoking his influence in his workplace, undertook to arrange passing of exams for driver license in return for material advantage. Owners of driving schools and one of examiners were also engaged in the illegal activity. So far, 27 persons have been arrested, and three of them were temporarily detained, 22 were released on bail, and one is under police supervision. The persons were presented with 103 charges of invoking influence and influence peddling.
Bribery	**Accepting material advantage by officials from the Centre for IT Projects of the Ministry of Internal Affairs** The investigation conducted since July 2011 uncovered so far the highest material advantage accepted in Poland in the amount of 1.5 mln PLN. The group of suspects includes: the former director of the Centre for IT Projects of MIA (CPI), and earlier director of the Communications and IT Bureau of the Police Headquarters, former deputy director and former head of the promotion division of CPI, and sales directors from big IT companies. In the years 2007–2011, the main suspect accepted from representatives of IT companies undue advantages in return for favourable treatment in tenders conducted by both units headed by him. The bribes were transferred to bank accounts of members of his family. They were also given in the form of exotic foreign trips and household equipment. During the proceedings, six persons were arrested and eight decisions to present charges (e.g. abuse of powers, negligence, bribery, fencing and money laundering). Chattel of total value of approx. 1.2 mln PLN were seized.

Corruption offence	Description of cases
Abuse of functions	**Abuse of powers and attestation to an untruth in documents by local government official** In 2013, CBA officers arrested a local government official from Lubuskie voivodeship responsible for investments and public tenders, and a businessman and his wife. The materials gathered during investigation led under supervision of the regional prosecutor office in Zielona Góra show that the businessman who performed for the municipality a construction investment, presented to the official false invoices and untruthful notice of selling his claim to one of cooperative banks, as a result of which the bank paid him over 10 mln PLN. The official concealed requests for payment of the amount resulting from taking over of the debt from the businessman that he received from the bank. In the case, seven suspects, including the official from Lubrza municipality and the president of the Cooperative Bank in Żary, were presented with 24 charges. Two suspects were temporarily detained.
Obstruction of justice	**Obstructing criminal proceedings** In 2011, an investigation conducted under supervision of the regional prosecutor office in Łódź was completed and 27 persons were presented with charges. Among suspects, there are nine persons charged with membership in an organised armed criminal group, and four solicitors, a prosecutor and four court physicians. In the case, 63 corruption charges were presented. The investigation concerned obstructing criminal proceedings through obtaining and using untruthful medical documents, corrupting physicians, prosecutors and solicitors in order to avoid criminal liability or obstruct using preventive isolation measures.

Source: Information on the results of CBA activities in 2011–2013.

Grzegorz Makowski

PROSPECTS FOR ENHANCING IMPLEMENTATION OF UNCAC IN POLAND

Poland has well-developed legal and institutional infrastructure which can be used to counteract corruption and prosecute corruption crimes, as witnessed by not only the assessment of implementation of the Convention, but also by analytical reports of organisations such as GRECO, OECD or by the recent report of the European Commission[22].

However, there are several more or less important deficiencies, such as the lack of regulations to protect whistleblowers or appropriate guarantees for proper functioning of CBA, that were indicated in this report. They can be remedied in foreseeable future if only the decision-makers show appropriate determination. In mid-2014, the government accepted the Government Programme to Counteract Corruption for 2014–2019[23]. The document is relatively general, and at the time when the report was prepared, it was only started to be made more specific and implemented. But the programme contains several declarations that let us hope that the issues indicated by us can be considered and solved by the government within next years.

[22] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_poland_chapter_pl.pdf [access: 12.12.2014].

[23] See the Resolution no. 37 of the Council of Ministers of April 1, 2014, on the Government Programme to Counteract Corruption for 2014–2019.

Notes about the Authors of the Report

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The Stefan Batory Foundation is a member of the international UNCAC Civil Society Coalition, acting for effective implementation of the United Nations Convention Against Corruption.

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Poland signed the United Nations Convention Against Corruption (UNCAC) in 2003, and ratified it in 2006. This report analyses the implementation of selected articles contained in chapter III of the Convention (Criminalisation and law enforcement) that are crucial for anticorruption policy in Poland. It supplements the official evaluation of UNCAC implementation in Poland, performed jointly by the Polish government and the United Nations Organisation.

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