

Original article

## Civil supervision and control over special services' activities

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### INFORMATION

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### ABSTRACT

The article addresses issues related to the civil system of democratic supervision and control over special services in Poland since the political transformation. The system is based on the supervision of the executive authority, which also sets the directions of activities, Parliamentary control – mainly with the help of the Committee for Special Services, judiciary supervision assessing their actions in terms of possible abuse of powers or failure to fulfill their obligations. The functionality of some legal solutions in the field of supervision and control over the services was assessed. The dominant role of the Prime Minister in exercising supervision over the special services was pointed out.

### KEYWORDS

control, supervision, authorities, services, powers

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## Introduction

The control of special services can be discussed in a broader sense – covering political and social influences and narrower – reduced to the legal and administrative approach as a legal means of supervision [1, p. 116]. Supervision includes all elements of the control (observation, checking, assessment and diagnosis, remedial postulates, conclusions for the future) and the possibility of a binding effect (authoritarian interference) on the activity of a given entity to modify this activity in the direction determined by the supervisor within his/her competences [See: 2, p. 18-25].

Due to the importance of the special services' activity in the national security system, with the simultaneous high degree of confidentiality of their operations, constant supervision and control of the political authorities, i.e., the government and parliament as well as judicial authorities, is necessary. According to the general assumptions of the control over special services:

- the government decides on the directions of their activity and supervises them on an ongoing basis,
- parliamentary control over their activities executed by introducing laws, setting the budget, requesting information and questioning persons responsible for managing the services,
- the judiciary exercises control over the application of special powers of these services and judges their abuses [3, p. 140].

## 1. Supervision by the Prime Minister

The current control system over special services is the effect of activities related to the political transformation after 1989 and the creation of new services. The role of the head of government in today's system is dominant. However, it should be noted that at the time of establishing the Office for State Protection (Polish abbrev. UOP), although its head was subordinate to the Minister of Internal Affairs, the legislator specified that "the Prime Minister at the request of the Minister of Internal Affairs defines in detail the structure and tasks of the Office for State Protection" [4, Art. 3] and appoints the Head of the UOP at the request of the Minister of Internal Affairs after consulting the Political Advisory Committee to that Minister [4, Art. 4]. In the years 1990-1996, ministers exercised direct supervision over the special services. The Military Information Services (Polish abbrev. WSI) were subordinate to the Minister of National Defense, and the Office of State Protection – to the Minister of Internal Affairs.

With the separation of the Office for State Protection from the Ministry of Internal Affairs' structures on October 1, 1996, the Head of the UOP was directly subordinated to the Prime Minister. The role of the then head of government in the system of supervision over the services was specified by:

- statutory provision on direct supervision over the Head of the Office for State Protection,
- directing and coordinating the activities of the Minister of National Defense as a member of the government to which the Military Information Services were subordinated,
- acting as the chairman of the College for Special Services.

The Prime Minister had the powers of supervision over the Head of the UOP:

- organizational in nature – he/she gave the statute by way of an ordinance, agreed to make structural changes in the UOP (including merging, transforming units or local departments) and defined the territorial structure of the UOP,
- in personnel terms – he/she appointed and dismissed the Head of the UOP and his/her deputies, performed the function of an appeal body against certain decisions of the Head of the UOP, and appointed to officer ranks,
- program-related – he/she defined the directions of activities, issued annual guidelines on activities and cooperation with other entities performing tasks in the security system, controlled the implementation of tasks related to the legislative process related to the special services' operation [5, p. 63].

A new consultative and advisory body to the Council of Ministers on programming, supervision, and coordination of the activities of the UOP and the WSI with other services in the field

of national security protection, was established by the amendment to the Act on the State Protection Office of 1996 [6]. At that time, the College for Special Services was set up and the President of the Council of Ministers became its chairman. The College's tasks included formulating assessments or expressing opinions on:

- appointment and dismissal of the UOP and WSI heads,
- setting directions and action plans for special services,
- detailed draft budgets of special services before the Council of Ministers examine them,
- creating and changing central plans for the protection of state bodies and institutions, as well as the national economy,
- performance of tasks assigned to special services,
- coordination of the special services' activities with the Police, Military Police, Border Guard, as well as their cooperation in the field of state security,
- cooperation of state bodies with special services [5, p. 64-65].

The College, besides the Prime Minister as its chairman, was composed of the Minister of the Interior and Administration, the Minister of National Defense, the Head of the Office for State Protection, the secretary of the National Defense Committee, and the chairman of the standing committee of the Council of Ministers responsible for internal and external national security. Moreover, meetings of the College were attended by the WSI Head, a secretary appointed by the Prime Minister, and a representative of the President of the Republic of Poland [5, p. 66].

Currently, the College operates pursuant to Article 11 of the Act on the Internal Security Agency and the Foreign Intelligence Agency. It is a consultative and advisory body in matters of programming, supervising, and coordinating the operations of the Internal Security Agency, the Foreign Intelligence Agency, the Central Anticorruption Bureau, the Military Counterintelligence Service, the Military Intelligence Service, and the activities of the Police, Government Protection Bureau<sup>1</sup>, Border Guard, and Military Gendarmerie undertaken to protect the state security, the Prison Service, the Customs Service, tax offices, tax chambers, tax inspection authorities, tax information authorities, as well as reconnaissance services of the Armed Forces of the Republic of Poland [7]. Article 12 of the said law sets out the specific tasks of the College.

Under the Act on the Internal Security Agency and the AW, the College for Special Services currently includes the Prime Minister – as a chairman, a college secretary, members: the Minister responsible for internal affairs, the Minister responsible for foreign affairs, the Minister of National Defense, the Minister responsible for public finance, the Head of the National Security Bureau, as well as the Minister responsible for coordinating the activities of special services (if appointed by the Prime Minister). The Heads of the ABW, AW, CBA, SKW, SWW, and the chairman of the Parliamentary Committee for Special Services also participate in the College meetings. The President of the Republic of Poland may delegate his/her representative to participate in the College meetings. At the same time, the chairman may invite

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<sup>1</sup> In Articles 11 and 12, in accordance with the Act of 8 December 2017 on the State Protection Service (Journal of Laws of 2018, item 138) [Ustawa z dnia 8 grudnia 2017 r. o Służbie Ochrony Państwa (Dz. U. z 2018 r., poz. 138)], the words “Government Protection Office” shall be replaced with the words “State Protection Service”; pursuant to the Act of January 26, 2018 – Regulations Introducing the Act on the Marshal's Guard (Journal of Laws of 2018, item 730) [Ustawa z dnia 26 stycznia 2018 r. – Przepisy wprowadzające ustawę o Straży Marszałkowskiej (Dz. U. z 2018 r., poz. 730)], the words “Marshal's Guard” were added.

the chairmen of appropriate parliamentary committees, representatives of state bodies, and other persons whose participation is necessary due to the subject matter of the meeting to take part in meetings.

New special services' tasks were imposed by the Act of January 22, 1999, on the protection of classified information [8], and therefore also by the Prime Minister. Special services have been obliged to create a system for the protection of classified information. Pursuant to the Act, the services gained the power to control other state bodies and became a party to international agreements on the protection of classified information. The increased scope of tasks and powers of officers made it necessary to reorganize the organizational structures of the services, which, in connection with Poland's entry into NATO, justified the need for the government to supervise those undertakings. Thus, the same law established the Committee for the Protection of Classified Information, operating at the Council of Ministers under the chairmanship of the Prime Minister. It functioned in the supervision and coordination system in 1999-2002, mainly duplicating the scope of activities and the composition of the College for Special Services [5, p. 66-67]. The decision to liquidate the Committee for the Protection of Classified Information was dictated by the desire to strengthen the role of the College as a center covering the entire sphere of special services' activity, also acting as state security services [1, p. 125]. The Act on the protection of classified information, as part of the new duties of the Prime Minister, also obliged the head of the government to carry out checks on verification procedures, culminating in a refusal to issue a security clearance. These inspections were carried out from 1999 to 2001 – until the Act was amended. Persons to whom the services refused to issue a security clearance could appeal against this decision to the Prime Minister, who, after carrying out actions provided for in the appeal procedures, could order the service to issue a security clearance [5, p. 67-68].

On January 1, 1997, there was created the position of the Minister-Coordinator for Special Services – a member of the Council of Ministers – to whom the Prime Minister delegated significant powers related to the function of supervision and coordination of special services' activity. The legal status of the new minister raised legal controversies. Despite the broad scope of activities, he/she was not equipped with the legal instruments of control and coordination. Performing the function of a coordinator could not violate the prime minister's statutory responsibility for the activities of the Head of the Office for State Protection and the Minister of National Defense for the activities of the Military Information Services. The special services coordinator's role was mainly related to the secretary of the College for Special Services [5, p. 65].

All the 1996-2006 reforms concerning special services have brought the Prime Minister's dominant position in the system of programming and control over special services. The content of the provisions contained in several normative acts, including the Act on the Council of Ministers, the Act on Government Administration Departments, and the competence acts (the ABW and AW Act and the CBA Act), is decisive. In the light of these provisions, the head of government has powers that constitute a set of measures enabling the Prime Minister to program, supervise, and coordinate the special services' activity [3, p. 161]. According to Article 33b (1) of the Act on Government Administration Departments, the Prime Minister issues binding guidelines and orders to heads of offices, including the Heads of ABW, AW, and CBA [9]. Also, the provisions of the Act on the Council of Ministers give the Prime Minister numerous powers for supervision over special services, e.g., requesting information, reports from the head of the central office, or employees of government administration bodies notifying the competent head of the central office [10]. The Prime Minister's powers in the field

of supervision over special services were included primarily in the so-called competence acts, i.e., the Act on the Internal Security Agency and the AW, the Act on the Central Anti-Corruption Bureau, the Act on the MCS and the SWW. Pursuant to the laws as mentioned above, the Prime Minister:

- 1) specifies, by way of guidelines, the directions of activities of the Internal Security Agency, the Foreign Intelligence Agency, and the Central Anti-Corruption Bureau [7, Art. 7 (1); 11, Art. 12 (1)],
- 2) approves of the directions of activities of the Military Counterintelligence Service and the SWW established by the Minister of National Defense by way of guidelines [12, Art. 7 (1)],
- 3) to coordinate activities in the field of state security and defense protection, issues binding guidelines and requests information and opinions from [7, Art. 13 (1)]:
  - the Minister of National Defense – about the activities of the Military Counterintelligence Service and the Military Intelligence Service,
  - the Head of the Internal Security Agency – about the activities of the Internal Security Agency,
  - the Head of the Foreign Intelligence Agency – about the activities of the AW,
  - the Head of the Central Anticorruption Bureau – about the activities of the CBA,
- 4) to ensure the required cooperation of special services, it may request information related to the planning and performance of the entrusted tasks from the Heads of ABW, AW, CBA, a request for information to be forwarded to the Head of the Military Counterintelligence Service or the SWW requires a simultaneous notification to the Minister of National Defense [7, Art. 13 (6)],
- 5) appoints the Head of the Internal Security Agency, the Head of the AW, the Head of the CBA – after consulting the President of the Republic of Poland, the College for Special Services and the Parliamentary Commission for Special Services [7, Art. 14 (1); 11, Art. 6 (1)],
- 6) appoints and dismisses the deputies of the Head of the Internal Security Agency, the Head of the Internal Security Agency, and the Head of the CBA – at the request of the Head of the relevant Agency, after consulting the Parliamentary Committee for Special Services [7, Art. 14 (2); 11, Art. 6 (4)],
- 7) appoints and dismisses the Head of the SKW and the Head of the SWW at the request of the Minister of National Defense – after consulting the President of the Republic of Poland, the College for Special Services, and the Parliamentary Committee for Special Services [12, Art. 13 (1)],
- 8) gives consent for the cooperation of the heads of ABW, AW, SKW, and SWW with the competent authorities and services of other countries to carry out the tasks of their services and agencies; in the case of the Military Counterintelligence Service and the SWW, the Prime Minister consults the Minister of National Defense before giving his consent [7, Art. 8 (1, 2); 12, Art. 9 (1, 2)],
- 9) grants, by way of ordinances, to each of the Agencies (ABW and AW) and to the Central Anti-Corruption Bureau a statute specifying their internal organization [7, Art. 20 (1); 11, Art. 11 (1)],
- 10) gives consent to the granting of the statute by the Minister of National Defense, separately for the SKW and the SWW [12, Art. 21],

- 11) gives consent to the handling of cases by ABW, AW, SKW and SWW, which are not in the competence of these services [7, Art. 22a (5); 12, Art. 27 (5)],
- 12) agrees that the officers of the ABW, AW, SKW, and SWW may conduct certain types of economic activity, usually prohibited for them [7, Art. 79a (2) (3); 12, Art. 41 (3) (4)],
- 13) issues many orders and regulations regarding the organization and operation of special services, including:
  - specifies, by way of an ordinance, the forms and procedure of cooperation of the Military Counterintelligence Service and the SWW with the relevant authorities, services, institutions authorized to perform operational-search activities, taking into account the properties of these authorities, services and institutions [12, Art. (1) (4)],
  - defines, by way of an ordinance, the method of documenting operational control as well as storing and submitting applications and orders [7, Art. 27 (14); 11, Art. 17 (18); 12, Art. 31 (16)],
  - defines, by way of a regulation, the scope and mode of cooperation as well as a detailed division of competences between ABW, AW, SKW, SWW, and CBA [7, Art. 42 (2)],
  - also specifies, by means of regulations, the methods of personal data processing, model documents applicable to the processing of data and other documents [11, Art. 22 (10)].

Taking into account the above and many other duties of the head of government, it can be concluded that if his/her direct supervision over the services seems difficult [See: 13], then the appointment of a special office – the Minister-Coordinator for Special Services or delegation of the Prime Minister's powers in this respect to the Minister of Internal Affairs is a good solution. An example may be the Regulation of the Prime Minister of November 24, 2011 [14], or the Regulation of February 28, 2013, in which the supervision over the services was entrusted to the Minister of the Internal Affairs [15]. Another minister responsible for the supervision and coordination of special services, on behalf of the Prime Minister and under his/her authority, performed various tasks [16]:

- 1) developed, conducted the process of arrangements, public consultations or opinions, and submitted for consideration drafts of assumptions of bills, laws, regulations and other legal acts, as well as government documents concerning special services,
- 2) could request information from the heads of special services related to the planning and performance of their tasks,
- 3) ensured the cooperation of special services to implement their statutory tasks,
- 4) consented to the cooperation of the Internal Security Agency and the Foreign Intelligence Agency with the competent authorities and services of other countries, and in the case of the Central Anticorruption Bureau – also with international organizations,
- 5) read the information:
  - which may be of significant importance for the security and international position of the Republic of Poland, provided by the special services, and decided whether the Head of the Internal Security Agency or the Head of the AW would provide the above-mentioned information to ministers, if they concern matters

- falling within the scope of the competent minister's activities; similarly in the case of the Head of the Military Counterintelligence Service and the SWW, but before making a decision, he had to notify the Minister of National Defense,
- a representative for the control of personal data processing by the Central Anticorruption Bureau on violation of the provisions of the Act of June 9, 2006, on the Central Anticorruption Bureau and provisions on the protection of personal data,
  - from the Central Anticorruption Bureau in the field of analytical activity regarding phenomena occurring in the area of its properties,
- 6) read and gave opinions on the annual reports presented by the representative for the control of personal data processing by the CBA,
  - 7) gave consent for the Head of the Military Counterintelligence Service or the Head of the SWW to cooperate with the competent authorities and services of other countries to perform the tasks of their services – after consulting the Minister of National Defense,
  - 8) analyzed the statements made by the Head of the Central Anticorruption Bureau and his deputies to the Prime Minister, referred to in Art. 72 (3) of the Act of June 9, 2006 on the Central Anti-Corruption Bureau<sup>2</sup>,
  - 9) made the arrangements referred to in Article 36 (3) of the Act of June 6, 2006 on the Central Anticorruption Bureau: “The inspection or its individual activities carried out in facilities managed by the Chancellery of the Sejm and the Senate Chancellery may be carried out in agreement with the Marshal of the Sejm of the Republic of Poland or the Marshal of the Senate of the Republic of Poland, respectively. The arrangements are made by the Prime Minister, and in the absence of such arrangements, the action cannot be performed”,
  - 10) performed activities resulting from the service relationship of the Head of the Internal Security Agency, the Head of the AW, the Head of the CBA, excluding their appointment and dismissal.

The scope of the Minister's activity was not specified in such detail as his/her successor – the Minister Coordinator for Special Services Mariusz Kamiński, who received specific powers in the field of:

- supervising and controlling the special services' activities,
- coordinating the special services' activities,
- supporting the Council of Ministers in shaping the main directions of the government's policy regarding the special services' activities.

The Minister's tasks also include conducting international cooperation with authorities of other countries and international institutions dealing with the supervision, coordination, and control of special services, organizing the information policy of the special services system and setting the assumptions and directions of activities undertaken in this field by the services, conducting research and studies on the system of management of special services and their control in order to optimize solutions used in Poland. To perform the tasks, the

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<sup>2</sup> Art. 72 (3) provides that the officers of the CBA submit financial statements to the Head of the CBA, on the terms and in the mode of the Act of August 21, 1997, on the Restriction of Business Activity by Persons Holding Public Functions. The Head of the CBA and his/her deputies submit a declaration to the Prime Minister, who analyzes the data contained therein.

Minister was granted several more detailed rights, e.g., he/she may request information, including classified documents, analyzes, and periodic reports, or concerning a particular case or type of case, from the heads of special services. Besides, the Minister cooperates with other authorities, and government administration bodies assist in the implementation of his/her tasks [17].

## 2. Parliamentary control

The first structure of parliamentary control of special services, which was organizationally separated, was the Sejm Subcommittee for the Control over Special Services. It was established in 1991 on the initiative of the Parliamentary Committee of Internal Affairs. Although the necessity to establish a permanent Sejm commission for parliamentary control over special services was noticed at that time, due to the constant political crisis that existed in the Sejm of the 1<sup>st</sup> term (1991-1993), it was not possible to create such a commission. It was only during the 2<sup>nd</sup> term of the Sejm (1993-1997) that it was possible in 1995 to set up the Sejm Committee for Special Services [1, p. 117]. In accordance with the Annex to the Resolution of the Sejm of the Republic of Poland of July 30, 1992 – Regulations of the Sejm of the Republic of Poland (The scope of activity of parliamentary committees, point 2), the Committee's activities include [18]:

- giving opinions on draft laws, regulations, ordinances, and other normative acts relating to special services, including those regulating the activities of these services,
- giving opinions on the directions of activities and considering the annual reports of the heads of special services,
- giving opinions on the draft budget for special services,
- considering the annual report on its implementation and other financial information of special services,
- issuing opinions on applications for the appointment and recall of people to the positions of heads of special services and their deputies,
- getting acquainted with the information of special services about particularly important events in their activities, including suspected irregularities in the activities of special services and suspected violations of the law by them, through access and inspection of information, documents and materials obtained as a result of performing statutory tasks, with the provisions of the Act on the Protection of Classified Information and the laws that regulate the activities of special services,
- evaluation of the cooperation of special services with other authorities, services, and institutions authorized to perform operational and reconnaissance activities in the scope of actions taken by them to protect the national security,
- assessment of cooperation between special services and the Armed Forces, government administration bodies, law enforcement bodies, as well as other state institutions and bodies of local government units, competent authorities and special services of other countries,
- assessment of classified information protection and examination of complaints relating to the activities of special services.

The subjective scope of the Commission's activities is defined in Art. 142 (2) of the Sejm Regulations, according to which the name of special services belongs to five state services constituting a part of the government administration: the Internal Security Agency, the Foreign



Intelligence Agency, the Military Counterintelligence Service, the Military Intelligence Service, and the Central Anticorruption Bureau (exactly the same state services are referred to as “special services” in Article 11 of the ABW and AW Act).

Pursuant to the Sejm Regulations, the Committee for Special Services consisted of no more than 9 deputies (currently no more than 7). Their number is determined by the Sejm by way of a resolution. The nominations of candidates for members of the Committee shall be made by the chairmen of deputies’ clubs or groups of at least 35 deputies to the Marshal of the Sejm. The Sejm, at the request of the Presidium of the Sejm, after consulting the Council of Seniors, selects the composition in a joint vote, i.e., approves or rejects all candidates [18, Art. 137 (1, 2, 3, 4)]. Meetings of the Committee for Special Services are secret, while joint meetings held with other committees may be open to the public. The functions of the chairman of the Committee and his/her deputies were performed by members of the Committee for 6 months [18, Art. 138 (1a), Art. 139 (1, 2)]. Since 2001, the chairmen of the Commission were its members from the opposition. In April 2009, that practice was abandoned and a representative of the ruling coalition or a representative of the opposition was appointed to the position of the Commission chairman alternately [3, p. 171]. The meetings of the Committee for Special Services may not be attended by deputies who are not its members, because only membership in this Committee is subject to the requirement of having access to classified information specified as “secret” or “top secret”, which results from the provisions of the Act of August 5, 2010 on the Protection of Classified Information [18, Art. 138 (4)]. Art. 142 (3) of the Sejm Regulations, the chairman of the Committee shall invite persons other than those specified in Art. 153 (1) to participate in the work of the Committee, through or after notifying the Marshal of the Sejm and, if necessary, the President of the Council of Ministers, the Minister of National Defense, the Minister of Internal Affairs, the Head of the Internal Security Agency, the Head of the AW, the Head of the CBA, the Head of the SKW, the Head of the SWW, and the Minister appointed to supervise the special services’ activity<sup>3</sup>. Art. 153 (1) gives the possibility of summoning people from the management of special services to the meetings of the Committee for Special Services when matters concerning the scope of their activities are considered.

Under the Appendix to the Sejm Regulations, apart from requiring the presence of heads of services, the Committee has the right to access information and inspect documents and materials obtained in the effect of the performance of statutory tasks by services. The condition is compliance with the provisions on the protection of classified information and the Acts regulating the activities of the services. However, the competence Acts regarding the ABW, AW, SKW, and SWW lack clearly defined duties of the heads of these services towards the Sejm. There is a general provision that the activities of the heads of these services “are subject to the control of the Sejm [7, Art. 3 (3); 11, Art. 5 (2); 12, Art. 3 (3). See: 3, p. 176]. On the other hand, the obligation to inform the Sejm takes the form of a task which consists in providing “competent authorities” with information on threats identified by the services. Only in the Act on the CBA, the task of this service is “to conduct analytical activities regarding phenomena occurring in the area of the CBA’s competence and provide information in this respect [...] to the Sejm and the Senate” [3, p. 177; 11, Art. 2 (1) (6)], and the Head of the CBA presents information about the activities of the CBA to the Sejm and the Senate by

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<sup>3</sup> Art. 153 (1) states: “At the request of the Presidium of the Commission, ministers and heads of the supreme organs of state administration, as well as heads of other state offices and institutions are obliged to submit reports and provide information and participate in committee meetings at which matters concerning their scope of activity are considered”.

March 31, except for information to which the provisions on the protection of classified information apply [3, p. 177; 11, Art. 12 (4)]. The power laws limit the provision of information to the Committee for Special Services:

- 1) "the discretion of the heads of special services as to the scope of information (materials, documents) submitted to the special commissions,
- 2) the statutory prohibition of disclosing classified information outside the structures of services that relates to the most important elements of the operational work of special services" [3, p. 182].

Although the scope of issues remaining in the sphere of activity of the Committee for Special Services is extensive, its activity is mainly consultative. Based on the information obtained, the Committee only expresses its opinion or takes a specific position. At the same time, it can use all the instruments available to parliamentary committees, and thus pass opinions, reports, desiderata, draft resolutions, resolutions, statements, appeals, and declarations of the Sejm. Acting like that, it draws the Sejm's attention to the problem it is diagnosing, expressing approval or objection to the actions of the special services. Under the provisions of the Sejm regulations, Members of the Council of Ministers supervising services are required to respond to the Committee's position within a specified period. However, the statements of the Committee, assessments of the activities of special services, suggestions for changes, have only a postulation value and do not constitute a legal requirement. The Committee's competencies lack resources appropriate for supervision institutions, which would allow for sovereign interference in special services functioning. Even if the Commission finds irregularities in the services' activities, it cannot issue binding guidelines or orders, but only address requests to supervisors of individual services or inform the Sejm about its findings. On the other hand, in detecting a violation of the law by the special services, the Commission is obliged to notify the prosecution authorities. Such findings of the Committee may also be the basis for the Sejm to appoint a committee to investigate a specific case [3, p. 173-174]. The Sejm may exercise its control function towards special services through the Supreme Chamber of Control, which is the supreme state control body and is subject to the Sejm's control. According to Art. 6 (1) of the Supreme Audit Office Act, the Sejm or its body (the Special Services Committee) may commission the Supreme Audit Office to audit special services [19].

### 3. Judicial and prosecutor's control over the special services' activity

The control over the special services, exercised by judiciary authorities, must be perceived in terms of compliance with the rights and freedoms guaranteed by the law. The judiciary organs responsible for the control of special services include common, military, and administrative courts, as well as the Constitutional Tribunal. The material scope of the control exercised by the judiciary is different [20, p. 51]. Administrative courts review administrative decisions issued by heads of special services as government administration bodies (e.g., decisions on dismissal from service) or decisions of state security services made against citizens in the scope of protecting classified information (e.g., refusal to issue a security clearance) [1, p. 200]. The common and military courts mainly control operational and reconnaissance activities performed by the services. However, only some of these activities require a court decision or consent – these include operational control<sup>4</sup>. According to the initial entry, it

<sup>4</sup> Activities subject to external control also include a controlled purchase and a controlled shipment. See: M. Kolaszyński. *Uwarunkowania kontroli i nadzoru nad czynnościami operacyjno-rozpoznawczymi polskich*

consisted in covert control of the correspondence and the contents of parcels, as well as the use of technical means that enabled the covert to obtain information and evidence and their recording, particularly telephone calls and other information transmitted via telecommunications networks [7, Art. 27 (6)]. In accordance with the Act of January 15, 2016, amending the Act on the Police and individual other acts, operational control consists of:

- obtaining and recording the content of conversations conducted with the use of technical means, including telecommunications networks,
- obtaining and recording the image or sound of people from rooms, means of transport, or places other than public places,
- obtaining and recording the content of correspondence, including correspondence carried out by means of electronic communication,
- obtaining and recording data contained in IT data carriers, telecommunications terminal devices, IT and teleinformation systems,
- gaining access and control of the contents of shipments [21, Art. 7, 10, 11].

The District Court in Warsaw orders the inspection. According to Article 27 (1) of the ABW and AW Act, the court orders the application of operational control by the Internal Security Agency when other measures employed by the service have proved ineffective. They will probably be ineffective or useless. Such control is ordered by way of a decision, upon a request submitted by the Head of the Internal Security Agency, after obtaining the Public Prosecutor General's written consent. Article 27 (2) of the ABW and AW Act refer to urgent situations. If there is a threat of loss of information or the obliteration or destruction of evidence of a crime, the Head of the Internal Security Agency, after obtaining the written consent of the Public Prosecutor General, may order an operational control, at the same time requesting the court to issue a decision in this matter. If the court does not grant its consent within five days from the date of ordering the operational control, then the Head of the Internal Security Agency suspends the operational control and orders the protocol destruction of the materials collected during it [1, p. 127]. Operational control is ordered for a period of not longer than three months. However, the court may issue a decision on a one-time extension of the operational control for no longer than another three months, if the reasons for ordering the control have not ceased to exist. When new circumstances relevant to the prevention or detection of a crime or the identification of the perpetrator and obtaining evidence of the crime emerge, the court may again extend the application of operational control. It is done each time at the request of the Head of the Internal Security Agency, after obtaining the written consent of the Public Prosecutor General. The application for extension of an operational control application must include a justification for the need for a further extension and the materials collected during the application of this control. The materials are delivered to a specific judge by an officer authorized by the Head of the Internal Security Agency, and then after the court issues the decision, he/she collects these documents from the judge. Only the prosecutor and the Head of the Internal Security Agency representative may participate in the court session during which the application for operational control is examined. The Head of the Internal Security Agency has the right to appeal against a court decision regarding the application or extension of the operational control [3, p. 188-189]. The Act of January 15, 2016, amending the Act on the Police and some other acts (Journal

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*służb specjalnych*. In: A. Krzak, D. Gibas-Krzak (eds.). *Służby specjalne w systemie bezpieczeństwa państwa. Przeszłość – Teraźniejszość – Przyszłość. Materiały i Studia*. Vol. 2. Szczecin – Warszawa: Wojskowe Centrum Edukacji Obywatelskiej; 2012, p. 46.

of Laws of 2016, item 147) introduced, among others, a provision to the competence acts stating that in justified cases when new circumstances relevant to preventing or detecting a crime, or identifying a perpetrator and obtaining evidence of the crime appear during the application of operational control, the court may issue further decisions on the operational control extension for subsequent periods, none of which may last more than 12 months [21, Art. 7, 10, 11].

Thus, judicial control mainly boils down to issuing decisions on the initiation or extension of an operational control. Like the Act on the Internal Security Agency, the legal Acts regulating the activities of the CBA and the Military Counterintelligence Service also contain analogous legal solutions [3, p. 190; 11, Art. 17; 12, Art. 31].

Apart from common and military courts, the Constitutional Tribunal is also entitled to inspect the control tasks for special services and their operational work result from the control of compliance of the provisions regulating the functioning of special services with the Polish Constitution. The Tribunal also submits to the Sejm and other law-making bodies comments on the identified shortcomings and gaps in the law that should be removed. The Constitutional Tribunal has repeatedly expressed its opinion on the compliance of the laws on competence with the Basic Law. The Tribunal's judgment of April 20, 2004, had an impact on the amendment of Article 23 of the ABW and AW Act concerning observation [20, p. 52]. The judgment of July 30, 2014, turned out to be significant since the Tribunal found the following issues inconsistent with the Constitution:

- Art. 27 of the ABW and AW Act, Art. 31 of the Act on the MCS and SWW, Art. 17 of the Central Anti-Corruption Bureau Act – to the extent that they do not provide for a guarantee of immediate, commission and report destruction of materials containing information subject to the ban on evidence, for which the court has not annulled professional secrecy or it was unacceptable,
- Art. 28 of the ABW and AW Act, Art. 32 of the Act on the MCS and SWW, Art. 18 of the Central Anti-Corruption Bureau Act – to the extent that they do not provide for the destruction of data irrelevant to the proceedings conducted,
- Art. 28 (1) (1) of the ABW and AW Act, Art. 32 (1) (1) of the Act on the Military Counterintelligence Service and the SWW, Article 18 (1) (1) of the Act on the Central Anti-Corruption Bureau – since they do not provide for an independent control of the provision of telecommunications data referred to in Art. 180c and Art. 180d of the Act of July 16, 2004 – Telecommunications Law (Journal of Laws of 2014, item 243) [22].

In the case of the public prosecutor's office, the Public Prosecutor General plays the dominant role in the control of special services. First, he/she gives consent to the application of operational control (since 2011 the obligation to submit statistical information on the application of operational control to the Sejm and the Senate was introduced). On the basis of the amendments introduced by the Act of February 4, 2011 amending the Act – Code of Criminal Procedure and certain other acts [23], the Ordinance of the Minister of Justice of June 9, 2011 on the manner of exercising the prosecutor's competences in the scope of supervision over operational and investigative activities was issued [24]. According to the regulation:

- the public prosecutor's supervision is carried out through the substantive and effective control of the factual grounds for the requested activities as well as the legality and correctness of their initiation and conduct (§ 2),
- before taking a position on the request, information, or notification, the prosecutor analyzes and assesses them (§ 3.1),

- the Public Prosecutor General or the District Public Prosecutor may appoint a public prosecutor to conduct an analysis and substantive evaluation of the submitted application, information, or notification (§ 3.2),
- the public prosecutor carrying out the analysis presents orally or in writing a substantive assessment of the application, information, or notification to the public prosecutor who appointed him/her (§ 3.3),
- if the Public Prosecutor General or the District Public Prosecutor does not consult the designated public prosecutor, the written position on the case is forwarded to that public prosecutor to keep the case under review (§ 5.2),
- after completion of the operational control, information on its results and its course are submitted to the Public Prosecutor General or a district public prosecutor, or through a designated public prosecutor, after he/she has assessed and analyzed the submitted information, by an authorized body (§ 7.1),
- the examination covers mostly the duration of operational and reconnaissance activities, their compliance with the conditions specified in the court order or the prosecutor’s decision, the timely notification of the order, and the execution of the order on the destruction of materials (§ 7.2),
- in the event of discovering shortcomings or irregularities, the appointed public prosecutor should report them to the Public Prosecutor General or a district public prosecutor, who may request an authorized body to explain the reasons for such deficiencies or irregularities within a specified period (§ 7.3),
- in the event of no reply or acknowledgment that the reasons for the deficiencies or irregularities have not been clarified, the public prosecutor general or the district public prosecutor notifies the body superior to the authorized body about it (§ 7.4),
- the public prosecutor periodically controls the course of cases in which he/she made an analysis and substantive assessment or in which he/she decided or expressed an assessment by the Public Prosecutor General or a regional public prosecutor until their completion (§ 8.1),
- shortcomings or irregularities noticed after the periodic inspection, the prosecutor presents to the Public Prosecutor General or a district office (§ 8.3),
- upon a written order of the Public Prosecutor General, a public prosecutor authorized by him controls the way in which regional public prosecutors exercise their competences within supervision over operational-search activities (§ 9.1),
- within the time limit set by the Public Prosecutor General, he is presented with a report on the findings made during the inspection (§ 9.5) [20, p. 53-54].

The imposition of the obligation to control certain operational and reconnaissance activities on the Public Prosecutor General significantly improves the substantive value of the public prosecutor’s supervision over the preparatory proceedings and the correct determination of its direction and scope. The more so as the special services have been equipped with extensive powers to operational and reconnaissance activities, the use of which involves interference with the sphere of an individual’s constitutional rights and freedoms [20, p. 54].

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The President of the Republic of Poland’s role in exercising control over special services also deserves attention. His/Her competences are consultative and advisory. They mainly result from the Acts regulating the functioning of special services. The President may delegate his/

her representative to participate in the College for Special Services meetings [7, Art. 12 (4)]. He/She expresses his/her opinion on the appointment and dismissal of the Heads of the Internal Security Agency, the AW. They provide the President with information that may be of significant importance for security and the Republic of Poland's international position. They also provide the President with such information when the President of the Republic of Poland so decides [7, Art. 18]. Similarly, in the case of appointment or dismissal of the Head of the CBA, the President presents his/her opinion, and the CBA provides the head of state with information on the Bureau's activities [11, Art. (1), Art. 2 (1) (6)]. The President has broader powers in the scope of exercising control over the Military Counterintelligence Service and the SWW. It is vital to immediately receive guidelines defining the directions of activities of the Military Counterintelligence Service and the SWW, approved action plans for these services, and activity and budget implementation reports from the Minister of National Defense, along with the opinions of the College for Special Services [12, Art. 7 (6)].

## Conclusions

The legislative, executive, and judiciary authorities cooperate in the system of control over the special services' activities in Poland. For parliamentary control over special services, the activities of the Committee for Special Services are fundamental. However, it operates only under an Annex to the Sejm Regulations, while it follows from the powers based on which the special services operate that the Parliament controls the activities of the Heads of Special Services following the general formula contained therein, without specifying the rules on which inspection is to take place [25, p. 12].

The supervision of judicial authorities consists in the control of the use by the services of specific operational techniques, with the control of correspondence and the content of parcels, and the use of technical means that allow to obtain and document information and evidence of a crime secretly, as well as to control administrative decisions made by organs of special services. Regarding the control exercised over the special services, the Human Rights Defender fulfills a crucial function in protecting the rights of the individual, infringed by the operational and reconnaissance activities conducted by these services. However, it has only formal and not real control powers. Thus, it cannot effectively control the special services while protecting citizens [20, p. 52; 26, p. 306-307].

The dominant position of the Prime Minister in the system of programming and supervision of special services is the result of solutions regarding them adopted in 1996-2006. The Prime Minister may supervise the special services directly, or on his/her behalf, the supervision may be exercised (to no small extent) by a designated member of the Council of Ministers – one of the ministers or a task minister specially appointed to the government office. Regardless of the model chosen, the most important thing is that the supervision of special services becomes effective. The President of the Republic of Poland also plays a significant role in the supervision and control system over special services under the competences granted.

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## Conflict of interests

All authors declared no conflict of interests.

### Author contributions

All authors contributed to the interpretation of results and writing of the paper. All authors read and approved the final manuscript.

### Ethical statement

The research complies with all national and international ethical requirements.

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## Cywilny nadzór i kontrola działalności służb specjalnych

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### STRESZCZENIE

W artykule przedstawiono zagadnienia dotyczące systemu cywilnego demokratycznego nadzoru i kontroli służb specjalnych w Polsce od czasów przemian ustrojowych. System ten oparty jest na: nadzorze władzy wykonawczej, która także wyznacza kierunki działań; kontroli parlamentarnej – głównie za pomocą Komisji do Spraw Służb Specjalnych; nadzorze władzy sądowniczej oceniającej ich działania pod kątem ewentualnego przekroczenia uprawnień czy niedopełnienia obowiązków. Oceniono funkcjonalność niektórych rozwiązań prawnych w zakresie nadzoru i kontroli służb. Zwrócono uwagę na dominującą rolę Prezesa Rady Ministrów w sprawowaniu nadzoru nad służbami specjalnymi.

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**SŁOWA KLUCZOWE** kontrola, nadzór, organy, służby, uprawnienia

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