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Tasks and powers of criminal law enforcement authorities in combating terrorism in Poland - a legal perspective

Abstract

This paper presents the tasks and powers of the law enforcement authorities in Poland in the area of combating terrorism from a legal perspective. Despite the vast amount of literature on this subject, this topic is still interesting, in particular due to the lack of comprehensive yet concise works presenting the tasks of the abovementioned authorities from the perspective of four phases of anti-terrorist activities. These phases consist of both actions of preventive nature, coordinated by the Head of the Internal Security Agency (ABW), and actions carried out to take control of terrorist incidents, ensure response and restore the resources necessary to take control of such incidents, coordinated by the Minister of the Interior and Administration.

The problems referred to above are presented from the perspective of the Polish system of combating terrorism. This paper analyses both its institutional scope, by indicating the authorities forming part of the system, and its material scope, by characterising procedures of anti-terrorist actions according to which the competent authorities carry out their tasks.

This paper attempts to analyse these issues comprehensively and briefly. Furthermore, the considerations are supported by an empirical study of experiences accumulated since the Act of 10 June 2016 on anti-terrorist activities came into force.

Keywords:

Polish anti-terrorist legislation, the Act on anti-terrorist activities, the Internal Security Agency, the Minister of the Interior and Administration

As indicated in the legal doctrine, (...) *the group of extra-constitutional law protection bodies should include the prosecutor's office and other criminal prosecution bodies. They correspond to the criteria of a law enforcement body and find full statutory support. (...) The group of extra-constitutional law enforcement bodies includes numerous law enforcement bodies of ministerial, military and administrative provenience*¹. This study analyses the tasks and powers of these bodies in the field of combating terrorism in Poland. The starting point and the axis binding these considerations is the analyses of the provisions of the Act of 10 June 2016 on anti-terrorist activities², which entered into force on 2 July 2016. It is in this act, as indicated in its Article 1, that the principles of conducting anti-terrorist activities and cooperation between the competent authorities in the implementation of these activities are set out, thus creating a *de jure* anti-terrorist system in Poland.

It is worth starting by emphasising that the aforementioned act materialised both the postulates of the legal doctrine and the conclusions of the analyses conducted since the beginning of the 21st century in the area of security sciences, assuming the necessity of the existence of such an act (...) *not only because the threat of terrorism in Poland is, in comparison with many European countries, significantly higher, but also because anti-terrorist activities of state authorities and other institutions have to encroach on the sphere of civil liberties and rights, which is an issue having a clear constitutional, convention (European Convention of 1950) and EU context*³. Moreover, it was then added that:

(...) Poland still lacks a national document, which would define for the uniformed services and civil institutions involved in counter-terrorism, the framework and limits of actions taken, and would indicate what "state" we are aiming at and with what acceptable means, consistent with the generally accepted strategy of state action, we want to achieve it. There is also a lack of a mechanism with a clear decision-making centre, which would bring together all the necessary areas into one integrated, supra-ministerial and national counter-terrorism system⁴.

¹ F. Prusak, *Niesądowe organy ochrony prawnej* (Eng. Non-judicial legal protection bodies) Warszawa 2004, p. 83.

² Consolidated text: Journal of Laws of 2021, item 2234, as amended.

³ L. Paprzycki, *Czy Polsce potrzebna jest ustawa antyterrorystyczna?* (Eng. Does Poland need an anti-terrorist law?), in: *Terroryzm. Materia ustawowa?* (Eng. Terrorism. Statutory matter?), K. Indecki, P. Potejko (eds.), Warszawa 2009, p. 6.

⁴ M. Adamczuk, P. Siejczuk, *Strategia obrony przed terroryzmem – cele i funkcje w systemie przeciwdziałania terroryzmowi* (Eng. Strategy for defence against terrorism - objectives

Despite such clearly formulated postulates and multi-stage organisational activities aimed at creating an anti-terrorist system in Poland, carried out mainly within the framework of the works of the Interministerial Team for Terrorist Threats⁵, it was not until the Act of 10 June 2016 on anti-terrorist activities led to the formal establishment of this system and at the same time it precisely defined e.g. tasks and obligations of criminal law enforcement bodies in this respect. As it was indicated in the justification to the draft of this act, its basic objective was (...) *to increase the effectiveness of the Polish anti-terrorist system, thus increasing the security of all citizens of the Republic of Poland*⁶. This was to be achieved, inter alia, by strengthening the mechanisms for the coordination of activities, clarifying the tasks of individual services and bodies and the principles of cooperation between them. During legislative work, it was pointed out that existing legislation on combating terrorism is dispersed and does not provide adequate legal and organisational instruments to effectively counteract existing threats. The new regulation was intended to integrate the activities of the criminal law enforcement authorities competent in the field of counter-terrorism and to clearly outline their responsibilities for the various segments of these activities. In this way, it was to directly affect (...) *the speed and correctness of decision-making at the strategic level*⁷.

The Act of 10 June 2016 on anti-terrorist activities was structurally divided into seven chapters⁸, while the foundation of the solutions contained therein was based on four separate phases of undertaking anti-terrorist activities. They consist of: 1) activities preventing terrorist

and functions in the counter-terrorism system), in: *Problemy prawno-organizacyjne zwalczania terroryzmu w Polsce* (Eng. Legal and organisational problems of combating terrorism in Poland), J. Szafranski, K. Liedel (eds.), Szczytno 2011, p. 91.

⁵ For more on the origins of the anti-terrorist system in Poland see P. Chomentowski, *Polski system antyterrorystyczny. Prawno-organizacyjne kierunki ewolucji* (Eng. Polish anti-terrorist system. Legal and organisational directions of evolution), Warszawa 2014, pp. 81–95; M. Gichomski, I. Idzikowska-Słezak, *Strategic level of the Polish anti-terrorist system - 15 years of the Interministerial Team for Terrorist Threats*, “Terroryzm – studia, analizy, prewencja” 2022, no. 1, pp. 297-319.

⁶ Government draft law on anti-terrorist activities and amendments to some other laws, print no. 516, <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=516> [accessed: 25 IV 2022].

⁷ Ibid.

⁸ For more on the regulatory scope of the act, see P. Burczaniuk, *Legal aspects of combating terrorism in the Polish legal system against the background of challenges shaped by European legislation*, “Terroryzm – studia, analizy, prewencja” 2022, no. 1, pp. 273-279.

events - entrusted to the Head of the Internal Security Agency; 2) preparation to take control over terrorist events by means of planned undertakings; 3) reaction in case of occurrence of such events; 4) recovery of resources intended for response to such events - entrusted to the minister in charge of internal affairs. The division into the mentioned phases emphasises the convergence of the anti-terrorist system established by this act with the system from which it de facto evolved, i.e. the crisis management system specified in the Act on crisis management of 26 April 2007⁹. In this act, the mentioned phases were treated in a non-identical manner. Two phases have been brought to the fore - activities preventing events (regulated in Chapter 2) and undertaking counter-terrorist activities (regulated in Chapter 4). The great value of this act, as Piotr Chorbot points out, is that (...) *until the enactment of this Act there had not been such an unambiguous separation of competency responsibilities in the context of counter-terrorism issues*¹⁰.

The Act of 10 June 2016 on anti-terrorist activities, currently the most important act from the point of view of considerations concerning the tasks of criminal law enforcement bodies in the field of combating terrorism, is supplemented by sectoral regulations, especially those covered by the competence provisions of individual services and bodies. Without taking them into account, the considerations subject to this study would not be complete.

It should also be noted that, in a broad sense, the tasks and powers of criminal law enforcement bodies in the field of combating terrorism in Poland derive from the Act of 1 March 2018 on counteracting money laundering and financing of terrorism¹¹, establishing mechanisms for counteracting terrorism financing, as well as from regulations devoted to states of emergency, which, due to the volume limitations of this study, will not be discussed in more detail.

⁹ Consolidated text: Journal of Laws of 2022, item 261, as amended.

¹⁰ P. Chorbot, *Ustawa o działaniach antyterrorystycznych. Komentarz do niektórych regulacji* (Eng. the Act of 10 June 2016 on anti-terrorist activities. Commentary to some regulations), in: *Uprawnienia służb specjalnych z perspektywy współczesnych zagrożeń bezpieczeństwa narodowego. Wybrane zagadnienia* (Eng. Powers of special services from the perspective of contemporary threats to national security. Selected issues), P. Burczaniuk (ed.), Warszawa 2017, p. 68.

¹¹ Consolidated text: Journal of Laws of 2022, item 593, as amended.

Measures to prevent incidents of a terrorist nature

Special position of the Head of the ABW

Pursuant to Article 3(1) of the Act of 10 June 2016 on anti-terrorist activities, the Head of the ABW is responsible for the prevention of terrorist events. The choice by the legislator of the Head of the ABW as the coordinator of activities of criminal law enforcement bodies in the phase of prevention of terrorist events appears to be obvious, primarily in the light of the competence provisions of the Internal Security Agency, the experience of that service, as well as its organisational capabilities in that area, related mainly to the units functioning within its structure - the Counter-Terrorism Centre (CAT) and the Terrorism Prevention Centre of Excellence (TP CoE).

Referring to the competences of the ABW, it should be pointed out that, pursuant to Article 5 sec. 1 item 1 and 2 letter a of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency¹², the Agency's tasks include the identification and combating of threats to the internal security of the state and its constitutional order and the prevention of such threats, as well as the identification, detection and prevention of crimes, especially terrorism. As Magdalena Gołaszewska underlines, (...) *as an element of a threat to internal security one should undoubtedly also qualify the recognition of issues related to terrorist activity*¹³. In turn, Tomasz Batory indicates that (...) *the offence covered by art. 5 sec. 1 item 2 letter a of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency is terrorism. However, unlike in the case of espionage, this concept does not refer to a single article of the Criminal Code. It is worth noting that the Code does not use the nomenclature "terrorism", but the concept of "terrorist offence". The definition of this concept is contained in Article 115 § 20 of the Criminal Code*¹⁴.

¹² Consolidated text: Journal of Laws of 2022, item 557, as amended.

¹³ M. Gołaszewska, *Zadania ABW w zakresie zwalczania zagrożeń godzących w bezpieczeństwo wewnętrzne państwa i jego porządek konstytucyjny* (Eng. Tasks of the ABW in combating threats to the state's internal security and constitutional order), in: *Prawne aspekty funkcjonowania służb specjalnych na przykładzie Agencji Bezpieczeństwa Wewnętrznego* (Eng. Legal aspects of the functioning of special services on the example of the Internal Security Agency), P. Burczaniuk (ed.), Warszawa 2021, p. 46.

¹⁴ T. Batory, *Zadania ABW w zakresie rozpoznawania, zapobiegania i wykrywania przestępstw* (Eng. Tasks of the ABW in the area of identification, prevention and detection of offences), in: *Prawne aspekty funkcjonowania służb specjalnych na przykładzie Agencji Bezpieczeństwa*

The competence of the ABW expressed in this way means that among all Polish criminal law enforcement bodies, it is this service that has the broadest competence in the fight against terrorism. This is, moreover, a characteristic feature of European special services of an internal character, which as a rule are tasked with espionage and terrorism. In the context of the above, it should be noted that the legal predecessor of the ABW, namely the State Protection Office (Urząd Ochrony Państwa), since its establishment on 10 May 1990, in line with Article 2 sec. 2 item 1 and 2 of the Act of 6 April 1990 on the State Protection Office¹⁵, had tasks in the area of identification of threats threatening, inter alia, the security of the country (which undoubtedly included terrorist threats) and counteracting them, as well as - explicitly expressed - tasks in the area of detection and prevention of crimes, inter alia terrorism.

The Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency in Article 21 sec. 1 specifies that the tasks of the ABW indicated in Article 5, including those aimed at combating terrorism, are performed by ABW officers:

- 1) at the level of identification and elimination of threats - operational and reconnaissance as well as analytical and information activities in order to obtain and process information vital for the protection of the state security and its constitutional order;
- 2) at the level of combating offences - operational and reconnaissance activities as well as investigative and prosecutorial activities aimed at recognising, detecting and preventing offences and prosecuting their perpetrators.

These powers have been presented in detail in chapter 4 of the the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency. It is worth noting that in the Act of 10 June 2016 on anti-terrorist activities the powers of the ABW in the scope of anti-terrorist activities preventing terrorist incidents have been specified. Analyses of the scope of these powers allows us to argue that in this phase of the fight against terrorism, the legislator has placed the greatest emphasis on the importance of analytical and informational as well as operational and reconnaissance activities. This should be assessed as a rational action, because in this phase,

Wewnętrzny (Eng. Legal aspects of the functioning of special services on the example of the Internal Security Agency), P. Burczaniuk (ed.), Warszawa 2021, p. 73.

¹⁵ Journal of Laws of 1990, No. 30, item 180.

the services are mainly confronted with terrorist threats, and not with crimes (apart from preparatory or attempted criminal activities), which in turn are dominant in the next phase, associated with the occurrence of an event of a terrorist nature.

In the case of analytical and information activities, the legislator emphasised the importance of the exchange of information, its aggregation and further distribution. He has imposed tasks on the Head of the ABW in the scope of:

- 1) coordination of analytical and information activities undertaken by special services (in the meaning of Article 11 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency) - Article 5 sec. 1 of the act;
- 2) coordination of the exchange of information provided by the Police, Border Guard, Marshal's Guard, State Protection Service, State Fire Service, General Inspector of Financial Information, National Revenue Administration, Military Police and the Government Security Centre, concerning:
 - a) events of a terrorist nature (defined in Article 2 item 7 of the act as a situation suspected to have arisen as a result of a terrorist offence referred to in Article 115 § 20 of the Act of 6 June 1997 - Criminal Code, or a threat of such an offence occurring),
 - b) data on persons:
 - undertaking activities for terrorist organisations or organisations connected with terrorist activities or members of such organisations,
 - wanted, conducting terrorist activity or persons suspected of committing crimes of a terrorist nature, with regard to whom in the Republic of Poland a detention order or a decision on searching with a letter of appointment has been issued, as well as persons wanted on the basis of the European arrest warrant,
 - in relation to whom there is a justified suspicion that they may carry out activities with a view to committing a terrorist offence, including persons posing a threat to the security of civil aviation,
 - participating in terrorist training or travelling to commit a terrorist offence,

by collecting, processing and analysing this information - Article 5(1) of the act. The data on the indicated persons are also subject to entry in the register kept by the Head of the ABW, pursuant to Article 6 section 1 of the act, created in compliance with the requirements concerning the protection of classified information;

- 3) receiving, from the special services and the entities indicated above, information serving the performance of anti-terrorist activities (defined as activities of public administration bodies consisting in the prevention of terrorist events, preparation to take control over them by means of planned undertakings, reaction in the event of occurrence of such events and removal of their consequences, including restoration of resources intended for response to them). The information has to be provided as classified in one of the incidents defined as a catalogue in a regulation issued by the minister in charge of internal affairs, in consultation with the minister in charge of public finance and the minister of national defence and after consulting the Head of the ABW¹⁶. The list currently includes 12 incidents grouped into two areas, i.e. incidents threatening the security of the Republic of Poland and incidents related to foreign representations of the Republic of Poland and citizens of the Republic of Poland outside its territory - Article 5, section 3 of the act;
- 4) collecting information from public administration authorities, owners and possessors of facilities, installations, equipment of public administration infrastructure or critical infrastructure in their possession concerning threats of a terrorist nature to the infrastructure of public administration or critical infrastructure, including threats to the functioning of energy, water and sewage systems and networks, as well as heating and telecommunication systems and networks important from the point of view of national security - Article 4, section 2 of the act;
- 5) free-of-charge access to data collected in public registers and records maintained both by participants in the anti-terrorist system indicated above in items 1 and 2, as well as by

¹⁶ Currently it is the Ordinance of the Minister of the Interior and Administration of 22 July 2016 on the catalogue of terrorist incidents (Journal of Laws of 2017, item 1517 and Ordinance of the Minister of the Interior and Administration of 5 February 2019 amending the Ordinance on the catalogue of terrorist incidents, Journal of Laws of 2019, item 317).

ministers in charge of government administration departments, the Head of the Office for Foreigners, the President of the Office of Electronic Communications, the President of the Civil Aviation Authority, the President of the State Atomic Energy Agency, the Social Insurance Institution (ZUS), the President of the Agricultural Social Insurance Fund (KRUS), the Financial Supervision Authority, the Chief Geodesist of the Country, local government units, the Public Prosecutor General and organisational units subordinate to them or supervised by them - Article 11 item 1 of the act.

Importantly, the act on the one hand establishes the Head of the ABW as the authority authorised to receive and aggregate information, and on the other hand makes him the source of its distribution. Information is provided:

- 1) pursuant to Article 7 of the act - for the needs of the most important state bodies. The Head of the ABW is obliged to immediately forward information which may be crucial for the prevention of terrorist events to the President of the Republic of Poland, the Prime Minister, the minister in charge of internal affairs, the Minister of National Defence, the minister in charge of foreign affairs, the Minister Coordinator of Special Services, if appointed¹⁷;
- 2) pursuant to Article 6 sec. 2 of the act - for the needs of other special services and the mentioned participants of the anti-terrorist system (the Police, Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Service, the General Inspector of Financial Information, the National Revenue Administration,

¹⁷ The scope of normative provisions covering, in Article 7 of the act, "information which may be of significant importance for the prevention of terrorist events" and prescribing the adequate application of Article 18 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency differs significantly from the scope of normative provisions of Article 6 sec. 3 of the act, which refers to "information serving the implementation of anti-terrorist measures". Given the specific scope of application of Article 7, which covers the most important state bodies, this argues for its interpretation and application in a wide range, covering, inter alia, information covered by certain prohibitions. Considerations concerning the correlation of Article 18 and Article 39 par. 3 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, undertaken in: P. Burczaniuk, *Zadania Szefa ABW w zakresie obowiązków informacyjnych* (Eng. Tasks of the Head of the ABW with regard to information obligations), in: *Prawne aspekty funkcjonowania służb specjalnych na przykładzie Agencji Bezpieczeństwa Wewnętrznego* (Eng. Legal aspects of the functioning of special services on the example of the Internal Security Agency), P. Burczaniuk (ed.), Warszawa 2021, pp. 17-39.

the Military Police and the Government Centre for Security), as well as other public administration bodies, within the scope of their competence. This information (also in the form of current analyses of the state of the threat of a terrorist event)

- a) for the implementation of anti-terrorist activities, classified in line with the catalogue of terrorist incidents,
 - b) included in the list of persons;
- 3) pursuant to Article 4, section 1 of the act - to public administration bodies, owners and holders of objects, installations, devices of public administration infrastructure or critical infrastructure. This is information necessary to prevent the occurrence of an event of a terrorist nature threatening public administration infrastructure or critical infrastructure, life or health of people, property of significant size, national heritage or the environment, to remove such a threat or to minimise it.

It should be added that, pursuant to Article 4 sec. 3 of the act, in the event of obtaining information on a possible terrorist incident threatening the public administration infrastructure or critical infrastructure, human life or health, property of considerable size, national heritage or the environment, the Head of the ABW has the right to issue instructions to the authorities and entities indicated above in item 3 (excluding the most important persons in the country) in order to counteract such threats, remove them or minimise them. The bodies and entities are obliged to inform the Head of ABW about the actions taken in this respect. The above-mentioned authority of the Head of the ABW was implemented into the anti-terrorist system from the crisis management system, namely in Article 12a of the aforementioned Act of 26 April 2007 on crisis management, in effect from September 2009¹⁸ until the Act of 10 June 2016 on anti-terrorist activities enters into force.

In the case of operational and reconnaissance activities, pursuant to Article 8 of the act, the Head of the ABW was entrusted with their coordination within the subject scope, when these activities are undertaken by special services, the Police, the Border Guard, the National Revenue Administration and the Military Police, and within the subject scope, when they relate to events of a terrorist nature. The only statutory specification

¹⁸ Added by the Act of 17 July 2009 amending the Act on crisis management (Journal of Laws of 2009, No. 131, item 1076).

of this task is the power granted to the Head of the ABW to issue recommendations to the aforementioned entities with a view to eliminating or minimising the terrorist threat. As Michał Gabriel-Węglowski points out, (...) *a question arises as to the binding character of these recommendations. (...) However, the leading role of the Internal Security Agency in counteracting a terrorist threat, resulting from this act, supports the assumption that the issued recommendations always require implementation by the remaining services*¹⁹. Moreover, from the very coordinating function performed by the Head of the ABW, a conclusion may be drawn about the obligation of the listed entities to inform him about the intention and conduct of operational and reconnaissance activities with regard to terrorist events. The lack of such information would make it functionally impossible for the Head of the ABW to fulfil the coordination task assigned to him, including issuing the discussed recommendations. By the way, it is worth noting that, as part of the solutions concerning operational and reconnaissance activities, the act has given the Head of the ABW two new powers:

- 1) conducting surveillance activities with regard to foreigners²⁰ - Article 9 of the act;
- 2) accessing images of events recorded by image-recording devices placed in public facilities, along public roads and other public places and receiving, free of charge, a copy of the recorded image - Article 11, item 2 of the act.

Moreover, the Act of 10 June 2016 on anti-terrorist activities introduced many comprehensive amendments to the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, the aim of which was to enhance the state's capability to prevent terrorist threats, and which constitute the sphere of basic responsibility of the ABW, including, inter alia, the power to:

- 1) secret cooperation with the ABW of a perpetrator of a crime of espionage or a suspect of a crime of a terrorist nature - Article 22b of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency;

¹⁹ M. Gabriel-Węglowski, *Działania antyterrorystyczne. Komentarz* (Eng. Anti-terrorist activities. A commentary), Article 8, Warszawa 2018, <https://sip.lex.pl/#/commentary/587754148/551588/gabriel-weglowski-michal-dzialania-antyterrorystyczne-komentarz?cm=URELATIONS> [accessed: 28 IV 2022].

²⁰ Detailed considerations concerning this power remain outside the thematic scope of this study. See in more detail: M. Gabriel-Węglowski, *Działania antyterrorystyczne. Komentarz...*

- 2) assess the security of IT systems in order to prevent and counteract terrorist incidents and to combat them - Article 32a of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency;
- 3) provide, at the request of the Head of the ABW, information on the construction, functioning and principles of operation of ICT systems in the event of obtaining information on the occurrence of an event of a terrorist nature involving these systems - Article 32b of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency;
- 4) block by the ABW the availability in the ICT system of specific IT data or ICT services connected with an event of a terrorist nature - Article 32c of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency.

As it follows from the above, the act on anti-terrorist activities made the Head of the ABW responsible for the prevention of terrorist events and provided him with two basic powers to perform this task in the form of a coordinating function over analytical, informational and operational-reconnaissance activities undertaken in this area. As it has already been pointed out, the legislator's choice of the Head of the ABW to perform this task was an obvious one, also due to his over-30-years' experience (taking into account the period of functioning of the UOP), which is currently used mainly by the two already mentioned organisational units of the ABW, i.e. the CAT and the TP CoE.

The Counter-Terrorism Centre is responsible for coordinating the activities of entities responsible for counter-terrorist protection in Poland. Hence, it seems that not only officers of the ABW, but also representatives of other participants in the anti-terrorist system of Poland are on duty at the CAT. Article 14 of the Act of 10 June 2016 on anti-terrorist activities and executive acts issued on its basis create an organisational system, on which, in practical terms, the operations of the CAT and the coordinating role of the Head of the ABW are based. It boils down to the possibility of delegating representatives of other special services, as well as the Police, the Border Guard, the Marshal's Guard, the State Protection Service, the State Fire Service, the General Inspector of Financial Information, the National Revenue Administration, the Military Police and the Government Centre for Security to serve or work in the ABW. These persons perform (...) *tasks within the competence of the institution which they*

*represent*²¹. The choice of these entities by the legislator is not accidental, as they undoubtedly constitute elements of the anti-terrorist system of the Republic of Poland, in which each of them, within the scope of its competence and taking into account the coordinating role of the Head of the ABW, performs tasks aimed at counteracting terrorism.

The importance of other services

Counter-terrorist tasks, in the scope similar to those of the ABW, have been entrusted to the Foreign Intelligence Agency which, pursuant to Article 6 sec. 1 item 5 and 7a of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, identifies, inter alia, international terrorism and extremism as well as identifies, prevents and counteracts terrorist incidents against citizens or property of the Republic of Poland outside its borders, with the exception of terrorist incidents against the personnel or property of the Armed Forces of the Republic of Poland, however it performs these tasks outside the borders of the Republic of Poland.

Counter-terrorist tasks are also performed by other special services, including the Military Counterintelligence Service. In accordance with Article 5 sec. 1 item 2a of the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service²², the Military Counterintelligence Service identifies, detects and prevents events and offences of a terrorist nature endangering the security of the state's defence potential, the Armed Forces of the Republic of Poland and organisational units of the Ministry of Defence. In turn, the Military Intelligence Service, similarly to the Foreign Intelligence Agency, pursuant to Article 6, section 1, item 2, letter b and item 3a of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, deals with the identification of threats of international terrorism and counteracting them as well as the identification of terrorist incidents against the personnel and property of the Armed Forces of the Republic of Poland outside the borders of the state, counteracting and preventing these incidents and combating their effects.

²¹ Service of the Republic of Poland gov.pl, Counter-Terrorism Centre (CAT ABW), <https://www.gov.pl/web/mswia/abw> [accessed: 27 IV 2022].

²² Consolidated text: Journal of Laws of 2022, item 502, as amended.

For the functioning of the anti-terrorist system in Poland the tasks in the field of counter-terrorism assigned to the Police, which - as emphasised in the legal doctrine²³ - in the phase of prevention of terrorist events are not directly mentioned in the Act of 6 April 1990 on the Police²⁴. However, they can be deduced from the wording of Article 1(2)(1)-(3) of this act, which indicates that the basic tasks of the Police include:

- 1) protection of human life and health and property against unlawful attempts infringing these goods;
- 2) protection of public safety and order, including ensuring calm in public places and in means of public transport and communication, in road traffic and on waters intended for common use;
- 3) initiating and organising activities aimed at preventing the commission of offences and misdemeanours as well as criminogenic phenomena and cooperating in this respect with state and local government bodies and social organisations.

In the system in question the legislator assigned an important place also to the Border Guard whose counter-terrorist tasks, similarly as in the case of the Police, are not expressed directly, but functionally result from the role this formation plays in protecting the state border, controlling border traffic and preventing and counteracting illegal migration (Article 1 sec. 1 of the Act of 12 October 1990 on the Border Guard²⁵). Pursuant to Article 1(2)(5d) of the act, the Border Guard is obliged to cooperate with other authorities and services in identifying and counteracting threats of terrorism.

The State Protection Service is also an important element of the anti-terrorist system in Poland, despite - as in the case of the Police and the Border Guard - the lack of explicitly expressed statutory competence, due to its general competence which boils down to the protection of persons and objects and the recognition and prevention of crimes directed against them (Article 2(1) of the Act of 8 December 2017 on the State Protection Service²⁶). A similar role in this system is played by the Marshal's Guard, which

²³ Cf. M. Gabriel-Węglowski, *Działania antyterrorystyczne. Komentarz...*

²⁴ Consolidated text: Journal of Laws of 2021, item 1882, as amended.

²⁵ Consolidated text: Journal of Laws of 2022, item 1061, as amended.

²⁶ Consolidated text: Journal of Laws of 2021, item 575, as amended.

performs tasks with regard to the protection of the Sejm and the Senate (Article 1(1) of the Act of 26 January 2018 on the Marshal's Guard²⁷).

Actions under the responsibility of the Minister of Interior and Administration

As mentioned earlier, pursuant to Article 3(2) of the act on anti-terrorist activities, the minister in charge of internal affairs is responsible for three out of four phases of undertaking anti-terrorist activities, i.e. preparation for taking control over terrorist events by means of planned undertakings, response in the event of occurrence of such events and restoration of resources intended for responding to such events.

In the legal doctrine it is indicated that (...) *one of the most significant solutions of the Act of 10 June 2016 on anti-terrorist activities, from the perspective of preparing to take control over events of a terrorist nature and responding in the event of the occurrence of such events, was the transfer of the institution of alert levels and CRP alert levels to the act*²⁸. In turn, the foundation of the response phase became the solutions included in chapter 4 of the act, devoted to actions on the scene of a terrorist event, including counter-terrorist actions. The most important for this chapter Article 18 determines the manner of designation of the leader of counter-terrorist activities on the scene of a terrorist incident, undertaken by competent services or authorities within the framework of their statutory tasks. In principle, the person in charge is appointed by the Commander-in-Chief of the Police. In the event that such an event occurs on areas or in facilities belonging to the Minister of National Defence, supervised or administered by him, the in-charge is appointed by that Minister. In eight

²⁷ Consolidated text: Journal of Laws of 2019, item 1940, as amended.

²⁸ See in more detail: M. Cichomski, M. Horoszko, I. Idzikowska, *Przygotowanie do przejęcia kontroli nad zdarzeniami o charakterze terrorystycznym oraz reagowanie w przypadku wystąpienia takich zdarzeń w świetle rozwiązania ustawy o działaniach antyterrorystycznych – w kontekście zadań resortu spraw wewnętrznych* (Eng. Preparing to take control over terrorist events and reacting in case of such events in the light of the solution of the act on anti-terrorist activities - in the context of the tasks of the ministry of internal affairs), in: *Polska ustawa antyterrorystyczna – odpowiedź na zagrożenia współczesnym terroryzmem* (Eng. Polish Act on anti-terrorist activities - a response to the threat of contemporary terrorism), W. Zubrzycki, K. Jałoszyński, A. Babiński (eds.), Szczytno 2016, p. 283.

points contained in Article 20 sec. 1 of the act the powers of the person in charge of counter-terrorist operations were defined.

It is clear from the presented regulations that the coordination tasks in these three phases entrusted to the Minister of the Interior and Administration may be performed by him through entities subordinate to him or supervised by him, the list of which is specified in the Ordinance of the Prime Minister of 18 November 2019 on the detailed scope of activities of the Minister of the Interior and Administration²⁹. They include: Commander-in-Chief of the Police, Commander-in-Chief of the Border Guard, Commander-in-Chief of the State Fire Service, Commander-in-Chief of the State Protection Service, Head of the National Civil Defence, Head of the Office for Foreigners, Inspector of Internal Supervision (and the Director of the Pension Fund of the Ministry of Internal Affairs and Administration, who does not participate in the anti-terrorist system due to the scope of his tasks).

In this context it should be pointed out that by means of the Act of 10 June 2016 on anti-terrorist activities the legislator amended the competence acts of the indicated services and strengthened their powers necessary to perform these tasks³⁰. Undoubtedly, the Police remain the most important service in this respect. In accordance with Article 1, section 2, item 3a of the Act of 6 April 1990 on the Police one of the basic tasks of this uniformed formation is to carry out counter-terrorist activities within the meaning of the Act of 10 June 2016 on anti-terrorist activities. By the way, it should be mentioned that on 5 April 2019 a counter-terrorist service was separated in the composition of the Police³¹, at the same time specifying it in Article 5c of the Act of 6 April 1990 on the Police. According to this regulation, the counter-terrorist service of the Police consists of the Central Counter-Terrorist Subdivision of the Police (BOA) and independent counter-terrorist subdivisions of the Police, which are

²⁹ Journal of Laws of 2019, item 2264.

³⁰ Amendments were introduced in: Act of 6 April 1990 on the Police, Act of 12 October 1990 on the Border Guard, Act of 24 August 1991 on fire protection (i.e. Journal of Laws of 2021, item 869, as amended – with regard to the organisation of the national rescue and firefighting system), Act of 16 March 2001 on the Government Protection Bureau (amendments were consolidated in the Act of 8 December 2017 on the State Protection Service).

³¹ Act of 9 November 2018 amending the Act on the Police and certain other acts (Journal of Laws of 2019, item 15). Previously, counter-terrorist subdivisions were part of the Police (from the entry into force of the Police Act on 10 May 1990 until 12 October 1995).

responsible for conducting counter-terrorist activities and supporting the activities of the organisational units of the Police in conditions of special threat or requiring the use of specialised forces and means and specialised tactics of operation. In view of the discussed importance of the Police for the performance of tasks in the scope of directing anti-terrorist actions on the site of a terrorist incident it is worth adding that the Act of 10 June 2016 on anti-terrorist activities has provided for the possibility of using for assistance of the Police divisions and subdivisions of the Armed Forces of the Republic of Poland in the event of introducing the third or fourth alert level and only in a situation where the use of the Police divisions and subdivisions proves to be insufficient or may turn out to be insufficient. Not without significance in this context is the entitlement, provided for in Article 23 of the act, to the special use of weapons during counter-terrorist operations. It constitutes a derogation from the principles of using firearms regulated in the Act of 24 May 2013 on means of direct coercion and firearms³², consisting in its use against a person carrying out an attack or taking or holding a hostage, which may result in death or a direct threat to the life or health of that person.

The Act of 10 June 2016 on anti-terrorist activities regulated separately the issue of coordination of the actions of services and bodies in the event of a terrorist incident outside the borders of the Republic of Poland. It was entrusted to the minister in charge of foreign affairs, in cooperation with the Minister Coordinator of Special Services, and if the incident was directed against the personnel or property of the Polish Armed Forces, then to the Minister of National Defence, in cooperation with the minister in charge of foreign affairs (Article 19 of the act). The act also allowed conducting anti-terrorist activities on the principles specified therein outside the borders of the Republic of Poland, in the waters of the Polish SAR area of responsibility, pursuant to the International Convention on Maritime Search and Rescue, drawn up in Hamburg on 27 April 1979³³.

³² Consolidated text: Journal of Laws of 2022, item 1416.

³³ Journal of Laws of 1988, No. 27, item 184.

Prosecution and preparatory proceedings

An important element of the solutions provided for in the Act of 10 June 2016 on anti-terrorist activities are special provisions concerning preparatory proceedings. As Wojciech Olsztyn points out, (...) *so far all procedural activities have been conducted in line with the principles of the Criminal Code and the Code of Criminal Procedure*³⁴. A change in this respect was introduced by regulations included in chapter V of the Act of 10 June 2016 on anti-terrorist activities. Pursuant to Article 25 of the act, in the case of a suspicion or attempt to commit or preparation of an offence of a terrorist nature, in order to detect or detain or forcibly bring in a suspected person, as well as in order to find items which may constitute evidence in the case or which may be seized in criminal proceedings, the public prosecutor may issue a decision to search premises and other places located in the area indicated in the decision or to detain a suspected person, if there are reasonable grounds to suspect that the suspected person or the said items are located in that area. Such a search and detention may be carried out at any time of day.

Preparatory proceedings conducted in connection with the suspected commission of an offence of a terrorist nature have been considerably improved by the power under Article 26 of the act, which makes it possible to draw up a decision to present charges on the basis of information obtained as a result of operational and reconnaissance activities. Moreover, in this case, the court, upon the prosecutor's motion, may apply temporary arrest for a period not exceeding 14 days, and the sole prerequisite for the application of this temporary arrest is the probability of committing, attempting or preparing to commit an offence of a terrorist nature.

The Act of 10 June 2016 on anti-terrorist activities significantly amended the regulations of the Criminal Code, introducing, inter alia, the punishable stage of preparation to commit crimes against peace, humanity and war crimes defined in: Article 117 of the Criminal Code (initiation or conduct of an attacking war), Article 118 of the Criminal

³⁴ W. Olsztyn, *Nowe rozwiązania w obszarze działań operacyjno-rozpoznawczych oraz procesowych wynikające z ustawy o działaniach antyterrorystycznych* (Eng. New solutions in the area of operational, reconnaissance and procedural activities resulting from the Act of 10 June 2016 on anti-terrorist activities), in: *Polska ustawa antyterrorystyczna – odpowiedź na zagrożenia współczesnym terroryzmem* (Eng. Polish Act of 10 June 2016 on anti-terrorist activities - a response to the threat of contemporary terrorism), W. Zubrzycki, K. Jałoszyński, A. Babiński (eds.), Szczytno 2016, p. 329.

Code (genocide), Article 118a of the Criminal Code (participation in a mass attack against a group of people), Article 120 of the Criminal Code (use of means of mass extermination), Article 122 of the Criminal Code (conducting hostilities in a manner inconsistent with international law), Article 123 of the Criminal Code (war crimes against prisoners of war or civilians), Article 124 of the Criminal Code (other violations of international law during the conduct of hostilities) and Article 125 of the Criminal Code (damaging or appropriating cultural property), and by adding in Articles 259a and 259b new types of criminal acts concerning the conduct of foreign fighters.

Summary

The above text systematises and discusses the tasks and powers of criminal law enforcement authorities in the field of combating terrorism in Poland, analysing them also from the perspective of more than six years of experience with the functioning of the Act of 10 June 2016 on anti-terrorist activities. It can be concluded that the aforementioned law has fulfilled its purpose, as it has organised the tasks and unified the activities of criminal law enforcement bodies, while providing them with modern tools to fulfil these tasks. The quality of this law is evidenced by the positive substantive assessment, among others, expressed in 2018 by Jukka Savolainen, Director of Resilience at the European Centre of Excellence for Countering Hybrid Threats in Helsinki. He considered that the act is an excellent example in terms of legislative solutions that can serve as model solutions and make an important contribution to the development of national legislation of EU and NATO countries in the context of “legal resilience” to hybrid threats³⁵. Equally positive was the practical verification of the solutions contained in this law - many of its solutions concerning anti-terrorist actions at the scene of a terrorist incident were not applied in practice.

However, given that the fight against terrorism can never be considered a closed topic, the analyses of the modus operandi of the perpetrators of terrorist actions should constantly follow the analyses of the needs for

³⁵ Cf. S. Żaryn, *Polska antyterrorystycznym wzorem* (Eng. Poland as an anti-terrorist model), wGospodarce, 28 XII 2018, <https://wgospodarce.pl/opinie/58189-polska-antyterrorystycznym-wzorem> [accessed: 29 IV 2022].

legal changes, undertaken both at the level of individual countries, and above all within the international community faced with identical threats. In this context, a number of legislative postulates can be put forward, which come from the experience of the application of the Act of 10 June 2016 on anti-terrorist activities.

Firstly, since the moment of its creation, attention has been drawn to the imbalance in the content of the solutions it covers in relation to the individual phases of undertaking anti-terrorist activities. As indicated earlier, the legislator put the main substantive emphasis on the solutions covered by the phase of activities aimed at preventing terrorist events (in respect of which the provisions of the act fill nearly half of its content, i.e. 12 out of 26). It is worth considering whether the remaining range of solutions covering the three remaining phases of activities, i.e. preparation to take control over terrorist events by means of planned undertakings, response in the event of the occurrence of such events, restoration of resources intended for response to such events, constitutes a comprehensive instrumentarium, which in practice will make it possible to manage the response to terrorist events. This issue requires - as it seems - detailed analyses, which should be undertaken primarily by the ministry of internal affairs responsible for it. However, the effectiveness of the actions of the first phase, coordinated by the Head of the ABW, often makes these considerations theoretical, as practical experience can only come from exercises, including the very important NATO Crisis Management Exercise (CMX).

Secondly, despite the broad regulation of activities undertaken in the first phase of counter-terrorist activities, the issue of cooperation in operational and reconnaissance activities undertaken by various services, both special services and those of a police nature, requires possible clarification - mainly due to the lack of statutory definitions. This applies in particular to the legitimacy of clarifying the principles and manner of performing the coordinating role by the Head of the ABW, taking into account the tasks in the area of supervision and control of the activities of services and the coordination of their activities entrusted to the Prime Minister and the Minister Coordinator of Special Services.

Thirdly, in the near future the most important challenge to be faced by domestic and European legislators will undoubtedly be the need to adapt anti-terrorist regulations to the changing paradigm of threats to state (international community) security. The emergence of threats considered

collectively as asymmetrical (hybrid) threats, in which both another state and a non-state entity may be the source of the threat, and the range of unconventional actions applied leads to the blurring of the definition of classic crimes, mainly such as terrorism, espionage or aggression war, requires - in order to counteract them properly - significant modifications. Changes will have to be introduced both at the level of substantive penal regulation, procedural regulation, and, perhaps most importantly, at the level of the system of legal protection bodies, headed by the competence regulations (tasks and powers) of the special services. This issue should become the subject of separate, more extensive considerations.

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