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Compliance in the Public Sector in the Light of the *Guidelines* of the Central Anti-Corruption Bureau as a Means to Overcome Impossibility in Preventing Corruption²

Submitted: 10.02.2021. Accepted: 4.05.2021

Abstract

The paper analyses the Guidelines issued in 2020 by the Central Anti-Corruption Bureau in Poland on the establishment and implementation of effective compliance programmes in the public sector. These guidelines constitute the very first Polish official document referring to compliance in the public sector. Its detailed critical analysis is therefore useful for the construction of compliance policies by public institutions, in order to prevent and possibly detect irregularities, including corruption, within these organisations.

Keywords: corruption, compliance, criminal law, prevention of corruption.

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² The article was written as part of the research project No. 2016/21/B/HS5/02051 entitled *Compliance jako narzędzie zapobiegania korupcji* [*Compliance as a Corruption Prevention Tool*], financed by the National Science Centre (NCN).

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Compliance w sektorze publicznym w świetle *Wytycznych CBA* jako środek przełamania imposybilizmu w zakresie zapobiegania korupcji³

Streszczenie

Artykuł poświęcony jest analizie wydanych w 2020 r. *Wytycznych CBA w Zakresie Tworzenia i Wdrażania Efektywnych Programów Zgodności (Compliance) w Sektorze Publicznym*. Jest to pierwszy polski oficjalny dokument odnoszący się do problematyki *compliance* w sektorze publicznym. Jego szczegółowa analiza krytyczna jest zatem potrzebna dla budowy polityk zgodności (*compliance policy*) przez instytucje publiczne w celu zapobiegania i ewentualnego wykrywania nieprawidłowości, w tym korupcji, w ramach tych organizacji.

Słowa kluczowe: korupcja, compliance, prawo karne, zapobieganie korupcji.

³ Artykuł stanowi część projektu badawczego nr 2016/21/B/HS5/02051 pod tytułem *Compliance jako narzędzie zapobiegania korupcji* finansowanego przez Narodowe Centrum Nauki.

The concept of corruption is difficult to define.⁴ Many authors seek the essence of corruption in using public power for private purposes.⁵ However, such an approach is too narrow as it limits the perception of corruption to activities within the public sector, and one does not notice corruption in the private sector. Nowadays, there is no doubt that corruption should be perceived as a multi-level phenomenon that takes place in various social contexts. Such a holistic approach to corruption as a phenomenon was expressed in numerous international documents, most notably the Criminal Law Convention on Corruption drawn up in Strasbourg on 27 January 1999, in the Preamble of which it was very aptly stated that ‘corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.’

Currently, it seems banal to state that fighting corruption is a difficult task. As a social phenomenon, corruption has been with humankind since the emergence of power structures, whose decisions influenced others. Therefore, in order to break through impossibilism in fighting corruption, more and more attention was paid to preventing it by creating mechanisms and procedures aimed at making it impossible to form corruptive relations. This issue has recently become the focus of the Polish Central Anti-Corruption Bureau which issued guidelines on the establishment and implementation of effective compliance programmes (*compliance*) in the public sector near the end of 2020. The purpose of this article is to analyse the document from the perspective of preventing corruption in Poland.

Corruptive activities have for a long time constituted the subject of regulation in criminal law as crimes that frequently involve relatively severe punishment.⁶ In the last decades, it has become clear that penal repression is not a sufficient measure for fighting corruption. This is because due to cultural factors,⁷ corruption is an

⁴ J. Kurczewski, *Czy socjologia korupcji jest możliwa?*, [in:] J. Kurczewski, B. Łaciak (eds.), *Korupcja w życiu społecznym*, Warszawa 2000, p. 157.

⁵ J.J. Senturia, *Encyclopedia of Social Sciences*, 1993, Vol. VI, as cited in J. Pope, *Rzetelność życia publicznego. Metody zapobiegania korupcji*, Warszawa 1999, p. 34.

⁶ In the Polish Criminal Code, sanctions for corruption in the public sector in the case of basic crimes are imprisonment from 6 months up to 8 years.

⁷ See: J. Bojarski, *Korupcja gospodarcza. Studium z dziedziny polityki kryminalnej*, Toruń 2015, pp. 105 et seq.

element of social life that is extremely difficult to eliminate. Therefore, the centre of gravity in anti-corruption activities began to move towards preventing corruption. An expression of the belief in the importance of corruption prevention at the level of international law is, for instance, Chapter II of the United Nations Convention against Corruption, adopted by the United Nations General Assembly on 31 October 2003. Regulations included in that part of the Convention relate to a range of activities that states-parties are obliged to undertake within the public sector (Articles 5–11 of the Convention) and the private sector (Article 12).

One of the measures that prevent corruption, next to educational activities, is promoting a compliance policy (*compliance*). From the legal perspective, compliance relates to the process of creating, adopting and applying norms (rules and procedures) within organisations which ensure the compliance of its activity with legal provisions.⁸ From the material perspective, compliance covers norms whose implementation in various kinds of organisations (entities from the public sector and the private one) is aimed at achieving compliance of a given organisation's activity with the applicable law;⁹ to a large extent that means the impossibility of building illegal relations and deterring potential perpetrators.

In Poland, compliance has been becoming more important and interesting to entities from the public sector for over a dozen years, which is influenced by national economic entities associated with American enterprises.¹⁰ Compliance programmes currently constitute one of the constant elements of the operation of Polish economic entities, as demonstrated by both legal instruments as recommendations adopted in the private sector,¹¹ and provisions of commercial law which include the obligation to establish an internal control system which ensures the compliance of a given organisation's activity with legal provisions, internal regulations and market standards.¹²

In the public sector in Poland, the issue of compliance was less known. The situation changed with the adoption of the Government Anti-Corruption Programme

⁸ The scope of compliance application is broad and it can cover provisions of labour law, financial law, environmental law, as well as repressive laws, especially criminal law.

⁹ For the concept of compliance, see C. Nowak, *Compliance Policy as a Manifestation of Legal Pluralism*, "Studia Prawnicze" 2018, 3, pp. 91 et seq., <http://doi.org/10.5281/zenodo.2544984>.

¹⁰ See: R.S. Gruner, *Corporate Criminal Liability and Prevention*, "Law Journal Press" 2017, § 14.01 et seq.

¹¹ See e.g. chapter 3 of the document *Dobre Praktyki Spółek Notowanych na GPW 2016*. More extensive norms were included in *Standardy rekomendowane dla systemu zarządzania zgodnością w zakresie przeciwdziałania korupcji oraz systemu ochrony sygnalistów w spółkach notowanych na rynkach organizowanych przez Giełdę Papierów Wartościowych w Warszawie S.A.*, adopted on 8 October 2018 (<https://www.gpw.pl/dobre-praktyki>, access: 24.02.2021).

¹² See e.g. Article 9c of the Act 29 August 1997 – the Banking Law Act (i.e. Journal of Laws of 2020, item 1896).

for 2018–2020, in which a task referring to compliance was provided for the first time in history – namely Action 4.2 entitled *Devising Guidelines for the Establishment and Implementation of Compliance Programmes (Compliance) in the Public Sector*.

The performance of that task was placed upon the CBA which fulfilled the obligation on 26 September 2020 by issuing *Guidelines for the Establishment and Implementation of Compliance Programmes (Compliance) in the Public Sector*¹³ (hereinafter referred to as '*Guidelines*').

The document is non-binding, nonetheless, as the first official set of compliance guidelines in the framework of the Polish public sector, it constitutes a milestone in preventing corruption in Poland.

The *Guidelines* are based on an apt philosophy that 'fighting corruption is not only repressive action, but also prevention.'¹⁴ They include nine more extensive recommendations as to building, implementing and executing a compliance programme within an organisation. These recommendations concern: involving management, integrating compliance with the mission, competences and tasks of employees in the compliance department, compliance monitoring and assessment, training, key competences, risk assessment, effective self-assessment, sanctions.

The starting point for further reflections must be the definition of compliance used in the *Guidelines*. According to the definition, 'Compliance is a set of related behaviour patterns, including legal and ethical ones, which obliges their addressees to adjust to them.'¹⁵ The form of the definition raises doubts because, in my opinion, it is not clear, firstly, what it means that behaviour patterns can be legal and ethical, and, secondly, whether the behaviour patterns can oblige their addressees to adjust to them. However, putting these concept ambiguities aside, it is worth noting that the intention of the authors of the definition seemed to be emphasising that compliance is a set of rules of conduct, and thus norms which should have not only a legal dimension, but also an ethical one. Additionally, the rules should bear an obligation to follow them, or, as it seems, a sort of sanction. Otherwise, it is difficult to imagine achieving the goal of compliance, which in the sense of the *Guidelines* is 'seeking to ensure that a norm addressee behaves as indicated by the norm-giver.'¹⁶

¹³ *Guidelines* available on the CBA website: <https://cba.gov.pl/pl/aktualnosci/4477,CBA-promotorem-zgodnosci.html> (access: 22.02.2021).

¹⁴ *Ibidem*, p. 3.

¹⁵ *Ibidem*.

¹⁶ On the other hand, the sentence that is noble-sounding but empty in terms of content, which reads that 'Pursuant to one dictionary definition, behaving in accordance with adopted rules or law is honesty' is completely incomprehensible in this context.

The *Guidelines* presented by the CBA concern the public sector, though the concept of the 'public sector' itself was not defined there and can be understood only intuitively. A detailed analysis allows for a claim that 'Compliance covers every sphere of an individual's functioning in public life', clarifying that 'In public authorities, compliance covers not only commonly applicable law and the internal law, but also organisational culture and professional ethos.' Analysing these formulations, one may conclude that the CBA indicates two groups of addressees who are obliged by compliance. The first, less detailed scope of compliance relates to natural persons who conduct public activity, whereas more detailed rules are supposed to apply to a special circle of persons, that is, persons who sit in the public authorities, including individuals who manage institutions in the public sector. This is because in relation to that group, compliance is supposed to cover not only compliance with the law, but also ethical stances – this is how one should interpret the reference to organisational culture and professional ethos.

One should make it clear that the division is not entirely transparent. If the definition of compliance used in the *Guidelines* refers to legal and ethical standards, it is hard to assume that persons from the first circle of addressees have an obligation to adjust only to the legal requirements of compliance without changing their ethical attitudes. On the other hand, it is good that the CBA puts an emphasis on the fact that persons sitting in public authority bodies are to meet higher requirements.

The *Guidelines* include the concept of 'every sphere of an individual's functioning in public life.' It seems that it should cover not only professional work, but also engaging in activity of another kind, such as, for instance, in the local government (carrying out the function of a councillor). Such a scope of applying the *Guidelines* differentiates them from compliance programmes adopted by organisations in the private sector (an enterprise, a corporation), which typically do not refer to those spheres of the lives of people subjected to compliance norms in an organisation, which are not related to those people's professions. Besides, it is hard to imagine an employer requiring their employees to behave according to law also outside their work. On the other hand, the CBA clearly sets a higher standard in the public sector, rightly expecting persons involved in public activity to have a higher level of ethics and to follow compliance rules also in their extra-professional activity.

As indicated above, the *Guidelines* include nine recommendations as to building, implementing and executing a compliance programme within an organisation. These recommendations may be considered conventional, and they cover rules which are found in every compliance programme. At the same time, however, they are substantively disordered – they concern various aspects of both the functioning of a public institution itself and the application of a compliance programme

in it. Perhaps it would be better if the recommendations were presented in a more logical order, for instance, chronologically, on the basis of stages of the functioning of a compliance programme in an organisation (devising, implementing, monitoring the compliance programme, potential sanctions for violation). In this context, a good example may be the rules of compliance programme assessment, adopted by the US Department of Justice, where a three-level evaluation of compliance programmes is proposed: in terms of the contents of a given programme, in terms of the effective implementation of the programme, and in terms of the effective practical execution (application) of the programme in an organisation.¹⁷

The first detailed element of the CBA *Guidelines* refers to involving management. As rightfully indicated by the authors of the document, it is the management that is responsible for the proper functioning of a given institution.¹⁸ In this regard, managers should implement appropriate compliance procedures and set an example by following these procedures and complying with law in general.¹⁹ Such behaviour is supposed to make one's subordinates believe that adopting a proper ethical stance is necessary, and thus, in general, to create a climate of the rule of law in the organisation. Persons who manage the organisation also have a more selfish interest in achieving compliance of the activity of the organisation and their subordinates with the law because, as correctly indicated in the *Guidelines*, 'in the end, it is management that is responsible for irregularities in an organisation.'

The second detailed recommendation in the CBA *Guidelines* concerns integrating compliance with the mission. There are, as it seems, two different issues behind this quite mysterious phrase. Firstly, the creators of the *Guidelines* apparently expect the public authorities to adopt an organisation mission. An organisation mission is a term taken from management sciences, in which a mission is defined as a brief definition of the goals, area of activity, values and organisational objectives of a given organisation.²⁰ All of these elements referring to the public authority bodies are defined in provisions concerning them, however, a brief review of them in a separate statement may constitute a valuable clue for the general public when it comes to the tasks of a given institution.

Secondly, the *Guidelines* set out an obligation to provide appropriate resources for the purpose of executing the compliance programme. This element is crucial to

¹⁷ See U.S. Department of Justice Criminal Division. *Evaluation of Corporate Compliance Programs* (Updated June 2020), p. 2.

¹⁸ See *ibidem*, p. 10. For details, see R.S. Gruner, *op. cit.*, § 14.06 point 6b.

¹⁹ In the English-language literature, this is called 'tone at the top'.

²⁰ A.K. Koźmiński, W. Piotrowski (eds.), *Zarządzanie. Teoria i praktyka*, Warszawa 2006, p. 701.

the effective implementation of the compliance programme.²¹ It is even indicated in the *Guidelines* that 'taking resources for performing compliance tasks into account in the institution's budget is recommended,' regardless of the allocated human and financial resources. There is no doubt that introducing a compliance policy into an organisation is difficult without providing resources, including financial ones. However, this enables, as the *Guidelines* aptly emphasised it, 'minimising future costs related to potential non-compliance, especially by: constant quality improvement in procedures and projects, adherence to the organisational culture, use of new technologies, stressing the importance of training, and compliance monitoring.'²²

The last recommendation is strictly connected to the following three ones, which concern compliance employees, training and self-assessment. In the *Guidelines*, the CBA recommends appointing persons responsible for the execution of a compliance programme at an institution in the public sector. It is very reasonably required that such a person take an independent position²³ and be properly 'prepared substantively and experienced, which allows for navigating in the area of mechanisms at an institution. Furthermore, that person should enjoy general respect which results from their everyday attitude and honest work for a given institution.'²⁴

Additionally, institutions in the public sector have an obligation to provide training in a compliance programme to both the managerial staff and mid-level employees. This element of compliance programmes is generally and rightly considered as extremely important,²⁵ so it should be executed regularly for all of the staff.

The last recommendation in this respect is the recommendation that refers to carrying out an effective self-assessment.²⁶ A compliance programme cannot be rigid, it should change with external conditions or internal modifications within a given organisation. Furthermore, the addressees of intra-organisational programmes grow accustomed to known impulses over time and lose their sensitivity to issues that they deem recognised. For these reasons, it is important that the compliance programme be constantly evaluated, which would be aimed at effective detection of loopholes and weaknesses. This task, in the light of the CBA *Guidelines*, is conferred on the managerial staff and employees responsible for supervising the compliance programme. At the same time, an additional clue comes from the

²¹ See U.S. Department of Justice Criminal Division. *Evaluation...*, p. 11.

²² *Guidelines*, p. 6.

²³ *Ibidem*; U.S. Department of Justice Criminal Division. *Evaluation...*, p. 12.

²⁴ *Guidelines*, p. 6. A similar recommendation is provided for in U.S. Department of Justice Criminal Division. *Evaluation...*, p. 11.

²⁵ U.S. Department of Justice Criminal Division. *Evaluation...*, p. 5.

²⁶ *Ibidem*, pp. 15 et seq. See also R.S. Gruner, *op. cit.*, § 14.02 point 6e.

Guidelines – to make ‘evaluation of the effectiveness of compliance holistic,’ and thus to make it concern all elements of the programme.²⁷

The *Guidelines* also relate to risk assessment. In the USA, this task is considered the first step of building an effective compliance programme²⁸ – without identifying risks for an organisation and evaluating these risks, one cannot build a personalised corruption prevention programme. In the CBA *Guidelines*, this issue was mentioned later, which, in my opinion, should be evaluated negatively because such an order may suggest to the addressees that risk assessment is less important than other elements of an extensive compliance programme. However, referring to the substantive aspects of the CBA recommendations in this respect, one should consider the recommendation that the compliance programme should include ‘identified dangers and incidents and high-risk areas should be subject to additional control’ as rightful.²⁹

The biggest problem in the analysis is linked to Recommendation 6 which concerns key competences. According to the *Guidelines*, ‘key competences in the area of compliance are the ability to identify essential problems and design solutions which diminish or eliminate those problems, as well as performing tasks by co-operation and collective intelligence.’³⁰ This concept seems to refer to skills which should be characteristics of persons who are responsible for the implementation and monitoring of a compliance policy in an organisation. Nevertheless, the definition itself constitutes an example of technocratic newspeak and it does not bring much content. As a result, the recommendation is unintelligible and unclear.

The last recommendation in the *Guidelines* concerns sanctions. The *Guidelines* confuse the reader at this point. On the one hand, it is indicated that ‘one of the ways of ensuring compliance is determining by the norm-giver a negative consequence of behaviour that not compliant with a behaviour pattern.’ On the other hand, it has been written that ‘it is not a sanction that should be the main goal of the public authorities, but prevention which is focused on improving voluntary adherence to binding behaviour norms.’ As a result, it was not sanctions that were named in this fragment of the *Guidelines*, but ‘recommended prevention tools’, the

²⁷ *Guidelines*, p. 7.

²⁸ See: U.S. Department of Justice Criminal Division. *Evaluation...*, pp. 2 et seq.: “The starting point for a prosecutor’s evaluation of whether a company has a well-designed compliance program is to understand the company’s business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.”

²⁹ For a broader discussion on risk assessment, see: R.S. Gruner, op. cit., § 14.07 points 7–7A.

³⁰ *Guidelines*, p. 8.

goal of which, as it seems, is ensuring adherence to a compliance policy, and which cover information and education, co-operation and mentoring, new technologies and praise and rewards.

Obviously, the creators of the *Guidelines* should be praised for appreciating the importance of penal prevention and in this respect, the importance of not repressive measures, but incentives in the context of fighting crime. However, one cannot help but notice that in the context of compliance, incentives alone are sometimes not enough. Therefore, it would be worth expanding this part of the *Guidelines* with a more detailed reference to sanctions.³¹

The discussed CBA *Guidelines* constitute a milestone in the process of preventing corruption in the public sector in Poland. This is the first time that a need for corruption prevention was formulated so clearly in an official document, and, what is more, extensive rules of prevention programmes in this respect were presented. Admittedly, they are not as developed as corresponding programmes adopted by entities in the private sector,³² nonetheless, they constitute the beginning of a new way of perceiving and recognising the importance of corruption prevention in the Polish public sector.

However, doubts may be raised by the fact that the *Guidelines* have been created as part of the work done by the CBA that identified itself in the discussed document as 'one of the market regulators in Poland in terms of adherence to legal norms, especially in the public sector.' This linguistically awkward definition indicates how the Bureau perceives its own role and that it perceives the role too broadly. A similarly far-reaching goal has been formulated by the Head of the CBA in the introduction to the *Guidelines*, hoping that the presented 'most essential theoretical and practical issues regarding compliance will not only be useful in everyday official service, but that they also contribute to devising a national honesty programme.' Nevertheless, the CBA's actual competences, defined in the Act of 9 June 2006,³³ are definitely narrower,³⁴ and the Bureau's tasks do not include taking care of adherence to legal norms, which I understand as preventing crimes, nor do they

³¹ As done by the US Department of Justice that mentions rewards and sanctions in one breath. See: *U.S. Department of Justice Criminal Division. Evaluation...*, p. 13 (Incentives and Disciplinary Measures).

³² For instance, there is no recommendation concerning internal communication or action in the event of detecting irregularities or contacts with external entities.

³³ Act of 9 June 2006 on the Central Anti-Corruption Bureau, i.e. Journal of Laws of 2019, item 1921, as amended.

³⁴ It is provided for in Article 1 of the above-mentioned Act that the CBA is a special service appointed 'to fight corruption in the public and economic life, especially at national and self-government institutions, as well as to fight activity that undermines the economic interests of the country.'

include building a (national) programme of honesty. If the CBA were also supposed to take care of prevention aspects – and this is indeed missing from the national anti-corruption activity in Poland – the Act on the CBA should be amended. At the same time, however, I believe that assigning preventive tasks to a special service is not an institutionally apt decision. For this reason, I postulate that establishing a separate institution, responsible solely for the prevention of corruption in the public sector, should rather be considered.

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