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Transparency in public life. Draft act – new anticorruption obligations

Jawność życia publicznego. Projekt ustawy – nowe obowiązki antykorupcyjne

Summary

The paper is devoted to the problem of fighting corruption in the public and private sector from the perspective of legal solutions adopted in the draft Act on Transparency in Public Life. The Draft Act will probably enter into force in the second half of 2018. And it will revolutionize the way of counteracting corruption, the burden of which will be transposed onto the heads of the public finance sector units and the businessmen having the status of at least medium entrepreneurs. This essay aims to present the most probable consequences of the upcoming legal changes. The risks and opportunities resulting from the Draft Act provisions are shortly discussed in the text.

Keywords

corruption, combating corruption, transparency in public life, public administration, private sector, whistleblowing

Streszczenie

Artykuł podejmuje zagadnienie przeciwdziałania korupcji w sektorze publicznym oraz prywatnym z perspektywy rozwiązań przyjętych w projekcie ustawy o jawności życia publicznego w wersji z dnia 8 stycznia 2018 r. Projekt ustawy wejdzie najprawdopodobniej w życie w drugiej połowie 2018 r. i całkowicie zmieni sposoby przeciwdziałania korupcji. Obowiązek jej przeciwdziałania będzie spoczywał przede wszystkim na kierownikach jednostek sektora finansów publicznych oraz na średnich przedsiębiorcach. Artykuł ma na celu przedstawienie ewentualnych konsekwencji prawnych wynikających z projektowanej regulacji prawnej. Podejmuje także zagadnienie potencjalnych zagrożeń i możliwości z niej wynikających.

Słowa kluczowe

korupcja, przeciwdziałanie korupcji, jawność życia publicznego, administracja publiczna, administracja prywatna, informowanie o nieprawidłowościach

Introduction

In October 2017 the first publication of the draft Act on Transparency in Public Life took place (further as the Draft Act). The new legal solutions will be the answer to the obligation brought under the recent anticorruption strategy of Poland.

On January 6, 2018, pursuant to Resolution No. 207 of the Council of Ministers of December 19, 2017 (Resolution No. 207), the Government Program for Counteracting Corruption for 2018–2020 was established. The new anti-corruption strategy implements the obligation to carry out anti-corruption activities on a systematic basis resulting from the recommendation of the GRECO Group of States against Corruption, recommendations of the European Union and the Council of Europe, as well as the United Nations Convention against Corruption.

The strategy aims to strengthen the transparency and control of public processes and increase public awareness in the field of corruption as well as to coordinate the work of law enforcement agencies. The program provided for the introduction of a regulation on the protection of whistleblowers and implementation of compliance systems in public administration. The realization of this assumption are the Draft Act provisions.

The new program is intended to present a comprehensive approach towards corruption crime in the country, and at the same time precisely indicates the instruments for counteracting and fighting it, as well as better identifies the implementers of individual tasks. In the opinion of project promoters, the greatest threat of corruption exists in the spheres of the greatest co-activity of private economic entities and public institutions as well as at the meeting point of private money and public funds. The program is to ensure an effective fight against this type of crime − not only through repressive measures, but also the prevention and effective diagnosis of corruption phenomena. The new requirements resulting from the draft legislation are definitely an expression of mandatory prevention.

After publication of draft provisions in October 2017 the Draft Act was subjected to public consultations, which lasted only two weeks. Nevertheless many public and private entities filed the comments and remarks to the project. The second round of consultation was open for the public bodies only. Not many of the remarks were considered, while the next version of Draft Act was published on January 8, 2018. This latest version of the Draft Act is currently subject of works in the Standing Committee of the Council of Ministers. The act will according to public discourse enter into force in the middle of 2018. All the provisions of the act will become binding straight ahead, however for the entities obliged to develop and apply internal anticorruption systems will be granted the transition period of 6 months from the date of act's entry into force.

1. Corruption and Ways of Preventing It in Public Administration Under the Provisions of the Draft Act

Corruption is not any new phenomenon. The first historical remarks on combating corruption reach back to Antiquity [Taylor, 2017] and the historians believe that it intensifies extensively in the moments of great political, demographic, cultural or social changes [Buchan, Hill, 2014]. It is perceived one of the most problematic social issues. According to many studies Polish citizens find it a huge social problem and one of the biggest obstacles for the development of the sound administration of the country [CBOS, 2009].

Polish legal system harshly penalizes corruption however such provisions come not only from the Penal Code, but there are other types of corruption provided. The corruptive crimes may take place in sports and turnover of medicines either. Polish legislator noticed that although having so many anti-corruption provisions, they give a little of effect. Still Poles find public administration officials one of the biggest sources of corruption and almost 1/3 of Polish citizens thinks that there is no political will to combat it [CBOS, 2009]. Maybe in response to that legislators decided not only to penalize corruption, which visibly may not bring a desired effect, but to make prevention of it obligatory for all the units of the public finance sector.

As it is widely known that *praestat cautela quam medela*, the legislator decided to put the burden of application of anti-corruption means on the units themselves. To be precise on the heads of those units. Additionally to penalizing the corrupt acts the usage and adaptation of the internal anti-corruption systems will be obligatory under the Draft Act.

All of the units from the above mentioned sector will have to introduce "organizational, technical and personnel measures" (art. 68 of the Draft Act) to prevent from commitment of the crimes defined in the Draft Act. The crimes listed in the Draft Act are corruptive acts form three already binding Polish legal acts:

1. art. 228, 230, 230a, 231 §2, 246, 250a, 286, 296, 305 of the Criminal Code: venality, paid protection, abuse of function, bullying to obtain a statement, urging to vote, fraud, abuse of trust and disrupting the public tender,
2. art. 46 (1–4) and art. 48 of the Act on Sports: corruption in sport, influence peddling in sports,
3. art. 54 (1–3) of the Reimbursement law: corruption in turnover of medicinal products, special nutrition foods and medical devices which are subject to reimbursement.

While the purpose of the internal anti-corruption system of the public finance sector units is clearly described, the elements of it are not that obvious. Article 68 of the Draft

Act introduces an open catalogue of elements that constitute an internal anti-corruption system. These are:

1. identification of offices particularly endangered by corruption − the starting point for the proper implementation of the anti-corruption system is a precise risk-mapping. Conduct of an analysis of all the processes that take place within the organization, each department and office is crucial for the adjustment of the right preventive measures. Both insufficient solutions as well as overregulation of the internal compliance management system may result in decrease of operational effectiveness of the organization.

   Upon the results from the risk-mapping the further procedures should be developed. The identification of the posts particularly endangered by corruption is important, as otherwise the procedures of conduct implemented in the organization would have to include every single employer, which would be unnecessary. There is an obvious difference between risks emerging in the work of a clerk having a direct contact with natural and legal persons whose cases he or she is deciding on and the risk occurring in the work of a receptionist or a security personnel. All of the posts should be certainly covered by the analysis anyway, nonetheless the positions of high risk exposure should be paid more attention. The final outcome of such an inquiry can be a well re-prepared organizational structure and the exact description of each post in the form of the exhaustive "job cards",
2. trainings for employees regarding criminal liability for corruption − probably every organization has its own HR department dealing with the obligatory trainings for employees. Such a department takes care of preparation of standard trainings like work-safety and fire protection and runs the schedules of cyclic courses. Anti-corruption trainings could be included in the schedules like these or be part of a mandatory adaptation training, and then the training would be perfectly fitting the actual post the newly hired person would hold and respond to risk particularly connected with it. The form of trainings is not dictated. For some of the organizations which hire a big number of employees the conduct of training for everyone will definitely be a challenge. This is why every unit should choose the most effective way of organizing these trainings. Worth considering are definitely e-learning courses and online exercises. Each time the result of the training could be checked by the undertaking of the small test, examining the employees' knowledge. That would also prove the effectiveness of organized trainings under eventual control,
3. anti-corruption code of the unit − each unit will have to develop such a code as a declaration of rejection of corruption that will have to be signed by every employee of the unit. Such declarations could be collected in the form of annexes to the employment contracts or as signing some kind of a collective letter,

4. "gifts and benefits" procedure − handing occasional gifts in business relations is a common practice. But even in the private sector the rules and approach towards this tradition become more and more strict under development of compliance and transparency culture. It happens that representatives of some companies handle the small promotional materials and gadgets to the public servants. However for the sake of total transparency each gift could and should be recorded in a dedicated Book of Gifts, with the description of exact circumstances of transfer of such a benefit. This can cause unnecessary chaos and misinterpretations, therefore more practical solution would be a total ban of acceptance of any kind of gifts. The first questions towards the opposite idea would be: "why would any person direct any marketing activities at a public servant? or how to differentiate the gifts and how to assess their value? or what kind of gifts are appropriate and which are not?" The simpler solution the better – an absolute prohibition of exchange of any gifts between public and private sector would be solving all the troubles in this field. Internal gifts exchange could be a subject of further analysis depending on the organization,
5. internal measures that prevent from making decisions based on corruption − the concept of these measures is not elaborated in the act itself. The measures will then have to be particularly designed for each organization considering its own risk-mapping and characteristics. One of the most obvious ideas is to strengthen, profile and grade the process of acceptance of decisions. Such process of making crucial decisions could be described in details and steps in the dedicated procedure,
6. internal procedure for informing the head of the unit about cases of corruption and procedure of dealing with notifications of irregularities − meeting these two statutory requirements (art. 68 (2) (6,7) of the Draft Act) is a good start for building the complex internal whistleblowing system. One of the biggest advantages of whistleblowing is the strengthening of control over the organization and possibility of quicker detection of irregularities and violations of law and internal standards. The biggest issue around whistleblowing is the problem of protection granted (or usually not) to the whistleblowers, who reporting on wrongdoing usually meet negative consequences and ostracism in their work environment. The provisions of the draft act in another part (Chapter 9 of the Draft Act) do try to deal with the protection of whistleblowers, but unfortunately they provide the protection which is granted externally by the public prosecutor, which in fact may contribute to fixing of the stereotype of a whistleblower as an "informer and snitch" that is already strongly rooted in Polish mentality as a heritage of the communistic past. This is why the legislator should rather emphasize the important feature of the well-functioning whistleblowing which is the possibility of an anonymous and confiden-

tial reporting with the strongest possible protection of whistleblower's identity. Legislator should also encourage to a constant improvement and upgrading of whistleblowing systems according to technical progress and opportunities it gives. The internal procedure of whistleblowing should cover the widest range of those entitled to notify which should not be limited to employees. An example of such form of whistleblowing system is the one introduced by The Polish Social Insurance Institution which allows everyone to report anonymously under a dedicated phone line and e-mail box. The procedure of dealing with the notifications filed by whistleblowers should address the concept of "a good faith" of the whistleblower, the procedure of granting the internal status of a whistleblower and the conditions for that and finally the scheme of informing the proper law enforcements authorities if the reported case considers a possibility of commitment of a crime.

2. "In Particular" − The Basic Elements of Anti-Corruption System in the Light of the Art. 68 of the Draft Act

Before the list of essential elements of a anti-corruption system is introduced, art. 68 of the Draft Act says that the head of the unit is obliged to "develop and apply" given elements, the list of which is preceded in the text of the article by the expression "in particular". This gives a rise to the concerns if the introduction of all the directly introduced elements will be enough for the organizations or units. It may also indicate that the proposed elements constitute a kind of an absolute minimum for the effective anti-corruption system. That would be true, considering the diversity of public finance sector units, the plurality of task they handle and the dissimilarity of risks their tasks-performance create. It is obvious that different kind of corruption risk would threaten a bank and a public university. The list of elements building the internal anti-corruption system can therefore be treated as a basic standard of measures that could be implemented in any kind of organization, no matter its type, tasks, functions and purposes it realizes. It may be seen as realization of one of the most visible European legislative trends, that somehow transfers the burden of risk-analysis on the entity that is obliged to apply the legal requirements in practice. It may be noticed on the example of GDPR [Regulation 2016/679] rules which force the data collector to adjust the protective measures to the kind of processed data and risks attached to the processing it conducts. It should be evaluated positively a it avoids the chance of the "overregulation of law", makes it easier for those who must meet legal requirements and possible to them to design the solutions that comply with the law but are at the same time "tailor-made" and perfectly suit the type of activity the obliged entity runs.

3. The Risks and Opportunities of Legal Solutions Adopted in the Draft Act

This kind of legislation however may give rise to some political battles especially on the level of local self-governments, which according to Central Anticorruption Bureau (further as: CBA) gather one of the most often pursued group of violators of anticorruption provisions. For example the head of the district hospital could be politically dismissed from the post even if all of the statutory elements were introduced in the hospital, but the poviat management's commission decides that the anti-corruption system was not effective, as it for example did not allow patients to report in the anonymous way about doctors demanding bribes for performance of medical procedure, but the whistleblowing system was functioning exclusively for the employees and allowed notifying only the other way round. That kind of an open catalogue when it comes to "filling positions" in public finance sector may be a tool of political games and manipulation.

But aside to dangers it can actually be a good base for building some kind of sectoral standards. Considering specific corruptive risks in different types of units, the units themselves – separately or jointly – may design additional preventive guidelines to develop statutory anti-corruption systems in certain fields to strengthen or precise the proposed elements of anti-corruption systems. For example the Association of Polish Counties could develop the standards of effective trainings for employees of poviats offices, with educational programs dedicated to different kinds of clerks and other personnel, taking into account the specific corruptive risks connected with different types of post that are held in the offices, to make the trainings more effective. The Draft Act suggests that all the employees should be familiarized with the criminal liability for corruption, but such educational programs could and should be more complex. It should be conducted after the implementation of all the procedures regulating their work and should at first popularize the anti-corruption standards and procedures building the whole system in the unit, then promote proper behavior and in result show the liability for misconducts. It could be even supported by the great number of case-study workshops with the use of real cases from the sector, because as studied every third case pursued by CBA concerns the bribery of public officials on the local self-government level and the most commonly accepted bribes are the small ones. Clerks in local self-governments and its agencies accept money for settling a case, speeding up a decision, e.g. a building permit, issuing appropriate permits or certificates or even arranging a work admission [CBA, 2015]. Promotion of standards worked out in sectors or associations could have a real impact as built on the experience.

4. "Develop and Apply" − Why is It Not Enough?

The direct obligation of building the internal anti-corruption system comes in fact to two activities directly specified in the text of article 68 (1) of the Draft Act: develop and apply. These two steps used exclusively may be the source of ineffectiveness of the whole system. It is easy to imagine that the head of the unit creates the perfectly designed solutions in the procedures directly required by the Draft Act, however nobody from his or her employees is applying them in practice. As it is out of his or her ability to apply them all alone. The procedures of conduct are for the employees. The only way to check if they are well-applied is to monitor it through cyclic audits and controls. Such audits should be concluded by the dedicated internal commission, but even more desirably by an impartial, external entity. Periodicity of regular checks could be described in e.g. the anti-corruption code or (when building more complex system) in an additional audits and controls procedure, which could describe the rules of conducting such evaluations of functioning of the system.

The auditing practice is well-known and widely exercised in the well-developed countries and financial sectors world-wide. International standards provide guidance for establishing, developing, implementing, evaluating, maintaining and improving an effective and responsive compliance management systems within organizations, which anti-corruption systems are part of, and the compliance systems built upon these standards require introduction of auditing and checking regularity [ISO 19600:2014] to ensure the highest effectiveness of the system and its continuous functioning.

The audits and controls should be the final step, however there could be one more intermediate step identified in between "developing" and "application", and that would be implementation. Private business knows the compliance systems far better than public sector and it has been building them for years already. Its experience shows, that it often happens that even at first glance ideally developed procedures, which consider all the potential risks according to previously detailed risk-mapping, are in practice completely unsuitable to the organization at stake. It may happen that the procedures are being developed by some external entity, which did not take a proper insight to the actual work environment of the organization or did not review the documentation of the organization well or created the procedures according to some basic template. Then or in many other possible situations involving simple mistakes in result the procedures are incompliant with the rest of the documentation or in some places even contrary to the rest of the internal management system and its particular parts.

This is why the implementation phase should always take place to make sure that the newly created anti-corruption system is fully consistent with the already worked-out

management system and other internal procedures. It should include the standardization and evaluation of the whole documentation new and already binding, newly created processes should be subject to cyclic employees training according to already functioning systems of personnel schooling.

Therefore the text of the provision provided in the article 68(1) of the Draft Act should be formulated according to the schedule:

Fig. 1: "Scheme of Activities connected with building of the effective anti-corruption system".
Source: own elaboration.

Working according to these scheme and developing the anti-corruption system according to the highest international standards of compliance management systems and the sectoral guidelines designed within the areas of cooperation like national associations or inter-sectoral forums may influence the effectiveness of internal anti-corruption systems. Which is incredibly important from the perspective of the head of unit, as the only penalty provided in the Draft Act for the week anti-corruption system would be imposed on him or her.

The procedure of penalty imposition is presented in the article 86 of the Draft Act. It starts in the moment when the public prosecutor charges a natural person employed in the public finance sector unit with committing one of the criminal offences defined in the Draft Act (art. 68(1) of the Draft Act and listed already above). The charges themselves may initiate the control in the unit ordered by Chief of CBA. The purpose of the control is to check if the implemented procedures constituting the anti-corruption system of the unit are effective and applied in practice and if they are not ostensible. If the control reveals that there were no procedures implemented, or the implemented procedures were not applied or that they were ineffective or ostensible, then the Chief of CBA draws up the application for punishment for the head of unit and directs it to the criminal court. The court will decide over the amount of the financial penalty. The scheme of the penalty imposition is described in art. 86 and may be presented in such a way:

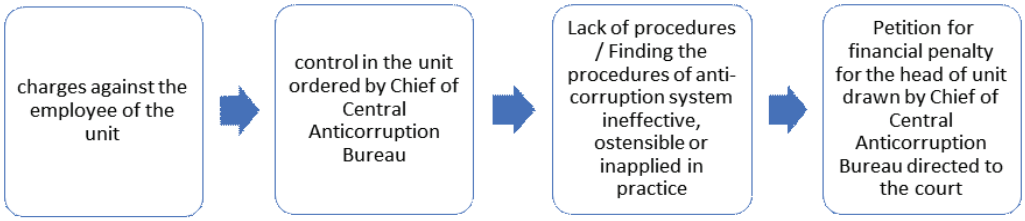

Fig. 2: "The procedure of punishment in public sector".
Source: own elaboration.

The Chief of CBA may (but does not have to) depart from formulating the application for punishment, when the head of the unit informs the services before and the investigation was started upon that notification. Nevertheless this probably will not happen frequently, as the most of the corruption crimes is committed by the clerks of the lower rank and are not managed, directed or authorized by the heads of the units, what along with the lack of internal whistleblowing system result in the head of the unit being the last to know about the violations of law or internal standards.

In result the risk is huge as the commitment of the crime by any employee may already be understood as the expression of ineffectiveness of the whole system or its particular elements. The same with the charges which initiate the control at the very first place. The charges in the end of investigation do not have to be confirmed, therefore the whole criminal procedure may rely on the weak evidence, which would later on ignite the bigger controlling procedure. Again the provisions formulated this way can create an incredibly strong tool for political manipulations and games for every power as to the filling the posts in public agencies and dismissing those who do not "fit".

5. The Draft Act and Central Anticorruption Bureau' Competences Towards Private Sector

Worth mentioning is also the huge power attached under draft provisions to Chief of CBA. The act definitely strengthens the activities which a public servant holding this post will be entitled to conduct, which will go far beyond the current powers and authorizations. But the whole Bureau is going to be developed according to public announcements. CBA is going to prepare more workplaces and regular posts. It is going to take to the services around 500 new agents (which equals to ½ of the current number of agents) within two years and strongly increase the operational budget, which according to some calculations will reach 80 mln PLN more than presently. The budgetary enhancement will be devoted to modernization of equipment and upgrade of retrofitting

[Kacprzak, 2017]. CBA will take over some tasks of The Internal Security Agency such as protection of an economical safety of the country. Taking into account all of the upcoming changes, one might say that Central Anticorruption Bureau is going to become one of the most powerful agencies of the state. A kind of a super-agency.

Combating corruption occurring among public servants is one of the tasks that citizens appreciate the most and associate the Bureau's work with. However chastening the economic (so called "managerial") corruption is also an enormous part of Bureau's activity. Its meaning in this field is again highlighted in the Draft Act on Transparency in Public Life. The private sector will be obliged to develop organizational anti-corruption systems composed out of very similar elements as those, which must be implemented in public administration units.

Entrepreneurs who reach the status of a medium or big undertaking will fall under the scope of anti-corruption provisions and will be obliged to introduce the following tools:

1. avoiding the situations of creation the mechanisms that support corruption activity with the use of company's assets,
2. trainings for employees regarding criminal liability for corruption,
3. anti-corruption clauses to use in the contracts,
4. anti-corruption code of the company,
5. "gifts and benefits" procedure,
6. internal measures that prevent from making business decisions based on corruption,
7. internal procedure for informing the employer about cases of corruption,
8. procedure of dealing with notifications of irregularities.

6. Imposition of Penalty – Combination of Different Types of Proceedings in the Draft Act

The lack of such procedures, their ineffectiveness, inapplicability or ostensibility during the control initiated on the same reason as in the case of public finance sector units and conducted again by CBA will be punished with financial penalty. The amount of fine will be decided by the Chief of CBA and it will range from 10 thousand PLN to 10 mln PLN in the form of application for punishment with the description of the facts established during the control. For a CBA inspection to be conducted it will be sufficient that only corruption charges are raised against an employee or another person acting in the name or on behalf of that company – regardless of the final outcome of investigation and their confirmation or dismissal.

The entrepreneurs will have 30 days to pay the fine imposed on them since they receive the application for punishment and if they fail to meet this deadline the petition

for penalty drawn up by the Chief of CBA will be directed to the President of the Competition and Consumers Protection Office. Then such an application initiates the proceeding before the President of the Office, who imposes a penalty on the entrepreneur in the way of an administrative decision. The entrepreneur will then have a right to appeal the case to the court of competition and consumer protection.

The whole penalty imposition procedure is described in the art. 77 of the Draft Act and may be presented according to this scheme:

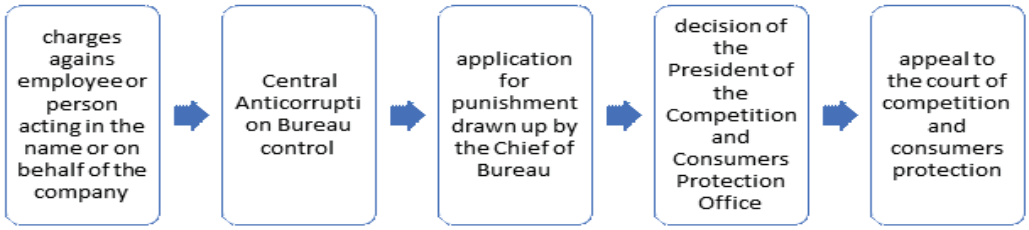

Fig. 3: "The procedure of punishment in private sector".
Source: own elaboration.

The additional risk for companies leaning some part or most of their business on the public procurements it the automatic ban for competing and applying for a public contract aside the application for punishment. The ban will last 5 years and its result as an economic and reputational disadvantage is huge.

The same with President of the Office decision, as these are public and published on the webpage of the Competition and Consumers Protection Office. But the control itself may bear a risk of public relations losses. The information about conducted controls are sometimes being published on the CBA webpage and the draft provisions do not exclude such a possibility.

Another concern is a mix of two types of known legal proceedings. The whole procedure combines somehow both administrative and judicial procedures. It is a completely new form of procedure and the reason for engagement of the President of Competition and Consumers Protection Office is now known yet as it was not delivered by the authors of the Draft Act. The effectiveness of the newly introduced proceeding will be proved in practice.

7. The Draft Act − Global Standards in Combating and Preventing Corruption?

As already mentioned in the introduction the Draft Act was guided by many of the international organizations' recommendations. But as to the form and elements of the internal anticorruption systems Polish legislator must have been inspired by the anticor-

ruption legislative global trends. An example from the European area may be the newest French weapon to combat corruption, which is the act called Sapin II. French legislation obliges large enterprises to introduce obligatory internal systems composed of the elements of prevention such as risk-mapping, trainings for employees or internal whistleblowing lines. Sapin II is said to be strongly influenced by the older acts of the similar characteristics that are American Foreign Corrupt Practices Act (FCPA) from 1977 or British Bribery Act from 2010 called the harshest anticorruption regime in the world, as the financial penalties there are unlimited.

The high financial penalties provided in the Draft Act are for sure inspired by the penalties that are being imposed under the provision of FCPA and that reach hundreds of millions of U.S. dollars. The recent Telia (Stockholm-based telecommunication company) case reached the record-breaking penalty of 965 mln $ of the settlement agreement [U.S. DoJ, 2017].

Not only the high amount of penalties is the visible influence by the foreign legislations but another worth mentioning aspect either. It is the responsibility of the company (or organization) for the acts committed by its employees. Such a concept is introduced in all of three above mentioned foreign acts and was tried to be implemented in Poland under the Act of Responsibility of Collective Entities for Acts Prohibited under Penalty. Unfortunately the act may be called "dead" as it is almost absolutely not being applied in practice. The amendments to the act are in the governmental plans [Sobczak, 2017]. but the Transparency in Public Life Act will already revolutionize this area. In the three above mentioned foreign acts the liability of the company for the acts committed by persons employed in the company or authorized to act on behalf or in the name of the company is justified by the assumption that it was the organization that failed to prevent from commitment of a crime through not establishing the proper internal procedures and other organizational solutions such as educational programs, etc. This concept and kind of a legislative trend is definitely realized in the draft provisions when it comes to entities from both public and private sector.

Conclusion

Introduction of the new tools for prevention and combating the corruption if enters into force and is applied in practice, will most probably result in:

- increase of social awareness thanks to educational measures,
- strengthening of organizational prevention and counterfeiting the corruption "at its source" thanks to obligatory internal procedures and high penalties,

- strengthening of chastening the corruption thanks to granting wider authorization to the CBA,
- supporting the state budget with the influences from high financial penalties imposed on entities non-compliant with new requirements,
- development of the concept of company's liability for wrongdoing of its employees.

The most important question remains: will the upcoming legal changes influence the statistics and will the corruption phenomenon be more uncommon? The other effects of the Draft Act will have to be observed after its entry into force.

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