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**TAKING RESPONSIBILITY FOR PREVENTION  
AND FIGHT AGAINST CORRUPTION  
IN LOCAL GOVERNMENTS**

**I. Foreword**

1. Corruption appears to affect almost every public sector in our country and its scale significantly exceeds the western European ‘norms’. Although the size of the problem is difficult to estimate, it certainly does **not** decrease, which is confirmed by the Corruption Perceptions Index (CPI) published annually by the Transparency International. In 1996, when Poland was included in this evaluation for the first time, we scored 5.6 points and were on the 24 position out of 54 countries covered by the Index. Ten years later, in 2005, with the score of 3.4 points we share the 70–76 position with Egypt, Lesotho and Syria.

Corruption affects public institutions to such a degree that it calls for preparation and implementation of an **anti-corruption strategy** represented by an integrated system of various actions taken in the areas of politics, administration, prosecution and the judiciary system. Anti-corruption strategy can bring the desired results through effective prosecution and sentencing of corrupted people, on the one hand, and by implementing changes in labour coordination and in access to civil service, on the other, as well as by promotion of ethical principles in public life.

In order to be effective, the anti-corruption strategy must go beyond academic seminars and media inquiries. Political determination of the present government is indispensable in taking action against corruption. So far, the successive governments, while doing their best to retain full privileges of the diplomatic immunity, have led to situations, when former MPs were being issued an arrest warrant, just after their term of office had expired. There are instances when parliamentary mandate becomes a goal and a cover for an offender. All the successive amendments to the Civil Service Act

were aiming at “ensuring a politically neutral performing of the duties of the state”, but by a current government in power.

2. In these circumstances, the idea to establish a Central Anti-Corruption Bureau seems startling; however, after years of unsuccessful actions taken against corruption, setting up a special structure appears necessary and well-grounded. Such initiative is corroborated by similar situations in other countries where corresponding institutions have been founded (Hong Kong, Singapore). Doubts emerge with regards to procedures for establishing the office (a party, not a state office), for appointing a supervising authority and also for selecting the personnel. Additionally, the project of founding a new office may give an impression that we no longer believe the problem could be dealt with through a reform of the prosecution service, the Central Bureau of Investigation and Internal Security Agency, which would enable the battle against corruption to be conducted with similar success but within traditional structures.

Taking into account the actual scale of the problem, it should be considered reasonable to establish a special institution, particularly when dealing with already committed offences of corruption. It is to be noted though that the main direction of the battle against corruption must be towards counteraction and far-reaching prevention. In the case of corruption within the administration sector (corruption in office), prevention would be the principle weapon, which would involve establishing a legal barrier (substantive and procedural) for protection against instances of corruption occurring in conflict of interests cases.

Legal actions, although very important, are still only one of several instruments in battle against corruption. Prevention ought to aim above all at the restriction of access to government and public administration sector positions for people susceptible to corruption.

3. Corruption has also its root in mentality of those deprived by the Communist system, and therefore, for the counteraction to be effective, it is necessary to restore the ethos of civil service. It is particularly important to encourage the restitution of noble and ethical standards of conduct in public life, such as codes of ethics and codes of honour.

In order to fulfil their sanative role, the main aim of codes of ethics is to raise the level of requirements for a particular group of employees in relation to the specifications of official practice and the universally applied laws. For a code to be effective, a specific approach to its implementation is necessary. Firstly, if the standards of ethical conduct are meant to constitute an objective model, they must not depend on agreements and compromises between the involved parties themselves (e.g. when councillors establish codes

of ethics for councillors). Secondly, a code of ethics should not be imposed as an order, even in a form of a normative act. Nevertheless, a code ought to include sanctions for non-compliance, because, with no liability imposed for violation of the standards, such code would represent a mere collection of wishes for desired conduct. Therefore, a code of ethics needs to have an appropriate status of a legal document, which would enable the enforcement of its regulations.

A solution to the problems with implementation of codes of ethics within local authorities may lie in a special **system of accreditation** for assessing the activities of local government and administration. The code of ethics for local government functionaries may be drawn up and agreed by the Joint State and Local Government Committee, and, as a normative act issued by the government or the Prime Minister, it would become a legally enforceable document. Such code would not be universally binding and each governing body would have to apply for the introduction of the document in a particular unit of local authority. After an assessment of a given unit's performance (carried out by a specially selected team) the Joint Committee would give or refuse the accreditation, i.e. permission to introduce the code. Introduction of a code of ethics would serve as a good mark for a local authority unit and this could also constitute a proper system of incentives for all local authorities. In the case of violating the principles of the code, the accreditation granting institution could withdraw the right to use the code in this particular local authority unit. The proposed system of accreditation in implementing the code of ethics would ensure flexibility of using this type of instruments and at the same time would prevent the depreciation and potential abuse of such instruments by members of local authorities.

Finally, it is to be noted that in the fight against corruption ethical codes should be applied with prudence to avoid their depreciation. A code of ethics represents a raised level of requirements imposed on a particular group of employees. With regards to the large majority of public, government and local administration officials, the anti-corruption activities should concentrate on monitoring the adherence to the current legal regulation.

## **II. Evaluation of the anti-corruption legislation in local government units**

4. As far as regulatory methods of prevention and fighting corruption are concerned, it needs to be stated that the deficiency of Polish anti-corruption law is mainly due to the shape of the legislation, which requires radical

and prompt improvement, if it is to be effective. The provisions which are supposed to prevent corruption in public administration are rather dissipated (all the 11 acts, from local government State laws to the Penal Code). Frequent amendments to the legal regulation, necessary for the law to “keep up with” constantly appearing new forms of corruption, result in the formation of far-reaching casuistry of regulations and overlapping dispositions of legal norms, especially when struggling with economic corruption.

Knowledge of the legislation establishment politics as well as prudence is required when employing law as an instrument to fight corruption. Anti-corruption legislation must be characterised by determination (never allowing exceptions) and effectiveness. In my view, a legal regulation fulfils the **effectiveness** requirement when:

- 1) Each norm of the anti-corruption legislation is accompanied by a precisely defined sanction for its violation;
- 2) A subject whose duty is to enforce this sanction is specified;
- 3) A clear and simple procedure for enforcing the disposition and sanction is specified;
- 4) A method of monitoring whether the enforcing subject has adequately fulfilled their duty is defined.

**Determination** is to be perceived as the absolutely irrevocable quality of legal solutions, which would allow for no exceptions and no relativization of the established legal rules. Determination is crucial, for instance, when dealing with the rule of equal treatment of all legal entities. It needs to be stressed here that local administration constitutes only a part of all public authorities, and therefore, corruption in administration should not be dealt with separately. Methods for prevention and counteraction of corruption in local administration need to be considered, created and applied as an extensive, integrated system for fighting corruption in public authority sectors – the executive, the judiciary and the legislative.

5. There is a lack of determination of the legislative body with regard to the basic condition for preventing corruption, namely, **the elimination of corrupt people among public functionaries**. Considering the scale of corruption and mafia crimes that are being reported in the circle of public authorities, it is indispensable to form a kind of barrier that would prevent the access of potential offenders to governmental positions. Those with legally valid conviction for deliberate crimes should be deprived by law of the eligibility to undertake and exercise any function or position in the area of public authority.

Until now the ban on access to governmental positions was through depriving a person of public rights by a legally valid ruling of a court.

This is stated in the rules of article 8 section 1 in relation to article 7 point 1 of the electoral law of the Polish Sejm and Senate.<sup>1</sup> According to the above regulations, in order to have a passive right of vote to Sejm and Senate one needs to have an active right to vote, which is removed if a person is deprived of all public rights by a valid judicial ruling. The same regulation is in force regarding the electoral law of district, powiats and province councils,<sup>2</sup> where the passive and active right to vote is withheld for individuals deprived of all public rights by a valid judicial ruling (art. 5 in relation to art. 6 point 1 of the Act). With respect to any restrictions to the voting rights, in unsettled cases, the Act of 20 April 2002, regarding the election of a borough leader and a mayor,<sup>3</sup> refers to the electoral law of district councils, which is characterised by the same standard of requirements.

Employment in the judicial sector and the eligibility to apply for judicial positions is regulated mainly by rules of the Act on the Ordinary Courts.<sup>4</sup> According to its provisions, in order to hold a judicial position one is required to be a Polish citizen, to exercise the civil rights fully and, additionally, to be of impeccable character (art. 61 of the Act). The same requirements apply to the election of judges in administrative courts, the Supreme Court and the Constitutional Tribunal. There is no doubt, therefore, that any legal conviction eliminates the eligibility to hold a position in judiciary sector. This solution is a consequence of the raised standards imposed on judges and prosecutors.

The question is whether, in the situation of an increased risk of corruption, the requirement of exercising all public rights is a sufficient barrier in the access to the legislative and executive power sector. Here, we need to refer to the Penal Code regulations. According to the article 40, section 1 of the current Penal Code of 1997, the deprivation of public rights includes the loss of the active and passive right to vote with regards to any position within public authorities or in any professional or economic self-government, the loss of eligibility to hold a position in the judiciary sector, civil service and local governments, as well as the removal of a military rank and de-

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<sup>1</sup> Act of 12 April, 2001 (Dziennik Ustaw [Journal of Laws], No. 46, item 499 as amended).

<sup>2</sup> Act of 16 July, 1998 (Dziennik Ustaw [Journal of Laws], No. 95, item 602 as amended).

<sup>3</sup> Dziennik Ustaw [Journal of Laws], No. 113, item 984.

<sup>4</sup> Act of 27 July, 2001 (Dziennik Ustaw [Journal of Laws], No. 98, item 1070 as amended).

grading to the lowest rank in the army. Deprivation of public rights also involves the loss of all orders, decorations and honours, and also the inability to receive any of the above during the time of the deprivation of rights. According to the statutory directive of the Penal Code (art. 40 § 2), the court can order the removal of public rights in a case concluded with 3 or more years of imprisonment sentence for an offence committed with a motive deserving particular contempt.

The statutory requirements for exercising a penalty in the form of deprivation of public rights indicate that the penalty should be used in cases of severe punishments for offenders deserving ‘particular contempt’. It is fully acceptable that the deprivation of public rights results in the loss of active right to vote in a public government election. With regard to the passive right to vote, the barrier in the form of public rights deprivation is too low, because it allows the access to public authority sector for common offenders. This gives rise to the proposal that **all offenders convicted for deliberate unlawful acts should, regardless of the kind and severity of punishment, be denied the access to public authority sector**. The subject side, i.e. the deliberate act by an offender, should determine the removal of eligibility to hold a public office. Therefore, those convicted for unintentional offences should not be deprived of the passive right to vote.

The above postulate is not a novelty, as similar normative solutions appeared in the legislation of 2002. The amendment to the electoral law of district, powiat and province councils, introduced by the Act of 20 April 2002 on direct election of borough leader, has established the rule that termination of mandate of a councilor (in all governmental levels) occurs as a result of a legally valid conviction ordered by a court for a deliberate offence (art. 190 sec. 1 point 4 of the statute). The similar rule applies to the positions of borough leader or mayor, i.e. legally valid conviction for deliberate offence results in the termination of this function (art. 26, sec 1 point 5 of the Act).

The sanction of mandate termination for councilor or borough leader has applied to individuals who were already holding the function. **The same ratio legis supports a regulation that would be both repressive and preventive**. If the sense of decency in public life is to be treated seriously, it is necessary not only to eliminate offenders from public authorities, but also, and above all, to prevent offenders from undertaking public functions in the first place. This loophole has been closed by the amendment of 1 May 2004 to the electorate law of district, powiat and province councils, which introduces a rule that individuals convicted for deliberate offences and who

are charged by the public prosecution service (art. 7 sec. 2 of the electoral law) cannot be elected to these governing bodies. The same rule applies to the election of borough leader or mayor.

Legal solutions that eliminate offenders from public offices should not be restricted to local governments only. Parallel legal solutions ought to be applied to personnel selection within government administration, both central and local. It appears well grounded to introduce a regulation to official practice of all services, inspectorates and public security units, saying that any previous conviction for a deliberate offence excludes the eligibility of an individual in question to be enlisted or be employed by government administration office. Consequently, if such conviction occurs during a service or employment, termination of this service or employment will be the consequence.

The World Bank assessment of Poland's ability to fight corruption holds an observation that: 'In general Poland has got most of the necessary instruments, but it lacks the will and the potential of its institutions to make good use of them'. It should be stated that, first of all, there is a lack of political determination to undertake the battle against corruption in the legislative power sector.

The demand for radical elimination of offenders from public authority sector manifests a need to restrict the scope of diplomatic immunity solely to acts committed in relation or in the course of holding a parliamentary position. Withdrawal of the immunity in cases of common offences can indicate the actual willingness of the parliament to combat the corruption in the legislative power sector, based on the principles parallel to the executive power sector.

The level of requirements for candidates for parliamentary positions should be raised in the electoral law of Sejm and Senate by means of the withdrawal of the passive right to vote for those with valid conviction for a deliberate offence. Similarly, the electoral law regulations should provide for the termination of a parliamentary mandate as a result of such a conviction, which would be parallel to the electoral law of district, powiat and province councils. A frequently repeated argument that it is the electorate's will to decide who will be holding parliamentary mandate is totally unacceptable. A sense of decency in public life **requires the definite elimination of offenders from the legislative power sector. No law established by offenders would ever gain authority.**

The proposal of restricting the access to positions in the legislative and executive power concerns individuals convicted by a legally valid court

ruling. This ban should be in effect until the rehabilitation of a subject (art. 106–108 of the Penal Code).

It may pose difficulties to define the situation when a person in a public position commits an offence during the period of holding that office. The termination of mandate takes effect (or should take effect) only after the court ruling becomes legally valid. The preliminary and court proceedings usually require a considerable amount of time, even if the offence is obvious. The question is whether it is acceptable that a lawbreaker, guilty of a deliberate offence, continues to hold a public position.

It appears necessary to put forward a proposal introducing suspension of a public functionary (MP, senator, borough leader, starosta, provincial governor, civil servant, etc.). This suspension should last until a legally valid conclusion of the case is issued by a court. As for the initial period of suspension there are two options: either when an offender is declared a suspect (i.e. an individual against whom there is a decision to issue charges; art. 71 § 1 of the Penal Code), or when the lawbreaker is charged with the offence (against whom the charge was filed in a court; art. 71 § 2 of the Penalty Code). I would advocate the latter, when the outcome of the preliminary procedures provides the grounds to bring an accusation to the court. A court advice, addressed to that public authority unit, regarding the charges of deliberate offence filed against their official could constitute the grounds for suspension of that person in holding the official position. Adequate procedures for this suspension ought to be formulated.

6. To proceed with the main stream of this discussion, i.e. the assessment of the legal regulations for preventing corruption in local government units, it is necessary to specify key circumstances regarded as causing corruption, which, according to the legislative, are to be eradicated by the established bans, restrictions and orders concerning local functionaries (councillors and local government officials, including executive bodies' officials). These are as follows:

- 1) Proscription to hold a councillor's seat together with a parliamentary mandate, provincial governor or his deputy position or membership of any local government unit;
- 2) Restrictions for local government officials with regard to their public duties:
  - a. Councillors cannot undertake any other employment
  - b. Restrictions of legal civil relations
  - c. Actions that could undermine electorate's trust cannot be taken
  - d. Restriction of business activities for councillors, which includes business activities involving public funds;

- 3) Government officials are obliged to submit their financial disclosure as well as financial and business disclosure of their close relatives;<sup>5</sup>
- 4) Bans regarding employment and other activities for local government officials;<sup>6</sup>
- 5) Restrictions on business activity of members of executive bodies, treasurers (chief accountants in district, powiat and province), secretaries and other officials deciding on behalf of borough leader, starosta and provincial governor.<sup>7</sup>

7. As stated above, the aim of this presentation is, first of all, to assess the **effectiveness** of the legal solutions, which are currently in force. As discussed earlier, the effectiveness of a legal regulation is manifested by an anti-corruption norm which is equipped with a strictly defined sanction for its violation, by specifying a subject whose duty is to enforce this sanction, as well as by adequate monitoring whether the enforcing subject has adequately fulfilled their duty.

**A.** Evaluation of the effectiveness of the current regulation of anti-corruption laws reveals that this effectiveness is inhibited, above all, by **superficial bans and restrictions** that are not supported by any sanctions.

A rule saying that councillors cannot invoke their position in connection with any other activities or business activities undertaken individually or with partners<sup>8</sup> represents a classic example of a superficial ban. The *ratio legis* of this ban is not clear – holding a councillor’s seat can by no means influence any other activities of that individual. There is not need to regulate obvious problems, because, for instance, in a situation when a councillor violates the decency threshold and invokes to his position, then, apart from public opinion and media, no public administration unit has any authority to exercise disciplinary procedure.

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<sup>5</sup> Bans, restrictions and obligations mentioned in point 1–3 are regulated by the rules: 1) art. 24 ‘a’ – 24 ‘m’ and art. 25 ‘a’ of the Act of 8 March, 1990 on District Government (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1591 as amended), 2) art. 21 sec. 8 and 23–25 ‘h’ of the Act of 5 June, 1998 on Powiat Government (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1952 as amended), 3) art. 23 sec. 4 and art. 24–27 ‘h’ of the Act of 5 June, 1998 on Province Government (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1950 as amended).

<sup>6</sup> See art. 6 and 18–19 of the Act of 22 March, 1990 on self-government employees (uniform text: Dziennik Ustaw [Journal of Laws] 2001, No. 142, item 1953 as amended).

<sup>7</sup> See the Act of 21 August, 1997 on restrictions referring to conduct of business activities by persons holding public functions (Dziennik Ustaw [Journal of Laws] No. 106, item 679 as amended).

<sup>8</sup> See art. 24 ‘e’ sec. 2 of the Act on District Government. Similar rules are included in Acts on Powiat Government and Province Government.

A similar conclusion arises with respect to the norm saying that councillors can neither undertake any other employment, nor accept any gifts that could undermine the electorate trust, in compliance with the words of councillor's oath.<sup>9</sup> The only practical sanction of this ban is the actual loss of trust of the electorate, who in the future election can change their preferences. This potential regularity, however, should not be written down as a legal rule. Councillors' activities that could undermine electorate trust ought to be assessed in ethical or political categories. If not accompanied by a sanction, they should not be a part of the regulation.

**Deregulation** of rules which indeed constitute superficial bans and restriction, because their application only results in **law depreciation**, should be the first step in improving the anti-corruption law.

**B.** A ban enacted in art. 7 sec. 1 of the 21 August 1997 Act<sup>10</sup> represents a legal norm which is of marginal effectiveness due to the **defectively formulated sanction**. According to the indications of the above rule, individuals in public positions cannot be employed by or provide any services for an entrepreneur, if they participated in any decisions regarding personal matters of this entrepreneur, within a year of the termination of their public function. In justified cases, an approval of earlier employment can be given by a committee appointed by a PM. The sanction for violation of this ban is of penal character, i.e. custody or fine (art. 15 of the Act) for the entrepreneur who employs an individual in public position within a year of termination of this position.

My opinion of this rule is absolutely critical in several aspects. As stated above, anti-corruption mechanisms should be characterised by determination. Allowing for the exception to the employment ban generates by itself a situation which could cause corruption, mainly because exceptions are made through discretionary decisions based on the ambiguous clause: 'in justified cases'. Appointing a committee to approve these exceptions to the rule by a high-ranking office (PM) does not guarantee objective decisions, particularly in the tense relations between the government and the opposition. After all, the fact of resolving exceptions by a committee manifests the vagueness of the responsibility for a decision. This rule should definitely be repealed.

As for the penal sanction, it appears that financial penalty in the form of a fine would be adequate. It is doubtful, however, whether the penalty is imposed on the right person. It is an entrepreneur who is to be punished for

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<sup>9</sup> See art. 24 'e' sec. 1 of the Act on District Government.

<sup>10</sup> See footnote 7.

employing of a former public official and thus violating the ban. My view is that a functionary himself ought to be held responsible for undertaking employment with this entrepreneur, because it is the functionary who should be aware if and to what extent he ‘participated in decisions regarding personal matters of this entrepreneur’ and who should prevent this clear conflict of interests situation.

C. There is a number of anti-corruption rules that do fulfil the aforementioned conditions of effectiveness. For instance, there is a **clearly formulated sanction** regarding a situation when a public official is appointed to a board of a company, a cooperative or a fund, which violates the bans about restrictions of business activities for public officials, as described in the Act. A parallel problem occurs in a case of electing a councillor to an executive board or monitoring and inspection bodies of commercial law companies with the share in the profit by local authority legal entities or economic operators involving such entities. In both cases, election or appointing to a public authority, with violation of the ban, is hedged with an **invalidity sanction *ex lege*** – acts of election or appointing which are legally void cannot be entered into an appropriate register.

Regulations are considered well formulated with respect to effectiveness, if they employ a sanction of renouncing the mandate by an official by choice. Consequently, a refusal to take an oath by a councillor – a member of legislative body within all levels of local government – is equal to renouncing his mandate.<sup>11</sup>

Similarly, failure to submit an application for unpaid leave by a person who works in a council and who was elected a councillor is parallel to renouncing the mandate.<sup>12</sup> Equally effective is a sanction of **dismissal from position** or **termination of employment** with respect to local government officials, which is equivalent to termination of employment contract without notice based on article 52 § 1 point 1 of the Labour Code.<sup>13</sup> Assessment of the sanction of the **termination of mandate** is more complicated and will be discussed in a further section of this essay.

D. There is an important legislative step that could foster the effectiveness of anti-corruption regulations and this is the **simplification of legal provisions**, which can be achieved by use of simple, clear and easy to understand legal formulas, as well as by verbalisation of legal norms with unambiguous language. Classic examples of such Byzantine regulations are

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<sup>11</sup> See art. 23 ‘a’ sec. 4 of the Act on District Government as an example

<sup>12</sup> See art. 24 ‘b’ sec. 5 of the above act.

<sup>13</sup> See art. 24 ‘k’ sec. 4 of the above act.

art. 24 'h'–'l' of the Act on District Government, which regulate **the obligation to submit financial disclosures** by councillors and other district council officials.<sup>14</sup> Several further amendments to the procedures for submitting and monitoring of financial disclosures have led to uncontrolled expansion of this very casuistic regulation (the body of the regulation currently exceeds 2 pages of 'Journal of Laws').

One of positive effects of the amendments is the principle of openness of information given in financial disclosures. Open information provided in financial disclosures is available in the Public Information Bulletin.<sup>15</sup> With regards to the principle of publication of financial disclosures there is no need for an extensive and bureaucratic system of supplying disclosures, and especially of the data analysis. Disclosures are supplied in two copies and the analysis is carried out by both an appropriate local or public administration body and a relevant local revenue office. According to the article 24 'h', section 3, 6–13 of the local government Act, the circulation of documents, information and analyses proves that administration is able to develop well and satisfy its needs.

The procedure of monitoring financial disclosures can be simplified and this would entail no expenses and no other than already involved bodies. I suggest considering the following solutions to ensure swiftness, reliability and effectiveness in the monitoring of financial disclosures submitted by local government officials:

- 1) The analysis of financial disclosures falls within the competence of local revenue offices who receive adequate instructions.
- 2) In a case of challenged credibility of a disclosure, the revenue office orders an inspection by an appropriate local revenue monitoring unit.
- 3) The competence to order an inspection is also given to the chairman of the deciding body of a local government, to the executive body of a local government and to the provincial governor who has an authority over the lawfulness of activities of that particular local government with which the official in question is involved.
- 4) In a case of refusal to undertake the inspection of a particular disclosure, the body that orders the inspection has the right to appeal to the General Revenue Inspector. To appeal against the final decision, a complaint can be directed to an administrative court.
- 5) The outcome of an inspection is revealed to the involved body and, if an offence is suspected, to the prosecutor.

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<sup>14</sup> Parallel regulations apply to powiat government and province government.

<sup>15</sup> This is mentioned in the Access to Public Information Act of 6 September, 2001 (Dziennik Ustaw [Journal of Laws], No. 112, item 1198 as amended).

- 6) These bodies execute administrative sanctions provided by regulations or they initiate legal action.

With respect to the **system of sanctions applied**, it is fully legitimate to employ penal responsibility for providing false information or suppression of truth in submitted financial disclosures, which is based on article 233 § 1 of the Penal Code. However, the system of **administrative sanctions** for failure to keep the deadline of submitting financial disclosure appears to be very inconsistent. For instance, suppression of truth in a disclosure results in criminal responsibility of the individual, based on article 233 § 1 of the Penal Code, and failure to submit financial disclosure by a councillor results only in suspension of his allowance until the disclosure is submitted (art. 24 'k' sec. 1 point 1 of the Act on District Government). This gives an impression that the legislative body encourages officials to calculate what is more advantageous, to provide false information or to give up the allowance. As a matter of fact, the sanction of losing allowance by a councillor (or losing salary by a borough leader) is the only sanction imposed for failure to submit a disclosure. Apparently, the law allows the situation that a position of councillor or governor can be held by individuals despite their failure to fulfil the statutory duty of submitting financial disclosure. And the loss of allowance is not a substantial sacrifice for a wealthy person. Thus such procedure ought to be severely criticised.

Failure to provide financial disclosure by other (than councillors or borough leaders) local government functionaries results in ultimate dismissal or termination of employment contract (art. 24 'k' sec. 2, 3 and 4 of the Act). That being the case, we deal here with **a situation of unequal treatment of local government officials**. This inequality cannot be justified by the condition that councillors and borough leaders are selected in direct election, because there are no rational grounds for functionaries selected in direct election to 'evade' the statutory duty to submit financial disclosure and 'get away' with this by only losing their allowance.

The attempt to toughen the sanction for failure to submit disclosure by councillor or borough leader (regarding their financial status and business activities of their spouse) by the amendment to the rules in 2005 was not successful. A sanction of termination of the councillor or borough leader mandate was introduced for failure to submit disclosure on time, which was defined by rules of appropriate acts. This solution was recognised by Constitutional Tribunal as violating Polish Constitution (the Court's judgment of 13 March 2007), and consequently lost its legal validity. Indeed, the sanction of mandate termination for merely missing a deadline for disclosure submission is disproportionate. Thus the problem to formulate an

appropriate sanction for refusal or failure to submit financial disclosure by councillors and borough leaders remains unsolved. This kind of regulation is indispensable for the anti-corruption regulations to satisfy the principles of universality and determination.

**E.** Another reason for the lack of success of the anti-corruption initiatives lies in the **application of law** and is related to the **enforcement** of rules of anti-corruption law. In Poland, it is typical for corruption to be detected by prosecution service, which is when its form and scale has already violated the **rules of the Penal Code**. Rarely does the public hear of anti-corruption actions being undertaken in **the form of disciplinary responsibilities** or in accordance with **the Labour Code regulations** which allow for termination of employment without notice due to severe violation of employee's responsibilities. Such state can indicate that preventing and fighting corruption is not a major concern of local authorities. This, however, necessitates the **formulation of procedures** which would determine **methods of enforcement** of anti-corruption regulations and clearly define the **responsibility of public administration bodies** for this enforcement.

Effective enforcement procedures are particularly required when it comes to creating solidarity among public functionaries with regard to the elimination of corruptive behaviour within local government authorities and administration. So far, we have repeatedly dealt with instances of negative solidarity among local authorities, who try to protect their colleagues from the responsibility for their criminogenic behaviour; for instance, commonly occurring disturbances due to dismissal of a starosta by provincial board, with him being already in custody, or frequent cases of failure to execute termination of mandate of a councillor or a borough leader despite the existence of evident grounds to impose this sanction.

Scarce responsiveness of local government officials to the necessity of elimination of people violating anti-corruption rules have encouraged the legislator to introduce regulations that give provincial governors the competence to undertake appropriate action, by means of successive amendments to State laws. The intervention mechanism is as follows: if relevant district, powiat or province authorities do not take appropriate action in the form of mandate termination, dismissal or termination of employment with individuals who, according to specific laws,<sup>16</sup> violate the anti-corruption regulations, the province governor requires a relevant local government

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<sup>16</sup> See art. 98 'a' of the Act on District Government; art. 85 'a' of the Act on Powiat Government; art 85 'a' of the Act on Province Government.

body to undertake appropriate action within 30 days. In case of a failure to act within the deadline, the governor, having informed a relevant minister dealing with public administration, issues a provisional order. Such provisional order can be appealed against in administrative court which controls its legality.

Introduction of provisional orders can be regarded as the first step in the development of the province governor **supervision over the legality of enforcement of anti-corruption law** by local government units. This solution is, however, largely casuistic, as it deals only with violation of a number of enumerated regulations. For instance, a governor had no legal basis for undertaking effective action, despite the fact that the powiat council refused to dismiss a starosta who had been detained in custody. The intervention procedure gives rise to doubts, because it is not clear whether the governor's provisional order can be disputed only by the local government body or also by the functionary in question. The right to dispute given to the interested party can result in the differentiation of court procedures for monitoring of legality of termination of councillor mandate. Legality of mandate termination due to the violation of anti-corruption regulations will be monitored by administrative court, while the council's decision about the termination of mandate due to the loss of passive voting right or lack of this right at the time of election can be appealed against in relevant district court.<sup>17</sup> This duality of the procedure ought to be eliminated.

As the corruption increases and the corruption fight toughens, it is necessary to foster **the supervision of government administration over the legality of application of anti-corruption law** by local government units. This reinforcement should involve broadening the scope of supervision and implementation of effective legal instruments for supervision. Effectiveness and simplification of procedures could be improved by enabling province governors to issue orders with decisions of mandate termination of local government functionaries. Administrative courts ought to have the competence to monitor the legality of these orders.

The supervision over anti-corruption regulations by a provincial governor would serve as a kind of safeguard. Local authorities should seek to eliminate individuals violating these regulations, because any act in defence of people suspected of corruption can severely affect public support for the self-government idea. Therefore, prevention and fight against corruption in local government units is in their own interest.

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<sup>17</sup> See art. 7 sec. 1 point 17 of the Act on District Government.

Anti-corruption actions could be accelerated by **specifying who is responsible for counterfeiting corruption in particular** organisational units of public authorities. Pursuant to the provisions of labour law, within working establishment units, **official responsibility ought to be held by a manager of the unit**. In collegial authorities or administration the duty of executing the anti-corruption regulations should lie with **the leader of a given collegial body**. After all, the role of a leader does involve obligation.

### **III. Factors restricting corruption in local governments**

Negative assessment of effectiveness of anti-corruption regulations does not exempt us from the obligation to adhere to these laws, and therefore, the basic problems related to applying anti-corruption regulations in the functioning of local governments should be addressed. There are two main issues with regard to these problems: 1) the level of familiarity with the anti-corruption regulation among government functionaries and members of local communities, 2) accomplishment of openness and transparency in the functioning of government bodies.

8. It is truistic to say that the successful implementation and application of anti-corruption regulations is determined by the level of familiarity with these regulations among persons involved in local government units through various social roles (councillors, officials or members of local community). Therefore, at least with regard to government functionaries (councillors and other officials), one cannot rely on the presumption of good knowledge of the published law, and it is necessary to ensure the adequate level of familiarity with regulations through a well-organised system of education. The responsibility and **burden of providing the training for local government functionaries belongs** certainly to **a given local government unit**, which ought to fulfil this need in the public as well as its own well understood interest. Familiarity with power and responsibilities of a councillor, and with competencies of local government officials, is a decisive factor in achieving the high standard of functioning of legislative bodies or local administration officials.

**Methods for education of local officials** may vary; the differences arise with regard to the rank and size of an office, financial capabilities or the internal teams of educators. It is important, however, that each public official is acquainted with the principles of local government functioning, particularly with the principles of openness of any activity and its practical

consequences for the responsibilities of a given functionary who holds a particular position. The proof of completion of such training, confirmed by the statement of that functionary, ought to be attached to their personal file, so that any violation of anti-corruption regulations cannot be justified by the lack of knowledge about these responsibilities or the lack of supervision by a leader of the local administration unit in question.

A more difficult problem is posed by preparing members of legislative bodies (councillors) to fulfil their duties in compliance with the statutory rules for local government activity, including the restrictions related to holding the position of councillor. Certainly, a democratic act of election of a councillor does not guarantee the adequate preparation to hold this office. But at the same time, unlike other officials, councillors cannot be obliged to participate in organised training. Still, it is popular among councillors to get acquainted with the anti-corruption regulation which apply to their office, because violating these rules involves the risk of losing the councillor mandate. The executive body of a local government may prepare and offer its councillors, at the initial stage of the office, a guidance session where legal status of a councillor will be discussed. This could be conducted, for instance, by a legal advisor to the local administration unit.

The pressure of public opinion, which monitors whether a councillor fulfils his duties 'duly, diligently and honestly' (the words of the councillor's oath), is the only incentive for councillors to partake in the training on principles for functioning of legislative bodies, including the principle of openness of their activities. It appears that educational projects, when professionally prepared by either an executive body or a public organisation, can be of great interest to councillors and can improve their knowledge about functioning of the local government unit.

The understanding of community members' rights regarding public administration, when dealing with members of local community, is significant for ensuring the transparency of activities of local functionaries and consequently for preventing corruption occurrences.

**The level of legal knowledge among community members** should be a subject of **concern for local authorities**, and community members cannot be treated as intrusive supplicants. With regard to youth education, information on responsibilities and principles of functioning of local government could be conveyed in the form of optional classes offered by schools which are administered by a given local government. According to the regulation of article 34 'a' section 4 of the Act of 7 September, 1991 on the Education System, a body which administers an edu-

ational establishment but does not have a competence for methodological supervision, can present a motion regarding educational matters to the head teacher.

The education of adults can be carried out in various forms by either a given local government unit or one of many public or administrative organisations, or both. We need to bear in mind that the responsibility for support and propagation of self-government idea belongs to the district authorities.<sup>18</sup> The self-government idea is to be propagated through acquainting community members with the principles of local government administration. The commitment of a local government to the propagation of self-government idea can be measured by the financial means allocated for this task in their budget.

In the process of widely understood legal education of local government communities it is important to provide the access to free legal advice with regard to local government issues. Each local government unit should aim to set up at least one office offering legal advice. Their organisational forms may vary; for instance, in rural districts, the advisory body can be localised in local rural government, whereas in municipalities such activities are already in progress in the form of student advisory services at universities.

In order to successfully prepare and accomplish the anti-corruption initiatives it is necessary to assess the level of legal awareness among local government officials and community members, which can be delivered only by empirical studies.

9. The principle of openness of government activities and the right to access to public information on functioning of local governments do not guarantee the adherence to every single anti-corruption regulation, but they still constitute prerequisites to the assessment and monitoring of local functionaries by the public. Therefore, for the effective enforcement of current anti-corruption solutions, it is important to ensure the actual openness and transparency of local government activities.

The constitutional right to access to information about activities of governing bodies and public officials (art. 61 of the Polish Constitution) was created by the State government regulations in the form of **the principle of openness of government activities**, as well as the openness of activities of district ancillary bodies and openness of financial activities. The obligation of open activities of local government units is supplemented structurally by a correlate, i.e. the right to access to public information, the

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<sup>18</sup> See art. 7 sec. 17 of the Act on District Government.

realisation of which is regulated by the Act on Access to Public Information of 6 September 2001.<sup>19</sup>

**Openness of local administration activities is multifaceted** and includes:

- 1) Access to the local legislation established by a given local government,<sup>20</sup> inclusive of fundamental acts defining the structure and working procedures of local authorities (statute) and principles of office organisation (regulation);
- 2) Admission to sessions of local government legislative units and their commissions;
- 3) Openness of procedures established for local government institutions in fulfilling their duties;
- 4) Access to documentation regarding public tasks performed by a body (rules of access to and use of documentation are defined in the statute of a district, a powiat or a province; the statute **defines only technical ‘rules for the access’** and cannot restrict the statutory openness regulations).

It needs to be stressed that if a person makes use of the right to access to public information, there is no requirement to present their legal or actual interest, which means that any person, whether it is a Polish citizen or a foreigner, can demand the access to public information without justifying this request (no explanation for asking about particular information is required).

**The right to public information is restricted only in cases defined by relevant laws.** According to the rules of article 5 sections 1 and 2 of the Access to Public Information Act, the right to public information is subject to restrictions as defined by the rules of protection of secret information and of protection of other confidential information secured by laws. The access to information is also limited with regard to privacy of individuals. This restriction does not apply to individuals holding public offices if requested information is related to their functions, including conditions of their appointing and performing duties.

The aforementioned regulations give rise to an observation that the application of the rules of openness of activities and obligation to provide access to public information by local government units is, from the practical

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<sup>19</sup> Dziennik Ustaw [Journal of Laws], No. 112, item 1198 as amended.

<sup>20</sup> According to art. 28 of the Act of 20 July, 2000 on Promulgation of Normative Acts (Dziennik Ustaw [Journal of Laws], No. 62, item 718), the office of a starost collects and allows the access to the local law acts established by the powiat, and the district office gathers and gives access to the district regulations.

point of view, a very complex problem. In the actual functioning of an office, it is essential to provide adequate **information about the right to access to information** to which members of local community are entitled. The message about what type of information can be requested from authorities needs to be conveyed to the community members by means of all available media, from the press and local broadcasting stations to simple information boards in offices.

There are two methods for the **delivery of factual information**: either each information unit of the office provides the information regarding their scope of activities, or a separate informative body is established. There are no doubts that the second option ought to be enforced. Where possible, it is necessary to create departments that will be responsible for providing access to and disseminating public information, for advising community members, propagating the self-government idea, as well as receiving complaints, motions and proposals from the members of community.

Principles for the access to public information and related restriction are too complex for the task of providing information to be split among units dealing with other diverse administrative matters. In today's world information is of great significance and this requires a proper approach to the 'public information' issue, which should be dealt with by a factually and legally specialised organisational structure.

Familiarity with regulations for giving access to public information is very important due to the procedures stipulated for exercising the right to information, in the form of the right to complain to the administrative court about refusal to provide information. The Access to Public Information Act is equipped with a sanction saying that a person who, despite the obligation, refuses the access to public information is subject to a fine, restrictions of freedom or imprisonment of up to a year (art. 23 of the Act).

Prevention of corruption is fostered by transparency of activities of local government units. Transparency can only be achieved when the access to information will no longer be treated as an interference of an intruder into the secrets of a government and when the goal of authorities will be to spread widely all information regarding their activities to the local community. The **responsible** attitude to the obligation to provide information by local authorities should become **a kind of a dialogue between the authorities and community members**. Open information may support the promotion of local government unit in their proposed, completed and future activities.<sup>21</sup>

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<sup>21</sup> See P. Sitniewski: *Dostęp do informacji publicznej w jednostkach samorządu terytorialnego*, Wyższa Szkoła Administracji Publicznej, Białystok 2005, p. 11–12.

#### **IV. Constructive principles of the act on prevention and fight against corruption in public authorities**

If anti-corruption mechanisms are to be effective, it is of utmost importance to urgently perform a review of current legal solutions and **prospective amendments**, which would involve the **deregulation of redundant norms, simplification of monitoring procedures** and introduction of **resolute and unambiguous sanctions**. With respect to the **anti-corruption strategy** one should also consider the **establishment of a law** which would **thoroughly** regulate the counteraction and fight against corruption in **all areas of public authority**. Such law ought to be explicitly titled as an **act on prevention and fight against corruption in public authorities**, which would define the fundamental objective of the regulation and would stigmatize corruptive behaviour.

10. Regulations of such law should apply to all members of public authorities, though the legislative definition of **the range of regulation subjects** may be diversely formulated.

It is known that the current legislation employs various legal constructions to define persons holding public offices or performing public duties. The Penal Code, for instance, uses the term ‘public functionary’ and encloses an exhaustive list of individuals belonging to this category (art. 115 § 13 point 1–8 of the Penal Code). Until recently, the Civil Code, when defining principles for compensative responsibility, used the term ‘functionary’, differentiating between ‘State functionaries’ and ‘local government functionaries’. The former included officials from governing bodies, State administration or economic institutions, as well as contractors of these institutions, persons appointed in elections, judges, prosecutors and armed forces servicemen. The latter included local authority clerks, councillors, borough leaders, mayors, members of powiat and province boards and other persons to whom local government regulations applied, as well as contractors providing services for local governments and their associates.<sup>22</sup>

‘Individuals who hold public positions’ and who are subject to the regulation restricting business activities have been defined as individuals who hold leading civil service positions, according to the rules of remuneration for civil servants and judges of Constitutional Tribunal (art. 1 of the Act). This definition is supplemented by a rule of article 2 of the Act, which lists other officials included in the category of individuals holding public positions.

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<sup>22</sup> See art. 417 and art. 4201 of the Civil Code, version valid until 31 August 2004.

According to the rules mentioned above, there are **two methods of defining the range of subjects of the anti-corruption law**, each with advantages as well as faults. The method of the casuistic enumeration of all positions within public authorities allows for precise indication of individuals that are subject to regulation, but poses a risk of ‘missing out’ a position, and each deep reorganisation in the administration will necessitate an amendment to such rules. Taking into the account the fact that public functionaries also include ‘other individuals who can issue administrative decisions’ on behalf of administrative bodies, the anti-corruption regulation ought to apply to all officials employed in the State and local governments’ administration. In compliance with the rule of article 268 ‘a’ of the Code of Administrative Conduct, a public administration body can authorize officials of a particular organisational unit, in writing, to deal on its behalf with specifically agreed matters, and also to issue administrative decisions, rulings and certificates. Each of these employees is therefore, at least potentially, holding a public function, as defined by the regulation restricting business activities.

The above state of affairs justifies the attempt to introduce and define the term ‘**public functionary**’, as stipulated by the rules of the draft law for prevention and fight against corruption. **Public functionary** is an individual who performs public functions in organisational structures of the legislative, the executive (the State and local government administration) and the judiciary, as well as in other State organisational units that are appointed by the regulation to perform public activities. This rather general definition could be complemented by examples of certain categories of public functionaries. Such representative cases (‘public functionaries include particularly:

- 1) senator, MP, councillor
- 2) judge, prosecutor, debt collector, etc’)

of various categories of functionaries could represent an important direction for interpreting the application of general definition for public functionary.

11. An initial step in substantive provisions of anti-corruption law is to ensure the **impartiality** of activities of public **functionaries** through impeding all **situations of corruption**. As for the legal definition of a situation of corruption, it is necessary to describe the state of **a conflict of interests**. It appears that **a conflict of interests** is a **situation** which may give rise to reasonable suspicions with regard to the **impartiality** of behaviour of a public functionary, whereas a **situation of corruption occurs** when a public functionary, faced with a conflict of interest situation and under the influence of personal considerations and motives, fails to act

in compliance with orders and restrictions provided by legal regulations, including anti-corruption laws.

Anti-corruption regulation ought to include requirements, orders and bans formulated specifically for public functionaries. The **formulation** of the requirements, orders and bans should be **determined** and, in principle, **uniform** for all public functionaries. From the point of view of legislation techniques, specific regulations can be distinguished in the draft law systematics regarding the following categories of public functionaries:

- 1) Regulation of requirements, orders and bans **applying to all public functionaries** in general, for instance, elimination of offenders from public offices or the obligation to submit financial disclosures,
- 2) Regulation of requirements, orders and bans referring to **members of parliament and councillors**, i.e. public functionaries chosen by public election,
- 3) Regulation of requirements, orders and bans applying to public functionaries who have **the status of employee**, regardless of the type of employment,
- 4) Regulation of requirements, orders and bans affecting **functionaries of administrative police**, i.e. public services, guards and inspectors whose role is to control the abiding of law (e.g. police, local guards, customs service, sanitary inspections, construction supervision, labour inspection).

It is necessary to distinguish between functionaries chosen by public election and officials with the status of an employee because of the need to differentiate between sanctions for violating anti-corruption regulations. In the case of a functionary **elected by public vote**, **sanctions** for failure to fulfil orders and for disobeying bans should lead to the **termination of mandate** or qualify the official's behaviour **as equal to resigning from the office**. In the case of an **employee**, **sanctions** ought to range from disciplinary to dismissal or termination of employment contract. In accordance with anti-corruption regulation, **dismissal from a position or termination of employment contract** would be **parallel to termination of employment contract without notice**, according to article 52 § 1 of the Labour Code.

When formulating the index of orders and bans designed to eradicate corruption, each rule ought to specify the sanction for its violation; if a legislator experiences difficulties with establishing a precise sanction, this would indicate that the proposed anti-corruption solution is meaningless and unnecessary.

Responsibility for preventing corruption should be specified for every single organisational unit within public authority. In units defined by labour law as workplaces, a unit manager is to hold public responsibility, whereas in collegial government or administration bodies the responsibility for enforcement of anti-corruption law should lie with the leader of a given body.

The grounds for separating the category of functionaries working within administrative police institutions are that these officials are to be given specific requirements or bans (in official praxis, for instance), because any type of corruption behaviour within these group of workers is very dangerous and should be counteracted through prevention and repressive measures by means of increased standards of requirements and stricter sanctions.

The supervision of the legality of anti-corruption law enforcement by local government units should be entrusted to government administration bodies (province governors). The formulation of methods for supervision needs to be simplified and ensure protection of interested parties in the form of the final adjudication of a case by the court. In case of a failure to take action of enforcing anti-corruption law by a relevant local government, the province governor should have competence to request the court to issue an appropriate order. When dealing with termination of mandate or dismissal, administrative court will be relevant, whereas in the situation of declaring the invalidity of civil and legal functions or commercial activities, the court of general jurisdiction will be appropriate.

## **V. Final word**

12. The degree of corruption risk justifies the application of exceptional measures. Therefore, the decision to establish a new special structure responsible for fighting corruption is mostly approved by the public. The creation of a new structure aims to **increase the effectiveness of operational actions** in detecting corruption and prosecuting offenders. The formation of this structure should not delay the headwork regarding legal regulation, which would represent **a legal basis to implement the anti-corruption strategy** that puts most emphasis on **preventing corruption**.