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Determinants, standards and principles of cooperation between the Polish Financial Supervision Authority and selected stakeholders of the state security system

Abstract

The aim of the article is to analyze determinants, standards and principles of co-operation between the Polish Financial Supervision Authority and selected stakeholders of the state security system. This is especially important in the context of the dynamic development of the financial market, challenges resulting from the computerization of this market in the era of pandemics and the geopolitical situation related to the war in Ukraine. Authors accepted the hypothesis that the effectiveness of cooperation of entities responsible for state security depends, on the one hand, on the proper legal basis, and on the other hand, on soft factors such as mutual trust, community of goals and competence of employees of public institutions and officers. The article is a review with a theoretical and empirical component. The doctrine and legal acts were analyzed, and-also empirical material collected during the research process was analyzed. For the purposes of the considerations, the dogmatic-legal method and the analysis of source materials of the Polish Financial Supervision Authority were used.

Keywords

Polish Financial Supervision Authority, financial supervision, state security, The Internal Security Agency, Central Anticorruption Bureau, Police, National Revenue Administration, The National Bank of Poland.

The modern financial market is characterized, on the one hand, by a high level of complexity in terms of the products offered, a large number of entities operating in it (both supervised and unsupervised) and network connections of many stakeholders, and, on the other hand, by a low level of economic knowledge in Polish society. High levels of digital development and innovation are also a factor in the health of today's financial market. Financial products and services are offered by different types of entities, which means that their quality sometimes varies. There are professional entities in the financial market that provide quality services and multiply benefits for customers. However, it should be borne in mind that there are also present on it entities engaged in activities aimed solely at maximizing their own profits without concern for the legitimacy of their operations, which do not maintain appropriate standards in forming relationships with customers. It can even be argued that the purpose of their operation is to deceive customers, thus criminal activity.

The problem of dishonesty of some financial entities is present in virtually every financial market, including highly developed markets. This is largely due to both the level of economic knowledge of the public, which does not always keep up with the development of the financial market, and the desire of the players to maximize the rate of return on their investments. Financial market participants, enticed by promises of high returns on their capital, often invest their life savings in products and services that are high risk and, on top of that, legally questionable. Many examples of such situations can be mentioned, but that is not the main purpose of this article. The authors focused in it primarily on an attempt to present the conditions, standards and mechanisms of cooperation of the Financial Supervision Authority (FSA), as well as the Office of the Financial Supervision Authority (OFSA) with selected entities of the state security system. Adopting such a goal is justified for several reasons.

First, as already mentioned, today's financial market is characterized by a high level of networking. Products and services provided in the financial market are offered by thousands of different types of entities, often also in cooperation with more than one entity (one entity may be the creator of the product, another its distributor or other type of intermediary). Many of these entities are supervised by the FSA or other public authorities, but a sizable percentage are not subject to any control by public authorities. It can even be argued that some entities operate in the "gray zone," not covered by specialized regulation or supervision.

Secondly, in modern countries, supervision of the financial market, within the institutional system, is carried out by many entities. This is also the case in Poland, where, in addition to the many supervisory areas under the authority of the FSA, certain aspects of supervision are the responsibility of, among others:

The National Bank of Poland (NBP), the Ministry of Finance, including the General Inspector of Financial Information (GIFI) and the National Revenue Administration (NRA), as well as the Office of Competition and Consumer Protection (OCCP), the Financial Ombudsman, the Internal Security Agency (ISA), the Central Anti-Corruption Bureau (CAB) and the Police.

Third, the market for financial services provided in Poland is cross-border in nature due to the benefits of European integration, as well as due to changes in the habits and expectations of customers who are gradually abandoning direct contact with employees of financial institutions, such as in their branches or other establishments, which has been further influenced by the coronavirus pandemic. More and more products and services are being offered by entities based in other countries. Supervision of these entities is usually exercised by the authorities of the entity's home state, not the host state. For this reason, the Polish regulator's mandate is often limited. The supervisory authority may not have a legal basis for obtaining and analyzing the necessary data. However, the activities of foreign entities may pose a risk to the security of the economic system of the Polish state. This issue assumes particular importance in the context of successive sanctions applied by EU institutions against entities with capital or personal ties to the Russian Federation.

The aforementioned challenges make it necessary to establish and implement effective and efficient mechanisms of cooperation between the FSA and other institutions responsible for the security of the Polish state, as mentioned earlier. The analysis of this issue is the main research problem of this article. The hypothesis adopted in the considerations carried out is the claim that the effectiveness of the cooperation of state security actors depends, on the one hand, on the implementation of the appropriate legal basis and its proper operationalization (such as the adoption of agreements defining the principles of inter-institutional cooperation), on the other hand – on soft factors, such as mutual trust, community of goals and appropriate competence of employees of public institutions and officers. The hypothesis will be verified using the following research questions: what role does the FSA play in the state security system? What are the tasks and goals of this institution? What is the FSA's responsibility for each area of the financial market? Has a proper legal basis been established in the legislation that gives the possibility of cooperation with other entities and public authorities responsible for state security? What is the practical effectiveness of these mechanisms? What are the barriers to cooperation? In systemic terms, have standards been developed for this cooperation? What are the main challenges with the increasing computerization of products and services offered by financial market players? What recommendations can be made based on the experience to date?

The article is an overview. The authors have analyzed both the body of doctrine and the empirical material gathered in the research process, especially the agreements made within the framework of the legislation establishing the general basis for inter-institutional cooperation, including the exchange of information. For the purpose of the present considerations, the dogmatic-legal method and the analysis of source materials of the FSA and the OFSA were used. The authors' direct experience gained during their professional work in financial supervision, including the OFSA's cooperation with other state institutions, is not without significance.

Financial Supervision Authority in the system of state security

The organization and rules of functioning of the FSA and the OFSA, as well as the scope and purpose of supervision of the financial market are defined in the *Act of July 21, 2006 on Financial Market Supervision* (hereinafter: FMSA)[1]. The literature on the powers and tasks of this body is extensive, so the authors' consideration will be limited to the most relevant issues.

According to the intention of the legislator, as defined in Article 2 of the FMSA, supervision of the financial market is aimed at ensuring the proper functioning of the market, its stability, security and transparency, confidence in the financial market, as well as protecting the interests of participants in this market also through reliable information on its functioning. Achieving these goals is possible through the implementation of the tasks set out in the special legislation[2]. The doctrine rightly emphasizes that:

> (…) the objectives of financial supervision are the basic values that the supervisory authority should aim to protect, while (...) the listed objectives are of a continuous nature; this means that even if, in the opinion of the FSA, the market is working properly, the authority cannot stop its activities and the pursuit of the continuous realization of the listed objectives. Every single

[1] Consolidated text: Journal of Laws of 2022, item 660, as amended.

[2] The cited provision indicates, among other things: The Act of 29 August 1997 - Banking Act (i.e., Journal of Laws of 2021, item 2439, as amended), Act of May 22, 2003 on insurance and pension supervision (i.e., Journal of Laws of 2019, item 207), Act of April 15, 2005 on supplementary supervision of credit institutions, insurance companies, reinsurance companies and investment companies that are part of a financial conglomerate (i.e. Journal of Laws of 2020, item 1413), Act of July 29, 2005 on capital market supervision (i.e., Journal of Laws of 2022, item 837, as amended), Act of November 5, 2009 on cooperative savings and credit unions (i.e., Journal of Laws of 2022, item 924, as amended), and the Act of August 19, 2011 on payment services (i.e., Journal of Laws of 2021, item 1907, as amended).

> action taken by the FSA is supposed to lead to the realization of the values enumerated in Article 2 (of the 2006 Act on financial market supervision – author's note) and to the realization of the goals set forth therein. The entire activity of the FSA is therefore intentional[3].

Chapter 2 of the act under review is devoted to issues related to the organization of financial market supervision. Article 3 of the FMSA stipulates that the OFSA (...) *is a state legal entity tasked with providing services to the FSA and the FSA Chairman* According to the act, the bodies of the OFSA are: the FSA, which has jurisdiction over financial market supervision, and the FSA Chairman, who directs the activities of the OFSA and represents the office externally. In addition, the FSA Chairman directs the work of the FSA and represents it externally. According to the legislator's intention, the Prime Minister supervises the OFSA. According to Paweł Wajda, the shape and nature of the provisions defining (...) the *powers of the Prime Minister in exercising supervision over the activities of the FSA indicates that the intention of the legislator was to limit the influence that the Prime Minister may exert over the FSA to the use of only non-interferential forms of action*[4]. This is a reasonable view if one takes into account the other provisions of the act, which guarantee, among other things, the tenure of the FSA Chairman. In practice, the prime minister's oversight is organizational and financial, not substantive.

The FSA consists of a chairman, three deputy chairmen and nine members. The members of the FSA – according to the wording of Article 5(2) of the FMSA – are: the minister responsible for financial institutions or his representative, the minister responsible for economy or his representative, the minister responsible for social security or his representative, the President of the National Bank of Poland or a member of the Management Board of the National Bank of Poland delegated by him, a representative of the President of the Republic of Poland, a representative of the Prime Minister, a representative of the Bank Guarantee Fund, a representative of the President of the Office of Competition and Consumer Protection and a representative of the minister-member of the Council of Ministers responsible for coordinating the activities of special services, and if not designated – a representative of the Prime Minister[5]. In accordance with the legislator's intention,

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[3] P. Wajda, *Charakter prawny wpisu na listę ostrzeżeń publicznych KNF*, „Monitor Prawa Bankowego" 2013, No. 6, p. 78–89.

[4] P. Wajda, *Pozycja prawnoustrojowa i skład Komisji Nadzoru Finansowego – kilka uwag krytycznych*, „Przegląd Prawa Publicznego" 2009, No. 7–8, p. 136–146.

[5] Representatives of the Bank Guarantee Fund, the President of the Office of Competition and Consumer Protection and the minister-member of the Council of Ministers responsible for

representatives of economic chambers of bank associations designated by the FSA may also participate in FSA meetings, in an advisory capacity.

The tasks of the FSA are typified in Article 4 of the FMSA. According to the wording of this provision, they include: 1) exercising supervision over the financial market; 2) taking measures for the proper functioning of the financial market; 3) taking measures to develop the financial market and its competitiveness; 4) taking measures to promote the development of financial market innovation; 5) undertaking educational and informational activities on the functioning of the financial market, its risks and the entities present on it in order to protect the legitimate interests of financial market participants, in particular by publishing – in a form and time determined by the FSA – free of charge warnings and announcements on public radio and television within the meaning of the provisions of the *Broadcasting Act of December 29, 1992*[6]; 6) participation in the preparation of draft legislation on financial market supervision; 7) creating opportunities for amicable and conciliatory settlement of disputes between financial market participants, especially disputes arising from contractual relations between entities subject to the supervision of the FSA and recipients of services provided by these entities; 8) cooperation with the Polish Audit Supervision Agency, and 9) performance of other tasks specified by laws.

The above-mentioned catalogue of tasks (which is open-ended in nature) allows us to distinguish the following functions of the FSA: licensing, regulatory, inspection and supervision, information, and policing (imposing penalties and verifying the formal requirements of those applying for entry in the registers)[7].

The sphere of action of the FSA in material terms is defined in Article 11 (1) of the FMSA. According to this provision, the FSA (…) *within the scope of its jurisdiction adopts resolutions, including issuing administrative decisions and rulings, as defined in separate provisions*. Matters related to the nature of the resolutions passed have raised questions, but a discussion of this issue is beyond the scope of this paper[8].

coordinating the activities of special services shall participate in the meetings of the FSA only in an advisory capacity.

6 Consolidated text: Journal of Laws of 2022, item 1722.

7 A. Szelągowska, *Opinia prawna dotycząca planowanych zmian w nadzorze nad rynkiem finansowym w Polsce*, Sejm print No. 2812, Sejm of the 8th legislature, Warsaw, September 17, 2018.

8 T. Czech believes that resolutions of the FSA, which "(...) establish norms of an abstract-general nature, are not acts of universally binding law". According to this author, the substantive provisions that give the FSA "(...) normative competence to issue resolutions of an abstract-general nature are contrary to Article 93 (1) of the Polish Constitution". Cf. T. Czech, *Miejsce uchwał Komisji Nadzoru Finansowego w systemie źródeł prawa polskiego*, "Monitor Prawa Bankowego" 2013, No. 7-8, p. 70-82.

Information duties of the FSA Chairman to the Prime Minister

Analyzing the issues related to the exchange of information on financial market security, it is impossible to ignore the topic of cooperation, especially the transfer of information on the line FSA – Prime Minister. By the *Act of November 9, 2018 on Amending Certain Laws In Connection with Strengthening of Supervision of the Financial Market and Protection of Investors in the Market*[9], Article 17aa into the FMSA was introduced. According to this provision, the FSA Chairman is obliged to inform the Prime Minister of the identification of systemic risk in the financial system or its environment, as defined in the *Act of August 5, 2015 on Macroprudential Supervision of the Financial System and Crisis Management in the Financial System*[10] and of any event that may threaten the security or results in a threat to the security of the financial market, including a threat or violation of the interests of a significant number of individual investors within the meaning of *Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of November 26, 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)*[11], as well as actions taken by the FSA in connection with such risk or event.

The introduction of this mandatory mechanism was aimed at increasing the resilience of the state security system. It is based on the assumption that the tools, powers and possibilities for the Prime Minister to influence the various institutions performing tasks related to state security are far greater than the powers of the FSA Chairman. The legislator, by introducing the provision under review, obliged in practice the FSA Chairman and the clerical apparatus subordinate to him to make ongoing analyses related to the functioning of the financial market. This approach is intended to allow the identification and minimization of various systemic risks at the earliest possible stage, so as to avoid negative consequences for the market and its stakeholders. This design seems to work in practice, as the Prime Minister has been informed many times over the past few years about identified areas of systemic risk. Their failure to materialize is evidence of the effectiveness of the measures taken.

Cf. also on the matter P. Wajda, *Rekomendacje Komisji Nadzoru Finansowego dla rynku ubezpieczeń i reasekuracji – soft law w wersji hard?*, in: *Źródła prawa. Teoria i praktyka*, T. Giaro (ed.), Warszawa 2016, p. 165–179.

[9] Journal of Laws of 2018, item 2243, as amended.

[10] Consolidated text: Journal of Laws of 2022, item 963, as amended.

[11] OJ EU L 352/1 of 9 December 2014.

It should also be emphasized that in Article 16a of the FMSA, the legislator established a mechanism for the FSA Chairman and his deputies to make available to the Prime Minister, upon his request, information obtained in connection with their participation in the work of the FSA, including information protected under separate laws. The request, as well as the response to it, is, as a rule, in writing. If the information is transmitted in any other form, the FSA chairman shall prepare a memo, a copy of which he shall immediately forward to the Prime Minister.

The mechanism regarding the obligation to provide information to the Prime Minister should be seen as complementary to mechanisms to increase the resilience of the security system. The Prime Minister undoubtedly has a broader view of potential risk areas related to financial market operations and security. The practice of the government center's operation clearly indicates that the prime minister receives information and signals related to various areas of state functioning practically every day. Part of their scope includes the functioning of the financial market. Analysis of this information and signals may make it necessary to consult the FSA Chairman. It is also not impossible to request specific documents and information. To this end, the legislature introduced the mechanism mentioned above.

Legal conditions of cooperation of the Financial Supervision Authority with selected entities of the state security system

The most important mechanisms and solutions for the considerations carried out in this article are adopted in Article 17 and Article 17ca of the FMSA. According to the first of the provisions referred to in paragraph 1, the FSA and the NBP provide each other with documents and information, including those protected under separate laws, to the extent necessary to carry out their statutory tasks. The possibility of transferring documents and information necessary for the performance of tasks also applies to the Bank Guarantee Fund, the Insurance Guarantee Fund, the Financial Ombudsman and the minister responsible for financial institutions. Determination of the rules of cooperation and transfer of documents and information between these entities is carried out through the conclusion of an agreement and relevant contracts.

The doctrine stresses that the regulations contained in Article 17 of the FMSA were introduced into the act

> (...) following the consideration of comments made by the European Central Bank (ECB) to the draft law on financial market supervision. The European

> Central Bank, in its March 9, 2006 opinion (CON/2006/15), stated that the Basel Core Principles for Effective Banking Supervision emphasize the provision of a system of cooperation and exchange of needed information at both the national and international levels between the various authorities responsible for the safety and proper functioning of the financial system. The European Central Bank noted that the FSA and the NBP should cooperate closely in all areas of common interest in order to properly carry out the functions entrusted to them. This principle of cooperation, in the ECB's view, should be reflected in a general provision establishing the obligation of cooperation between the said authorities, and the implementation of such a provision should include the development of effective, practice-responsive agreements on cooperation and on the exchange of information between the NBP and the FSA[12].

The cited provision sets the statutory framework for the FSA's cooperation with other entities responsible for state economic security. Its introduction is intended to safeguard the interests of the state in systemic terms. It is important to keep in mind that the responsibility and purpose of each institution varies. What remains common, however, is the responsibility to build the resilience of the state and its institutions.

Mechanisms for cooperation and transfer of information to the heads of services and bodies of central offices were defined by the legislator in Article 17ca of the FMSA. This provision in paragraph 1 states that:

> The Chairman of the FSA provides the Head of the Internal Security Agency, the Head of the Central Anti-Corruption Bureau, the Head of the National Fiscal Administration, the General Inspector of Financial Information, the Commander-in-Chief of the Police, and the President of the Office of Competition and Consumer Protection with documents and information, including those protected under separate laws, to the extent necessary to carry out the statutory tasks of the Internal Security Agency, the Central Anti-Corruption Bureau, the National Fiscal Administration, the General Inspector of Financial Information, the Police, and the President of the Office of Competition and Consumer Protection.

In paragraph 2 of the cited provision, the legislator obliged the heads of the ISA, CAB, NRA and GIFI, the Commander-in-Chief of the Police and the president

[12] L. Góral, *Ustawa o nadzorze nad rynkiem finansowym. Komentarz*, LexixNexix 2013, komentarz do art. 17 u.n.r.f., https://sip.lex.pl/komentarze-i-publikacje/komentarze/ustawa-o-nadzorze-nad-rynkiem-finansowym-komentarz-587478653 [accessed: 12 IX 2022].

of the OCCP to submit to the FSA chairman documents and information – including those protected under separate regulations – to the extent necessary to carry out the tasks of the FSA. Paragraph 2a 17ca of the FMSA, added in 2021, specifies that the information provided by the Head of the ISA in accordance with paragraph 2 of this article does not include the information referred to in Article 39(3) of the *Act of May 24, 2002 on the Internal Security Agency and the Intelligence Agency*[13].

For the clarity of the argument, it is necessary to signally recall the subject and object scope of Article 39 of the Act on ISA and AW. According to the wording of paragraph 1 of this provision, the heads of the Agency, each within the scope of their activities, may authorize officers and employees of the Agency and former officers and employees, after the termination of their official relationship or employment relationship with the Agency, as well as persons assisting them in the performance of operational and reconnaissance activities, to provide classified information to a specified person or institution. Paragraph 3 of this article specifies that the authorization discussed above may not apply to the provision of information about: 1) a person, if they were obtained as a result of operational and reconnaissance activities conducted by the Agencies or other state bodies, services or institutions; 2) detailed forms and rules for carrying out activities, as well as the means and methods used in connection with their conduct; 3) a person providing assistance to the Agency, and 4) a person providing assistance to the State Protection Office in carrying out operational and reconnaissance activities.

The literature aptly emphasizes that in the management of information collected by the ISA and AW, the heads of these institutions act as a kind of "guardians of this information"[14]. It is necessary to agree here with the view of Martin Bożek, who believes that (…) *decisions on the release of a particular category of classified information to external entities are made completely autonomously by the head of the ISA, and that* (…) *certain specific classified information cannot be transferred outside the structures of the ISA at all, which makes the head of the ISA their sole depositary*[15].

No such mechanism was introduced in the FMSA for the CAB. However, in Article 28 of *the Act of June 9, 2006 on the Central Anti-Corruption Bureau*[16] the legislator provided for the possibility of granting (with certain exceptions) to officers and employees of the CAB and former officers and employees,

[13] Consolidated text: Journal of Laws of 2022, item 557, as amended.

[14] M. Bożek, *Status prawnoustrojowy Szefa Agencji Bezpieczeństwa Wewnętrznego. Zarys problemu na tle rozwiązań konstytucyjnych i ustawowych*, „Przegląd Sejmowy" 2014, No. 3, p. 97.

[15] Ibid.

[16] Consolidated text: Journal of Laws of 2022, item 1900.

after the termination of the official relationship or employment relationship in the CAB, as well as persons assisting them in the performance of operational and reconnaissance activities, permission to provide classified information to a specific person or institution[17].

Analysis of source material (contracts and agreements)

As already mentioned, the FMSA indicates that the rules of cooperation and transfer of documents and information between the said public institutions are defined in agreements and contracts concluded by the FSA. The analysis of selected contracts and agreements is the primary purpose of this part of the article. The authors evaluated the following documents:

1) agreement of December 14, 2007 on defining the principles of cooperation and exchange of information between the National Bank of Poland and the Financial Supervision Authority[18];
2) agreement of November 4, 2015 on detailed rules of cooperation between the Minister of Finance and the Polish Financial Supervision Authority with regard to the performance by the Polish Financial Supervision Authority of certain tasks of the competent authority within the meaning of Regulation (EU) No. 236/2012 of the European Parliament and of the Council;
3) agreement concluded on August 16, 2019 between the Head of the National Tax Administration and the Chairman of the Financial Supervision Authority on principles of cooperation and transfer of documents and information;
4) agreement of December 10, 2020 on principles of cooperation and transfer of documents and information between the Head of the Internal Security Agency and the Chairman of the Financial Supervisory Authority;
5) agreement of August 6, 2020 on the principles of cooperation and transfer of documents and information between the Head of the Central Anti-Corruption Bureau and the Chairman of the Financial Supervision Authority;

[17] For more, see: S. Hoc, P. Szustakiewicz, *Ustawa o Centralnym Biurze Antykorupcyjnym. Komentarz*, LEX/el. 2012, Commentary to Art. 28 of the CAB Act, https://sip.lex.pl/komentarze-i-publikacje/komentarze/ustawa-o-centralnym-biurze-antykorupcyjnym-komentarz-587334449 [accessed: 12 IX 2022].

[18] Agreement amended by Annex No. 1 dated January 26, 2011, Annex No. 2 dated November 16, 2015, Annex No. 3 dated April 7, 2017 and Annex No. 4 dated July 31, 2020.

6) agreement dated January 22, 2020 on the principles of cooperation and transfer of documents and information between the Chief of Police and the Chairman of the Financial Supervisory Authority.

The most elaborate document is the agreement between the NBP and the FSA. The National Bank of Poland is an institution authorized by the *Constitution of the Republic of Poland of April 2, 1997*[19] and, according to the wording of Article 227 of the Constitution, it is the central bank of the state with the exclusive right to issue money and to determine and implement monetary policy. The National Bank of Poland is responsible for the value of Polish money. The organization and rules of operation of the NBP, as well as detailed rules for the appointment and dismissal of its bodies, are set forth in the *Act of August 29, 1997 on the National Bank of Poland*[20]. The doctrine specifies that the NBP is

> (…) a state institution with legal personality, but not subject to registration in the register of state-owned enterprises. The area of operation of the NBP is the territory of the Republic of Poland, and its headquarters is the capital city of Warsaw. The capital of the NBP belongs entirely to the state. The central bank is crucial to the implementation of the country's monetary policy and the stability of the banking sector. The NBP operates a separate financial management, and the profit from its activities is paid to the state budget[21].

Rafał Sura is also correct, pointing out after other representatives of the doctrine that the constitutional position and mandate of the NBP make it not fall within the classical structure of the tri-partite government, but it has a twofold legal personality, i.e. public-law and private-law, and, most importantly, is endowed with the attribute of independence[22]. A detailed analysis of the position and powers of the NBP goes beyond the research intentions adopted in the article, so only the most important information on this institution is cited. Undoubtedly, it is a fundamental subject of the state security system in economic terms.

The preamble to the December 14, 2007 agreement emphasized that the President of the NBP and the FSA Chairman entered into the agreement (…) *expressing their will to cooperate harmoniously and provide each other with*

[19] Journal of Laws of 1997, No. 78, item 483, as amended.

[20] Consolidated text: Journal of Laws of 2022, item 492, as amended.

[21] P. Dziekański, *Niezależność Narodowego Banku Polskiego w świetle polskiego prawa i prawa Unii Europejskiej*, „Przegląd Prawa Publicznego" 2009, No. 7–8, p. 124.

[22] R. Sura, *Niezależność Narodowego Banku Polskiego a relacje z Parlamentem RP*, „Przegląd Sejmowy" 2021, No. 4, p. 108; R. Piotrowski, *Zasada podziału władz w Konstytucji RP*, „Przegląd Sejmowy" 2007, No. 4, p. 122 et seq.

information to the extent necessary to carry out the statutorily defined tasks of both institutions. § 1(2) of the agreement in question specifies that the NBP and the FSA provide each other with information in their possession, including data, opinions and analyses to the extent necessary to carry out the tasks entrusted to the law. § 8 of the agreement defines the rules for providing information (…) *on request to carry out the statutory tasks of the National Bank of Poland related to granting credit to banks and the National Savings and Loan Fund*.

The section setting forth the rules and procedures for the transmission of information provides for its four basic modes: 1) cyclical; 2) upon request; 3) on one's own initiative; 4) on demand. The exchange of information by e-mail between the NBP and the FSA follows the use of cryptographic means of information protection. This provision is intended to enhance the security of information provision, which should certainly be considered the right direction.

Information provided on a cyclical basis is defined in the annexes to the agreement. These include data on: participants in securities clearing and settlement systems, brokerage entities and custodian banks; pension funds and pension companies, insurance companies, as well as data necessary for assessing the financial condition of banks and banking sector risk, and data on the banking sector from the FSA's supervisory and information systems.

Transmission of information at the request of any of the parties to the agreement (or authorized representatives) may take place at any time. The request should indicate: the type and scope of information, when and how it will be provided, and the purpose of the transfer. The application may be submitted electronically. The contracting parties have the right to refuse to provide information if it does not meet the formal requirements and has not been completed, and if the information requested is not in the possession of the information provider. It is the duty of the contracting parties to inform the applicant of the reasons for refusing to provide information. In a situation where the information provided by the contracting party proves unsatisfactory to the applicant, the applicant has the right to request additional information. Such a request should specify their scope and type, as well as the deadline for their release.

Another mode involves the possibility of transferring information between institutions on their own initiative. § 7 of the contract stipulates that if, in the course of performing statutory tasks, a contracting party obtains information that it deems necessary for the other contracting party to properly perform its tasks, it should provide this information on its own initiative. The FSA Chairman and the President of the NBP decide on the application of this mode, respectively.

The most extensive section of the agreement deals with the provision of information upon request from the NBP. Paragraph 1 of § 8 of the agreement

indicates that the provision of information is made upon written request of the President of the NBP or representatives authorized by him. The authorization must be given in writing and submitted to the FSA for information. Thus, this special entitlement cannot be exercised by every NBP employee. The prerequisite is to have the appropriate authorization.

The information on banks prepared by the FSA should include, as appropriate to the content of the request: 1) the opinion of the FSA on the bank's ability to repay the funds raised from the NBP with interest; 2) information from the FSA on the importance of the bank in the banking system; 3) estimated information on the shaping of the bank's liquidity situation in the coming days (this information should also include the projected amounts/salaries of the maturity of the bank's receivables and liabilities in the interbank market; 4) information on the strategic owner and the actions it has taken and intends to take, as well as the anticipated effects of these actions; 5) information on the share of the bank's assets in the assets of the capital group; 6) information on the bank's strategy regarding group financing and external financing, including available credit lines and guarantees obtained from a strategic investor and other institutions; 7) photocopies of documents confirming the bank's declarations of liquidity support from the parent company, including the extent of any liquidity support and the period covered by the declaration; 8) estimates of the impact of bank failure and an assessment of the cost of bank failure to the banking system, including the impact of bank failure on the current financial performance of banks; 9) assessment of the bank's loan portfolio, primarily receivables that are collateral for the NBP loan; 10) information on the bank's core business lines; 11) indication of the markets in which the bank is active (foreign exchange, swap, repo, other); 12) information on the bank's role as a depository; 13) information on whether the bank is active in the settlement of exchange transactions; 14) a contact list for the bank's management (members of the board of directors, persons responsible for crisis management, persons responsible for liquidity management, collateral); 15) a contact list for the consolidating supervisor (in the case of a banking group); 16) copies of letters discussing the results of inspections with supervisory recommendations addressed to systemically important banks; 17) report of economic and financial indicators for the last five quarters; 18) report of economic and financial indicators for the last five months; 19) other information requested by the NBP, given the specifics of the situation.

The transmission of the above information shall be made immediately by e-mail. Dedicated email boxes have been set up for secure exchanges to ensure the efficiency of information exchange.

After analyzing the content of the agreement between the FSA and the NBP, one can conclude that it is comprehensive in nature and allows both institutions

to carry out their tasks efficiently. The agreement, in the part concerning the request by the President of the NBP for data related to banks and cooperative savings and credit unions, is asymmetrical in nature, as it defines the obligations of only one of the parties to the agreement. Arguably, this is due to the constitutional position of the NBP, which is constitutionally empowered and has a broad statutory mandate.

The agreements between the FSA and the ISA, CAB and Police are largely similarly structured, so they will be analyzed together. Each of the agreements sets forth the principles of cooperation between the FSA and the listed institutions, the mechanisms and rules for the transfer of information and documents to the extent necessary to carry out the tasks of each institution.

All agreements with the aforementioned institutions were concluded in 2020, and it was explicitly indicated that the information, data and documents collected in connection with the implementation of the agreement may be used only for the purpose of carrying out the statutory tasks of each institution, i.e. ISA, CAB and Police. It also stressed that the information and data obtained cannot be transferred to third parties without obtaining the consent of the holder of the information or document. In the case of the agreement between the FSA and the ISA, an additional restriction was introduced. It stipulates that the transfer of documents and information by the Head of the ISA will be carried out only in a processed form, preventing the disclosure of information about the means, forms and methods of carrying out the tasks of the ISA, the information collected, as well as the ISA officers' own facilities and identifying data.

The agreements under review – notwithstanding the implementation of mutual information obligations under Article 17ca of the FMSA – provide mechanisms for broader cooperation aimed at, among other things: 1) disclosing, combating and preventing violations of the law in connection with the conduct of activities in the financial market; 2) cooperation in the issuance of recommendations and guidelines by the FSA relating to matters of interest to the ISA; 3) exchange of experience in the training of financial market entities on countering terrorist financing and proliferation; 4) identifying, reviewing and combating threats from financial market crimes; 5) providing technical and analytical assistance; 6) improving the methodology of performing tasks and official activities; 7) organizing joint conferences, meetings and training sessions.

The agreement entered into by the FSA Chairman and the Head of the NRA in 2019 is part of the solution provided for in Article 17ca (3) of the FMSA. It defines the principles of cooperation and information exchange. However, it defines differently the mechanisms for assessing whether the information and documents in question are necessary to carry out the statutory tasks of both institutions. § 3 of the August 16, 2019 agreement explicitly stipulates that documents and

information provided on the FSA Chairman's own initiative are considered necessary for the implementation of the NRA's statutory tasks, if they were obtained in the course of the supervision exercised and relate to the facts identified and documented by the OFSA. Such a state of affairs was the activity of a given entity supervised by the FSA bearing the hallmarks of engaging in business operations for which the probability of violation of laws within the jurisdiction of the FSA was established, while, to the knowledge of the NRA Chairman, these documents and information are not or may not be in the possession of the NRA.

Paragraph 2 of the cited provision states that it is not considered necessary to provide, on the initiative of the FSA Chairman, information and documents other than those specified in paragraph 1, especially statistical data on the characteristics of supervised entities, which may be useful in analytical activities of a general nature, unless the indispensability of such documents and information for the performance of the statutory tasks of the NRA is expressly stated by the Head of the NRA. In such situations, he shall submit a letter to the FSA Chairman specifying the scope of the documents and information, along with the reasons. On its basis, the FSA Chairman may recognize the legitimacy of transferring these documents and information to the Head of the NRA.

Virtually identical provisions operate in the case of the relationship of the Head of the NRA with the FSA Chairman. The difference lies in the subject. In the case of the FSA, it refers to supervised entities, and in the case of the NRA, it refers to taxpayers.

According to the will of the parties to the agreement under review, the transfer of documents and information recorded on tangible media, including documents and information in electronic form, shall be carried out through employees or officers of the NRA or employees of the OFSA. Provision has also been made for the exchange of information, data and documents using e-mail, with the caveat that *the sine qua non* is the use of agreed cryptographic techniques. Taking into account the dynamics of changes in the environment, the agreement also includes the possibility of making additional arrangements for the form and mode of transmission of documents and information.

There is no doubt that both institutions have sensitive information and data, as well as documents containing various types of secrets, but it was not the purpose of the authors to analyze this issue in detail. However, it should be emphasized that each party to the agreement in question is obliged to protect information protected under separate laws and is liable for its disclosure to unauthorized persons. The wording of the agreement clearly indicates that documents and information collected under the agreement may not be transferred to third parties without

the prior consent of their disposer. The exception is when the request for the transfer of data, information or documents arises directly from mandatory provisions of law.

The FSA's cooperation with the NRA also includes other types of activity. The agreement provides, among other things: 1) coordination of activities where they involve persons, entities or facilities covered by simultaneous actions of the NRA and the FSA; 2) organization of joint conferences, seminars, workshops and training courses for NRA employees and officers and OFSA employees, exchanging training materials, and, as necessary and possible, sharing training databases and specialized teaching facilities with each other; 3) cooperation in improving the methodology of performing tasks and official activities, including the exchange of conceptual studies, analyses and forecasts; 4) provision of technical protection of the premises at the disposal of the OFSA, consisting in the performance of an anti-bugging check by Customs and Fiscal Service officers in the designated premises.

The agreement between the NRA and the FSA also assumes the possibility of setting up permanent or temporary working teams. This is aimed at improving the quality of cooperation at the working level, thereby building the effectiveness of state institutions from a holistic perspective.

FSA's cooperation with selected entities – analysis of empirical data for 2020-2021

The analysis of OFSA's activity reports in 2020[23]-2021[24] confirms the thesis that the established mechanisms for cooperation and information exchange are being used in practice. As written in the 2021 document, based on the provision of Article 17ca of the FMSA, cooperation has been intensified with central offices and units of state departments and agencies in the exchange of documents and information necessary to achieve statutory objectives in the area of prevention and detection of crimes in the financial market[25]. Within the framework of the authority mentioned in this article, the OFSA has forwarded more than 50 reports of phenomena and entities operating illegally in the financial market or impersonating licensed entities. In 2020, there were more than 60 such instances.

[23] *Sprawozdanie z działalności Urzędu Komisji Nadzoru Finansowego w 2020 roku*, Urząd Komisji Nadzoru Finansowego, 2021, https://www.knf.gov.pl/knf/pl/komponenty/img/SPRAWOZADANIE%202020_76375.pdf [accessed: 12 IX 2022].

[24] *Sprawozdanie z działalności Urzędu Komisji Nadzoru Finansowego w 2021 roku*, Urząd Komisji Nadzoru Finansowego, 2022, https://www.knf.gov.pl/knf/pl/komponenty/img/Sprawozdanie_z_dzialalnosci_UKNF_oraz_KNF_w_2021_roku_78361.pdf [accessed: 12 IX 2022].

[25] Ibid, p. 188.

In connection with the implementation of the OFSA's statutory tasks under Article 83(1) of the *Act on Prevention of Money Laundering and Financing of Terrorism of March 1, 2018*,[26] it also provided the GIFI with 9 notifications on suspicion of an offense under Article 299 § 1 of the Criminal Code, which were then used to formulate notices of suspicion to prosecutors. The exchange of information with the above-mentioned authorities is related to the continuous organizational strengthening of the OFSA's units responsible for carrying out activities in criminal cases, as well as improving activities related to the collection and processing of information on observed criminal phenomena in the financial market.

In 2021, the OFSA continued to cooperate with law enforcement agencies in detecting and combating the crime of conducting illegal activities in the financial market.

The cooperation took place both on a general level, aimed at developing an optimal model of cooperation, and focused on specific issues. This activity, in view of the intensification of the phenomenon of conducting illegal activities in the financial market, focused, among other things, on the issue of illegal brokering of investments in the capital market and support for law enforcement agencies in identifying schemes used in such a procedure. Of the 98 notices filed in 2021 with the prosecutor's office, 83 pre-trial proceedings were initiated, 9 of them were subsequently discontinued, and in 8 cases a complaint was filed. As of December 31, 2021, 5 complaints were pending before the court, 6 cases were denied investigation (1 case was filed). The remaining notices were awaiting the prosecutor's decision on further proceedings.

Summary and conclusions

An analysis of the law and the source materials, which are the agreements concluded by the FSA Chairman with the heads of selected institutions responsible for state security, allows us to conclude that the legislature has intensified the exchange of inter-institutional information over the past few years and has laid a solid foundation for the development of cooperation mechanisms. This is particularly important in the context of the growing number of challenges related to the functioning of the financial market in Poland. Information about risks and threats to its operation must be communicated almost immediately as part of ongoing cooperation. Any delay related to the provision of information may have

[26] Consolidated text: Journal of Laws of 2022, item 593, as amended.

negative consequences for the financial market and its stakeholders, as well as for the state and its institutions.

An important factor affecting the efficiency and effectiveness of cooperation between public institutions, especially those in the special services group, is trust. Based on the experience of the authors of this article, it can be concluded that trust in cooperation with the special services responsible for state security is built over the long term. For employees of many public institutions, including the FSA, cooperation with the special services is not always obvious. The fear of the FSA staff to establish it and exchange information is often observed. This is accompanied by feelings of uncertainty about the desirability and scope of such interaction. Staff is also concerned that the information they provide could be used against them. This, in turn, stiffens cooperation and brings it to the executive level. It is difficult to answer unequivocally whether there is a remedy for this state of affairs. Probably not. Interaction with the special services, whether involving public or private sector employees, is not natural and causes fear.

However, there is no doubt that public institutions responsible for state security must share a common goal. The goal is the implementation of tasks and duties performed within the framework of their assigned competencies in such a way that it contributes to increasing the level of state security both in terms of systemic and executive solutions. Each of the institutions has a mandate defined in the law, defining its responsibilities in carrying out tasks related to state security. This mandate sometimes varies in definition by the legislature, which often causes interpretative problems and challenges with the creation of so-called institutional competence gaps. This phenomenon can have the negative effect of creating undeveloped areas that are exploited by criminals. The imprecise indication of the limits of responsibility of individual institutions creates the risk that each institution will narrow the perception of its mandate, hoping that the problem will be addressed by another institution. This, in turn, carries a systemic risk, as in reality none of them will take the expected action.

In the context of the community of goals, it is also necessary to point out that in the Polish reality, the community of goals is viewed narrowly, from the perspective of one's own organization, rather than comprehensively – from the perspective of the state as a whole. Employees and officers of individual institutions primarily identify with the goals of their own organization, rather than the state as a kind of meta-organization. Particularism combined with a narrow view of the goals of one's own institution carries significant risks to security in systemic terms.

According to the authors, the information sharing solutions introduced in 2018 are moving in the right direction. In the future, consideration should be given to implementing mechanisms that would allow a broader exchange of information

not only among institutions, but also among other participants in the financial market. This may include the exchange of information related to the cyber security of the financial market in Poland, physical security, and threats related to money laundering and terrorist financing. According to the authors, such a comprehensive view of security issues can contribute to increasing the resilience of the Polish state to various types of threats. This proves to be particularly important when considering the challenges posed by the complex geopolitical situation resulting from, among other things, Russian aggression in Ukraine.

The hypothesis formulated in the introduction assumed the need for a correlation of strictly legal factors (a proper legal basis for information exchange) and strictly qualitative factors. In addition to the trust needed in building efficient and effective cooperation mechanisms, additional factors such as commonality of goals and the quality of civil servants carrying out public tasks related to state security are necessary. Only the existence of all these factors may contribute to institutional synergy and increase the level of state security in systemic terms. A look at the operation of individual institutions, operating in a model of equally connected organizational divisions (so-called silos), is particularly dangerous in the current geopolitical situation, with the war in Ukraine and the possible threats in cyberspace. Successfully fighting criminals, both in the real and virtual world, requires effective and efficient cooperation. Therefore, a particularist and narrow approach to the mandate of security institutions should not be accepted for both policymakers and the public.

Having analyzed the cooperation of state security actors, it is impossible to ignore the risks of institutional rivalry. Observing the functioning of public organizations, it is a common phenomenon that individual institutions compete for "media and political success." This leads to tensions between the staff of these institutions and, consequently, negatively affects future cooperation. This risk may be minimized by promoting inter-institutional successes and valuing cooperation at every level. However, such practice must be demonstrated by representatives of the top management of the various institutions. Their role cannot be overestimated, as competition at the executive level will be replicated at lower levels of the organization. Undoubtedly, security tasks require the development of mechanisms for cooperation of state security actors in various dimensions.

The task facing the institutions responsible for state security is also to design and create a common tool (platform) for the exchange of information, data and documents to meet the challenges that may arise in the coming years. Building an environment that is resilient to cyberattacks is essential. Only this approach can provide systemic benefits.

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