

INTOSAI



*Principles of
jurisdictional activities of
SAIs*

EXPOSURE DRAFT

INTOSAI



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1. PREAMBLE

1.1 Introductory remarks

1.1.1 Supreme Audit Institutions (SAIs) with jurisdictional functions have the possibility to engage directly the liability of managers of public funds when their findings show some irregularities or when such irregularities are referred to it by a third party. Indeed, it has been observed that funds management difficulties could come with irregularities with regards to legal provisions or specific regulations related to management. Hence, observations made in a financial, performance or compliance audit report of a public organization, whether they are reported to civil or criminal court or not, can be followed by quick and proper legal proceedings lead by the SAI itself within the framework of its jurisdictional activities.

1.1.2 The jurisdictional activities of the SAIs consist in a control of regularity of the accounts and management operations of officials and other managers of public funds and considered as such. Said activities include the engagement of the personal liability and the sanctioning of those accountable in case of irregularities in the management of these funds and operations or of losses caused by these irregularities or mismanagement.

1.1.3 The aim of the jurisdictional activities of a SAI is the protection of the proper functioning of public management as well as the interests of the audited entity and, furthermore, of public authorities and citizens. The jurisdictional activity aims to compensate in whole or in part for losses suffered by a public entity and/or to sanction the personal liability, either financial or disciplinary of individuals found guilty. The exemplary value of issued judgements has a preventive character. The SAI with jurisdictional competence has specific powers to guarantee the protection of public funds and considered as such as well as the transparency and integrity of public management.

1.1.4 Jurisdictional activities also participate in the accountability of public managers who, from their personal funds, pay a sanction or compensate for all or part of a financial loss by contributing to the reimbursement of irregular expenses, lost revenues or cash and account deficits. The judgement may also affect the career of the person accountable by law who was found guilty, as may be taken into account by his employing authority in the course of his career. The publicity given to judgement of SAIs contributes to the prevention of irregularities through the exemplary nature of the sanctions and the authorities and citizen's trust in the reliability of the public financial order and in the probity of public managers. Hence, the jurisdictional activities helps the SAI to meet citizens' expectations for identifying and sanctioning individuals' liability of official in charge of public fund management.

1.2 Objectives of the pronouncement

1.2.1 Professional standards and guidelines are essential for the credibility, quality and professionalism of public sector auditing relying on the SAI. The INTOSAI Framework of Professional Pronouncements (IFPP) developed by the International Organization of Supreme

Audit Institutions (INTOSAI) aims to promote independent and effective auditing and support the members of INTOSAI in the development of their own professional approach in accordance with their mandates and with national laws and regulations.

1.2.2 This INTOSAI Core Principle 50 –Principles of jurisdictional activities of SAIs develops twelve principles to suit the specific context of jurisdictional activities of the SAIs empowered with those missions. INTOSAI–P 50 is to be read and understood in conjunction with INTOSAI Core Principles and with the international principles, included in international treaties and conventions, applicable in the domain of justice.

1.2.3 The model of jurisdictional SAI is recognized as one of an organisation that can carry out all types of audit that a SAI has to perform and which is, in addition to those, invested with the power to rule on the liability of the persons accountable by law in case of irregularities or mismanagement. In that sense, jurisdictional activities differ from financial, performance or compliance audit even if they can occur in conjunction with such audits or follow them. They have to comply with particularly requiring principles as they have a direct impact on the personal situation of individuals and as the violation of those principles directly threaten the judgement itself.

1.2.4 SAIs with jurisdictional powers operate under different mandates. However, these principles are intended to be used by SAIs with jurisdictional mandates to strive towards a high quality performance of the jurisdictional activities. SAIs are encouraged to apply them and assess their compliance with such provisions in a manner that is most appropriate for their respective environments. National norms can apply the principles of this norm through various ways, depending on their national remit, constitutional and legal framework or the strategy of the SAI. This document forms an integral part of the other INTOSAI Framework of Professional Pronouncements (IFPP) and the principles are intended to be used in conjunction with those pronouncements. Jurisdictional SAIs must declare which standard they apply when conducting audits using means legally fitted to jurisdictional activities.

1.3 Context and other relevant standards

1.3.1 Several international norms relating to Supreme Audit Institutions deal with some specificities of SAIs jurisdictional powers. Said mentions can be found either in the INTOSAI Core Principles or elsewhere within the INTOSAI Framework of Professional Pronouncements and enforced by this organisation.

1.3.2 . This pronouncement, as an INTOSAI Core principle, aims at complementing the other INTOSAI Core principles and at providing an umbrella for all the current and future professional pronouncements of the INTOSAI related with the matter of jurisdictional activities of SAIs.

1.3.3 The INTOSAI Core Principle 1 – The Lima Declaration spells out the role of SAIs in identifying the individual responsibilities and provides that post-audit shall enable to obtain compensation for the losses incurred (1.2.3), which is one of the functions of jurisdictional activities for SAIs invested with this power. The INTOSAI Core Principle 10 – Mexico Declaration on SAI independence also mentions the possibility of enforcement of sanction by the SAI when such power is part of their mandate and so does INTOSAI Core Principle 12 – The Value and Benefits of Supreme Audit Institutions.

1.3.4 The INTOSAI Code of Ethics ISSAI 130 (7) sets out specific rules for this kind of SAI: INTOSAI recognizes the necessity to take into account the specificities of SAIs that are jurisdictions.

1.3.5 Furthermore, ISSAIs also mention specificities regarding the activities executed by SAIs with jurisdictional functions. ISSAI 100 - Fundamental Principles of Public Sector Auditing – recognizes the importance of SAIs with jurisdictional functions through dedicated paragraphs for this kind of SAIs (15 and 51) that mention the possibility to issue judicial decisions. One must also underline this INTOSAI-P provides a heading for ISSAIs 400 and 4000 – respectively Compliance Audit Principles and Compliance Audit Standard - when these standards address jurisdictional authority and compliance audit characteristics.

2. EXPLANATIONS, DEFINITION AND ACTORS OF THE JURISDICTIONAL ACTIVITIES OF THE SAIs

2.1 Explanations and definitions

2.1.1 General Jurisdictional competences: These consist in powers vested in a SAI recognized as jurisdictional, either as a whole or through one of its components. These powers grant the SAI with the authority to issue judgements passed following an independent and contradictory procedure. Those judgements tend to assert or reassert a right or an obligation or impose a sanction and they are enforceable decisions (res judicata).

2.1.2 Judgement of the managers of public funds and alike: The SAI issue a judgement on irregularities and mismanagement caused by managers of public funds and considered as such, accountable by law and pinpointed in a financial, performance or compliance audit report drafted by the SAI or transmitted to it by a third party.

2.1.3 Judgement of accounts: Among their jurisdictional activities, some SAIs must judge public accountants and/or other persons accountable by law, on the accounts kept and handed over by them. Such jurisdictional activities engage the personal and financial liability of those accountable when they commit an irregularity concerning the regulations related to expenditure and revenue execution, or more generally public accounting.

2.1.4 Persons accountable by law:

These are individuals who, due to their function and as a result of the law, are subject to the SAI jurisdictional competences. They mainly consist in:

- managers of public funds and alike intervening in public management,
- public accountants,
- elected officials when the law allows it
- any individual interfering with public management without having the legal authority to do so.

2.2 Actors

Within the SAI, several functions are essential to the implementation of jurisdictional competences:

2.2.1 Those instructing:

The employees or members of the SAI (public prosecutor included, when appropriated) in charge of the preliminary investigation (identification and analysis of facts which may constitute irregularities / infringements), up to the drafting of the report leading to the launching of jurisdictional procedures. Ideally, they do not take part in the adoption of the decision.

2.2.2 “Financial judges” or “members of the jurisdictional collegial body”:

The members of the SAI in charge of the judgement making process, in the first instance or in remedies. Their status is outlined in the national law and their independence guaranteed.

2.2.3 Public Prosecutor or assistant public prosecutor, when the Law provide:

Formed by one or several members, its mission is to defend the public interest and the due application of the law. It is placed within the SAI with jurisdictional function or its jurisdictional section. It safeguards the public interest and the proper use of the law, mainly with regard to the legal framework set by the law and can be may be the holder of the investigative activity. He is independent of the formation of judgment and does not take part in the adoption of the decision. He may intervene to institute proceedings and to express his opinion on the judgement to be issued.

3. GENERAL PRINCIPLES SPECIFIC TO JURISDICTIONAL ACTIVITIES: PREREQUISITES AND LEGAL FRAMEWORK

In order for SAIs to undertake jurisdictional activities, the national legal framework shall provide the SAIs with the appropriate legal means and regulations.

3.1 Legal basis of the responsibilities regime

Principle 1: The law should define the liability and sanction regime applicable to persons accountable by law before the SAI.

In order for a SAI to be able to exercise its jurisdictional activities defined above, the legal framework must specify, on the one hand, the missions, scope, powers and procedures of the

institutions, and on the other hand, the liability regimes of the different categories of persons accountable by law. This regime must clarify the obligations of the persons accountable by law, whose breach can lead to legal proceedings, notification of sanctions and if need be the enforcement of sanctions, issued by the SAI. In particular, it must include the statute of limitations of the facts subject to sanction.

It is divided into two distinct principles:

- the principle of legality of the offenses, sanctions and enforcement;
- the principle of legality of the SAI's jurisdiction on identifying and qualifying the offenses and on issuing the condemnations.

Members of the SAI must act within the framework of the liability regime. This principle is strictly linked to jurisdictional activities of SAI, considering that audit activities do not engage the personal liability of the auditees.

3.2 Independence of the SAI's members involved in jurisdictional activities

Principle 2: The member(s) of the SAI, involved in the jurisdictional activities, should benefit from guarantees legally spelled out, which explicitly ensure their independence toward the public authorities.

Specific legal provisions regarding the judges or those instructing the case shall namely regulate their nomination, in order to guarantee their independence especially via their non-removability as well as their "neutrality". Overall, when existing, the ethical provisions included in the national rules for financial judges should be compatible with the INTOSAI Code of ethics (ISSAI 30).

This principle is more demanding for jurisdictional activities than it is for audit activities. Failure to ensure the independence of the members of the SAI can void the judgement.

3.3 Freedom of access to information

Principle 3: The SAI should have legal powers or rights guaranteeing its access to information.

Due to the utmost importance of compelling elements on which the judgement is based, the good conduct of jurisdictional activities of the SAI requires that the law should guarantee its access to any useful information. In the case where its investigation would be impeded, the SAI shall be able to quickly and efficiently initiate a measure enabling it to remove this hindrance. Due to its fundamental role as a warrant of the public interest, the SAI should have the capacity to lift some secrets that have been established by law.

SAIs may benefit from some strong investigation powers usually granted to judicial powers in order to obtain relevant information. Anyway, in all case, their powers to access to information

have to be as complete as possible to allow the rigorous and fair exercise of jurisdictional activities.

3.4 Statute of limitations

Principle 4: An irregular fact may be prosecuted or sanctioned only before the expiry of a reasonable time from the moment it was committed or discovered.

The principles of security of the legal position of persons and of the efficiency of justice require that the law establishes statute of limitations regarding irregularities with regard to the rules of public management. After a certain period following the committing of an irregularity, or its discovery by an authority likely to prosecute it, the persons accountable by law shall not be prosecuted or sanctioned. In the absence of such statutes of limitations, accountable persons would face permanent insecurity, throughout their professional activity and their retirement. In addition, the absence of statutes of limitations would not encourage the SAI to be prompt in the conduct of its audits and its jurisdictional proceedings. Finally, the passing of too long a time between facts and the investigations concerning them would complicate substantially:

- the search for missing, damaged, hidden or inaccessible evidence, as well as
- the analysis of facts and offenses in relation to a potential succession of different legal regimes.

This principle is strictly linked to jurisdictional activities of SAI.

3.5 Appeal and annulment of the judgement

Principle 5: Any judgement of the SAI must be open to be objected and reconsidered and is subject to appeal or annulment in accordance with the national regulation.

The judgement sanctioning an accountable person or a public authority must be subject to possible reconsideration, on the initiative of a litigant, a public authority or an interested third party through:

- Review in some cases by the member of the SAI that made it, by the competent authority; and/or;
- Appeal or cassation to have its substance or regularity of the judgement objected in first instance reviewed or annulled. The specific judgement's objection process are legally established.

This principle is strictly linked to jurisdictional activities of SAI.

4. GENERAL PRINCIPLES SPECIFIC TO JURISDICTIONAL ACTIVITIES: INTERNAL REGULATIONS AND ORGANISATION OF THE SAI

In order for a SAI to undertake jurisdictional activities, it must adopt the appropriate internal regulations and organisation.

4.1 Right to a fair trial

Principle 6: The SAI must ensure that the persons accountable before it undergo a fair trial guaranteed by the legal procedures.

Every accountable person to the law is entitled to a public hearing by an independent and impartial jurisdiction, which will determine if their liability should be incurred.

Every accountable person especially has the right to:

- be informed promptly, and in detail, of the nature and cause of the accusations against him;
- have adequate time and means for the preparation of his defence notably by being given access to all documents and information filed before the judges by any party.
- defend himself in person or through legal assistance of his own choosing within the framework of the law;
- check that the sanctions against him are based on evidence;
- have an explicit ground for the decision rendered. The reasoning of a judgement must be clearly and precisely expressed in the decision itself. It will be compliant with the principle of intelligibility of justice and allow the exercise of the appeals.

This principle is strictly linked to jurisdictional activities of SAI. The right of the auditee to access to evidence may also exist in other types of audit; however, it is much more compelling within jurisdictional activities. Failure to comply with those obligations can void the judgement.

4.2 Impartial judgement and decision making

Principle 7: The impartiality of the judgment process must be guaranteed by regulations governing the activities of the jurisdictional SAIs and the resulting proceedings.

In order to guarantee the judge's impartiality, the rules and procedures governing the jurisdictional activity of the SAI must ensure that the judge or the member of the jurisdictional collegial body have not participated in the investigation of the case on which they are brought to rule. In order to avoid any possible pressure on them, the judges of the collegial body must be assured that their personal opinion (expressed between them after public hearings), will not be disclosed, unless the law authorizes public access to those opinions and provides the relevant framework.

This principle is particularly important considering that any suspicion of partiality can void the decision.

4.3 Effectiveness of jurisdictional activities

Principle 8: The SAI must ensure that the exercise of the jurisdictional activities leads to notified and implemented judgement. The sanction of the personal liability of the litigant must be effective.

The SAI must notify, within a reasonable timeframe, its decision to the parties concerned and to the authorities in charge of its implementation. It must also follow up of its execution and have the appropriate means to do so. Where the SAI does not have a legal mandate to enforce its own decisions, they have to coordinate with the relevant public authorities able to do so.

This principle is strictly linked to jurisdictional activities of SAI, although it is like a form of follow-up of recommendation. Indeed, it gives the SAI a concrete power to strengthen the implementation of its decisions.

4.4 Accumulation of sanctions for the same irregularity

Principle 9: A person accountable by law cannot be condemned for the same irregularity to several sanctions of the same nature imposed by the SAI. A person accountable by law can only be condemned for the same irregularity to sanctions of a different nature imposed by the SAI and other courts if the law so permits.

An irregularity should not be condemned several times by the SAI through several sanctions of the same nature. When the SAI condemns a person accountable to compensate a loss, this person cannot be condemned several times to pay the same amount.

On the other hand, when the SAI sanctions irregular behaviour with a fine, the law must strictly regulate the possibility that another sanction may be imposed for the same facts. This may be the case when the sanctions do not pursue the same objectives. The legislation of each country must therefore provide whether the accumulation of different sanctions for the same irregularity is authorized or prohibited (principle of non or ne bis in idem).

This principle is strictly linked to jurisdictional activities of SAI.

5. GENERAL PRINCIPLES SPECIFIC TO JURISDICTIONAL ACTIVITIES: JURISDICTIONAL PROCEEDINGS

These principles, although sometimes based on a regulatory framework, depend exclusively or almost exclusively on the practices of the jurisdictional SAI.

5.1 Quality control

Principle 10: The SAI must guarantee the quality of jurisdictional procedures through an efficient and systematic quality control.

The engagement of the liability of the person accountable by law as well as the sanctions, which can derive from it, justify the utmost importance of the quality control. This quality control concerns the respect of the legality of the proceedings. It may be ensured by using a process adequate to judgements, such as collegiality, intervention of the public prosecutor and remedy actions, especially appeals. It must also ensure that the length of procedure was reasonable

[see 4.2.], that the required actions were carried out during the instruction and that only necessary procedure acts have been used. Annual reporting of the jurisdictional activity to Parliament and the citizens concurs to the SAI quality control.

This principle is common to both audits and jurisdictional activities; however, it must be adapted and suited for jurisdictional activities. The quality of the whole jurisdictional process has to be completely guaranteed: quality control shall be exerted before, during and after the jurisdictional activities and involve independent checks as much as possible. Its failure may be underlined by litigants to void the judgement.

5.2 Judgement in a reasonable period

Principle 11: The SAI must complete the jurisdictional procedure within a reasonable time.

An excessively long jurisdictional proceedings is harmful to legal security and to the accountable persons involved, especially if they are exempt from any sanction at the end of the first instance or appeal proceedings. The completion requirement within a reasonable time means the proceedings duration should be proportional to the complexity of the case. If the case is complex, the process can last longer. Otherwise, it should be carried out within a short time period. The procedure should use suitable and modern means, aiming at reducing its length. The procedure ends with a judgement that concludes with the engagement of the liability or of absence of liability of the persons accountable by law and the application of the corresponding sanctions. The persons accountable by law have the right to compensation for loss caused by an excessively long judgement process, as foreseen in national legislation.

This principle is common to both audits and jurisdictional activities, but more demanding in the latter case because it may result the sanctioning of the public authorities and damaging public funds and the legitimacy of justice.

5.3 Communication to the public

Principle 12: The SAI must ensure that judgements, as any judicial decision, are made publicly, respecting the secrecy and restrictions linked to confidentiality that are legally mandatory as well as the protection of personal data.

Justice is done on behalf of the people; therefore the citizens must be informed of its daily exercise. Judgements have to be presented not only to the parties but also accessible to all the citizens.

The jurisdictional procedure must be compatible with the rules governing the confidentiality or reservation of public information and the protection of personal data unless the public interest justifies its limitation.

The principle of public open access of citizens to the judgements results from the nature of the jurisdictional activity itself. Therefore, it is more requiring than the possible publicity of the audit report.

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