

Fundamental principles of jurisdictional activities of SAIs

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1. INTRODUCTION

1.1 Objectives of the standard

1.1.1 Professional standards and guidelines are essential for the credibility, quality and professionalism of public sector auditing relying on the Supreme Audit Institutions (SAI). The International Standards of Supreme Audit Institutions (ISSAIs) developed by the International Organization of Supreme Audit Institutions (INTOSAI) aim 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.

1.1.2 *ISSAI 100 – Fundamental Principles of Public-Sector Auditing* provides the fundamental principles for public sector auditing in general and defines the authority of the ISSAIs. *ISSAI/ GUID XXX – Fundamental principles of jurisdictional activities of SAIs* builds on and further develops the fundamental principles of ISSAI 100 to suit the specific context of jurisdictional activities. *ISSAI/ GUID XXX* should be read and understood in conjunction with ISSAI 100 and with the international principles, included in international treaties and conventions, applicable in the domain of justice.

1.1.3 Jurisdictional activities differ from financial, performance or compliance audit even if they can occur in conjunction with such audits or follow them.

1.1.4 Even though some INTOSAI principles, standards and guidelines mention jurisdictional SAIs, there is no complete written standard for this specific kind of institution, which would provide a comprehensive view of all the requirements and main procedures to be followed to carry out their jurisdictional mission and compile good practices. The model of jurisdictional SAI is recognized as one of an organization that can carry out all types of control that a SAI has to perform and which is, in addition to those, invested with the power to rule on the responsibility of the persons accountable to the law in case of irregularities.

1.2 Introductory remarks

1.2.1 Jurisdictional SAIs have the possibility to invoke directly the responsibility of managers of public funds when they observe or are submitted with irregularities. Indeed, it has been observed that funds management difficulties could come with irregularities with regards to legislative provisions or specific regulations relative 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 competences.

1.2.2 The jurisdictional activities of the SAIs consist in a control of regularity of the accounts and management operations of officials and others responsible for public funds and considered as such. Said activities include the incurrence of the personal liability and the sanctioning of

those officials in case of irregularities in the management of these funds and operations or of damages caused by these irregularities.

1.2.3 The aim of the jurisdictional function of a SAI is the protection of the proper functioning of public management as well as the interests of the controlled entity and, furthermore, of public authorities and citizens. The jurisdictional activity aims to compensate in whole or in part for damage suffered by a public entity and/or to sanction the personal liability, either financial or disciplinary of perpetrators of offences. 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.

1.2.4 On the other hand, through said competences also participate in the accountability of public managers who, from their personal funds, pay a fine 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 jurisdictional decision may also affect the career of the accountable person before the 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 jurisdictional decisions 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 officers.

1.3 Context and other relevant standards

1.3.1 This section aims at the following objectives:

- Articulating and harmonizing the document at hand with the existing INTOSAI principles and professional pronouncements.
- Guaranteeing the respect of the notions and principles contained in ISSAI 100 - Fundamental Principles of Public Sector Auditing

1.3.2 Several international norms relating to supreme audit institutions – ISSAIs – deal with some specificities of SAIs jurisdictional powers.

1.3.3 Said mentions can be found either in the INTOSAI fundamental principles or within the Framework of Professional Pronouncements draft and enforced by this organization.

1.3.4 The INTOSAI founding principle, *ISSAI 1 – the Lima declaration* – provides that post-audit shall enable to obtain compensation for the damages incurred (1.2.3)¹, which is one of the functions of jurisdictional control for SAIs invested with this power.

1.3.5 Some jurisdictional SAIs' specificities also appear in others INTOSAI founding principles. That is the case, among others of *ISSAI 10 – the Mexico declaration* and its list of good practices, *ISSAI 11* and *ISSAI 12 - Value and Benefits of SAIs*, which contain mentions of the power to impose sanctions or to run jurisdictional control of public finances when the

¹ ISSAI 1, I.2.3: Post-audit by a Supreme Audit Institution highlights the responsibility of those accountable; it may lead to compensation for the damage caused and may prevent breaches from recurring.

public interest is at stake. The INTOSAI *Code of Ethics ISSAI 30 (7)*² sets out specific rules for this kind of SAI: INTOSAI recognizes the necessity to take into account the specificities of SAIs that are jurisdictions.

1.3.6 Furthermore, ISSAIs also mention specificities regarding the controls executed by SAIs with jurisdictional functions.

1.3.7 *ISSAI 100 - Fundamental Principles of Public Sector Auditing* – recognizes the importance of SAIs with jurisdictional functions through dedicated paragraphs for this kind of SAI (15 and 51)³ that mention the possibility to issue judicial decisions.

1.3.8 One must also underline the complementarity of this document with ISSAIs 400 and 4000 – respectively Fundamental Principles of Compliance Auditing and Compliance Audit Standard. These standards contain common provisions regarding jurisdictional authority and compliance audit characteristics – especially concerning « sufficient and appropriate audit evidences » (ISSAI 4000, 144) and the identification of persons « who may be held responsible for non-compliance acts » (ISSAI 4000, 57, a). However, this standard lacks provisions to completely and accurately describe jurisdictional activities.

2. THE AUTHORITY OF THIS ISSAI

2.1 This ISSAI will in no way override national laws, regulations, mandates, or prevent SAIs from carrying out audits, investigations or other engagements that are not specifically covered. For the conduct of those other missions, SAIs will have to refer to other norms or principles.

2.2 This document provides the international standard for jurisdictional activities for those SAIs choosing to make direct reference to international standards for their work

2.3 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.

2.4 Jurisdictional SAIs must declare which standard they apply when conducting audits using means legally fitted to jurisdictional control.

² ISSAI 30, 7: To satisfy the diversity of culture, and legal and social systems (such as specific rules applying to SAIs of judicial nature), each SAI is encouraged to develop or adopt a code of ethics and an appropriate ethics control system to implement it.

³ ISSAI 100, 15: In certain countries, the SAI is a court, composed of judges, with authority over State accountants and other public officials who must render account to it. There exists an important relationship between this jurisdictional authority and the characteristics of public sector auditing. The jurisdictional function requires the SAI to ensure that whoever is charged with dealing with public funds is held accountable and, in this regard, is subject to its jurisdiction.

ISSAI 100, 51: In some SAIs, such as courts of audit with jurisdictional authority, this may include issuing legally binding reports or judicial decisions.

3 EXPLANATIONS, DEFINITION AND STAKEHOLDERS OF THE JURISDICTIONAL ACTIVITIES OF THE SAIs

3.1 Explanations and definitions

3.1.1 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 render judgements allowing it to render enforceable (res judicata) decisions have been passed following an independent and contradictory procedure, which tend to assert or reassert a right or an obligation or impose a sanction.

3.1.2 Judgement of accounts:

Among their jurisdictional competences, some SAIs must judge public accountants and/or other persons accountable by law, on the accounts kept and handed over by them. Such a jurisdictional control engages the [personal and financial] responsibility of those accountable when they commit an irregularity with regards to the regulations relative to expenditure and revenue execution, or more generally public accounting.

3.1.3 Judgement of the managers of public funds and alike: These consist in jurisdictional competences granting a SAI the power to issue a ruling on irregularities caused by managers of public funds and considered as such, accountable before the law and pinpointed in a financial, performance or compliance audit report drafted by the SAI or transmitted to it by a third party.

3.1.4 Persons accountable under the 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.

3.2 Stakeholders

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

3.2.1.1 those instructing:

The employees or members of the SAI (public prosecutor, when appropriated included) 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. They do not take part in the adoption of the jurisdictional decision.

3.2.1.2 “Financial judges” or “members of the jurisdictional formation”:

The members of the SAI in charge of the litigation phase, in the first instance or in remedies. Their status is outlined in the national Law and their independence guaranteed.

3.2.1.3 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 jurisdictional decision. He may intervene to institute proceedings and to express his opinion on the jurisdictional decision to be issued.

4 GENERAL PRINCIPLES SPECIFIC TO JURISDICTIONAL COMPETENCES

4.1 Legal basis of the liability and sanction regime

4.1.1 Principle: **The law defines the responsibilities incumbent to persons accountable before the SAI.**

4.1.2 Explanation: In order for a SAI to be able to exercise its jurisdictional competences 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 responsibility regimes of the different categories of persons accountable under the law. This regime must clarify the obligations of the persons accountable to the law, whose breach can lead to legal proceedings, notification of sanctions and if need be the enforceable 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 sentences

4.2 Right to a fair trial

4.2.1 Principle: **The persons accountable before the SAI are entitled to a fair trial guaranteed by the legal procedures**

4.2.2 Explanation: 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 defense notably by being given access to all documents and information filed before the court 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.

4.3 Independence of the members of the formation of the court

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

4.3.2 Explanation: Specific legal provisions regarding the member(s) of the judgment formation or of 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”. The ethical provisions included in the financial judge statutes and the INTOSAI Code of ethics (ISSAI 30) complement each other.

4.4 Impartial Judgement

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

4.4.2 Explanation: In order to guarantee the judge’s impartiality, the rules and procedures governing the jurisdictional activity of the SAI must ensure that the deliberating judge(s) have not participated in the investigation of the case on which they are brought to rule. Whenever the jurisdictional decision is rendered by a panel of judges, the Law must guarantee the secret of the deliberation or frames the modality of disclosure of the dissenting opinions. The secrecy does not have the effect of exempting the judges from explaining the analysis of the facts and the legal framework that led them to render their decision. The motivation of jurisdictional decision must be clear and precise as well as being explicitly communicated in the decision itself made in application of the principle of due process and of intelligibility of justice and to allow the exercise of the remedies. The secrecy of deliberation is compatible with the requirement of explicit motivation of jurisdictional decisions.

4.5 Freedom of access to information

4.5.1 Principle: The SAI must have legal powers or rights guaranteeing its access to information.

4.5.2 Explanation: Due to the utmost importance of compelling elements on which the jurisdictional decision is based, the good conduct of jurisdictional functions of the SAI requires that it be entitled by law to access any information. In the case where its diligences would be impeded, the SAI is able to quickly and efficiently initiate a measure enabling it to remove this hindrance. Due to the fundamental role that plays the SAI as a guarantor of the public interest, it has the capacity to lift some secrets that have been established by law

4.6 Judgement in a reasonable period

4.6.1 Principle: The jurisdictional procedure must be completed within a reasonable time.

4.6.2 Explanation: An excessively long jurisdictional phase is harmful to legal certainty and harms the data subjects, especially if they are exempt from any penalty 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 modern means, fitted to reduce its length. The procedure ends with a ruling that concludes with the determination of the liability or of absence of liability of the persons responsible before the law and the application of the corresponding sanc

A conviction of the public authorities of the SAI to remedy the prejudice caused by too long a judgment must be possible. (right to compensation for damage caused by an excessively long trial)

4.7 Quality control

4.7.1 Principle: The quality of jurisdictional procedures shall be guaranteed by an efficient and systematic quality control.

4.7.2 Explanation: The engagement of the responsibility of the accountable person as well as the sanctions, which can derive from it, justifies 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 jurisdictional decisions, 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 3.6], 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.

4.8 Communication to the public

4.8.1 Principle: Jurisdictional decisions, as any judicial decision, must be made publicly, respecting the secrecy and restrictions linked to confidentiality that are legally mandatory as well as the protection of personal data.

4.8.2 Explanation: Justice is served on behalf of the people; therefore the citizens must be informed of its daily exercise. Jurisdictional decisions must be presented not only to the parties but also to all the citizens. The judicial 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.

4.9 Effectiveness of jurisdictional competence

4.9.1 Principle: the exercise of the jurisdictional competence must lead to notified and implemented judicial decisions. The sanction of the personal liability of the litigant must be effective.

4.9.2 Explanation: 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 make sure of its execution and beneficiaries from the appropriate means to do so.

4.10 Existence of remedies

4.10.1 Principle: **Any judicial decision of the SAI must be open to be objected and reconsidered and is subject to appeal or annulment in accordance with the established regulation.**

4.10.2 Explanation: the jurisdictional decision that adversely affects an individual or a public authority, may be able to be reconsidered, on the initiative of the defendant, a public authority or an interested third party through:

- Revision in some cases by the judgment formation that made it, by the competent authority; and/or
- Appeal 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.

4.11 Principle of the cumulation of sanction for the same irregularity

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

4.11.2 4.11.2 Explanation: An irregularity found on the basis of an event should not be condemned several times by the SAI through several sanctions of the same nature (for example, several fines, or several obligations to repay the same sum). On the other hand, depending on the country, the applicable law may allow or, on the contrary, may prohibit the same person from being punished several times for the same irregularity by different courts which do not pursue the same objectives (for example, the financial judge may order repayment of a loss, by assessing the material elements of the irregularity, and the criminal judge may impose a fine or a penalty of deprivation of liberty or civil rights, by also assessing a moral element). The legislation of each country must therefore provide whether the cumulation of different sanctions for the same irregularity is authorised or prohibited (principle of non bis in idem).

4.12 Statutes of limitations (prescription)

4.12.1 Principle: An offense may be committed against an accused person or sanctioned only before the expiry of a reasonable time from the moment it was committed or discovered.

4.12.2 Explanation: the principles of security of the legal position of persons and of the efficiency of justice require that the law establishes a statute of limitations regarding infringements of the rules of public management. After a certain period following the committing of an irregularity or, of its discovery by an authority likely to prosecute it, the accountable persons may not be able to be subjects to prosecution or sanctions. 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.