

# THE ROLE OF THE POLISH AGENCY FOR AUDIT OVERSIGHT AND COMMON COURTS IN DISCIPLINARY PROCEEDINGS AGAINST STATUTORY AUDITORS: *DE LEGE LATA* AND *DE LEGE FERENDA* REMARKS

JACEK KOSONOGA\*  
MACIEJ JAKUB ZIELIŃSKI\*\*

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## ABSTRACT

This article is of a scientific and research nature, covering the role of the Polish Agency for Audit Oversight (Polska Agencja Nadzoru Audytowego – PANA) and common courts in disciplinary proceedings against statutory auditors. The research aims to determine whether the provisions of Directive 2006/43/EC and Regulation (EU) 537/2014 justify assigning the aforementioned Agency the status of an authority for proceedings concerning disciplinary offences committed while performing assurance or related services in compliance with national professional standards. The provisions of European Union law regarding the role of public supervision bodies of auditors and audit firms are analysed, and the results are compared with the constitutional and systemic conditions for shaping the norms of disciplinary proceedings. Some *de lege ferenda* proposals regarding the regulation of disciplinary proceedings bodies in matters concerning statutory auditors are put forward.

Keywords: disciplinary proceedings, auditors, Polish Agency for Audit Oversight

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\* LLD hab., Lazarski University in Warsaw (Poland), e-mail: jacek.kosonoga@lazarski.pl, ORCID: 0000-0001-7348-944X

\*\* LLD, Adam Mickiewicz University in Poznań (Poland), e-mail: maciej.zielinski@amu.edu.pl, ORCID: 0000-0003-2250-6582



## INTRODUCTION

The rules governing the profession of a statutory auditor, which is regarded as a profession of public trust,<sup>1</sup> are laid down in numerous legal acts issued by various law-making bodies within the multi-centric legal order.<sup>2</sup> This includes the Act of 11 May 2017 on Statutory Auditors, Audit Firms, and Public Oversight,<sup>3</sup> internal acts issued by the authorities of the Polish Chamber of Statutory Auditors (Polska Izba Biegłych Rewidentów), which is a professional self-governing body of representatives of this profession,<sup>4</sup> as well as by the EU secondary law. Recently, the latter has directly regulated the requirements for statutory oversight of financial reports of public-interest entities (Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC,<sup>5</sup> hereinafter referred to as 'Regulation (EU) 537/2014'). On the other hand, within the remaining scope, it directs that standards resulting from the provisions of Directive 2006/43/EC of the European Parliament and of the Council of 16 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC<sup>6</sup> should be implemented and national legal frameworks should be created to apply Regulation (EU) 537/2014.<sup>7</sup> Both of these legal acts require that a public system of supervision of statutory auditors and audit firms performing those tasks should be created. *De lege lata*, in accordance with the provisions of Article 88 ASA, the authority responsible for this supervision in Poland is the Polish Agency for Audit Oversight (Polska Agencja Nadzoru Audytowego),<sup>8</sup> which is a state legal person (Article 94a ASA).

One of PANA's tasks is to carry out explanatory proceedings, disciplinary proceedings and to act as a prosecuting body before courts in cases concerning disciplinary offences committed while carrying out statutory audits and providing other assurance and related services (Article 90(1)(6) ASA). At the same time, the

<sup>1</sup> Szydło, M., 'Komentarz do art. 17', in: Safjan, M., Bosek, L. (eds), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa, 2016, p. 425 et seq.; Świerc, Z., Baran, W., 'Certyfikacja zawodowa a specjalności biegłych sądowych', in: Łazarska, A., Miczek, Z. (eds), *Dowód z opinii biegłego z zakresu ekonomii w sprawach cywilnych i gospodarczych*, Warszawa, 2024, p. 119; Jastrzębski, J., 'Odpowiedzialność cywilna biegłego rewidenta. Glosa do wyroku SN z dnia 1 grudnia 2006 r., I CSK 315/06', *Glosa*, 2007, No. 2, p. 45.

<sup>2</sup> For a more detailed comparison of multi-centricity of the legal system see: Łętowska, E., 'Multicentryczność współczesnego systemu prawa i jej konsekwencje', *Państwo i Prawo*, 2005, No. 4, pp. 3–10; Łętowska, E., "'Multicentryczność" systemu prawa i wykładnia jej przyjazna', in: Ogieńko, L., Popiołek, W., Szpunar, M. (ed.), *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków, 2005, pp. 1127–1146; Kustra, A., 'Wokół problemu multicentryczności systemu prawa', *Państwo i Prawo*, 2006, No. 6, pp. 85–99; Lang, W., 'Wokół "multicentryczności systemu prawa"', *Państwo i Prawo*, 2005, No. 7, pp. 95–99.

<sup>3</sup> Journal of Laws of 2023, item 1015, as amended, hereinafter 'ASA'.

<sup>4</sup> See Article 23(1) ASA.

<sup>5</sup> OJ L 158, 27.5.2014, p. 77.

<sup>6</sup> OJ L 157, 9.6.2006, p. 87, as amended, hereinafter 'Directive 2006/43/EC'.

<sup>7</sup> OJ L 158, 27.5.2014, p. 77.

<sup>8</sup> Hereinafter 'PANA'.

statute stipulates that the first-instance disciplinary proceeding shall be carried out before a district court that has jurisdiction over the place of residence of the accused (Article 176 ASA). Although the competence of those bodies is limited to 'cases concerning disciplinary offences committed while providing assurance and related services in compliance with the national professional standards', in practice they conduct most of the disciplinary proceedings against statutory auditors. The definition of assurance services (Article 2(5) ASA)<sup>9</sup> and related services (Article 2(6) ASA)<sup>10</sup> means that, in fact, failure to fulfil the obligation to improve professional skills<sup>11</sup> and failure to pay membership contributions<sup>12</sup> are the only offences not within the scope in question and are subject to proceedings carried out by the National Disciplinary Prosecutor (within the scope of explanatory proceedings and disciplinary investigations – Article 34(2) ASA) and the National Disciplinary Court (within the scope of the first-instance disciplinary proceeding – Article 154(2) ASA). However, from the point of view of the aforementioned purpose of disciplinary liability, their importance is marginal. In such cases, PANA has the right to join a disciplinary proceeding as a party at any stage of the proceeding (Article 144(2) ASA), the right to inspect the files at any stage of the disciplinary proceeding, to request information on the results of the proceeding, as well as the right to request delivery of final judgments or resolutions together with the case files (Article 145 ASA). PANA may also file a complaint against the decision terminating the disciplinary proceeding issued by the National Disciplinary Prosecutor, even if it did not join the proceeding as a party (Article 152a ASA), and to appeal against a judgment or a decision terminating the disciplinary proceeding issued by the National Disciplinary Court, even if it did not join the proceeding as a party (Article 164(2) ASA).

The above-mentioned PANA's role in cases of disciplinary offences committed while providing assurance or related services in compliance with national professional standards, as well as the reservation of the jurisdiction of common courts (district courts) in the first instance, raises doubts at first glance. Disciplinary liability is a special type of legal responsibility of persons practicing a profession

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<sup>9</sup> In accordance with this provision, these are services aimed at providing high or moderate credibility to issues concerning in particular financial and non-financial information, systems, processes, as well as aspects of behaviour or attitudes of specific entities, based on evidence obtained during appropriate procedures constituting the basis for the assessment of the issues covered by these services, in accordance with the adopted criteria, included in the report on the service provided.

<sup>10</sup> These are services consisting in carrying out agreed procedures that are performed based on an agreed goal, scope of work and method of their implementation, the description and result of which are presented in the report on the service or a service of compilation of financial information, the aim of which is to use accounting knowledge to collect, classify and summarise financial information.

<sup>11</sup> See reports on activities of the National Disciplinary Prosecutor based on Article 34(3) ASA for 2021 ([https://pana.gov.pl/wp-content/uploads/2022/05/Sprawozdanie\\_KRD\\_za\\_2021.pdf](https://pana.gov.pl/wp-content/uploads/2022/05/Sprawozdanie_KRD_za_2021.pdf) [accessed on 27 February 2024]), and for 2022 (<https://pana.gov.pl/wp-content/uploads/2023/04/Sprawozdanie-KRD-za-2022.pdf> [accessed on 27 February 2024]).

<sup>12</sup> In practice, it is only a matter of failure to fulfil the training obligation because failure to pay membership fees for a period longer than one year constitutes grounds for removal from the register of statutory auditors (Article 18(1)(4) ASA).

of trust for their behaviour that, generally speaking, may result in the loss of trust necessary for its proper practice.<sup>13</sup> Its aim is to ensure compliance with the rules of practising a free profession and to create the possibility of eliminating people who do not have the qualities necessary for its proper practice.<sup>14</sup> For this reason, in general, professional self-government bodies exercise this responsibility.<sup>15</sup>

The legislative motives show that granting PANA the status of the body of disciplinary proceedings against statutory auditors in the vast majority of cases resulted from the alleged lengthiness of disciplinary proceedings conducted by the Polish Chamber of Statutory Auditors,<sup>16</sup> on the one hand, and from the

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<sup>13</sup> Cf. Giętkowski, R., *Odpowiedzialność dyscyplinarna w prawie polskim*, Gdańsk, 2013, p. 25 et seq.; Łętowski, J., 'O problemach odpowiedzialności służbowej i dyscyplinarnej w administracji', *Państwo i Prawo*, 1971, No. 8–9, pp. 384–385; Kubiak, J.R., Kubiak, J., 'Odpowiedzialność dyscyplinarna sędziów', *Przegląd Sądowy*, 1994, No. 4, p. 3; Rejman, G., 'Pojęcie odpowiedzialności', in: Turska, A. (ed.), *Refleksje o prawie, państwie i społeczeństwie*, Warszawa, 2005, pp. 61–77; Wincenciak, M., *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa, 2008, p. 73; Czarnecki, P., *Postępowanie dyscyplinarne wobec osób wykonujących prawnicze zawody zaufania publicznego*, Warszawa, 2013, pp. 64–70.

<sup>14</sup> Giętkowski, R., *Odpowiedzialność...*, op. cit., p. 25; in relation to statutory auditors: Zieliński, M.J., 'Komentarz do art. 139', in: Ślebzak, K., Ślebzak, M. (eds), *Ustawa o biegłych rewidentach, firmach audytorskich oraz nadzorze publicznym. Komentarz*, Warszawa, 2018, p. 557.

<sup>15</sup> See Article 86a(1) and Article 91(1) of the Act of 26 May 1982: Law on Barristers (consolidated text, Journal of Laws of 2022, item 1184, as amended); Article 54<sup>1</sup>(1) and Article 70<sup>2</sup>(1) of the Act of 6 July 1982 on Solicitors (consolidated text, Journal of Laws of 2022, item 1166); Article 65(1) and (2) and Article 30(2) of the Act of 2 December 2009 on Medical Chambers (consolidated text, Journal of Laws of 2021, item 1342); Article 47(1)–(4) and Article 55(1) of the Act of 1 July 2011 on Self-government of Nurses and Midwives (consolidated text, Journal of Laws of 2021, item 628); Article 47(1) and (2) and Article 25(1) of the Act of 15 December 2000 on Self-government of Architects and Construction Engineers (consolidated text, Journal of Laws of 2023, item 551); Article 65(1) and Article 68 of the Act of 5 July 1996 on Tax Consultancies (consolidated text, Journal of Laws of 2021, item 2117); Article 90(1) and Article 100(2) of the Act of 15 September 2022 on Laboratory Medicine (consolidated text, Journal of Laws of 2023, item 2125); Article 33 and Article 46(1) and Article 46a of the Act of 19 April 1991 on Pharmacy Chambers (consolidated text, Journal of Laws of 2021, item 1850); Article 79 and Article 81 of the Act of 25 September 2015 on the Profession of a Physiotherapist (consolidated text, Journal of Laws of 2023, item 1213); Article 33 and Article 43 of the Act of 21 December 1990 on the Profession of a Veterinarian and Veterinary Chambers (consolidated text, Journal of Laws 2023, item 154); Article 55 § 1 and Article 55 of the Act of 14 February 1991 Law on Notaries Public (consolidated text, Journal of Laws of 2022, item 1799, as amended); Articles 58, 59 and 60 of the Act of 8 June 2001 on the Profession of a Psychologist and Professional Self-government of Psychologists (consolidated text, Journal of Laws of 2019, item 1026); Article 132(1) and Article 171(1)–(3) of the Act of 1 December 2022 on the Profession of a Paramedic and Self-government of Paramedics (consolidated text, Journal of Laws of 2023, item 2187); Article 53(1) and (3) of the Act of 11 April 2001 on Patent Attorneys (consolidated text, Journal of Laws of 2023, item 303).

<sup>16</sup> See the justification for the Bill amending Act on statutory auditors, audit firms and public oversight, and some other acts (the Sejm print No. 3481, the Sejm of the 8<sup>th</sup> term), where it is indicated that '[out of] 473 cases conducted by the National Disciplinary Prosecutor in 2017, 273 cases were completed, but 194 of them without a motion to impose a penalty (decisions on refusal to instigate a disciplinary investigation and decisions on discontinuation of a disciplinary proceeding), which constitutes 70% of cases concluded in 2017. It should be borne in mind that the National Disciplinary Court imposed disciplinary penalties banning the performance of financial audit only six times in 2017. In most cases (circa 80% of judgments), the National Disciplinary Court imposed the least severe disciplinary penalties of warnings, reprimands, and pecuniary penalties (up to twice the amount of the minimum salary, i.e., circa PLN 4,000).'

need to implement the provisions of Directive 2006/43/EC into the Polish legal system and to create a national legal framework necessary to apply Regulation (EU) 537/2014, on the other hand.<sup>17</sup> However, a question arises as to whether these legal acts require such action. The answer is of particular importance in the context of the ordinary legislator's discretion to shape the model of functioning of self-governments in accordance with Article 17(1) of the Constitution of the Republic of Poland and to deprive them of tasks that may be considered to be the oversight of practicing the profession. The aim of the present paper is primarily to resolve this issue. At the same time, the following research hypothesis may be formulated: neither Directive 2006/43/EC nor Regulation (EU) 537/2014 justifies granting PANA the status of an authority for proceedings in cases of disciplinary offences committed while providing assurance or related services in compliance with national professional standards; however, this is opposed by the political system conditions resulting from the provisions of the Constitution of the Republic of Poland.

#### STATUS OF AN AUTHORITY OF PUBLIC OVERSIGHT IN DISCIPLINARY PROCEEDINGS AGAINST STATUTORY AUDITORS IN THE LIGHT OF DIRECTIVE 2006/43/EC AND REGULATION (EU) 537/2014

With regard to statutory audits of financial reports of entities that are not public-interest ones, public oversight of statutory auditors and the role that Member States should assign to the authorities responsible for this oversight are laid down in Chapter VIII of Directive 2006/43/EC. Article 32(1) of this legal act obliges Member States to organise an effective system of public oversight. In particular, the provision obliges Member States to 'designate a competent authority responsible for this oversight'. The competent authority shall be governed by non-practitioners who are knowledgeable in the areas relevant to statutory audit and shall be selected in accordance with an independent and transparent nomination procedure (Article 32(2) of Directive 2006/43/EC).

The tasks of the audit authorities are laid down in Article 32(4) of Directive 2006/43/EC. In accordance with this provision, an authority of public oversight shall have the ultimate responsibility for the oversight of: (a) the approval and registration of statutory auditors and audit firms; (b) the adoption of standards on professional ethics, internal quality control of audit firms, auditing, and assurance of sustainability reporting, except where those standards are adopted or approved by other Member State authorities; (c) continuing education; (d) quality assurance systems; and (e) investigative and administrative disciplinary proceeding systems. The phrase 'ultimate responsibility' referred to therein does not provide grounds for

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<sup>17</sup> Ibidem. Also see the justification for the governmental Bill amending Act on statutory auditors, audit firms and public oversight, and some other acts (the Sejm print No. 3481, the Sejm of the 8<sup>th</sup> term).

the assumption that an authority of oversight should perform all tasks independently because, by virtue of paragraph 4a,<sup>18</sup> Member States may delegate any of the tasks of a competent authority to other authorities and bodies designated or otherwise authorised by law to carry out such tasks.

The Regulation is particularly important for the legislations of Member States where constitutional or statutory provisions provide for a special role for a professional self-government. It is important to note that although the Directive indicates that oversight bodies should be authorised to impose penalties for the infringement of its provisions and of Regulation (EU) 537/2014, where applicable, the analysis of Article 30a unambiguously indicates that it concerns administrative and not disciplinary penalties. The provision includes: (1) a notice requiring the person responsible for the breach to cease the conduct and abstain from any repetition of that conduct in the future; (2) a public statement which indicates the person responsible and the nature of the breach, published on the website of competent authorities; (3) a temporary prohibition, of up to three years' duration, banning the statutory auditor, the audit firm or the key audit partner from carrying out statutory audits and/or signing audit reports; (4) a temporary prohibition, of up to three years' duration, banning the statutory auditor, the audit firm or the key sustainability partner from carrying out sustainability reporting and/or signing assurance reports or sustainability reports; (5) a declaration that the audit report does not meet the requirements of Article 28 of this Directive or, where applicable, Article 10 of the Regulation (EU) 537/2014; (6) a declaration that the assurance report on sustainability reporting does not meet the requirements of Article 28a of this Directive; (7) the imposition of a temporary prohibition, of up to three years' duration, banning a member of an audit firm or a member of an administrative or management body of a public-interest entity from exercising functions in audit firms or public-interest entities; (8) the imposition of administrative pecuniary sanctions on natural and legal persons.

This means that achieving the aims determined by the provisions of Directive 2006/43/EC does not require that the bodies of statutory auditors' self-government be deprived of the competence to enforce the disciplinary liability of statutory auditors. Quite the opposite, it is necessary to shape the system of supervision of the representatives of this profession and audit firms in such a way that the supervisory authority is only 'ultimately responsible' in matters of 'the systems of administrative disciplinary proceedings'. The national legislator has a wide margin of discretion in this area; nevertheless, it should take into account national conditions.

As regards Regulation (EU) 537/2014, it requires that competent authorities be independent of statutory auditors and audit firms (Article 21(1)) and have all supervisory and investigatory powers necessary for the exercise of their functions

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<sup>18</sup> In accordance with the provision, Member States shall designate one or more competent authorities to carry out the tasks provided for in this Directive. Member States shall designate only one competent authority bearing the ultimate responsibility for the tasks referred to in this Article except for the purpose of the statutory audit of cooperatives, saving banks or similar entities, as referred to in Article 45 Directive 86/635/EEC, or a subsidiary or legal successor of a cooperative, saving bank or similar entity as referred to in Article 45 of Directive 86/635/EEC.

under this Regulation in accordance with the provisions of Chapter VII of Directive 2006/43/EC (Article 23(2)). The powers shall include at least the power to: (a) access data related to the statutory audit or other documents held by statutory auditors or audit firms in any form relevant to the carrying out of their tasks and to receive or take a copy thereof; (b) obtain information related to the statutory audit from any person; (c) carry out on-site inspections of statutory auditors or audit firms; (d) refer matters for criminal prosecution; (e) request experts to carry out verifications or investigations; (f) take the administrative measures, and impose the sanctions referred to in Article 30a of Directive 2006/43/EC (Article 23(3)). Regulation (EU) 537/2014 requires at the same time that Member States ensure that the competent authorities may exercise their supervisory and investigatory powers in any of the following ways: (a) directly; (b) in collaboration with other authorities; (c) by application to the competent judicial authorities (Article 23(4)). Regulation (EU) 537/2014 allows the Member States to delegate their tasks to other authorities or bodies designated or otherwise authorised by law to carry out such tasks, except for tasks related to the above-mentioned investigations. In fact, it is not clear whether this concerns disciplinary investigations; however, the systematisation of the Regulation analysed indicates that it pertains to proceedings related to the application of administrative measures and the imposition of sanctions referred to in Article 30a of Directive 2006/43/EC. Even if a different stance were adopted, it would only apply to statutory auditors carrying out statutory audits of public-interest entities.

In this context, it should be recognised that the requirements concerning organisation of public oversight of statutory auditors resulting from Directive 2006/43/EC do not demand that a public oversight body in matters of disciplinary offences committed by statutory auditors be assigned the role that the legislator assigned to PANA. Regarding the oversight referred to in Regulation 537/2014, such a solution could be justified at most in relation to offences committed while carrying out statutory audits of reports of public-interest entities, which does not seem, however, to be an indisputable statement. Each time, however, the national legislator must take into account national conditions.

The analysis of legal solutions adopted in other Member States of the European Union confirms the above conclusions. Regarding Directive 2006/43/EC, pursuant to Article 288 third paragraph of the TFEU,<sup>19</sup> they were obliged to achieve the same objective that Poland pursued by determining the role of PANA in disciplinary proceedings against statutory auditors. The report by Accountancy Europe on the organisation of public oversight in 30 European states after the implementation of the 2014 European reform of oversight<sup>20</sup> shows that, as of 2021, the competences of

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<sup>19</sup> On the objective of the Directive binding Member States, see e.g. Szwarz, M., 'Warunki poprawnej implementacji dyrektyw w porządkach prawnych państw członkowskich w świetle prawa wspólnotowego', *Przegląd Prawa Egzekucyjnego*, 2001, No. 9, p. 12; Simon, D., *La Directive Européenne*, Paris, 1997, p. 3 et seq.; Kurcz, B., *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Kraków, 2004, p. 46 et seq.; Kunkiel-Kryńska, A., 'Granice swobody implementacyjnej – komentarz do wyroku ETS z 25.04.2002 r. w sprawie C-183/00 González Sánchez przeciwko Medicina Asturiana SA.', *Europejski Przegląd Sądowy*, 2008, No. 10, p. 51.

<sup>20</sup> <https://accountancyeurope.eu/wp-content/uploads/2022/12/210519-Organisation-of-the-Public-Oversight-of-the-Audit-Profession-2021-survey-update.pdf> [accessed on 27 February 2024].

the supervisory authorities in the field of disciplinary proceedings varied depending on whether the offence was committed while carrying out the statutory audit of a public-interest entity in the Czech Republic, Hungary, Ireland, Italy, Latvia, Slovakia and the United Kingdom. Comprehensive disciplinary proceedings were entrusted to public supervisory bodies in Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Greece, Lithuania, Malta, and Slovenia. However, it is difficult to draw unambiguous conclusions from those circumstances. It is necessary to consider the entire legal system, which is illustrated by the following examples.

For instance, in Spain, the conduct of disciplinary proceedings against statutory auditors, also in relation to offences committed while carrying out statutory audits of entities that are not public-interest ones, was entrusted to a supervisory authority. The system of disciplinary proceedings against statutory auditors in that country is reserved to the jurisdiction of the Institute of Accounting and Auditing (*Instituto de Contabilidad y Auditoría de Cuentas*).<sup>21</sup> It should be emphasised, however, that there is no professional self-government of statutory auditors in Spain, and the tasks assigned to such self-governments, such as maintaining the register of statutory auditors and making entries in the register, are entrusted to the above-mentioned Institute (Article 46 para. 2 LAC).

The discussed issue is resolved in German law in an entirely different way. There is a professional self-government of statutory auditors, called the Chamber of Statutory Auditors (*Wirtschaftsprüferkammer*). Pursuant to the German Act on statutory auditors,<sup>22</sup> the application of disciplinary sanctions is reserved for the bodies of the Chamber of Statutory Auditors.<sup>23</sup> In turn, a public body of oversight (*Abschlussprüferaufsichtsstelle*) supervises the Chamber of Statutory Auditors, being able to participate in the meetings of its bodies and having the right to information and inspection. The auditor's supervisory body may commission the Chamber of Statutory Auditors to conduct a disciplinary proceeding. It may also participate in investigations carried out by the Chamber of Statutory Auditors (Article 66a § 3 WPO).

## STATUS OF A BODY OF PUBLIC OVERSIGHT IN DISCIPLINARY PROCEEDINGS AGAINST STATUTORY AUDITORS IN THE LIGHT OF THE POLITICAL SYSTEM CONDITIONS

As indicated above, while defining the specific tasks of a body of public oversight, the national legislator has quite a wide margin of discretion. However, in making use of it, he should take into account national conditions of working in a given profession. In the Polish reality, this primarily concerns the requirements resulting

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<sup>21</sup> See Article 46 para. 2 (f) of the Act No. 22/2015 of 20 July 2015 on audit (Spanish: ley 22/2015, de 20 de julio, de Auditoría de Cuentas), BOE-A-2015-8147, hereinafter 'LAC'.

<sup>22</sup> German: *Wirtschaftsprüferordnung in der Fassung der Bekanntmachung vom 5. November 1975 (BGBl. I S. 2803)*, das zuletzt durch Artikel 4 des Gesetzes vom 17. Januar 2024 (BGBl. 2024 I Nr. 12) geändert worden ist, hereinafter 'WPO'.

<sup>23</sup> See Article 68(1) WPO.



from Article 17(1) of the Constitution of the Republic of Poland, in accordance with which, by means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with and for the purpose of protecting the public interest. The aim of this concern is to achieve a state in which the activities constituting the practice of a profession of public trust are performed while maintaining appropriate quality and in accordance with legal requirements.<sup>24</sup> Although the detailed definition of specific tasks and competence of professional self-governments rests with the legislator, his discretion to cross the borders of the concept of 'concern' is not unlimited. It is necessary that, while defining the model of a self-government functioning, the legislator retains the essence of this concept and fulfils the condition for this oversight 'in accordance with and for the purpose of protecting the public interest'.<sup>25</sup> The term 'concerning oneself with the proper practice of a profession' should be understood broadly.<sup>26</sup> It does not only mean providing support (assistance) to the self-government's members in the performance of their duties but also enforcing their liability for improper exercise of the profession.<sup>27</sup>

Among the tasks of professional self-governments that constitute the concept or the function of 'concern' about the proper practice of the professions in which the public repose confidence, the case law of the Constitutional Tribunal explicitly mentions the exercise of disciplinary judgements in matters of liability of persons practicing professions of public trust for conduct that infringes the law, principles of ethics, or dignity.<sup>28</sup> This statement seems even more justified if we take into account that the practice of public trust professions is regulated on many planes. The rules of practising the profession and particular activities that constitute it may be regulated by provisions of commonly binding law, as well as internal regulations and acts containing deontological norms established by a professional self-government. This is why the basic form of liability within the scope of compliance with professional standards established by a professional self-government is disciplinary liability, which, in accordance with Article 17(1) of the Constitution of the Republic of Poland, should be exercised by the appropriate self-government.

The above means that professional self-governments should be primarily competent to enforce disciplinary liability in matters related to standards of practising

<sup>24</sup> Judgment of the Constitutional Tribunal of 18 February 2004, P 21/02, OTK-A 2004, No. 2, item 9.

<sup>25</sup> See the above-mentioned judgment of the Constitutional Tribunal of 14 December 2010, K 20/08, subsection III.5.1.

<sup>26</sup> Izdebski, H., 'Sprawowanie pieczy nad należyтым wykonywaniem zawodu przez samorządy zawodowe', in: *Zawody zaufania publicznego a interes publiczny – korporacyjna reglamentacja versus wolność wykonywania zawodu. Materiały z konferencji zorganizowanej przez Komisję Polityki Społecznej i Zdrowia Senatu RP przy współudziale Ministerstwa Pracy i Polityki Społecznej pod patronatem Marszałka Senatu RP Longina Pastusiaka 8 kwietnia 2002 r.*, Warszawa, 2002, p. 35.

<sup>27</sup> Judgment of the Constitutional Tribunal of 14 December 2010, K 20/08, OTK-A 2010, No. 10, item 129, subsection III.5.1).

<sup>28</sup> Cf. judgments of the Constitutional Tribunal: of 6 March 2012, K 15/08, OTK-A 2012 No. 3, item 24; of 30 November 2011, K 1/10, OTK-A 2011 No. 9, item 99; of 14 December 2010, K 20/08 (referred to above), and of 19 April 2006, K 6/06, OTK-A 2006 No. 4, item 45.

a profession. Therefore, in principle, depriving a professional self-government of the function to enforce disciplinary liability conflicts with Article 17(1) of the Constitution of the Republic of Poland. Although completely depriving a professional self-government of the possibility of enforcing liability in some disciplinary matters cannot be ruled out, it would have to be justified in constitutional terms, in particular to implement other constitutional values, which should be given priority in a given case, for example, in relation to compliance with international law binding the Republic of Poland or the law of organisations of which Poland is a member.

Assigning PANA the powers to carry out explanatory proceedings and disciplinary investigations, as well as the role of a prosecutor before a district court in cases of disciplinary offences committed while providing assurance or related services in compliance with national professional standards, as well as reserving the jurisdiction of the common courts in first-instance cases, does not seem to meet the above criteria, at least to the extent in which the services are provided to entities that are not public-interest ones. This is not determined by European Union law or other constitutional values, which should be given priority over professional self-government oversight of the proper practice of a profession of public trust.

## DISCIPLINARY LIABILITY OF STATUTORY AUDITORS: A SYSTEMIC APPROACH

As mentioned above, the disciplinary liability of statutory auditors as representatives of a profession of public trust, in principle, does not constitute an exception to this type of liability of other professional groups. However, the detailed issues are completely different, in particular the role of PANA in a disciplinary proceeding in matters concerning disciplinary offences committed by a statutory auditor while providing assurance or related services in compliance with the national professional standards, and the issue of transferring such cases to a district court for adjudication.

As far as this first aspect is concerned, the solution of entrusting a specialised state authority with the powers to conduct all proceedings concerning professional liability in the majority of disciplinary cases is specific and rather unusual in other proceedings of this type. Usually, specific powers of state authorities are provided for at most. They include mainly the minister responsible for performing particular activities in the course of a proceeding (e.g., requesting that a proceeding be instigated, designating a prosecutor, gaining access to the files and requesting information), which is hosted and administered by a professional self-government body.<sup>29</sup>

The transfer of powers to adjudicate in the first instance in disciplinary cases to a district court shows even more distinctiveness. It is difficult to find justification for

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<sup>29</sup> See e.g. Article 69(4) of the Act of 5 July 1996 on Tax Consultancies (consolidated text, Journal of Laws of 2021, item 2117, as amended), Article 57a and Article 58 of the Act of 14 February 1991: Law on Notaries Public (consolidated text, Journal of Laws of 2022, item 1799, as amended), Article 74(1), Article 75i(3) of the Act of 29 August 1997 on Bailiffs and Execution (consolidated text, Journal of Laws of 2018, item 1309, as amended).

such a solution. It certainly should not consist of the gravity of the examined torts. They do not seem more reprehensible or complicated than, for example, professional misconduct of physicians, prosecutors or barristers. It should be noted at the same time that one of the basic professional offences is a violation of the principles of professional ethics or national standards for practising a profession, which only partially have the status of commonly applicable legal norms (Article 139(1)(1) ASA). The former do not have the character of legal norms but are deontological ones. The latter are, to a large extent, intra-self-government standards adopted by the National Council of Statutory Auditors and approved by PANA (Article 2(23) in conjunction with Article 2(24)(b) ASA). It should be a self-government body rather than a common court that determines the content of those norms. Considerations of prevention, whether general or specific, remain irrelevant. It seems that, like in the theory of criminalisation, transferring disciplinary cases for adjudication to criminal courts should be *ultima ratio* if, for some specific reasons, liability before corporate authorities is recognised as insufficient.

However, even if, for some reasons, it were assumed that a court should decide cases of the disciplinary liability of statutory auditors in the first instance, it would be difficult to find convincing arguments for it to be a district court. Its subject matter jurisdiction is reserved for crimes and the most serious misdemeanours. Nonetheless, the adopted solution means that the same judicial authority responsible for resolving cases of genocide, murder, or waging an aggressive war will be adjudicating the most trivial disciplinary offences of statutory auditors referred to in Article 172 ASA.

Involving a court in disciplinary proceedings is not unprecedented or undesirable in legal systems. However, it is always justified in situations where there is interference in the sphere of particularly protected human rights and freedoms. This is noticeable, for example, in the case of imposing penalties for breach of order, detention, and bringing a witness as part of a disciplinary proceeding or an activity conducted by a court.<sup>30</sup> The legislator rightly assumes that the level of interference, especially in the right to personal freedom, requires the participation of an independent court and an impartial judge. There are guarantee-related reasons for this. A common solution is to entrust courts with the supervision of decisions made by bodies adjudicating in disciplinary cases,<sup>31</sup> as well as to exercise judicial

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<sup>30</sup> See e.g. Article 60 of the Act of 2 December 2009 on Medical Chambers (consolidated text, Journal of Laws of 2021, item 1342, as amended); Article 53 of the Act of 19 April 1991 on Pharmacy Chambers (consolidated text, Journal of Laws of 2021, item 1850, as amended), Article 54 of the Act of 21 December 1990 on the Profession of a Veterinarian and Veterinary Chambers (consolidated text, Journal of Laws of 2023, item 154, as amended), Article 78(3) of the Act of 29 August 1997 on Bailiffs and Execution (consolidated text, Journal of Laws 2018, item 1309, as amended).

<sup>31</sup> See e.g. Article 75 of the Act of 5 July 1996 on Tax Consultancies (consolidated text, Journal of Laws of 2021, item 2117, as amended), Article 124j of the Act of 24 August 1991 on the State Fire Brigade (consolidated text, Journal of laws of 2024, item 127, as amended), Article 63(2) of the Act of 27 July 2001 on Probation Officers (consolidated text, Journal of Laws of 2023, item 1095, as amended), Article 75ma of the Act of 29 August 1997 on Bailiffs and Execution (consolidated text, Journal of Laws of 2018, item 1309, as amended).

supervision of certain disciplinary cases by the Supreme Court.<sup>32</sup> The situation in which the entire disciplinary proceeding, from the instigation of an explanatory proceeding through the submission of a motion to impose a penalty to a final judgement on disciplinary liability, is conducted only by specialised state authorities without the representatives of a given corporation is certainly not a typical solution and conflicts with the constitutional distinctiveness of professional self-governments (Article 17 of the Constitution). In this aspect, there is little difference between the disciplinary liability of statutory auditors and criminal liability where state authorities perform the prosecuting, indicting, and adjudicating functions.

Considering the above, it is necessary to state that the hybrid structure of holding statutory auditors liable for disciplinary offences, which basically provides for two separate procedural regimes (Article 139 et seq. and Article 172 et seq.) and deprives professional self-government bodies of the ability to conduct some disciplinary proceedings, clearly differs from commonly applied normative solutions. The standard in this respect is only to limit, in justified cases, the autonomy of corporate bodies or to make their decisions subject to judicial supervision. This not only matches the idea of professional self-government but also allows for maintaining an appropriate degree of specialisation of the bodies of explanatory proceedings and ensuring the necessary distance from state authorities in this case. In turn, these authorities are not deprived of the possibility of reacting to pathological phenomena occurring within the functioning of a given professional group but on a different plane, mainly the administrative or criminal one.

*De lege lata* solutions concerning the disciplinary liability of statutory auditors are not only without systemic precedent but are also difficult to justify at the axiological level by referring to some kind of deontological specificity or superior values that distinguish this professional group and its activities from other professions of public trust.

At this point, it is necessary to address another systemic problem related to the need to standardise professional liability. The legislator is not fully consistent in the way disciplinary proceedings are regulated. They show fundamental differences, for example, with regard to the scope of reference to the Code of Criminal Procedure.<sup>33</sup> In some cases, it is full, and in others, it is limited to selected sections or provisions. This leads to some type of systemic inconsistency and fundamental differentiation of the scope of procedural guarantees in cases of the same type. Therefore, it is not groundless to call for the standardisation of the procedure of disciplinary liability. One of the ideas is to introduce a code of disciplinary procedure or a separate mode in the Code of Criminal Procedure.<sup>34</sup>

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<sup>32</sup> See Article 27a of the Act of 8 December 2017 on the Supreme Court (consolidated text, Journal of Laws of 2023, item 1093, as amended).

<sup>33</sup> See Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds), *Komentarz do kodeksu postępowania karnego, t. I*, Warszawa, 2017, pp. 44–45.

<sup>34</sup> Czarnecki, P., 'Koncepcja kodeksu odpowiedzialności dyscyplinarnej zawodów prawnych – założenia modelowe', in: Hofmański, P. (ed.), *Węzłowe problemy procesu karnego. Materiały konferencyjne*, Warszawa, 2010, pp. 390–394.

*DE LEGE FERENDA DESIDERATA*

The above considerations lead to a few fundamental conclusions. Firstly, the performance of tasks set in the provisions of Directive 2006/43/EC does not require that the bodies of the professional self-government of statutory auditors be deprived of the competence to enforce disciplinary liability for acts committed while providing assurance and related services. On the contrary, it is necessary to shape the system of supervision of the representatives of this profession and audit firms in such a way that the supervisory authority has 'ultimate responsibility' in matters of the systems of administrative disciplinary proceedings. The national legislator has quite a wide margin of discretion in this area but should take into account national conditions. With regard to supervision provided for in Regulation (EU) 537/2014, the above-mentioned exclusion of the bodies of professional self-governments could be justified at most in relation to offences committed while carrying out statutory audits of reports of public-interest entities; however, this does not seem to be an undisputed statement. Secondly, in the Polish political system, when assessing the implementation of the above-mentioned legal acts into the Polish legal order, it is necessary to take into account the fact that, based on the Constitution of the Republic of Poland, professional self-government bodies should be responsible in the first place for enforcing disciplinary liability in matters concerning the norms of professional practice. Therefore, in principle, depriving professional self-government bodies of the ability to conduct disciplinary proceedings is in conflict with Article 17(1) of the Constitution of the Republic of Poland. Although fully depriving professional self-governments of the ability to enforce liability in some disciplinary cases cannot be ruled out, it must have appropriate constitutional justification each time, and in particular implement other values that should be prioritised in a given case, for example, in relation to compliance with international law binding on the Republic of Poland or the law of an organisation of which Poland is a member. Thirdly, assigning PANA the competence to conduct explanatory proceedings and disciplinary investigations, as well as the role of a prosecutor before a district court in cases of disciplinary offences committed while providing assurance and related services in compliance with the national standards of professional practice, and reserving the jurisdiction of district courts in those cases in the first instance, does not seem to meet the above-mentioned criteria, at least to the extent that the services are provided to entities other than public-interest ones. As mentioned above, neither European Union law nor other constitutional values that should be given priority over the professional self-government's concern about the proper practice of the professions of public trust. Fourthly, *de lege lata*, both the role of PANA and the adjudication of the first instance common courts in disciplinary proceedings against statutory auditors not only lack a systemic precedent but also are difficult to justify on the axiological plane by means of reference to some deontological specificity or superior values distinguishing this type of professional group and its activities compared with other professions of public trust.

Taking the above into account, it is necessary to request that explanatory proceedings and disciplinary investigations in all disciplinary cases against

auditors, or at least those that do not concern services provided to entities that are not public-interest ones, be conducted by the National Disciplinary Prosecutor and be adjudicated in the first instance by the National Disciplinary Court. The role of PANA should be limited to exercising the powers that it currently has in proceedings conducted by professional self-governments, which relate to: (1) the possibility of joining a disciplinary proceeding as a party at any stage of the proceeding; (2) the possibility of obtaining access to the files at any stage of the disciplinary proceeding, requesting the preparation and delivery of copies of the files and requesting information about the results of the proceeding, as well as requesting the provision of final judgements or decisions together with the case files; (3) the possibility of filing a complaint against a decision to terminate a disciplinary proceeding by the National Disciplinary Prosecutor, also in the event he did not join the proceeding as a party; (4) the possibility of filing an appeal against a judgement or decision to terminate a disciplinary proceeding issued by the National Disciplinary Court, also in the event it did not join the proceeding as a party. These powers should be considered fully sufficient to achieve the state required by Directive 2006/43/EC, in which a supervisory body is ultimately responsible for the disciplinary system.

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