

ANTI-CORRUPTION HELPDESK

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OVERVIEW OF COUNTRIES' SUPREME AUDIT INSTITUTIONS WITH SURCHARGING POWERS

QUERY

I am researching the surcharging power (the power to require a person to pay back monies lost to state bodies due to corruption, fraud or misappropriation) of auditor generals/supreme audit institutions. Which countries have this power and what are the legal provisions governing it?

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SUMMARY

Many supreme audit institutions (SAIs) rely on external accountability mechanisms to enforce the outcomes of their audit findings. However, some SAIs have the power to disallow public expenditures where they are deemed to be unauthorised or unlawful due to negligence or misconduct, and require such amounts to be refunded by those responsible. This is known as the power of surcharge. This paper provides a brief overview of 10 jurisdictions with some form of surcharging power granted to its SAI.



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1 THE ROLE OF SUPREME AUDIT INSTITUTIONS

Supreme audit institutions (SAIs) are public institutions which carry out the external audit of the administrative and financial management of state organisations, independently of the executive branch (Cogliandro 2001).

According to the International Organisation of Supreme Audit Institutions (INTOSAI) – an umbrella organisation for SAIs – the purpose of the external audit is to ascertain the proper and effective use of public funds, sound management, and the administrative propriety and public accountability of the authorities through the publication of objective reports (INTOSAI 1977).

SAIs promote accountability through annual financial reports and evaluating internal control structures (Bracci et al. 2015; Borge 1999; Dye & Stapenhurst 1998). They are generally seen as belonging to one of three institutional frameworks: i) the Westminster model, used in the United Kingdom and most Commonwealth countries; ii) the board model, used by many Asian countries; and iii) the judicial model used by France and several Latin American countries, among others (Evans 2008).

Enforceability of audit findings

INTOSAI identifies eight pillars that establish the independence of SAIs. The eighth pillar is that SAIs should have independent procedures for follow-up audits to ensure that audited entities properly address their observations and recommendations and that corrective actions are taken (INTOSAI 2012).

Many SAIs do not hold powers to sanction or surcharge. Rather, they depend on other integrity and accountability institutions – including parliament, prosecutors, the judiciary, anti-corruption agencies and voters – for the effective enforcement of corrective actions following audit findings (Effective Institutions Platform 2014; Hildago et al. 2015).

Normally, SAIs report to the appropriate authorities, and ultimately to the supreme executive authority, on

the results of the audit. SAIs with a Westminster structure generally report to a committee of parliament, while those with a board structure report to parliament (Evans 2008). It is then for the authorities concerned to take remedial action. Therefore, the strength of a SAI's relationship with other accountability institutions can affect the effectiveness of any corrective action (Effective Institutions Platform 2014:29; OECD 2002).

SAIs under the judicial model often form part of the judicial system and make judgements on the use of public funds by government officials (Evans 2008). However, not all external auditing institutions which are called “courts” or “tribunals” exercise judicial functions. Some do (for example, in Belgium, France and Italy), but the European Union's SAI has no judicial powers at all (Cogliandro 2001).

Power of surcharge

In some cases, SAIs are conferred powers to impose economic and disciplinary sanctions in accordance with their constitutional and legal system (Insausti & Leal 2014). A number of countries empower their SAI to surcharge, that is, to disallow public expenditure and require those monies to be refunded by those found guilty of having used public monies improperly. However, the circumstances in which this can happen differs across jurisdictions.

Given time and space constraints, it is not possible to review the legislation guiding every country's SAI. However, the following provides an overview of 10 jurisdictions where SAIs have some form of surcharging power. Further, where possible, current legislation has been referred to and cited. However not all countries' legislation is publicly available and may have since been amended. Examples are drawn from each different institutional framework: the Westminster model, board model and judicial model.

2 WESTMINSTER MODEL

Key features of the Westminster model include a national audit office headed by an independent auditor general or equivalent (Evans 2008). Examples of Westminster-style SAIs who have a power of

surcharge include The Gambia, Ghana, Latvia, Zimbabwe, New Zealand, Sri Lanka and Malta. In some countries, the power of surcharge is constitutionally guaranteed, while in others it is contained in either the SAI's guiding legislation or legislation that governs local authorities.

Constitutional power of surcharge

In The Gambia and Ghana, the power of surcharge conferred on the SAI is constitutionally entrenched.

The Gambia

Article 160(2)(b) of the [Constitution of the Republic of Gambia 1997](#) empowers the auditor general to disallow and surcharge any illegal public expenditure.

Specifically, the auditor general can disallow any item of expenditure which is unlawful and to surcharge:

- the amount of any expenditure so disallowed upon the person responsible for incurring or authorising the expenditure
- any sum which has not been brought into account upon the person by whom that sum ought to have been brought into account
- the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred

This vested power, however, does not preclude the auditor general from a high court challenge.

Ghana

Ghana's SAI – the auditor general – has a similar power of surcharge to The Gambia's SAI under Article 187(7)(b)(i) of the [Constitution of the Republic of Ghana 1992](#) which is reinforced under section 17 of the [Audit Service Act 2000 \(Act 584\) \(Ghana\)](#).

Ghana's auditor general's powers are limited to the federal level. The auditor general, Daniel Yaw Domelevo, recently issued certificates of surcharge to four persons cited for various cash irregularities against the state (Audit Service Ghana 2017; INTOSAI 2017). This came after a ruling by the supreme court which ordered the auditor general to surcharge

anyone it found to have misappropriated public funds after the auditor general had neglected to impose any surcharges as constitutionally required ([OccupyGhana v Attorney-General \[Unreported, Supreme Court, Writ No. J1/19/2016, 14th June 2017\]](#)). The plaintiffs submitted in this case that the auditor general had identified a wide range of stolen and/or misappropriated funds over 11 years, from the year ended 31 December 2002 to the year ended 31 December 2012. Nevertheless, although the auditor general was known to have made "recommendations", the plaintiffs were not aware of a single instance in which a disallowance and surcharge had been made by the auditor general or any of his offices ([OccupyGhana v Attorney-General \[Unreported, Supreme Court, Writ No. J1/19/2016, 14th June 2017\]](#)).

Legislative power of surcharge

In several jurisdictions, the power of surcharge given to the SAI can be found in either its governing legislation, or other legislation which governs local authorities and the like. Where the power is in the SAI's governing legislation, such as in Latvia and Zimbabwe, it is generally a broad power which encapsulates all public entities.

Latvia

The state audit office in Latvia had the rights to enforce the institution to pay a surcharge from 1923 to 1940. The decision to apply the surcharge mechanism was made in the presence of a judge from the court of appeal (INTOSAI 2016).

The state audit office has been without such surcharge power until recent amendments to the state audit office law were adopted. Under these amendments, the state audit office is granted the right to make decisions regarding recovery of losses due to unlawful actions of officials (SAO Latvia 2016). The state audit office can then impose recovery sanctions against officials if their unlawful actions caused losses to the state unless such sanctions had already been imposed by the official's supervisors (SAO Latvia 2016).

Prior to the introduction of these amendments, the state audit office reported in 2016 that since 2006, the state audit office had submitted materials to law enforcement institutions containing proof of infringements in 173 audits. On 87 occasions, a criminal case was opened, eventually leading to prosecution of four persons in total. Two convictions took place in 2014 (INTOSAI 2016).

Zimbabwe

The SAI in Zimbabwe has the power to impose surcharges on those in the employment of the state who are responsible for any deficiency, improper payment or payment not duly vouched where that has led to a loss of public monies. The power of surcharge extends to sums not collected or accounted for; the amount of any deficiency or improper payment; payment which is not duly vouched; or loss or destruction of public monies. This power is discretionary ([Audit and Exchequer Act \(Zimbabwe\)](#), s 13, Part II).

In 2016, the auditor general's report on Appropriation Accounts, State Enterprises and Parastatals (a company owned or controlled wholly or partly by government) found 22 ministries out of 26 had abused funds. The state has, however, failed to hold those responsible to account (Phiri 2017) despite recommendations by the auditor general (Ndebele 2017).

Appeals against surcharge are determined by the president. The surcharge raised which has not been withdrawn or from which the person concerned has not been released in appeal is a debt due to the state.

However, where it is in the legislation that governs local authorities, such as New Zealand and Sri Lanka, the power of surcharge only extends to those authorities and not more broadly.

New Zealand

New Zealand's controller and auditor general lost the power to surcharge on 1 July 2001 with the introduction of a new [Public Audit Act 2001 \(NZ\)](#). Prior to the introduction of this legislation, the auditor

general had the power to impose a financial surcharge on someone responsible for a loss or deficiency ([Public Finance Act 1977 \[NZ\]](#), ss 30, 31). Although that power was seldom used, its threatened use was occasionally valuable as a deterrent (Buchanan 2013). The power was most commonly used in the 1970s against public servants who had damaged work motor vehicles and were surcharged by the audit office to make good the costs of the damage ([Controller & Auditor General \[NZ\] 2015](#)).

There is, however, a surcharge power under section 44 of the [Local Government Act 2002 \(NZ\)](#) which effectively gives the auditor general a power to rule that individual elected members who have been a party to an unlawful act are personally liable for the loss that results ([Controller & Auditor General \[NZ\] 2015](#)). In addition, the auditor general can prosecute persons for breaches of the [Local Authorities \(Members' Interests\) Act 1968 \(NZ\)](#) (section 8).

Sri Lanka

Currently, in Sri Lanka, the auditor general has the power of surcharge only in relation to the audit of local bodies and universities. With respect to local authorities ([Pradesiya Sabhas](#)), the auditor general is empowered to disallow any items of accounts contrary to law and charge the amounts to the person responsible for making or authorising the illegal payment; charge the responsible persons for any sum that has not been duly brought to account; and charge any person for any loss that has arisen from their negligence or misconduct ([Section 172\(3\) Pradesiya Sabhas Act No 15 of 1987 \[Sri Lanka\]](#)).

Under section 107(6)(a) of the [Universities Act \[Cap 383\] \(Sri Lanka\)](#), the auditor general is empowered to disallow every item of the accounts which is irregular or contrary to law and surcharge that amount on the officer, teacher or employee who made or authorised such payment. Further, the auditor general is required to charge against any officer, teacher or employee any sum which ought to have been but has not been brought into account by such person.

The auditor general's 2015 annual report noted that although the recovery process of surcharges imposed

had functioned smoothly in the past, follow-up action for the recovery of surcharges was lacking. According to the auditor general, 16 recharge certificates amounting to Rs13.78 million (US\$99,745) had been issued from 1 January 2015 to 31 December 2015 on 70 parties. However, only Rs157,017 (US\$1,137) had been recovered by 30 May 2016. Rs13.63 million (US\$88,063) remained recoverable (Auditor General Sri Lanka 2015).

A draft national audit bill proposed to further expand the auditor general's surcharge power to encompass the entire public sector. The bill included authority for the auditor general to disallow the value of the deficiency or loss in every transaction of an audited entity where the transaction had been unlawfully made and caused any deficiency or loss due to the fraud, negligence, wastage of public resources or misconduct of those involved in that transaction. Further, where any transaction had been omitted in the accounts of an audited entity, the auditor general could impose a surcharge on these transactions (Auditor General Sri Lanka 2015). However, this expanded surcharge power has been omitted from the most recent draft of the bill (Ariyawansa 2017).

Referral power of surcharge

In some jurisdictions, the power of surcharge only enables the SAI to make a recommendation of surcharge to another entity. This is the case in Malta.

Malta

In Malta, the auditor general does not have the power to impose surcharges. However, the auditor general has the power to recommend surcharges on auditees to the minister of finance.

Article 10 of the First Schedule to the [Auditor General and National Audit Office Act \[Cap 396\]](#) stipulates that the auditor general is to bring to the attention of the responsible minister any serious irregularity discovered by the auditor general in an audited entity. The auditor general *may* recommend that the minister surcharges against that person the amount of deficiency, loss or improper payment resulting from the non-compliance with laws and regulations. Any

person aggrieved by the imposition of any such surcharge has a right to contest it by action taken against the minister in the first hall of the civil court (EU Contact Committee 2015).

3 BOARD MODEL

The board model has similarities to the Westminster model, except that an audit board or boards produce audit reports and submit these to parliament (Evans 2008). As with Malta, the power of surcharge conferred upon Japan's SAI only enables the SAI to make a recommendation of surcharge to another entity.

Japan

Although Japan's SAI – the board of audit – does not have the power to impose surcharges, where the board of audit deems, as a result of an audit, that an official in charge has caused a grave loss to the state either intentionally or through gross negligence, it may demand a disciplinary action against the official from the head of the department the official belongs to or from other supervising persons.

This power applies to cases where an official in charge of a fiscal transaction of the state does not observe the regulations for the verification of accounts – for example, by failing to submit statements of accounts and vouchers and supporting documents – or does not comply with the demand made upon the official ([Board of Audit Act 1947](#) Article 31). Since 1953, the board has not demanded disciplinary action because auditee agencies voluntarily took disciplinary actions in all cases where the board considered disciplinary action was required (Katsuno 1994).

4 COURT OF AUDITORS

Some jurisdictions adopt a judicial model as the institutional framework for their SAI. Here, the SAI – often a court of accounts or *cour des comptes* – forms part of the judicial system and forms judgements on the use of public funds by government officials. (Evans 2008). In the judicial model, government officials are often held personally liable for illegal payments made

in their official capacity (Evans 2008). Brazil and France are examples of judicial model of SAIs.

Brazil

In Brazil, the Tribunal de Contas da União (TCU) – the Federal Court of Accounts – is the country's SAI, established under the Constitution of the Federative Republic of Brazil. The TCU shares similarities with the French Court of Audit (OECD 2012).

The TCU has the power to make a final verdict on the accounts of public resources. The sanctions which the TCU can impose are broad. The TCU can discharge administrators of public funds definitively or hold them responsible for the improper use of resources. The court also has the power to impose financial penalties, mandate reimbursements for financial losses due to irregularities and recommend civil and criminal prosecution (Hidalgo 2015).

However, the rejection of accounts is considered to be one of the most severe sanctions the court can impose. For example, the rejection of President Dilma Rousseff's accounts in 2015 was considered grounds for a possible impeachment (Hidalgo 2015). In this case, the TCU found that Rousseff's government had systematically delayed repayments to Brazilian lenders for advancing money to pay for social programmes, such as unemployment insurance amounting to some 40 billion reais (US\$11.6 billion). The delay in repayments resulted in the nation's fiscal account appearing to be healthier than it was (Soto 2015).

France

The French *Cour des Comptes* (the court of auditors) is a quasi-judicial body of the French government. The court's judicial role requires it to verify the legality of revenue and expenditure operations authorised and performed by public accountants. The court may order accounting officers to settle uncollected revenue or irregular expenses out of their own resources. Further, the court can impose penalties on public servants in cases where there are breaches of the law and can prosecute public servants who committed management offences, through the court of budgetary

and financial discipline, a body attached to the court (Queyranne & Moretti 2012).

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