Jacek Mazur

Contribution of the Supreme Audit Office of Poland to Legislation and Experiences of Some Other SAIs

Summary: As a result of audits performed, the Supreme Audit Institutions (SAIs) present recommendations, including de lege ferenda proposals. In Poland the law clearly establishes such competence, while in many countries it has been defined only indirectly. Some SAIs consider themselves as not taking part in the law making processes, in order not to be involved in anything that later can be audited. The article presents how the Supreme Audit Office of Poland (NIK) formulates de lege ferenda proposals versus the practice of other SAIs, in particular in Austria, the Czech Republic, Hungary, Slovakia and Slovenia. It presents actions to ensure the quality and enhance the effectiveness of the proposals through *a)* formulating them adequately; *b)* keeping a register and listing them in the SAI annual activity report; *c)* examining their use in contacts with the Parliament and Government. The paper ends with a problem of a role of the NIK proposals in the law making process.

Keywords: Supreme Audit Institution, Supreme Audit Office of Poland, de lege ferenda proposals, law making
JEL codes: K1, K2, K3, K4, M4, M48

An audit usually leads to an assessment of the audited activity[1]. There is an indication as to how to improve a given activity and proposed solutions. In this way SAIs formulate audit findings which contain e.g. recommendations (conclusions) for the audited entities, as well as for the superior entities or other competent state or local-government authorities. Those recommendations may concern the changes to the activity of the specific entities; there can also be recommendations on the entire audited activity (systemic recommendations)[2]. International audit standards contain postulates for formulating and examining the audit findings, together with a suggestion to formulate *de lege ferenda* proposals[3] (INTOSAI, 2016). In addition to general rules outlined in the basic INTOSAI documents (ISSAI 1 – Lima Declaration; INTOSAI, 1977; ISSAI 10 – Mexico Declaration on Independence; INTOSAI, 2007) there are also more concrete suggestions:

ISSAI 300 – Fundamental Principles of Performance Auditing (INTOSAI, 2013):

„12. [...] Performance auditing [...] does not question the intentions and decisions of the legislature, but examines whether any shortcomings in the laws and regulations or their way of implementation have prevented the specified objectives from being achieved".

E-mail address: Jacek.Mazur@nik.gov.pl

ISSAI 3000 – Standards and guidelines for performance auditing based on INTOSAI's Auditing Standards and practical experience (INTOSAI, 2004):

"1.8. [...] proposals to amend laws, regulations, and structural design of government undertakings are not excluded, if is shown that the existing structure give rise to severe and verified problems [...]".

The SAI recommendations may include findings and suggestions concerning the legislation in force: indication of inconsistency (gaps, contradictions) of legal provisions or their vagueness, or of self-evident failure of a given act to comply with the public policy defined by relevant authorities. Such occurrences make the functioning of the State difficult, raise doubts as to the reliability of the law, create favourable conditions for latitude of law interpreting and its evasion, and undermine the trust of citizens. So, the audits can lead to the opinion that the law needs to be changed or implementing acts issued or changed. Although the SAIs are usually not entitled to submit formally such proposals, they can present them to the authorities entitled to initiate the proceedings or enact a given act – usually to the Parliament, Government or individual ministries. It seems that such motions cannot be numerous – *de lege ferenda* proposals should always be something extraordinary, very well grounded, formulated after evaluating the reasons for and against, taking into account that the change of law is usually only one of possible ways to overcome or prevent dysfunction in the functioning of the auditees, a given administration or economy area, or the whole state[4].

One can probably surmise that all SAIs in the world formulate – more frequently or rarely, to a lesser or larger degree – *de lege ferenda* proposals, although they are not always called that and have a different form[5]. Sometimes an SAI gives a very general statement concerning the legislation in force, limiting itself to expressing an opinion about the imperfection of the legal regulation in a certain area, sometimes not even defining which act should be changed and in what way – being convinced that those issues belong to the authorities that form the legislation. But such declarations can also be considered – in very broad terms – as *de lege ferenda* proposals[6].

At the Polish NIK, the mere opinion about the imperfection of legislation is not considered as *de lege ferenda* proposal. Such a motion should define:

- a legal act which should be changed, possibly with an indication as to its exact part (chapter, article, etc.),
- the content of the future regulation (presented as detailed as possible) and goals to be achieved,
- actual basis (audit-related arguments which justify the suggested change),
- an authority to which the proposal is addressed.

However, some SAIs consider themselves as not taking part in the such processes. For example the SAIs of Austria, the Czech Republic, France or Sweden do not formulate *de lege ferenda* proposals: post-audit recommendations can be a point of departure for legislation changes, but the SAI does not participate actively in their drafting (the audit report may recommend the changes, but their introduction is a task of e.g. a relevant ministry)[7].

To justify this position, two reasons are given. Firstly, the principle that SAI should not be involved in anything that later can to be audited. A SAI must avoid executive responsibility and having any executive role, something that is valid for all recommendations. It means that the SAI states the problems, highlights possible ways to tackle it, but avoids presenting the only solution. Sometimes it is related to the fear

that de lege *ferenda* proposals can constitute (or can be considered) a form of going into the political arena, which would break the SAIs political neutrality. Secondly, some SAIs (e.g. in Belgium, Denmark, France, Greece, Latvia, Malta, Sweden) consider that formulating *de lege ferenda* proposals is such an important instrument that it has to be based on a clearly granted competence – in case there is none, there is no mandate to act in such a way. Many recommendations have a legal implication and it is important to avoid any future objections by the auditee that they are not legally correct or feasible (Summary, 2015).

Concerns mentioned here are important to all SAIs, because formulating *de lege ferenda* proposals is a delicate issue, which may push state audit to a political zone. It is indeed not a merely technical or organizational tool. Using this opportunity can put the SAI in a position of a "legislator" or "reformator", possibly paving the path for better legal regulation or higher ethical norms. Therefore, it should be considered in terms of involvement or possible influence on policy, whether the SAI deliberately wishes to do so or not. However, the chances and dangers steaming from this situation should be first of all discussed in relation to the political and public opinion environment in a given country.

SAIs which do not formulate *de lege ferenda* proposals (examples named above) have a different remit and way of operating, so the issue of formulating – or not formulating – such proposals is not bound with the historically formed division into the courts of audit and others which I suggest referring to as the "audit offices". Nowadays, differences between SAIs are becoming less and less apparent: courts of audit are mostly concerned with carrying out audits and they do it with basically the same procedures and methods as those used in "audit offices". The main difference between these two types of SAIs is the judiciary function of courts which, although it constitutes only a small part of their activities, forms the basis of the prominent status of courts and of their members who, as judges, have judicial independence, freedom in planning their activities, access to documentation, etc. (Mazur, 2007, pp. 145–146). It seems however, that it does not have a direct impact on the formulating *de lege ferenda* proposals.

LEGAL GROUND FOR FORMULATING BY THE SAI *DE LEGE FERENDA* PROPOSALS

Probably most of the SAIs are entitled to formulate *de lege ferenda* proposals, however in many countries the legislation does not enact clearly their competence in this regard, but it results (or may be implied) from the general provisions. Here are some examples:

In Austria:

"§ 5. The Court of Audit shall report the result of its audit as well as any motions resulting from the units audited either directly or by way of the authorities they report to in the matter (...). The Court of Audit shall communicate its audit also to the Federal Ministries involved" (Austria, 1948, Article 5).

In the Czech Republic, according to Supreme Audit Office Act (Czech Republic, 1993):

"Section 4 (3). The result of the auditing activities of the Office are audit conclusions. An audit conclusion is a written report summing up and evaluating the facts ascertained in the course of an audit carried out pursuant to this Act".

"Section 30 (1). All approved audit conclusions shall be published by the President of the Office in the Office Bulletin and he or she shall send them without delay to the Chamber of Deputies, the Senate, the Government and, upon request, to the ministries (...)".

In Hungary, according to the Act on the State Audit Office (Hungary, 2011):

"The audit report and its publicity
Article 32
(1) The State Audit Office of Hungary shall prepare reports on the audits which it conducts. Such reports shall contain the facts found as well as the findings and conclusions based on them. (2) Reports submitted to the National Assembly, as well as those on audits conducted upon the request of the Government shall be signed by the President of the State Audit Office of Hungary". (...)
Obligation of the audited entity to act
Article 33 (1)
The State Audit Office of Hungary shall forward its report containing its audit findings to the head of the audited entity. The head of the audited entity shall develop an action plan in response to the findings in the report and send that plan to the State Audit Office of Hungary within thirty days from the receipt of the report". (...)"

In the Slovak Republic, according to the Act on the State Audit Office (Slovakia, 1993):

"Article 13. (...) (2) The Office may make recommendations to audited entities and to relevant bodies on how to deal with weaknesses and shortcomings identified during the exercise of its competence".

"Article 18. The audited entities and their employees shall be obliged: (...) e) to take measures to remedy weaknesses and shortcomings identified by the audit and to submit them to the Office, within the time periods specified by the Office, in writing and to submit to the Office, within the time periods specified by the Office, a written follow-up report (...)".

In Slovenia, according to the Court of Audit Act (Slovenia, 2001):

"Article 21 (Consulting Users of Public Funds). The Court of Audit shall consult the users of public funds as follows: 1- it shall provide recommendations at the time of performing the audit and in the report referred to in Article 28 of this Act; 2- it may make comments on working drafts of laws and other provisions (...); 5- it may express opinions on public finance issues".

"Article 28 (Completion of Process of Audit) (1) The Process of audit shall be completed by issuing an audit report. In the audit report, the Court of Audit shall provide their opinion on the business operation of the auditee". (...). (16) "The audit report shall be delivered to: 1- the auditee; 2- the auditee's officer who was responsible in the period covered by the audit; 3- the National Assembly; 4- other authorities which, in the opinion of the President of the Court of Audit, shall be informed of the audit disclosures".

The provisions quoted above are – indirectly – a basis for formulating *de lege ferenda* proposals by these SAIs (this follows the most evidently from the Slovenian law).

In Poland, the Act on NIK (Poland, 1994) includes two kinds of provisions:

❶ Firstly, provisions defining the right of NIK to submit recommendations to the audited entities, and, if needed, to the superior entities and competent state or local-government authorities. The right of NIK to formulate *de lege ferenda* proposals results indirectly from those provisions:

"Article 62. Within the time limit specified in the post-audit statement but no shorter than 14 days of the receipt thereof (...), the Head of the auditee shall inform the Supreme Audit Office about how the comments and recommendations formulated in the post-audit statement have been used and implemented, as well as about the measures taken or grounds for failing to take them".

"Article 62a. 1. The President of the Supreme Audit Office may provide in writing the head of the superior entity or the competent state or local-government authority with comments, evaluations and recommendations concerning the audited activity, as formulated in the post-audit statement (...). 2. The entities referred to in paragraph 1 shall inform the Supreme Audit Office, within

time limit which may not be shorter than 14 days, about their position, the measures taken, or the reasons for failing to take them".

❷ Secondly, provisions from which NIK's right to formulate *de lege ferenda* proposals arises:

- Article 7 (1) (6a) sets up the obligation for NIK to submit to the Sejm (first chamber of the Parliament) the follow-up analysis of how audit conclusions concerning the making or application of law have been used;
- Article 11a sets up the right of the President of NIK to move to the Marshal of the Sejm to request the Prime Minister to provide a statement on audit conclusions concerning the making and application of law.

NIK may formulate *de lege ferenda* proposals on all kinds of legislation which can be initiated or enacted by all public bodies defined in the Act on NIK as subject to auditing (Poland, 1994, Article 2) and by their superior entities or other competent state or local-government authorities (Poland, 1994, Article 62a). Those proposals potentially comprise all legislation which regulates issues subject to NIK's audits, e.g. all acts concerning the functioning of public administration.

NUMBER OF *DE LEGE FERENDA* PROPOSALS

In NIK's practice, there are the following kinds of *de lege ferenda* proposals:

❶ proposals to change acts;
❷ proposals to change regulations[8];
❸ proposals to enact the missing regulations.

Detailed data are shown in *Table 1*.

Data on the number of *de lege ferenda* proposals formulated by the SAIs in other countries are fragmentary, but despite this, they show the importance of this activity:

The National Audit Office of Bulgaria annually presents 5 or more proposals referring to laws and acts adopted by the government, ministries and other bodies; the most important proposals concern public procurement and property sales in communities;

From January to September 2013, the State Audit Office of Hungary formulated *de lege ferenda* proposals concerning 11 laws, e.g. proposal for amending the act on the e-administration, which was taken into consideration;

In Israel, the Office of the State Comptroller and Ombudsman basically is not involved in the forming and phrasing of the law. However, sometimes the office recommends and points out the necessity to change an existing law, or to enact a new law, in order to regulate or to improve the provisions of a certain field. For example:

❶ a report from 2006 pointed out that the national security council acts on the basis of a government decision, rather than being based on a law (consequently, a law was enacted, adopting the specific recommendations proposed by the audit);

❷ a report published in October 2015 pointed out that there is a need for a comprehensive amendment in the existing law regarding the handling emergency situations on the national level;

The Portuguese Court of Audit presents *de lege ferenda* proposals in different areas: here are data on the number of acts amended on basis of the Court's proposals: in 2009 – 19 acts, 2010 – 33, 2011 – 25, 2012 – 29. They concerned e.g. the hospital management (motion to the minister of finance and minister of health), tax system (motion to the government), public works (motion to the government);

The Supreme Audit Office of Slovakia submitted: in 2012 – 23, in 2013 – 5, in 2014 – 7 *de lege ferenda* proposals;

Table 1

NUMBER OF *DE LEGE FERENDA* PROPOSALS FORMULATED BY NIK IN 2001–2014

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Total	136	137	108	68	53	52	47	43	65	71	33	65	78	75
Change of an act	80	78	57	49	29	41	33	32	48	61	26	50	61	54
Change of a regulation	56	59	51	19	20	7	10	10	16	10	7	11	15	21
Lack of a regulation	–	–	–	–	4	4	4	1	1	–	–	4	2	–

Source: NIK annual activity reports 2001–2014

The Spanish Court of Accounts formulates *de lege ferenda* proposals which have impact on the national legislation (e.g. a motion on subsidy resulted in the change of legal provisions in this area).

De lege ferenda proposals are included mostly in a report from the audit during which the issue was noticed, and more precisely – in the part of the report with conclusions and recommendations. Another way of presenting those conclusions is a separate letter to the law making bodies (e.g. in Hungary), the SAI annual audit report (e.g. Cyprus, Portugal) or the annual activity report (e.g. Bulgaria, Lithuania, Poland, Slovakia, Spain). Sometimes these ways are used in parallel (Summary, 2015).

EXAMPLES OF *DE LEGE FERENDA* PROPOSALS FORMULATED BY NIK

The results of audits performed by NIK are the basis for calling for law changes and changing or enacting implementing acts. Most frequently they are addressed to the Parliament and the Government.

For example, in 2014, 33 audit reports of NIK contained 75 *de lege ferenda* proposals, mostly (almost 72%) concerning the amendments to the provisions in such areas as: management of agricultural real estates of the State Treasury, biofuels and bio-components in transport, income tax, local taxes and charges, military service of professional soldiers, road transport and traffic, city monitoring, land-use planning, financial support for agriculture restructuring and modernization, protection of rights of financial institutions clients, public finance, mountain and organized sky areas safety and rescue, financing of public and non-public kindergartens by local governments, environment protection, social security scheme, construction law, accessibility and financing of therapeutic rehabilitation, cooperation with Polish community abroad, assistance for persons entitled to maintenance, functioning of blood donation and haemotherapy system, functioning of animal farms, air protection against pollution, and protection of tenant rights (Poland, 2015, pp. 51–56 and appendix No. 4).

Here are three examples of the formulation and implementation (or lack of implementation) of NIK's *de lege ferenda* proposals.

Public procurement

In 2012–2013 NIK performed an audit on how the General Directorate for National Roads and Motorways (hereinafter GDDKiA) meets the investment tasks. The scope of the audit covered: planning of the investments, their preparation for implementation, selection of the investment contractors, performing the investor tasks, supervision of implemented investments, financing of investments and keeping the record of assets. Overall, NIK assessed positively the performance of these tasks.

At the same time, irregularities were found related to the public procurement procedures. They concerned i.a. the use of the „abnormally low price" notion. NIK observed that although this notion was in the Act of 29 January 2004 Public Procurement Law (hereinafter Pzp Act), it has not been explicitly defined. Consequently, it was considered appropriate to change the Pzp Act due to the problems encountered by a contracting party to determine whether the offer includes the abnormally low prices versus the subject-matter of the contract. NIK turned to the Prime Minister to consider the possibility of introducing a definition of the „abnormally low price" to the Pzp Act and including the determination whether the price offered is not abnormally low versus the subject-matter of the contract (Poland, 2013b).

NIK's proposal was carried out: Article 90 (1 and 2) of Pzp Act has been changed in a bit different way than suggested by NIK, but according to the intention.

Civil budgets in the countryside

The *sołectwo* funds [the lowest unit of local administration, usually a single village] are funds singled out from the community budget for the implementation of undertakings to improve the life of the residents of a given village. They are a kind of a civil budget, established with the agreement of the community boards. The residents decide about how those funds are spent, what increases social activity and civil initiatives.

In 2012–2013 NIK performed an audit of the functioning of the *sołectwo* funds. It was found that the first three years of the functioning of the Act on the *Sołectwo* Fund showed weaknesses of some of its provisions. The following led to unnecessary limitations as to the functioning of funds and makes the rationalization of using them difficult. NIK suggested that the Ministry of Administration and Digitization should consider initiating a legislative proceedings to eliminate the aforementioned limitations (Poland, 2013a).

NIK's proposal was carried out: in February 2014, Sejm enacted a new Act on the *Sołectwo* Fund which included NIK's proposals.

Extracting and collecting telecommunication data (billings)

In 2012–2013 NIK performed an audit on extracting and processing of telecommunication data. The audit covered: Internal Security Agency, Central Anti-Corruption Bureau, policy units, National Border Guard, Military Counterintelligence Service, Military Gendarmerie, Ministry of Finance, 3 District Courts, 4 District Prosecutor's Offices and Office of Electronic Communications[9]. NIK assessed positively, despite found irregularities, the activity of the audited bodies, in terms of the procedures for extracting and processing the retention data (information retained by the telecommunication operators, which identifies the owner of the phone number, discloses the phone numbers of his/her interlocutors,

localisation of the phone and owner of the IP number) in connection to current legislation.

NIK recognized that the effective prevention against crimes and their prosecution would be impossible without providing the services with access to telecommunication data. Audit findings showed however that the current provisions do not protect human rights and freedoms against the excessive state interference. Therefore NIK suggested taking actions that would require introducing changes to the laws:

- The scope and purpose of extracting telecommunication data should be clarified. It is necessary to create a catalogue of cases for which telecommunication data can be extracted. The present laws usually refer only to the general scope of tasks of individual services, also those which are not directly related to the crime prosecution.
- External control should be established over the process of extracting data. Under the present legislation, there is no body which could hold real control over the use by the police and other services telecommunication data of the citizens. This situation is exceptional in comparison with most of the EU Member States, where such control is performed by the courts, prosecutor's office or independent administration body. An important instrument of such control should also be the obligation to inform persons whose data have been extracted, with the possibility of adjourning the transmission of such information until the procedure is ended.
- Instruments should be introduced that would guarantee destroying the extracted data when it is no longer needed. The provisions should not only define the obligation to destroy, but also clarify the mode and way of its realization.
- Reporting mechanisms should be developed. It should be the State and its services, and not only the telecommunication operators who should be accountable towards the citizens for activities related to the telecommunication data extraction (Poland, 2013c).

Initially, all interested ministries – apart from the Prosecutor's Office – negatively assessed NIK motions. However, on 30 July 2014 the Constitutional Tribunal ruled – in a way very much coincident with NIK's proposals – that the provisions of the laws on extracting and processing of telecommunication data were not constitutional which led the government to begin drafting a bill to introduce changes in the legislation. Subsequent legislative processes were complex, drawn out and difficult. Finally, NIK's proposals were partly carried out: in January 2016 the act on the change of the act on the police and some other acts was adopted.

NIK'S ACTIONS TO ENSURE THE QUALITY AND ENHANCE THE EFFECTIVENESS OF ITS *DE LEGE FERENDA* PROPOSALS

Better formulation of *de lege ferenda* proposals

The law making is a complicated process. The entirety of legal norms in a given country is a system of law. It should be a uniform entirety, not contradictory internally and with no gaps. The entirety is also expressed in rules being in effect which are norms of a specific meaning. This is a very brief vision of the law system. It is about calling attention to some issues which should be taken into consideration when formulating *de lege ferenda* proposals.

The Polish „Rules of legal drafting" (Poland, 2002) require that the law making process should be proceeded by e.g.:

1. description of social relations in the area that requires intervention,

❷ decision as to the potential – legal and other than legal – impact measures which will facilitate the achievement of the planned goals,

❸ decision as to the expected social, economic, organisational, legal and financial results of each of the considered solutions.

As a result, when drafting laws, one should e.g.:

- get familiar with the present legislation, including laws, international agreements which Poland is bound to, legislation of international organisations which Poland belongs to, and EU legislation,
- determine effects of the present legal provisions,
- define goals to be achieved by enacting a new law,
- determine alternative legal solutions which may serve the established goals achievement,
- formulate forecasts for basic impacts and potential side effects of each considered solution,
- define financial effects of individual solutions and sources to cover them,
- choose an optimal solution.

Analogous rules are valid in other countries and the EU.

When formulating *de lege ferenda* proposals, the state authorities – including the SAIs – should make the best possible preparations. This requires taking into account the knowledge and expertise, and ensuring cooperation of experts in a given area and lawyers. It is not enough to have – even perfect – factual knowledge, it is also necessary to have law-making knowledge.

The 2013 review of NIK *de lege ferenda* proposals formulated in previous years showed that considerable number of them referred rather to the change of way of using the present legislation (*de lege lata* motions); there were also motions incomplete e.g. on the directions of the law change without indication as to the specific provisions. On basis of the analysis, the President of NIK decided to enhance the management of *de lege ferenda* proposals at NIK, entrusting the Department of Legal Affairs (hereinafter referred to as "Legal Department") with the coordination of activities in this respect. It was decided that a unit which performs an audit (audit department or regional branch) should draft *de lege ferenda* proposal, if the audit results indicated the need for changes to the present law; the draft proposal would be subject to consultation with the Legal Department (Poland, 2014).

In other SAIs there are also solutions aimed at ensuring adequate quality of *de lege ferenda* proposals. For example, in the Slovak Republic responsible for formulating them is the legal department in coordination with the unit that performed the audit. In Slovenia usually it is a unit that performed the audit in coordination with the legal department. At the SAI of Hungary tasks in this area are performed by various departments.

Apart from improving the way of formulating *de lege ferenda* proposals, the SAIs organise trainings for their staff (Hungary, Poland). At NIK, the legal advisors are employed not only in the Legal Department, but also – usually two persons – in all audit departments and regional branches. For some time training have been organised every year for them: in March 2008 the formulation of *de lege ferenda* proposals in the audit reports was discussed in detail. In December 2013 at the meeting of NIK audit directors and advisors to the President, the President of the Government Legislation Office discussed the government's legislation process, indicating the possibilities and conditions for the implementation of NIK's proposals and the methods for increasing NIK's impact on the law making.

Keeping and updating a register of SAI *de lege ferenda* proposals

Legislation processes in state authorities in relation to the SAI's *de lege ferenda* proposals usually occur only after 1–2 years from the day of their presenting, sometimes even after a longer period. This makes the assessment difficult as to whether SAI's motions have been taken into account, and if so, in which way. To facilitate the monitoring, some SAIs keep a register of *de lege ferenda* proposals (Hungary, Poland, the Slovak Republic, Slovenia). In the past, there used to be registers in writing, whereas recently there are rather electronic, which increases the transparency and facilitates data updates.

The current updating of the register is important. It is related with the more general issue of monitoring by the SAI of the results of earlier audits. Generally, the audit team who performed a given audit, is disbanded, and individual auditors perform next duties, frequently in another area. Adequate organisation of permanent monitoring of all audited areas is a challenge: it requires additional work which may result that this function is not always fully performed.

At NIK for a long time the register of *de lege ferenda* proposals used to include the information at the moment of submitting the proposal. Presently, an audit unit which elaborated the proposal is responsible for the on-going updating of the register as concerns the implementation of the proposal:

- undertaking the proceedings by the Council of Ministers or competent ministries,
- undertaking the proceedings by the Sejm or Senate,
- implementation (in full or in part) of the proposal and entry into force of a given act.

The register includes proposals from the last 5 years up to the present time. Out-of-date proposals are deleted from the register by the Legal Department.

Another step was to launch a IT tool „FERENDA II", an application for the systemic handling of *de lege ferenda* proposals, developed by the IT Department in consultation with the Legal Department. The monitoring process is supported here by a table to which all detailed data are linked. It makes it possible to obtain – at any moment – information about the status of the implementation of all proposals of different cross sections.

Informing the state bodies and public opinion about *de lege ferenda* proposals

SAI d*e lege ferenda* proposals are typically included in a report from the audit during which the issue had been noticed. Usually the reports are easily available, but to call attention of the Parliament, Government, other state bodies and the public opinion, and thus to use better SAI's proposals – an additional, overall presentation is beneficial (possibly with an analysis of their implementation) in an SAI annual activity report, or in its another publicly available document submitted to the Parliament. The practice in this regard exists in some countries.

Since 2002, NIK – in its each annual activity report – has been including information about *de lege ferenda* proposals which had been previously part of the audit reports submitted to the Sejm in a given year, with a description of the status of their implementation. It is contained in the main part of the report – usually in a chapter dedicated to the auditing activity. Moreover, since NIK's 2004 activity report (i.e. since 2005), the attachment to the report has included a list of proposals in the form of a table. It is concise, but also detailed. It includes such information as:

- title and number of an audit,
- name of the law / regulation which the proposal refers to, or – in case of a proposal to enact a new law – a problem which could be regulated,
- content of the proposal,
- status of the implementation of the proposal,
- possible additional information e.g. explaining why the law / regulation needs to be changed.

Including the above-mentioned information in the annual activity report of NIK makes it gain high prestige: it is considered – and taken note of – by the Sejm under the general mechanism of examining such a report; first by the Sejm committees, and then during the plenary session of the Sejm. In this way, that information may become a basis for discussion at the Sejm, and it is also easily available (the annual activity report is uploaded to the Public Information Bulletin).

Apart from calling attention of media and public opinion by including *de lege ferenda* proposals of NIK to the annual activity report and individual summary audit reports, some of those proposals are also published separately on the NIK website and presented during press conferences.

Presenting the issue in contacts with the representatives of the Parliament or Government

Formulating *de lege ferenda* proposals by NIK is bound with their efficiency. The problem has been repeatedly signalled in NIK annual activity reports; it was also the subject of discussions of successive Presidents of NIK with representatives of the Parliament and the Government. For example, in April 2002 information on the implementation of NIK anti-corruption motions was submitted to the Sejm. The document was examined on 10 September 2002 by the State Control Committee which asked NIK to make a list of legal gaps and provisions for amending because they create a risk of acting unjustly and increase the likelihood of corruption. The President of NIK provided the Sejm with the list of 77 *de lege ferenda* proposals formulated as the result of audits performed in 1996–2002. In March 2003 the Sejm received further information on anti-corruption recommendations of NIK, which were not used, even though audit findings showed that the then existing legislation had been creating favourable conditions for corruption-prone activities.

Despite many attempts, the effectiveness of *de lege ferenda* proposals formulated by NIK was weak. Since autumn 2013 the improvement of the use of proposals has become one of priorities. After reviewing and verifying of the previously submitted proposals NIK has taken many-sided actions that should lead to get the Parliament, Government and other bodies interested in its proposals. For example:

- The President of NIK discussed with the Marshal of the Sejm and the Marshal of the Senate how to improve the implementation of NIK's *de lege ferenda* proposals. They declared to pay attention to the need of implementing *them;*
- Since autumn 2013, the Senate's committees examined circa 20 audit reports submitted by NIK from the point of view of the possibilities of implementing the de lege ferenda proposals, in many cases taking decision on the start of the legislative proceedings. One of examples can be an initiative of the Local Government and State Administration Committee of October 2014 related to the change of the Law on road traffic. In November 2014, the Family, Senior and Social Policy Committee decided to begin work over the change of the Law on the social security system. The Human Rights, the Rule

of Law and Petitions Committee worked over the regulation on billings. The Senate has also developed a bill on the change of the Law on public finance (which includes 4 *de lege ferenda* proposals presented by NIK), which was tabled to the Sejm – as the legislative initiative of the Senate – in March 2015 and then adopted.

▸The Sejm's Administration and Digitization Committee examined – at its sessions on 13 June and 6 November 2013 and 28 May 2014 – the information on the unimplemented *de lege ferenda* proposals presented by NIK in 2010–2012, concerning the organisation and effectiveness of the functioning of public administration, and familiarized itself with information whether legislative proceedings are planned and when it is expected, and if not – what are the reasons that a given *de lege ferenda* proposal has not been implemented. The Committee supported NIK's proposals and requested the administration bodies to implement them, but it did not put forward a formal desideratum.

▸The Sejm's State Control Committee examined – at its sessions on 19 March, 9 April and 9 July 2015 – the information on the unimplemented *de lege ferenda* proposals presented in NIK's audit reports in 2013–2014. In the desideratum adopted by the Committee, it requested the Prime Minister to use the enclosed 59 *de lege ferenda* proposals presented by NIK in the subsequent legislation work of the Council of Ministers. In reply to the desideratum (letter of 21 May 2015 signed, with authorization of the Prime Minister, by the Vice-president of the Government Legislation Office), it was stated that the government agrees to 39 (66%) proposals, informing about the expected way of their use, but as for 20 others – the government decided that the existing legal provisions are correct and efficacious, so no legislative proceedings will be initiated. The Committee decided to re-examine the status of the implementation of NIK's proposals in the next term of office of the Sejm starting in 2016.

Similar activities – on different scales and in different forms – are done in other countries:

In the Czech Republic the recommendations and opinions are contained in audit reports which are presented at the Government sessions. In urgent matters, the SAI President sends letters to the Government or the President of the Republic. The SAI recommendations are opinions are also presented in contacts with mass media (press releases, press conferences, direct media interaction).

The SAI of Hungary sends separate letters to law makers (external actions depend on the legal environment or other aspects of jurisprudence).

In the Slovak Republic the SAI takes external actions to improve the effectiveness of the *de lege ferenda* proposals with respective ministers and parliamentary committees.

Similarly, in Slovenia the SAI President presents the issue in contacts with the Parliamentary Committee for Public Finance, sometimes also with Ministers or Prime Minister, if the issue is of such importance and they were not the auditee.

IMPLEMENTATION OF NIK'S PROPOSALS

The legislative proceedings are a very complex and multi-phase process in which one should learn and take into consideration sometimes divergent stands on many interested subjects. Therefore, there are many reasons for why these processes last long, both in the case of proposals of relevant changes to the law, and minor modifications.

Regardless of this, in the past most of *de lege ferenda* proposals formulated by NIK have not been implemented. For example, as of autumn

2005, from among 166 proposals presented in 1996–2002 – 61 were implemented, 15 were partially implemented, and 13 became out of date; 77 proposals were valid, but not implemented. On the other hand, in 2009–2012 NIK presented 230 proposals to change the law, out of which only 39 were implemented partially or in full.

Recently, the situation has slightly improved: from among 330 proposals presented by NIK from 1 January 2010 to 31 December 2015 (data after deleting the out-of-dated proposals), 116 proposals (35%) were implemented in full or partially. Detailed data are shown in *Table 2*.

NIK PROPOSALS IN THE LAW MAKING PROCESS

NIK does not participate formally in the law making process in Poland, however it has some – limited – competence to present *de lege ferenda* proposals to the state and local-government authorities, and request to examine them, i.e.:

- NIK may ask the Sejm to consider "particular problems in relation to the activity of authorities performing public tasks" (Poland, 1994, Article 7(1)(5). The motion is to be examined by the Presidium of the Sejm which – upon consulting the State Control Committee – decides to set it in motion (Poland, 1992, Article 126(1)(3) and (2));
- The President of NIK may move to the Marshal of the Sejm to request the Prime Minister to provide a statement on audit conclusions containing *de lege ferenda* proposals (Poland, 1994, Article 11a);
- The President of NIK may provide the state or local-government authority with comments, evaluation and recommendations concerning the audited activity, as formulated in the post-audit statement. The authority is obliged to inform NIK, within time limit which may not be shorter than 14 days, about its position and measures taken or reasons for failing to take them (Poland, 1994, Article 62a);
- The President of NIK is entitled to speak, at the Sejm sessions, of any matter being the subject of the sessions e.g. during the examination of a bill (Poland, 1992, Article 186 (2); the representatives of NIK are entitled to similar opportunities at the sessions of the Sejm committees (Poland, 1992, Article 153(3);
- The President of NIK is entitled to speak, at the Senate sessions, of any matter being the subject of the sessions e.g. during the examination of a bill (Poland 1990, Article 50 in relation to Article 32(2) and Article 33(1)

The above instruments ensure NIK an indirect, "soft" impact on law making. No legal provision grants NIK e.g. the right of legislative initiative (in general or in certain areas) or establishes explicitly the obligation of a certain state body to take a position on *de lege ferenda* proposals. Therefore, NIK's participation depends not on using formal competence, but on the capabilities of NIK to formulate and provide state authorities with proposals which will be considered by them as legitimate and, at the same time, feasible in current conditions.

NIK's suggestions are not always accepted. It happens that NIK calls for the drafting of a law, or to issue a regulation by the Government, Prime Minister or a minister – but the authority concerned decides that a given issue should be normalized differently or it does not require any legal rules. We should agree that if, in accordance with Article 146(4) of the Constitution of Poland, the Council of Ministers ensures the implementation of statutes, and also – since the constitutional legislator assigned it the right, and not the obligation of the legislation initiative (Article

Table 2

STATUS OF THE IMPLEMENTATION OF *DE LEGE FERENDA* PROPOSALS FORMULATED BY NIK IN 2010–2015 (AS OF 31 DECEMBER 2015)

Calendar year in which the audit report was approved	Proposals formulated in total (data after verification)	Incl.: proposals implemented in full	Incl.: proposals implemented partially	Incl.: proposals under legislative proceedings	Incl.: proposals not implemented
2010–2015	330	104	12	53	161
2015	55	12		2	41
2014	73	16	1	24	32
2013	71	29	4	15	23
2012	56	15	2	9	30
2011	27	7	1	2	17
2010	48	25	4	1	18

Source: NIK's data (e-register of de lege ferenda proposals "FERENDA II")

118(1) of the Constitution of Poland), it has the right to make independent decisions as to whether to put forward a specific bill or not. At the same time, the Government is obliged to present explanations as to which of NIK's proposals have been implemented and in what way, and if not – why?

So far, these constitutional principles have been applied selectively: the Sejm and NIK were rarely and partially informed by the Government and relevant ministries of how *de lege ferenda* proposals tabled by NIK had been used or of reasons why they had been put off or not implemented. In recent years, NIK could gain knowledge of that mainly by delivering a list of unimplemented proposals to the Sejm's committee so that it could request the Prime Minister for information. The committee initiatives were on an ad hoc basis because there is no mechanism today that would provide NIK with systematic information on what happened to its proposals. It seems that such a mechanism could be developed based on the following principles:

- NIK will annually provide the Sejm with the analysis of using NIK's *de lege ferenda* proposals, included in the audit reports of previous years (Poland, 1994, Article 7(1)(6a); such analysis could be another appendix to the NIK annual activity report;
- With reference to such analysis, the Council of Ministers will annually provide the Sejm with detailed information on the status of implementation of NIK's *de lege ferenda* proposals;
- The Sejm will introduce a rule to its Rules of Procedure that a selected Sejm committee will examine such analysis and the above-mentioned Government's information every year (this provision – because of its importance – should be clearly stated in the scope of activity of the Sejm committees as an annex to the Rules of Procedure of the Sejm).

Establishing such (or similar) mode of cooperation between NIK, the Sejm and the Government would correspond to a main role of the contemporary SAI which usually

operates mostly for the Parliament and public opinion. In this context, it is also proposed that the Sejm should „notice" more the activity of NIK and its recommendations. The Sejm State Control Committee could probably play a larger role here.

CONCLUSIONS

Formulating *de lege ferenda* proposals is a rather difficult way of the SAI's work, however which creates additional possibilities of influence, therefore it is worthwhile using it.

NIK, with its function defined in the Constitution of Poland as the chief organ of state audit, does not have lawmaking powers. However, NIK contributes substantially to law making, being of assistance to other state authorities, through the transfer of knowledge and audit conclusions. Out of different public bodies, NIK cooperates in the first place with the Sejm.

The audits performed disclose cases of gaps and contradictions in the system of law. Based on them it is important to formulate adequately *de lege ferenda* proposals and convince the relevant state or local-government authorities to undertake the legislative initiative and change the legislation. To this purpose, since Autumn 2013 NIK has stepped up its pursuit of adequate formulation of the proposals, and their presentation, notably at the sessions of the Sejm and Senate committees.

NIK takes such actions knowing that not all proposals will be implemented. A SAI should reliably examine a given area and formulate proposals, but an audited entity or supervising authority is responsible for the implementation. The fulfilment of NIK motions is not obligatory and is done by way of persuasion and discussion. For such exchange of views, it is essential that the entities to which *de lege ferenda* proposals have been addressed present in detail arguments for and against their use.

Notes

[1] This article is partly based on the paper presented at the meeting of the Heads of SAIs of the Visegrád Group, Austria and Slovenia (Promnice, Poland, 20–21 May 2015). The draft was commented by several colleagues to whom I would like to extend my highest appreciation and acknowledgements. In particular, special thanks go to Ms Elżbieta Jarzęcka-Siwik and Mr Zbigniew Wrona (both from NIK) and Mr Yehoshua Roth (Israel), Mr Göran Olson (Sweden) and Mr Harry Havens (USA).

[2] Information about the activities of other SAIs comes mainly from answers to two questionnaires sent by NIK: 1) in autumn 2013 NIK asked the majority of European SAIs about their practice of formulating *de lege ferenda* proposals (Summary, 2015); 2) in spring 2015 NIK sent additional questions to the SAIs of Austria, the Czech Republic, Hungary, Slovakia and Slovenia.

[3] *Lex ferenda* is a Latin expression that means "future law" used in the sense of "what the law should be" (as opposed to lex lata – "the current law"). The derivative expression *de lege ferenda* means "with a view to the future law". The expressions are generally used in the context of proposals for legislative improvements.

[4] In the opinion of the representatives of the Spanish Court of Auditors, *de lege ferenda* proposals are a particularly visible form of activity of a SAI (Algarra Paredes, Á. – Ferrán Dilla, J., 2012, p. 126).

[5] As Moliere has described, Mr. Jourdain was surprised to learn that he has been speaking prose all his life without knowing it.

[6] For example the Court of Audit of Slovenia considers, as *de lege ferenda* proposals, not only formal submissions of legislative proposals to the legislator but also recommendations, proposals, requests to amend and similar actions taken by SAI to influence the *lege/i lata* and/or adopted practice.

[7] For example, the Court of Audit of Belgium states, that it evaluates the legislation not directly, but by performing audits and – in exceptional cases – by examining the financial impact of bills, if the Parliamentary Committee asks for it.

[8] In Poland regulations are the implementing acts to the laws (statutes). According to Article 92 (1) of the Constitution „regulations shall be issues on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitutions".

[9] The audit could not include the activities of telecommunication operators which are private entities, however the results of the audit performed by the Inspector General for Personal Data Protection at five telecommunication operators were used.

Literature

Algarra Paredes, Á. – Ferrán Dilla, J. (2012): *Transparency in Public Management: External Control*, "EUROSAI Magazine" No 18 – 2012, pp. 123–127

Mazur, J. (2004): Legal Status of the Supreme Audit Institution: Application of International Standards vs. National Traditions [in:] *Diaphaneia & Anexartesia Ston Elegkho Toy Demosioy Khrematos. Timetikos tomos gia ta 170 khronia toy Elegktikoy Synedrioy*, Athena – Komotene, pp. 559–582

Mazur, J. (2007): The Polish Supreme Chamber of Control in comparison with Supreme Audit Institutions of other countries, *Iyunim. Studies in State Audit*, Jerusalem, Volume 61, pp. 143–171

Austria (1948): Bundesgesetz vom 16. Juni 1948 über den Rechnungshof (1948 Federal Act on the Court of Audit); https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1948_144/ERV_1948_144.pdf

Czech Republic (1993): Zákon ze dne 20. května 1993 o Nejvyšším kontrolním úřadu (Supreme Audit Office Act No. 166/1993 of 20 May 1993); http://www.nku.cz/assets/act166–93.pdf

Hungary (2001): 2011. évi LXVI. törvény az Állami Számvevőszékről (Act LXVI of 2011 on the State Audit Office of Hungary); http://www.asz.hu/introduction/act-lxvi-of–2011-on-the-sao/act-on-sao-july–2013.pdf

INTOSAI (1977): ISSAI 1 – The Lima Declaration http://www.issai.org/media/12901/issai_1_e.pdf

INTOSAI (2004): ISSAI 3000 – Standards and guidelines for performance auditing based on INTOSAI's Auditing Standards and practical experience http://www.issai.org/media/13224/issai_3000_e.pdf

INTOSAI (2007): ISSAI 10 – Mexico Declaration on Independence http://www.issai.org/media/12922/issai_10_e.pdf

INTOSAI (2013): ISSAI 300 – Fundamental Principles of Performance Auditing http://www.issai.org/media/69911/issai–300-english.pdf

INTOSAI (2016): International Standards of Supreme Audit Institutions http://www.issai.org

Poland (1990): *Resolution of the Senate of the Republic of Poland of 23 November 1990 – Rules of Procedure of the Senate* (Monitor Polski 2015.805 as amended) http://www.senat.gov.pl/en/about-the-senate/regulamin-senatu/

Poland (1992): *Uchwała Sejmu Rzeczypospolitej Polskiej z 30 lipca 1992 r. – Regulamin Sejmu Rzeczypospolitej Polskiej* (M.P. 2015.31 ze zm.) [*Resolution of the Sejm of the Republic of Poland of 30.07.1992 – Rules of Procedure of the Sejm of the Republic of Poland* (Monitor Polski 2015.31 as amended)]

Poland (1994): Act on Supreme Audit Office (NIK) of 23 December 1994 http://www.nik.gov.pl/plik/id,2759.pdf

Poland (2002): Rozporządzenie Prezesa Rady Ministrów z dn. 20 czerwca 2002 r. w sprawie "Zasad techniki prawodawczej"; Dz. U. Nr 100, poz. 908 [Regulation of the Prime Minister of 20 June 2002 on the "Rules of legal drafting"; OJ No. 100, item 908]

Poland (2013a): NIK – *Informacja o wynikach kontroli funkcjonowania funduszy sołeckich*, Nr ewid. 4/2013/P/12/134/LGD, podpisana 2013–02–12, data publikacji: 2013–04–03 [NIK – Audit report on the functioning of *sołectwo* funds, identification No. 4/2013/P/12/134/LGD, signed 2013–02–12, publication date: 2013–04–03]

Poland (2013b): NIK – *Informacja o wynikach kontroli wykonywania przez Generalną Dyrekcję Dróg Krajowych i Autostrad obowiązków inwestora przy realizacji inwestycji drogowych*, Nr ewid. 191/2012/P12076/KIN, podpisana 2013–04–08, data publikacji: 2013–05–07 [NIK – Audit report on the investment obligations met by the General Directorate for National Roads and Motorways at implementing the road investments, identification No. 191/2012/P12076/KIN, signed 2013–04–08, publication date: 2013–05–07]

Poland (2013c): NIK – *Informacja o wynikach kontroli uzyskiwania i przetwarzanie przez uprawnione podmioty danych z bilingów, informacji o lokalizacji oraz innych danych, o których mowa w art. 180 c i d ustawy Prawo telekomunikacyjne*, Nr ewid. 107/2013/P/12/191/KPB, podpisana 2013–06–12, data publikacji: 2013–10–08 [NIK – Audit report on obtaining and processing by authorized entities of data from the billings, localization information and other data referred to in Article 180 (c and d) of the Act on the Telecommunication Law, identification No. 107/2013/P/12/191/KPB, signed 2013–06–12, publication date: 2013–10–08]

Poland (2014): Pismo okólne Prezesa NIK z dnia 6 maja 2014 r. w sprawie opracowywania i uzgadniania wniosków *de lege ferenda* w Najwyższej Izbie Kontroli [Circular letter of the President of NIK of 6 May 2014 on developing and agreeing on *de lege ferenda* proposals at NIK]

Poland (2015): *Sprawozdanie z działalności NIK w 2014 r.*, Warszawa 2015 [NIK Activity Report 2014, Warsaw 2015]

SIGMA (2002): *Relations between Supreme Audit Institutions and Parliamentary Committees*, *SIGMA Papers: No. 33,* Paris 2002 http://search.oecd.org/officialdocuments/displaydocumentpdf/?doclanguage=en&cote=ccnm/gov/sigma(2002)1

Slovakia (1993): Zákon č. 39/1993 Z. z. o Najvyššom kontrolnom úrade Slovenskej republiky (Act of the National Council of the Slovak Republic No 39/1993 Coll. of Laws on the Supreme Audit Office of the Slovak Republic); https://www.nku.gov.sk/documents/10272/98328/xact_on_sao_sr.pdf

Slovenia (2001): Zakon o računskem sodišču (Court of Audit Act); http://www.rs-rs.si/rsrs/rsrseng.nsf/I/K18FDFD2BA4047034C12570660026EBC9

Summary (2015): *Summary of answers received from SAIs in relation to the questionnaire on de lege ferenda motions*; 08.01.2014, updated 12.05.2015, will be available at www.eurosai.org/