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Incompatibility of Functions and Mandates in Governing Bodies of Legal Professional Self-Government Organisations

Niepołączalność funkcji i mandatów w organach w prawniczych samorządach zawodowych

ABSTRACT

The article discusses the organisational issues of self-government organisations of the professions of public trust in Poland, in the context of the implementation of the principle of *incompatibilitas*, as a *sine qua non* condition for their proper functioning and due performance of the public tasks entrusted to them. The analysis covers the self-government organisations of advocates, attorneys-at-law, notaries, bailiffs, patent attorneys and tax advisers, taking into account their different structures and the legal basis (statutory law or bye-laws) for the prohibition on the one-handed holding of multiple functions or mandates in the bodies of these professional associations. The study found that the phenomenon of holding multiple functions in the self-government of attorneys-at-law constitutes a problem. The study outlines the cause of this situation and draws conclusions for the law as it should stand, which concern the introduction of a prohibition of accumulating functions to the optimum extent, in line with the solutions applied by the self-government of advocates. The aim of the article is not only to substantiate the necessity of these changes, but also to show how they should be made. This proposal can be implemented by amending the internal rules governing the self-government of attorneys-of-law, which should be treated as intra-corporate normative acts and only ultimately through legislative intervention.

Keywords: *incompatibilitas*; legal professional self-government; self-government of attorneys-at-law; self-government of advocates; acts of internally binding law

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INTRODUCTION

The inspiration to address legal and organisational issues related to the principle of incompatibility (*incompatibilitas*) of functions and mandates in governing bodies in legal professional self-government organisations was born as a result of observation of the practice of the self-government of Polish attorneys-at-law. The phenomenon of holding multiple functions by one individual, once incidental or limited, has become increasingly common and its current extent makes it necessary to point to the need to improve the organisational standards of this professional self-government as it leads to undesirable situations within the self-government and may be detrimental to its image as an organisation of a profession of public trust performing public tasks. This situation stems also from the lack of appropriate restrictions in generally applicable law and the lack of mechanisms limiting this practice in the provisions of bye-laws of the self-government of attorneys-at-law.

Organisations of self-government of legal professions of public trust are established by statutory law. The legislature defines their internal organisation in more or less detailed manner, allowing to varying degrees to regulate these issues more specifically in bye-laws of professional self-government. This applies especially to the method of staffing bodies whose composition is supposed to guarantee the correct performance of the statutory tasks of professional self-government. The attitude of people who are constantly involved in its activities of professional self-government is also important. In the regulations governing the system of legal professional self-government, this issue is approached differently depending on the rules of its organisation. The lack of regulation in this area results in an increase in the number of holders of multiple functions and mandates in the bodies. This phenomenon is very clearly seen in the self-government of attorneys-at-law. The aim of this study is to identify the reasons for this and to point out possible approaches to the principle of *incompatibilitas*, in particular to determine its optimal extent. In order to get a complete picture of this issue, although it must be noted that the study is not intended as a comprehensive analysis of the research field in question, the solutions applicable to other legal professional self-government entities have been examined through the prism of their internal structure and organisation. This issue has not been addressed in legal literature so far, probably due to the specialist nature of the issue. However, it has a key impact on legal professional government activities and the way, and particularly the quality, in which they carry out their public tasks. It is therefore not surprising that it sometimes also becomes the subject of internal debate within the community of self-government of legal professions.

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ORGANISATIONS OF SELF-GOVERNMENT OF LEGAL PROFESSIONS OF PUBLIC TRUST

Organisations of self-government of legal professions of public trust operate under the laws based on Article 17 (1) of the Constitution of the Republic of Poland.[1] The content of these laws points to the existence of various tasks of public character which have been entrusted to professional self-government entities. They are related to the representation of public trust profession practitioners (both in relation to citizens and their organisations, as well as before State authorities) and the exercise of supervision over a correct practice of these professions within the limits of public interest and for its protection. The consequence of this is the obligatory membership in the professional self-government. Professional self-government is one of the forms of decentralization in the performance of public tasks, implementing the constitutional principle of subsidiarity. It assumes independent performance of specific public tasks by individual communities (in this case, professional communities) in society more efficiently than State bodies.[2] Thus, professional self-government is a form of public administration entrusted to a professional organisation and acts as a "public authority" to the extent granted by law.[3]

The study analyses the organisation of self-government of legal professions of public trust, which include: advocates, attorneys-at-law, patent attorneys, tax advisers, notaries and bailiffs.[4] Attorneys-at-law and advocates are organised as professional self-government, bringing together in self-governing associations of attorneys-at-law and advocates.[5] The self-government of tax advisers and patent attorneys is organised on a similar basis. Public officers, who are notaries and bail-

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 443, as amended), hereinafter: the Polish Constitution. English translation of the Constitution at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 15.6.2022). See also M. Kępa, *Essence of Self-governance Illustrated with an Example of the Professional Self-government Body of Legal Counsels (in Poland)*, "Lex localis – Journal of Local Self-Government" 2021, vol. 19(4), pp. 906–907.

[2] Judgment of the Constitutional Tribunal of 7 March 2012, K 3/10, OTK ZU 2012, no. 3A, item 25.

[3] Judgment of the Supreme Administrative Court of 23 April 1991, II SA 238/91, ONSA 1992, no. 3–4, item 61. See also judgment of the Constitutional Tribunal of 18 February 2004, P 21/02, OTK ZU 2004, no. 2A, item 9.

[4] I disregarded the profession of probation officer, which is included in the legal professions related to law execution due to the nature and organisation of the self-government of probation officers formed by professional probation officers (Articles 43–51 of the Act of 27 July 2001 on probation officers, consolidated text, Journal of Laws 2020, item 167).

[5] Article 5 and Article 42 (2) of the Act of 6 July 1982 on attorneys-at-law (consolidated text, Journal of Laws 2022, item 1166), hereinafter: the AAL; Article 1 (2) of the Act of 26 May 1982 – Law on Advocates (consolidated text, Journal of Laws 2022, item 1184), hereinafter: the LA.

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iffs, as well as assistant bailiffs who do not have such a status, form respectively the notary self-government and the bailiff self-government.[6]

As of 1 January 2022, the most numerous self-government is that of attorneys-at-law, which is composed of 50,228 attorneys-at-law, while the self-government of advocates brings together 28,578 advocates, and the self-government of tax advisers has 8,886 members and the self-government of patent attorneys has 926 members. These figures, for the self-government organisations of attorneys-at-law, advocates and patent attorneys, should be increased by the number of trainees, who are members of the self-government. However, this is irrelevant to the considerations in question, as they do not have voting rights within their respective professional self-government organisations. The self-government of notaries is made up of 3,683 notaries, while the self-government of bailiffs brings together 2,110 bailiffs and 1,273 assistant bailiffs (who have limited voting rights[7]).

MANNER OF ORGANISATION OF SELF-GOVERNMENT OF LEGAL PROFESSIONS

Legal professional self-government organisations should be organised in such a way as to be able to perform the tasks defined for them by the Polish Constitution as effectively as possible. In principle, it is up to the legislature, but this does not preclude the adoption, under a statutory delegation, of acts of internally binding law which are to complement the statutory provisions relating to the organisation of a professional self-government. The purpose of adopting them is, i.a., to ensure the appropriate staffing of bodies performing public tasks, including laying down

[6] Article 26 (1) of the Act of 14 February 1991 – Law on Notaries (consolidated text, Journal of Laws 2020, item 1192, as amended), hereinafter: the LN; Article 2 (1) and Article 195 (1) of the Act of 22 March 2018 on bailiffs (consolidated text, Journal of Laws 2022, item 1168), hereinafter: the BA; Article 115 § 13 (3) of the Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2022, item 1138). Assistant bailiff is not a public official within the meaning of this provision, but he should be treated as such on the basis of criminal liability and criminal law protection, when he performs the duties of a deputy bailiff assigned to him, or conducts enforcement activities entrusted to him by the bailiff. As in resolution of the Supreme Court of 30 April 2003, I KZP 12/03, OSNKW 2003, no. 5–6, item 42.

[7] Assistant bailiffs may not stand as President and Vice-President of the National Council of Bailiffs (Article 199 of the BA), Chairman of the Council of the Chamber of Bailiffs (Article 208 (1) (1) of the BA), member of the National Audit Committee (Article 204 of the BA) or member of the disciplinary committee (Article 231 of the BA). The solution regarding the introduction of assistant bailiffs to the self-government of bailiffs and their status in the self-government has been critically assessed by P. Rączka (*Samorząd komorników sądowych w ustawie o komornikach sądowych z 22 marca 2018 r.*, [in:] *Perspektywy rozwoju samorządów prawniczych*, eds. P. Rączka, K. Rokicka-Murszewska, Toruń 2020, pp. 54–55).

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rules for the exercise of functions or standing as a candidate (which affects the eligibility to stand for election) for the functions and legal bodies of professional self-government to an extent not regulated by the legislature.

The organisation of legal professional self-governing associations is structurally based on a system of local organisational units and central structures representing all members. This two-tier organisation stems from the corporate nature of the organisational units. It should be noted that the attribute of legal personality is not necessarily attached to an organisational unit. At the local level, legal personality is attributable to organisational units of the self-government of attorneys-at-law, advocates, notaries and bailiffs (although in the latter case the law also grants the local organisational unit the status of a body of the self-government of bailiffs). The (territorial) area of operation of local organisational units in the self-government organisations of attorneys-at-law and advocates is determined by internal regulations issued by these self-government organisations,[8] while in the case of the self-government of bailiffs and notaries it is statutorily adapted to the divisions of court system at the level of the districts of courts of appeal.[9] This also means that the number of local organisational units in the self-government of attorneys-at-law and advocates is set out in the internal regulations of these self-government organisations (as a side note, it can be mentioned that it has not changed since 1983), and in the case of bailiff and notary self-government organisations it is 11, which corresponds to the current number of districts of appellate courts. Local organisational units of self-government organisations of tax advisers and patent attorneys do not have legal personality, which is only assigned to their central organisational units. On the other hand, in the self-government organisations of advocates, bailiffs and notaries at the central level, legal personality is attributed to the body indicated in the law. Therefore, the self-government of attorneys-at-law has a special structure, in which both local organisational units and the central organisational unit have legal personality. This determines the specific organisation of the self-government of attorneys-at-law, whose governing body at the head of the central organisational unit should *de facto* represent not only all attorneys-at-law, but also local organisational units equipped with a high degree of independence, which in turn creates a quasi-federalist structure of the self-government.[10]

[8] Article 38 and Article 58 (4) of the LA; Article 49 (3) and Article 60 (9) of the AAL. The power of the bodies of the self-government organisations of advocates to issue internal regulations concerning the determination of the number of bar associations and their area of operation is challenged as incompatible with the Polish Constitution in the request of 22 April 2022 of a group of 9th term Sejm deputies submitted to the Constitutional Tribunal.

[9] Article 28 § 1 of the LN; Article 205 (1) of the BA.

[10] T. Schefller, [in:] *Ustawa o radcach prawnych. Komentarz*, ed. T. Scheffler, Warszawa 2018, p. 650.

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Legal professional self-government organisations (including their organisational units) operate through their bodies, the tasks of which are determined by generally applicable regulations. While the tasks of central-level bodies are strictly enumerated in legislation on professional corporations, the scope of authority of local organisational units is generally open-ended (although some public tasks have been explicitly assigned to them as exclusive). The regulations concerning the competences of legal professional self-government bodies are contained in the acts governing their structure and organisation. The exclusive tasks of the central-level bodies of the legal self-government include, i.a., delivering opinions on draft legal acts and submitting proposals and postulates related to making and applying the law,[11] whereas the exclusive tasks of local-level bodies and units with legal personality include, i.a., organisation and running the training for trainees in the profession.[12] The legislation also contains the general tasks of legal professional self-government organisations, the implementation of which requires cooperation between bodies at different levels.[13]

The situation becomes somewhat more complicated in the event that central--level authorities and local-level authorities act within the scope of their respective *imperium*, e.g. in the context of proceedings in individual cases conducted by the bodies of the legal professional self-government indicated in the Act, or even their *dominium*, e.g. with regard to disposing of and managing separate property of self-government organisational units having a separate legal personality. Against this background, the prohibition on holding multiple functions or mandates in one hand (incompatibility) in legal professional self-government bodies appears to be relevant. These considerations are confined only to functions or mandates held as part of the legal professional self-government (from the subjective perspective the so-called formal incompatibility), and they ignore the issues of their incompatibility with functions held and occupations undertaken outside the legal professional self-government. This is the subject of a separate debate that is currently under way (within the self-government of advocates, and more recently also in the

[11] Cf. Article 58 (9) of the LA; Article 60 (2) of the AAL; Article 40 § 1 (b) of the LN; Article 202 (1) (2) of the BA; Article 56 (2) (7) of the Act of 5 July 1996 on tax consulting (consolidated text, Journal of Laws 2021, item 2117), hereinafter: the ATC; Article 51 (2) of the Act of 11 April 2001 on patent attorneys (Journal of Laws 2021, item 944, as amended), hereinafter: the APA; A. Bereza, *Participation of Legal Profession Self-Government Organizations in the Process of Law-Making*, "Barometr Regionalny. Analizy i Prognozy" 2018, vol. 16(5), pp. 51–53.

[12] Cf. Article 44 (1) of the LA; Article 38 (1) of the AAL; Article 73 of the LN; Article 94 (1) of the BA.

[13] Sometimes, also an informal cooperation with various public authorities, an example of which may be the organisation of the system of legal aid. For more details, see A. Bereza, *Cooperation of the Central Government, Local Government and Self-Government of Legal Professionals in Organising the System of Legal Aid in Poland*, "Lex localis – Journal of Local Self-Government" 2021, vol. 19(3), pp. 740–748.

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self-government of tax advisers) in terms of ethical and deontological standards to protect the axiology of the profession, including the maintenance of guarantees of its independence.[14]

BASES OF THE RESTRICTIONS IN HOLDING FUNCTIONS IN LEGAL PROFESSIONAL SELF-GOVERNMENT ORGANISATIONS

Functions in the self-government of legal professions are the positions listed in the law governing the professional self-government. The objective scope of this concept cannot be extended to all members of the statutory bodies of self-government, unless the law provides otherwise. Restrictions on the eligibility for functions in some legal professional self-government organisations appeared in 2005. In the self-government organisations of attorneys-at-law and notaries, statutory restrictions have been imposed on the prohibition of holding the same office for more than two consecutive terms. In the self-government of notaries, these restrictions concerned the president and vice-president of the notarial chamber, and in the self-government of attorneys-at-law all the functions in the self-government bodies, although with time an exception to this rule was made for the disciplinary bodies because of the need to professionalise them. The intention of the legislature, when introducing these restrictions, was to prevent the excessive concentration of certain functions held by the same persons. The problem did not concern the self-government of advocates as since 1982 such restrictions had already existed and concerned functions in the Executive Committee of the Polish Bar Council and the executive committees of district bar councils.[15]

A much more serious issue is the prohibition of the simultaneous holding of functions in legal professional self-government organisations, and it does not necessarily mean that the eligibility of a member of the self-government to stand as a candidate for election is restricted. This prohibition seeks to exclude the possibility of persons performing these functions in different legal or factual situations which would give rise to or could give rise to a suspicion of a broadly understood conflict of interest and risks arising from the accumulation of functions, including the risk

[14] P. Kardas, J. Giezek, *O etycznych i deontologicznych podstawach obowiązującego adwokatów zakazu łączenia zajęć – uwagi na marginesie uchwały NRA z 21.09.2019 r. zmieniającej § 9 Zbioru zasad etyki adwokackiej i godności zawodu*, "Palestra" 2019, no. 10, pp. 22–36. Resolution of the 6th National Congress of Tax Advisers of 16 January 2022 amending the ethical rules for tax advisers by introducing, i.a., a prohibition of the provision of services to the tax authorities or offices serving those authorities in connection with the settlement of individual cases of taxpayers, with the exception for the drafting of tax opinions and educational activities, has been suspended in this respect by the supervisory authority – the Minister of Finance.

[15] Article 11 (3) of the LA.

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of detriment to the reliability of the tasks performed and the risk of disturbing the efficiency of operation of the professional self-government (not to mention possible abuses of power).

The restriction on holding public office should have a statutory basis, as it constitutes an interference with the sphere of freedoms and rights of the individual. Should this principle be applied to functions in professional self-government organisations? This is not supported by the current practice related to adopting internal regulations of legal professional self-government organisations, which is not questioned by the supervisory authority. These matters are only occasionally regulated at the statutory level. They are more often regulated by internal regulations of legal professional self-government organisations, issued based on an explicit statutory delegation. Certainly, they cannot be adopted solely on the basis of Article 17 (1) of the Polish Constitution, which assigns the functions and main tasks of self-government organisations of professions of public trust.[16]

The bye-laws of the legal professional self-government institutions impose different restrictions (incompatibility of functions) or additional requirements (requirement of a certain length of professional practice) to run for functions in the professional self-government or restrictions in their simultaneous holding to ensure such an organisation of legal professional self-government that would make it capable of fulfilling the obligations arising from the generally applicable regulations. Against this background, the question arises as to whether a legal professional self-government organisation representing under the Polish Constitution its members who practice a profession of public trust may regulate, as an exercise of its organisational autonomy, the issue of the incompatibility of functions in its internal acts issued on the basis of the statutory delegation. In the author's opinion, this is acceptable due to the nature of these internal provisions, provided that they do not violate the rules set out in the statutory laws governing the system of legal professional self-government.[17] The adoption of another construct would mean that a number of provisions of the currently binding acts of internal law concerning the corporate interior of legal professional self-government organisations, concerning the structure or limitations in holding various functions or candidature for these functions (so-called ineligibility, which means a real restriction of the right to stand as a candidate for election), violates the law, especially the constitutional rule concerning the holding of public posts.

[16] J. Ciapała, *Wpływ aktów prawnych samorządów zawodowych i gospodarczych na konstytucyjne wolności działalności gospodarczej oraz wyboru i wykonywania zawodu. Uwagi w kontekście konstytucyjnego statusu samorządów*, "Studia Iuridica Lublinensia" 2014, vol. 22, p. 213.

[17] Article 43 (3) of the AAL; Article 11 (3) of the LA; Article 32 § 3 of the LN; Article 198 (2) of the BA; Article 44 (4a) of the APA. So far, this principle has not been introduced in the self-government of tax advisers.

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The incompatibility of functions in the self-government of legal professions performing public tasks has similar systemic objectives as those attributed to the incompatibility of different offices in public authorities. It serves to separate the implementation of tasks which in organisational and functional terms cannot be performed by the same person (for example, functions in disciplinary bodies of legal professional self-government or resolution-taking bodies – combined with holding positions in the bodies controlling them), provides institutional guarantees for the proper performance of their duties, prevents conflicts of interest and eliminates corruption, ensures transparency in decision-making and is an element of rational management.[18] These assumptions underpin an analysis of the organisation and functioning of the organisations of self-government of legal professions, which allows conclusions to be drawn and amendment proposals to be formulated. This is particularly true of the self-government of attorneys-at-law, which is the domain of a limited debate allowed within the procedural democracy framework. Paradoxically, this phenomenon stems from a broad authorisation to regulate the rules of staffing the governing bodies of the self-government of attorneys-at-law and, consequently, unfounded fears of changes of people professionally dealing with self-government activities.

PROHIBITION ON HOLDING MULTIPLE FUNCTIONS AND MANDATES IN GOVERNING BODIES ON THE BACKDROP OF THE ORGANISATION OF LEGAL PROFESSIONAL SELF-GOVERNMENT

A model solution can be observed in the self-government of advocates, the more so as the unregulated sphere is accompanied by an electoral culture developed over the years. The organisation of the self-government of advocates is co-created by the bodies of the advocates' national Bar and the bodies of regional bar councils and collective law firms.[19] The bodies of the Bar are: the National Congress of the Bar, the Polish Bar Council, the High Disciplinary Court, the Disciplinary Commissioner of the Bar and the High Auditing Committee, while the bodies of the regional bar associations (there are currently 24 of them) are the Assembly of the Bar, the District Bar Council, the Disciplinary Court, the Disciplinary Commissioner and the Auditing Committee.[20] The legal personality is conferred on: collective law firms, district bar associations and the Polish Bar Council,[21] which has the status of a body. The Bar's

[18] M. Zubik, *Ustrojowe założenia niepołączalności mandatu parlamentarnego*, "Przegląd Sejmowy" 2008, no. 4(87), p. 107.

[19] Collective law firms (Pol. *zespoły adwokackie*), along with their bodies listed in Article 30 of the LA, are a more and more extinct form of running advocate's business.

[20] Article 9 (1) and Article 39 of the LA.

[21] Article 10 of the LA.

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bodies are elected by the National Congress of the Bar, while the Bar's bodies and delegates to the National Congress are elected by the assemblies of a district bar associations. The law specifically defines the composition of the Polish Bar Council. In addition to the President of the Polish Bar Council, it is made up ex officio of the deans of district bar councils and of advocates elected by the National Congress of the Bar, in the number corresponding to the number of the deans of the district bar councils, but no more than eight advocates from the same bar association.[22] This mechanism of staffing the most important body of the Bar guarantees a real influence of all bar associations on the direction of its activities. The Act expressly prohibits the compatibility of statutory mandates in the bodies of the self-government of advocates (with the exception of the head of collective law firm).[23] This means not only a ban on holding multiple functions in bodies, but also of membership in the statutory bodies of the self-government of advocates, which undoubtedly affects the achievement of the objectives that this prohibition is intended to meet. It also ensures the transparency of the decision-making process in individual cases, which are decided by the Praesidium of the Polish Bar Council in an appeal procedure. It is composed of the President of the Polish Bar Council and two Vice-Presidents, the Secretary, the Treasurer, the Deputy Secretary and two members, all selected from among the members of the Polish Bar Council.[24] These persons do not hold any other mandates, let alone functions in the statutory bodies of the self-government of advocates, including the district bar council, which acts as a body of first instance in individual cases.

The solutions in the organisations of self-government of bailiffs and notaries are similar due to a similar, but non-identical organisational structures, as well as the principle of holding elections at the local level.

The bodies of the self-government of bailiffs at the central level are the National Council of Bailiffs and the National Audit Commission, while at the local level the bodies chambers of bailiffs are: general assemblies of chambers of bailiffs, councils of chambers bailiffs and audit committees. All these bodies are elected by the general assemblies of chambers of bailiffs, according to the rules set out in statutory law.[25] Legal personality is possessed by chambers of bailiffs and the National Council of Bailiffs, having the status of bodies of the self-government of bailiffs.[26] The Act prohibits holding multiple membership in elected self-government bodies of bailiffs.[27] Despite the systemic flaws in the catalogue of bodies (the catalogue of

[22] Article 57 (1) of the LA.

[23] Article 11 (5) of the LA.

[24] Article 59 (1) of the LA.

[25] Article 196 (1) (1) and (2), Article 198 (1), Article 204 (2) and Article 206 of the BA.

[26] Article 196 (1) and (3) of the BA. For a critical assessment on classifying the chamber of bailiffs as a body of the self-government of bailiffs, see P. Rączka, *op. cit.*, pp. 58–59.

[27] Article 196 (2) of the BA. Chambers of bailiffs have been classified as bodies of the self-government of bailiffs (Article 196 (1) (3) of the BA) but they are not elected bodies.

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bailiffs' self-government bodies and a separate catalogue of bodies of chamber of bailiffs, which has been included in the bodies bailiff's self-government bodies), this prohibition should apply to all elected bodies of bailiffs' self-government and bodies of chambers of bailiffs.[28] The ban on holding multiple mandates also results in the fact that the President and the Vice-President of the National Council of Bailiffs, elected from among bailiffs – members of the National Council of Bailiffs, and the chairman and vice-chairman of the council of a chamber of bailiffs, do not perform any other functions in the elected bodies of the self-government of bailiffs. This prohibition has been introduced, according to views presented in the literature, to prevent bailiffs from assuming too many responsibilities in the self-government and promote transparency in the work of self-government bodies, and in the case of auditing bodies and the prohibition of combining functions in councils of chambers of bailiffs and the National Council of Bailiffs, it results from the need to ensure the independence and impartiality of their members.[29]

The body of the self-government of notaries, elected at the central level is the National Council of Notaries, and at the local level – the councils of chambers of notaries. Together they form the self-government of notaries. These bodies are elected by the general meetings of notaries in chambers of notaries, according to the rules set out in the Act. The President of the National Council of Notaries is elected by the National Council of Notaries from among their members, and the presidents and vice-presidents of the councils of chambers of notaries are elected by respective general meetings of notaries of chambers of notaries.[30] Chambers of notaries and the National Council of Notaries, having the status of a body, have legal personality.[31] The Act does not provide for prohibitions of holding multiple functions, but such problems did not arise in the electoral practice. In view of the situation of holding elections concurrently, it does not happen that candidates for the National Council of Notaries also apply for the functions of president, vice-president or member of the council of the chamber of notaries. It is even more clearly visible in the standing as a candidate for members of disciplinary courts (having

[28] A. Powałowski, [in:] *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Kodeks Etyki Zawodowej Komornika Sądowego. Komentarz*, eds. J. Święczkowski, M. Święczkowska-Wójcikowska, Warszawa 2020, p. 579.

[29] M. Rączkowski, [in:] *Ustawa o komornikach sądowych. Ustawa o kosztach komorniczych. Komentarz*, eds. M. Simbierowicz, M. Świtkowski, LEX/el. 2021. The analysis does not cover a separate disciplinary division, which includes a disciplinary committee (which is not a body of bailiffs' self-government), whose members are appointed by the National Council of Bailiffs from among candidates proposed by the council of each chamber of bailiffs (Articles 230 and 231 of the BA) and the disciplinary commissioner and his deputies appointed by the Minister of Justice as set out in Article 236 (1) and (3) of the BA.

[30] Article 26 § 2, Article 30 § 1, Article 32 § 1 and Article 39 §§ 1 and 2 of the LN. See also A. Oleszko, *Prawo o notariacie. Komentarz*, vol. 1: *Ustrój notariatu*, Warszawa 2016, p. 531, 543, 577.

[31] Art. 26 § 3 of the LN.

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the status of organisational units of the notary self-government) or for the function of disciplinary commissioner, as the disciplinary division has been separated from the structure of notary chambers.[32] Members of disciplinary courts and the Higher Disciplinary Court, as well as disciplinary commissioners, are elected by the general meetings of notaries of chambers of notaries, while the disciplinary commissioner at the Higher Disciplinary Court is elected by the National Council of Notaries.[33]

Another structure is the self-government of tax advisers, i.e. the National Chamber of Tax Advisers (the NCTA), which has legal personality. Its bodies are the National Convention of Tax Advisers, the National Council of Tax Advisers, the National Audit Committee, the High Disciplinary Court, the Disciplinary Court and the Disciplinary Commissioner.[34] The National Convention of Tax Advisers elects the Chairman of the National Council of Tax Advisers, the NCTA bodies and the deputies of the Disciplinary Commissioner. The numerical composition of the authorities and the number of deputies is determined by the National Convention of Tax Advisers in a separate resolution adopted under a statutory authorisation.[35] The National Council of Tax Advisers is composed of the Chairman and 37 members, and its Praesidium comprise the Chairman and the Vice-Chairmen (currently 5), the Secretary and the Treasurer elected by the National Council of Tax Advisers from among their members.[36] By a resolution of the National Convention of Tax Advisers adopted on the basis of a statutory authorisation, local structures were established in the form of regional NCTA branches (currently 16) and branches of the Disciplinary Court, whose areas of competence cover the territorial scope of regional NCTA branches. The regional branches do not have legal personality, nor are they NCTA bodies.[37] The NCTA regional branches perform their tasks through general assemblies and the board of the NCTA regional branch with 5 to 15

[32] A. Oleszko, *op. cit.*, pp. 829–832.

[33] Article 30 § 1 (3), Article 40 § 1 (5), Article 53 § 2 and Article 55 of the LN. In May 2022, a draft law amending the Law on Notaries and amending certain other laws (UD 383) was introduced, which is currently in the inter-ministerial consultation phase, under which disciplinary commissioners are to be appointed by the Minister of Justice, i.e. the Disciplinary Commissioner for the Notaries elected from among three candidates presented by the National Council of Notaries and its deputy (not more than three) at the request of the National Council of Notaries (Article 1 (6) and (19) of the draft Act of 17 May 2022). These solutions are modelled on Article 236 (1) and (3) of the BA.

[34] Article 47 (1), Article 48 (1) and Article 49 (1) of the ATC.

[35] Article 51 (1) (2) of the ATC.

[36] Article 51 (1) (3) and Article 54 (2) of the ATC; § 22 (2) and (3) of the Statutes of the National Chamber of Tax Advisers (Annex to Resolution 11/2022 of the National Chamber of Tax Advisers of 14 February 2022 on the adoption of the consolidated text of NCTA Statutes), hereinafter: Statutes of the NCTA.

[37] Article 49 (2) of the ATC; Resolution of the First National Convention of Tax Advisers of 27 January 2002; T. Miłek, [in:] *Ustawa o doradztwie podatkowym. Komentarz*, ed. A. Mariański, Warszawa 2015, p. 226, 231.

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members elected by the assemblies. The board elects from among its members the chairman and his deputies, the secretary and the treasurer.[38] The general meetings of the regional branches elect also delegates to the National Convention, members of the branches of the Disciplinary Court, who together with the members elected by the National Convent form the Disciplinary Court, and submit candidates to the NCTA bodies (except the Disciplinary Court).[39] The Act contains prohibitions on accumulating functions and membership in bodies. Members of the Court may be members of only one instance of the Court and may not hold other functions in NCTA bodies (with the exception of the National Convention of Tax Advisers and the Convention authorities).[40] Membership in the National Audit Committee cannot be combined with a function in another body of the NCTA (except for the National Convention of Tax Advisers), which is supposed to guarantee full independence of the National Audit Committee from other bodies subject to its control.[41] Due to the specificity of the profession, the restrictions on the right to stand for election went even further in the internal regulations (the Statutes of the NCTA) which forbade tax advisers to stand for election to the Audit Committee in the term immediately following the term in which they held a position in the Praesidium of the National Council of Tax Advisers or were persons authorised to enter into financial commitments on behalf of the National Council of Tax Advisers.[42] It was also introduced the prohibition on holding multiple mandates, in the light of which a tax adviser may be a member of only one of the NCTA's bodies (with the exception of the National Convention of Tax Advisers).[43] In addition, it was forbidden in the same term of office – which is important at the level of the deliberations – to combine the functions of a member of the board of a regional NCTA branch and a member of the NCTA bodies (with the exception of the National Convention of Tax Advisers), as well as the function of deputy Disciplinary Commissioner and a member (elected by the general meeting) of a branch of the Disciplinary Court.[44] Thus, within the framework of organisational autonomy, not only the principle of separation of the disciplinary division was introduced, but also the principle of incompatibility for NCTA bodies and local structures established on the basis of internal regulations. These are far-reaching solutions, aimed at maintaining corporate order to ensure proper functioning of the tax advisers self-government in order to properly carry out the tasks entrusted to it.

[38] § 45, § 47 (1) (1) and § 48 (1) and (3) of the NCTA Statutes.

[39] § 5 (11), § 35 (2) and § 47 (1) (3) of the NCTA Statutes.

[40] Article 65 (3) of the ATC.

[41] Article 59 (2) of the ATC; A. Michalak, [in:] *Ustawa o doradztwie podatkowym. Komentarz*, Warszawa 2012.

[42] § 8 (4) indent 2 of the Statutes of the NCTA.

[43] § 13 (1) of the Statutes of the NCTA.

[44] § 13 (2) of the Statutes of the NCTA.

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The self-government of patent attorneys has a similar structure to that of tax advisers. It is the Polish Chamber of Patent Attorneys (the PCPA), which has legal personality.[45] The statutory bodies of the self-government are: the National Convention of Patent Attorneys, National Council of Patent Attorneys, President of the Polish Chamber of Patent Attorneys, Audit Committee, Disciplinary Court of Appeal, Disciplinary Court, Disciplinary Proceedings Representative, regional assemblies of patent attorneys and regional councils of patent attorneys.[46] The powers of the National Convention of Patent Attorneys include: the adoption of the Statutes of the Polish Chamber of Patent Attorneys, which defines the detailed organisational structure, number and boundaries of districts and detailed rules for the operation of the self-government and its bodies, the procedure for appointing and dismissing members of these bodies and supplementing their composition, as well as general rules for determining the number of delegates to the National Convention of Patent Attorneys.[47] On its basis, local structures of the self-government of patent attorneys were established in the form of districts (currently 12), which do not have legal personality and are not self-government bodies. At the district level, there is a regional assembly of patent attorneys that elects the regional council and its dean.[48] The regional council may additionally elect deputy deans and a secretary from among its members.[49] The National Convention of Patent Attorneys also determines the rules for holding elections to self-government bodies and the number of members of these bodies (in practice, the adopted Statutes regulate this matter) and elects self-government bodies at the central level and deputies of the Disciplinary Commissioner.[50] The Act defines the composition of the National Council of Patent Attorneys, which consists of: the President of the Polish Chamber of Patent Attorneys, deans and members elected by the National Convention of Patent Attorneys. The detailed composition of the National Council has been defined by the Statutes in such a way (12 deans and 13 members elected by the National Convention) that it guarantees a real influence of representatives of individual districts on the directions of its work.[51] This also applies to other bodies at the central level. The executive body of the National Council of Patent

[45] Article 7 (1) and (3) of the APA.

[46] Article 44 of the APA.

[47] Article 45, Article 48 (1) and (2) (1) of the APA. This authorisation has been further specified in Article 51a (1) (5), Article 54 (3) (7), Article 54 (6) (5) of the APA. See E. Tkaczyk, *Ustawa o rzecznikach patentowych. Komentarz*, Warszawa 2012, p. 195.

[48] § 89, § 90 and § 92 (1) (1) and (2) of the Statutes of the Polish Chamber of Patent Attorneys, being an Annex to the Resolution of the 1 Extraordinary 13th National Convention of Patent Attorneys of 21 May 2021, hereinafter: the Statutes of the PCPA.

[49] Article 54 (5) APA; § 95 (1) of the Statutes of the PCPA.

[50] Article 48 (2) (4) to (6) of the APA; E. Tkaczyk, *op. cit.*, pp. 195–196, 201.

[51] § 18 (1) of the Statutes of the PCPA.

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Attorneys is the Praesidium of the Council, acting as a management body, composed of: the President of PCPA and vice-presidents (currently 2), the secretary, treasurer and members elected by the National Council of Patent Attorneys from among its members.[52] The statute introduces a number of prohibitions on holding multiple functions and positions in self-government bodies, which is related to the separation between the auditing and disciplinary bodies. Members of the Audit Committee may not be members of other self-government bodies (this does not apply to participation in the National Convention and regional assemblies) or perform the function of Deputy Disciplinary Commissioner. It was forbidden to combine the functions of the Disciplinary Commissioner, his deputies and membership in disciplinary courts and membership in disciplinary courts with membership in the National Council or regional council.[53] These regulations are sufficient, and the problem of combining national and regional functions in the self-government of patent attorneys does not arise in practice.

The organisation of the self-government of attorneys-at-law involves the existence of the following organisational units: the National Bar Association of Attorneys-at-Law and the district bar associations of attorneys-at-law (currently 19), which have legal personality.[54] This differs from the structure of the advocates' self-government, in which at the central level the legal personality is held by a body, which is the Polish Bar Council. The solution adopted in the self-government of attorneys-at-law is somewhat troublesome in legal transactions and in the construction of adopting the budget of the National Bar Council of Attorneys-at-Law, which is only an organ of the National Bar Association of Attorneys-at-Law (without legal personality granted, but with budgetary capacity). The bodies of the self-government are: the National Assembly of Attorneys-at-Law, the National Bar Council of Attorneys-at-Law, the Higher Audit Commission, the Higher Disciplinary Court, the Chief Disciplinary Commissioner (at the level of the National Bar Association of Attorneys-at-Law) and the assembly of the district bar associations of attorneys-at-law, the district bar council of attorneys-at-law, the district audit committee, the district disciplinary court and the disciplinary commissioner (at the level of the district bar associations).[55] The bodies of the National Bar Association of Attorneys-at-Law are elected by the National Assembly of Attorneys-at-Law, while the bodies of the district bar associations of attorneys-at-law and delegates to the National Assembly are elected by the Assembly of the District Bar Association of Attorneys-at-Law, which may be replaced by the meeting of delegates who are elected in electoral districts. In this way, the self-government of attorneys-at-law in Poland, due to its

[52] Article 50 of the APA; E. Tkaczyk, *op. cit.*, pp. 190–191.
[53] § 20 of the Statutes of the PCPA.
[54] Article 5 (2) of the AAL.
[55] Article 42 of the AAL.

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size, is the only one to elect bodies at a local level by means of two-tier election. The rules for elections to the self-government bodies, the number of members of those bodies and the procedure for their dismissal, as well as the rules for passing resolutions by the self-government bodies, are adopted by the National Assembly of Attorneys-at-Law based on statutory authorisation (hereinafter: the electoral ordinance of the self-government of attorneys-at-law).[56] The resolution sets out the numerical composition of the central-level bodies[57] and a range-specified numerical composition of the bodies at the local level, with the meeting of delegates being authorised to specifically determine it. The legislature did not specify the numerical composition of the National Bar Council of Attorneys-at-Law, indicating only that this body consists of: the President of the National Bar Council of Attorneys-at-Law, attorneys-at-law elected by the assemblies of district bar associations of attorneys-at-law, the so-called permanent members (19 members), and other members elected by the National Assembly of Attorneys-at-Law. In 2016, the number of members of the National Bar Council of Attorneys-at-Law elected by the National Assembly of Attorneys-at-Law was determined in the electoral ordinance for the self-government of attorneys-at-law at 49,[58] and the rationale of this solution was to ensure that all district bar associations (taking into account the numbers of their respective members) are duly represented in the National Bar Council of Attorneys-at-Law. However, no mechanisms were introduced to ensure the implementation of this assumption and to counterbalance the dominance of a few district bar associations with a majority of delegates (selected on the basis of the proportionality principle adopted in the internal regulations of the self-government) at the National Assembly of Attorneys-at-Law. In 2020, the election of members of the National Bar Council of Attorneys-at-Law was determined by a backroom-deal majority formed at the National Assembly of Attorneys-at-Law, ignoring candidates coming from certain district bar associations. This resulted in certain district bar associations (regardless of their size) being overwhelmed and the loss of the statutory significance of their permanent members in the decision-making process in the National Bar Council of Attorneys-at-Law, including the election of the Board – the executive body of the National Council of Attorneys-at-Law. A similar practice also concerned the election to other bodies of the National Bar Association

[56] Article 57 (4) of the AAL.

[57] In addition to the National Assembly of Attorneys-at-Law, due to the authorisation under Article 56 (2) of the AAL to adopt a resolution of the National Bar Council. The concurrence of the authorisations under Article 56 (2) of the AAL and Article 57 (4) of the AAL brings specific problems, and their execution raises reasonable doubts. For more details, see K. Dąbrowski, P. Mijal, *Dylematy procedury wyborczej do organów samorządu radcowskiego*, [in:] *Dylematy polskiego prawa wyborczego*, eds. J. Ciapała, A. Pyrzyńska, Warszawa 2021, pp. 290–292.

[58] § 28 (1) of the electoral ordinance for the self-government of attorneys-at-law.

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of Attorneys-at-Law, though it stirred much less controversy.[59] In the context of the functioning of the National Council of Attorneys-at-Law, the electoral act carried out in such a manner, disregarding the customary rules yet formally correct, bring the implementation of the function of representation of the entire self-government of attorneys-at-law into question.[60] This phenomenon is undoubtedly related to the lack of a prohibition of holding multiple offices in one hand in the self-government bodies, which leads to its oligarchization, and thus posing the danger that internal check and balance mechanisms eventually disappear.

DILEMMAS RELATED TO HOLDING MULTIPLE FUNCTIONS AND MANDATES IN THE BODIES OF THE BAR OF ATTORNEYS-AT-LAW

In view of the above, a question arises: May the prohibition on holding multiple functions in the self-government organisations of legal professions be governed by bye-laws adopted on the basis of a statutory authorisation, or does it require direct intervention by the legislature? To answer this question, we need to analyse the current practice of the self-government of attorneys-at-law and the nature of the acts of internal law of the self-government.

The electoral ordinance for the self-government of attorneys-at-law restricted the possibility of simultaneously running for a position in the horizontal structure of the district bar association to more than one of its organs and the function of dean (this does not apply to running for a delegate to the assembly of a district bar association), as well as to more than one of the bodies of the National Bar Association of Attorneys-at-Law and to the function of the President of the National Bar Council of Attorneys-at-Law (not applicable to running for a delegate to the of Attorneys-at-Law).[61] Such a restriction raised no doubt, as did the provision in force until 2016 to deprive an attorney-at-law of his eligibility to stand as a candidate during the period of suspension of his right to practise as an attorney-at-law imposed by the disciplinary court.[62]

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[59] This concerns the Higher Audit Committee and the Higher Disciplinary Court whose composition was determined as respectively 19 and 38 members (§ 28 (3) and (4) of the electoral ordinance for the self-government of attorneys-at-law). This numerical composition was also established in 2016 based on the need to ensure due representation for all district bar associations, provided that the delegates propose such candidates.

[60] More on this topic, see K. Dąbrowski, P. Mijal, *op. cit.*, pp. 296–297, 300.

[61] § 5 of the electoral ordinance for the self-government of attorneys-at-law. At the same time, a reservation was made regarding the possibility of running for another body by an attorney-at-law who had not previously been elected as the dean of the council (at the meeting of delegates) or the President of the National Bar Council of Attorneys-at-Law (at the National Assembly of Attorneys-at-Law).

[62] § 4 (4) (1) of the electoral ordinance for the self-government of attorneys-at-law (Resolution No. 10/2010 of the National Assembly of Attorneys-at-Law of 6 November 2010). Pursuant to

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In 2015, the resolutions of the National Bar Council of Attorneys-at-Law introduced a ban on the exercise by the judges of disciplinary courts, the Chief Disciplinary Commissioner and his deputies elected by the National Bar Council of Attorneys-at-Law and the disciplinary officers and their deputies elected by district bar councils of attorneys-at-law – other functions in the bodies of the self-government of attorneys-at-law (so-called horizontal incompatibility).[63] The formal basis for adopting such a solution was the statutory delegation to adopt the rules of procedure of the self-government and its bodies, and its justification was the striving for separation (although inconsistently, since the ban should concern the exercise of mandates in other bodies of the self-government) of the disciplinary division of the self-government.[64] At the same time, it was explicitly stipulated that this prohibition does not apply to judges of disciplinary courts, the Chief Disciplinary Officer and disciplinary ombudsmen and their deputies who perform their functions on the date of entry into force of the aforementioned.[65] The ban entered into force in 2016 with the commencement of the 10th term of the Bar of attorneys at law and has not been repealed so far.

It was the moment the discussion about limiting the effects of holding in one hand multiple functions in other bodies of the self-government began, but the changes proposed at the forum of the National Bar Council of Attorneys-at-Law used to be

§ 1 (2) (a) and (b) of Resolution No. 6/2016 of the National Assembly of Attorneys-at-Law of 4 November 2016, § 4 (4) (1) and added item 1a of the electoral ordinance for the self-government of attorneys-at-law were given a wording consistent with the content of the new Article 64 (2g) and (2h) of the AAL. These provisions of the electoral ordinance concern the deprivation of an attorney-at-law of the right to stand as a candidate for a period of 6 years from the date of the disciplinary decision suspending the right to practice the profession of attorney at law becomes final and for a period of 3 years from the date on which the disciplinary decision on the penalty of reprimand or financial penalty becomes final.

[63] § 4 (3) of Resolution No. 98/IX/2015 of the National Bar Council of Attorneys-at-Law of 11 September 2015 on the rules of operation of the Chief Disciplinary Commissioner, disciplinary commissioners and their deputies, and the procedure and method of selecting deputies of the Chief Disciplinary Commissioner and deputy disciplinary commissioners; § 2 (2) of the Rules of procedure of disciplinary courts of the self-government of attorneys-at-law, attached to Resolution No. 99/IX/2015 of the National Bar Council of Attorneys-at-Law of 11 September 2015 on the Rules of procedure of disciplinary courts of the self-government of attorneys-at-law.

[64] Article 60 (8) (a) of the AAL. The second delegation – having less importance for the analysed problem – contained in Article 60 (9a) of the AAL, concerned the adoption of the rules of operation of deputies of the Chief Disciplinary Commissioner and deputy disciplinary commissioners as well as the procedure and method of their election.

[65] § 3 of Resolution 99/IX/2015 of the National Bar Council of Attorneys-at-Law of 11 September 2015 on the Rules of procedure of disciplinary courts of the self-government of attorneys-at-law; § 37 of the Resolution No. 98/IX/2015 of the National Bar Council of Attorneys-at-Law of 11 September 2015 on the rules of operation of the Chief Disciplinary Commissioner, disciplinary commissioners and their deputies, and the procedure and method of selecting deputies of the Chief Disciplinary Commissioner and deputy disciplinary commissioners.

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rejected. Requests for individual reports on the tasks performed by the members of the Board of the National Bar Council of Attorneys-at-Law were ignored. In 2018, under the slogan of amelioration in the Bar of attorneys-at-law, an Extraordinary National Assembly of Attorneys-at-Law was convened at the request of eight district bar councils, during which a debate was held on the incompatibility of mandates in the vertical structure of the self-government bodies (so-called vertical incompatibility) similar to solutions existing in other legal professional self-government organisations. Although this demand was limited solely to functions in the self-government bodies, it was perceived within the community as a threat to those who at that time were holding positions in the Board of the National Bar Council of Attorneys-at-Law. The proponents assumed that these changes could be carried out in the internal regulations of the self-government of attorneys-at-law as an exercise of its organisational autonomy, while opponents of the proposed solution accused the proponents of seeking an extra-statutory limitation of the right to stand as a candidate (eligibility) for positions in the Bar. Ultimately, this issue was not discussed in the absence of the adoption of the agenda and the immediate closure of the Extraordinary National Assembly of Attorneys-at-Law. It should be pointed out that the fact that delegates to the National Assembly were deprived of the right to speak or submit new applications calls into question both the legality of such behaviour by those presiding the Extraordinary National Assembly and the condition of the self-government as such.

The previously existing restrictions on the right to stand as a candidate in the electoral ordinance adopted by the National Assembly of Attorneys-at-Law, as well as the detailed provisions contained therein regarding the rules for the election of body members were not questioned by the supervisory authority. This also applies to the incompatibility to guarantee partial separation of the disciplinary division in resolutions of the National Bar Council of Attorneys-at-Law based on the statutory delegation regarding the issuance of regulations for the activities of the self-government of attorneys-at-law and its bodies. This confirms the existing practice of introducing such solutions in the internal regulations of the self-government of attorneys-at-law to the extent similar to that in the self-government organisations of tax advisers or patent attorneys.

Related to this practice is the theoretical issue of the correctness of introducing provisions on incompatibility of functions or mandates in the bye-laws of the self-government of attorneys-at-law, issued on the basis of statutory delegation. In the author's opinion, it is possible given the nature of those acts. Their purpose is not only to ensure corporate governance, but above all to guarantee conditions for the proper functioning of the self-government of attorneys-at-law to allow it carry out its tasks properly. Resolutions of the self-government bodies concerning the functioning and creation of their bodies are not sources of universally binding law and do not constitute a source of internally binding law within the meaning of

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Article 93 of the Polish Constitution. It should be noted, however, that Article 93 of the Polish Constitution does not close the catalogue of acts of internally binding law, and therefore does not exclude the issuance of such acts also by bodies not mentioned therein.[66] Resolutions of the attorney-at-law self-government bodies are of varied nature and the assessment of their content depends on the sphere to which the act relates due to the degree of detail in their statements.[67] Having analysed resolutions of the bodies carried out according to this criterion, it can be concluded that most of them should be included in the sphere of application of the law. The bodies of the self-government of attorneys-at-law may act within the scope of their public-administrative authority or take individual decisions in the sphere of property management and exercise internal management. A distinction should be made, however, between the resolutions of the bodies of the self-government of attorneys-at-law which are issued on the basis of statutory delegation and contain a normative statement with all its necessary elements.[68] This delegation differs from the construct of statutory delegation for executive acts in the system of sources of universally binding law and is characterized (not only in the Act on attorneys-at-law, but also in other acts defining the system of self-governing legal professions) by a high degree of generality, but it cannot be qualified as a provision containing administrative competence. These resolutions, adopted by the central bodies of legal profession's self-government, should be qualified as normative acts that are "a formalised, authoritative result of the law-making process, consisting of legal provisions containing normative content (characteristics of behavioural models addressed to specific types of addressees in certain abstractly defined circumstances)".[69] They contain legal norms of general and abstract nature and are issued by the self-government of attorneys-at-law on its own behalf as acts of internally binding law.[70] They are intended to shape the organisational structure, rules regarding its staffing and rules of procedure that will enable the professional self-government to perform the tasks set before it by the provisions of generally applicable law. The sphere of the organisational interior of the self-government of

[66] P. Sarnecki, *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej*, Warszawa 2002, p. 21; M. Chmaj, *Prawo administracyjne. Część ogólna*, Warszawa 2007, p. 52; W. Płowiec, *Koncepcja aktu prawa wewnętrznego w Konstytucji RP*, Poznań 2006, pp. 129–131. A different view in A. Wiktorzak, *Akty prawa wewnętrznie obowiązującego a uchwały organów prawniczych samorządów zawodów zaufania publicznego*, Katowice 2018, pp. 140–141.

[67] A. Bień-Kacała, *Źródła prawa wewnętrznego w Konstytucji RP z 1997 r.*, Toruń 2013, p. 128.

[68] A. Korybski, [in:] A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa*, Lublin 2001, p. 85.

[69] Idem, [in:] A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa. Elementy teorii*, Warszawa 2015, p. 83.

[70] K. Dąbrowski, P. Mijal, *op. cit.*, p. 289; A. Bień-Kacała, *op. cit.*, p. 343. A different view is presented by A. Wiktorzak (*op. cit.*, p. 143), who considers these resolutions as standalone, non-normative acts of application of law.

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attorneys-at-law has thus been left to the discretion of self-governing activity, as long as it does not infringe the provisions of the Act.[71] This means that electoral ordinance adopted by the National Assembly of Attorneys-at-Law and resolutions of the National Bar Council of Attorneys-at-Law concerning the activities of the self-government of attorneys-at-law and its governing bodies, which govern matters of the organisational interior, fall within the powers vested in the self-government of attorneys-at-law and are addressed – as binding – to all of its members. To that end, the internal regulations of the self-government of attorneys-at-law provide for forms of promulgation and publishing internally binding legal acts. They should therefore be treated as normative acts of an internal nature, permitting the introduction of provisions concerning incompatibility of functions or mandates in the bodies of the self-government.[72] Only if it appeared that they pertain to a wider range of addressees (and such a situation may rather occur in the case of the rules of ethics adopted by the National Assembly of Attorneys-at-Law), should such a situation be treated as an abuse and excess of the limit of admissible organisational authority.[73]

PROPOSALS FOR THE LAW AS IT SHOULD STAND (*DE LEGE FERENDA*)

The introduction of the principle of *incompatibilitas* (without defining its scope) in resolution-making and executive bodies, modelled on that in the disciplinary bodies, is possible at the level of internally binding law of the self-government of attorneys-at-law. This can be done by introducing changes by the National Assembly of Attorneys-at-Law in the electoral ordinance of the self-government of attorneys-at-law concerning the restriction on the eligibility of a person already elected for a single function or holding a mandate in a particular body, or concerning the expiry of a function or mandate held in the body in the event of being elected for a new function or to another body of self-government. Another solution, much easier one but not as far-reaching, is the introduction of changes by the National Bar Council of Attorneys-at-Law to the rules of procedure of the Bar and its bodies concerning the prohibition of holding two functions in self-government bodies concurrently. This kind of regulation is supported not only by functional arguments, but also by ones of a sociological nature or even related to reputation issues.

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[71] Judgment of the Supreme Administrative Court of 23 April 1991, II SA 238/91, ONSA 1992, no. 3–4, item 61.

[72] For more on internally binding normative acts, see M. Świstak, *Charakter prawny uchwał organów samorządu zawodowego radców prawnych w Polsce*, Lublin 2018, pp. 104–116.

[73] S. Pawłowski, *Ustrój i zadania samorządu zawodowego w Polsce*, Poznań 2009, pp. 154–155; W. Płowiec, *op. cit.*, p. 133.

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Holding mandates in the National Bar Council of Attorneys-at-Law (supervising the activities of district bar associations of attorneys-at-law) together with a mandate in the district bar council (which manages the activities of the district bar association of attorneys-at-law)[74] leads to a situation in which the "supervising" persons may also be those "supervised". This applies in particular to the supervisory proceedings conducted by the National Bar Council of Attorneys-at-Law (as a superior authority within the meaning of Article 17 of the Code of Administrative Procedure[75]) to repeal unlawful resolutions of the assembly of the district bar council of attorneys-at-law.[76] This objection could be less important due to the collegial nature of the body's activity and the criterion of objectivity accompanying the adopted resolutions, but there should be appropriate representation of the district bar associations in the composition of the National Bar Council of Attorneys-at-Law (following the example of the Polish Bar Council). The lack of electoral mechanisms eliminating the possibility of excluding representatives of individual district bar associations from the composition of the National Bar Council of Attorneys-at-Law and the loss of the rank of a statutory representative of the district bar in this body result in the fact that the National Bar Council of Attorneys-at-Law, as a collegial body, exercises supervision through its members – representatives of district bar associations holding a majority of votes. Thus, the supervision over the activities of some district bar associations becomes illusory and, consequently, narrows the statutory scope of activities of the National Bar Council of Attorneys-at-Law in practice. General supervision activities (with the exception of repealing unlawful resolutions of the assembly of a district bar association of attorneys-at-law) may be exercised by the Board of the National Bar Council of Attorneys-at-Law in lieu of the Council[77] but a hypothetical conflict of interest appears in this case, since most members of the Board also hold other positions in the boards of district bar councils. These remarks become even more significant in the appeal proceedings, especially in administrative proceedings in the strict sense. The National Bar Council of Attorneys-at-Law, especially its Board, is the appellate body in relation to resolutions adopted by district bar councils of attorneys-at-law. This applies to resolutions in individual cases (entry on the list of attorneys-at-law, entry on the list of trainee attorneys-at-law, suspension of the right to practice the profession of attorney-at-law, deletion from the list of attorneys-at-law, deletion from the list of trainee attorneys-at-law)[78] and other resolutions adopted by the district bar

[74] Article 52 (1) and Article 63 (3) *in fine* of the AAL.

[75] Act of 14 June 1960 – Code of Administrative Procedure (consolidated text, Journal of Laws 2021, item 735, as amended).

[76] Article 60 (8a) of the AAL.

[77] Article 59 (4) and Article 63 (3) *in fine* of the AAL.

[78] Article 31 (2), Article 33 (7), Article 28 (5), Article 29^1 and Article 37 (3) of the AAL.

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councils of attorneys-at-law.[79] Thus, holders of mandates in the district bar council of attorneys-at-law, adopting resolutions in individual cases in the first instance, should not be members of the National Bar Council of Attorneys-at-Law, especially the Board of the National Bar Council of Attorneys-at-Law, the bodies operating as the second instance.

While the subject-matter jurisdiction of the National Bar Council of Attorneys-at-Law in this respect is minor, this problem appears to be important for the Board of the National Bar Council of Attorneys-at-Law. Pursuant to the provisions of the Act, it hears most individual cases as a second instance body, while its functional jurisdiction in this field is further extended by the power to act as a substitute for the National Bar Council of Attorneys-at-Law.[80] The Board consists of the President of the National Bar Council of Attorneys-at-Law and members selected from among the members of the National Bar Council of Attorneys-at-Law: the vice-presidents, secretary and treasurer.[81] Thus, the numerical composition of the Board of the National Bar Council of Attorneys-at-Law was not specified by the legislature (as in the case of the eight-member Praesidium of the Polish Bar Council in the advocates' self-government), leaving it to the discretion of the National Bar Council of Attorneys-at-Law.[82] The Board of the National Bar Council of Attorneys-at-Law of the 11th term was composed of 14 people: the President of the National Bar Council of Attorneys-at-Law, five Vice-Presidents, the Treasurer, the Secretary and six members.[83] Of these, 13 people were members of district bar councils of attorneys-at-law, including three deans, seven vice-deans and three regular members. These figures confirm the thesis about the established practice of cumulative functions by the members of the Board of the National Bar Council of Attorneys-at-Law and that the exclusion in the case of hearing individual cases must be a rule, not an exception, in administrative proceedings carried out.

The accumulation of functions in the hands of a small group of people also calls into question the proper use of the personnel available to the self-government of attorneys-at-law. The formula adopted for the organisation of self-government of attorneys-at-law at the central level dangerously opens a space for discussion on the proper functioning of the self-government of attorneys-at-law, and the above-described practice of cumulative holding of functions of members of the self-government at the district level with the functions at the national level to build a majority in the National Bar Council of Attorneys-at-Law, results not

[79] Article 60 (6) of the AAL.
[80] Article 60 (6) and Article 59 (4) of the AAL.
[81] Article 59 (2) of the AAL.
[82] Article 59 (3) of the AAL.
[83] One of the members of the Board of the National Bar Council of Attorneys-at-Law in 2022 resigned.

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only in a weakening of the self-government and in the potential of its members being poorly used, but also in a negative impact on its image. From the point of view of prestige of the Board of the National Bar Council of Attorneys-at-Law, a situation of being perceived through the prism of other functions held by persons sitting in it, is not advisable. Such a state cannot be assessed positively, also due to difficulties in obtaining individual reporting from persons holding functions in the Board of the National Bar Council of Attorneys-at-Law, which prevents checking proper performance of the duties. Attempts to obtain such information during the previous term of office proved unsuccessful, which reduces the level of trust in people holding various cumulative functions in the Bar. This situation is accompanied by the way how the Higher Audit Committee is constituted, with the participation of the President of the National Bar Council of Attorneys-at-Law (as a person who propose a candidate for the presidency), i.e. a person subject to auditing. Such behaviour may raise doubts in third parties as to the independence of this body, which is responsible for controlling the financial activities of the National Bar Council of Attorneys-at-Law.[84]

CONCLUSIONS

A solution to such problems is the introduction in the bye-laws of the self-government of attorneys-at-law of a prohibition of holding by one person of multiple mandates in various bodies of the Bar. An exception should concern the mandate of a delegate elected at the district meeting, as well as the mandate of a delegate to the National Assembly of Attorneys-at-Law, since obtaining them implies the legitimacy to participate in the further stages of the complex electoral process in the self-government of attorneys-at-law. These changes, proposed in the requests of district bar councils of attorneys-at-law to convene the Extraordinary National Assembly of Attorneys-at-Law in 2018, sought to introduce a new model of functioning of the self-government of attorneys-at-law at national level and thus ensuring reliability in the performance of the statutory tasks of the Bar, including the public tasks entrusted to it. Unfortunately, substantive debate and the will of the majority are needed to make such changes. These proposals have not been examined and the current situation in the bar association of attorneys at law, especially in its resolution-making and executive bodies at the national level, may constitute an obstacle for the Bar to be able to regulate these matters on its own, irrespective

[84] Article 61 of the AAL. The role of the President of the National Bar Council of Attorneys-at-Law should be confined, in the light of § 60 (1) of the rules of procedure of the self-government of attorneys-at-law and its bodies, which in current practice has not raised any doubts, to convening the first meeting of the higher Audit Committee.

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of the legal arguments presented. The assessment of the phenomena that accompany the current formula of operation of the self-government of attorneys-at-law and the absence of any modifications that could be made using its organisational autonomy should in the near future result in the legislative intervention in order to prohibit the holding of multiple mandates in one hand and to define the numerical composition of bodies adapted to its needs, in line with the solutions existing, for example, in the bar association of advocates.

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ABSTRAKT

Artykuł dotyczy zagadnień organizacyjnych samorządów prawniczych zawodów zaufania publicznego w kontekście realizacji zasady *incompatibilitas* jako warunku *sine qua non* właściwego ich funkcjonowania i rzetelnej realizacji powierzonych im zadań publicznych. Przeprowadzona analiza dotyczy samorządów: adwokatów, radców prawnych, notariuszy, komorników, rzeczników patentowych i doradców podatkowych, z uwzględnieniem ich zróżnicowanej struktury oraz podstaw obowiązywania (ustawa lub/i akty prawa wewnętrznego) zakazu łączenia funkcji lub mandatów w organach tych samorządów zawodowych. W wyniku przeprowadzonych badań ustalono, że zjawisko łączenia funkcji stanowi problem w samorządzie radców prawnych. W opracowaniu przedstawiono przyczynę tego stanu oraz sformułowano wnioski *de lege ferenda*, które dotyczą wprowadzenia

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zakazu łączenia funkcji w optymalnym zakresie na wzór rozwiązań obowiązujących w samorządzie adwokackim. Celem artykułu jest nie tylko udowodnienie tezy o konieczności tych zmian, lecz także wskazanie sposobu ich wprowadzenia. Postulat ten można zrealizować poprzez zmianę przepisów wewnętrznie obowiązujących samorządu radców prawnych, które należy traktować jako akty normatywne o charakterze wewnątrzzakładowym, a dopiero ostatecznie w drodze ingerencji ustawodawcy.

Słowa kluczowe: *incompatibilitas*; prawnicze samorządy zawodowe; samorząd radców prawnych; samorząd adwokacki; akty prawa wewnętrznie obowiązującego

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