The institutional role of the European Court of Auditors
Reasons why the EU needs the European Court of Auditors

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Contents

List of abbreviations .................................................................................................................. 5

Summary .................................................................................................................................. 6

Sammanfattning .......................................................................................................................... 7

1. Introduction ............................................................................................................................... 8
   1.1 Background .......................................................................................................................... 8
   1.2 Aim ...................................................................................................................................... 9
   1.3 Method and material ......................................................................................................... 10
      1.3.1 Definition of Terms ................................................................................................. 12
   1.4 Delimitation ..................................................................................................................... 12
   1.5 Outline ............................................................................................................................... 13

2. The EU, the ECA and the Financial Legal Framework .............................................................. 14
   2.1 Introduction ....................................................................................................................... 14
   2.2 Brief overview of EU its institutions ............................................................................. 14
   2.3 EU’s finances and budget ............................................................................................... 15
      2.3.1 2018 EU budget and future challenges ................................................................. 16
   2.4 Legal framework applicable to the financial system of the EU .................................. 16
   2.5 The European Court of Auditors ............................................................................... 17
      2.5.1 Structure and role of the ECA today ...................................................................... 19
      2.5.2 The Members ........................................................................................................... 20
   2.6 Legal framework and hierarchy of norms for the ECA .............................................. 21
   2.7 The Swedish National Audit Office ............................................................................. 23
   2.8 Conclusions ..................................................................................................................... 24

3. Role of the ECA ......................................................................................................................... 26
   3.1 Introduction ....................................................................................................................... 26
   3.2 The ECA’s consultative role ............................................................................................. 26
      3.2.1 The SNAO’s consultative role ............................................................................... 28
   3.3 Interview with Georgios Prantzos on the ECA’s functions and legal power ........... 29
      3.3.1 Supreme audit institutions with legal powers ....................................................... 31
   3.4 The EU’s actions on fraud and corruption and the challenges for ECA ............... 31
      3.4.1 Examples of Sweden’s actions on corruption and fraud ..................................... 35
   3.5 Conclusions ..................................................................................................................... 36

4. Challenges for the ECA ............................................................................................................ 38
   4.1 Introduction ....................................................................................................................... 38
   4.2 Criticism towards the ECA ............................................................................................. 38
      4.2.2 The Report on the Future Role of the ECA by the European Parliament ........... 39
   4.3 Accessibility of the ECA ................................................................................................. 41
   4.4 Ethical principles and objectivity of the ECA .............................................................. 42
      4.4.1 Size of the Court and appointment of its Members .............................................. 44
      4.4.2 Who is examining the ECA? ............................................................................... 44
   4.5 Ethic of the SNAO ........................................................................................................... 45
      4.5.1 Criticism towards the SNAO ............................................................................... 45
      4.5.2 Who is examining the SNAO? ............................................................................. 46
   4.6 Conclusions ..................................................................................................................... 46

5. Discussion and analysis ............................................................................................................ 48
   5.1 Introduction ....................................................................................................................... 48
   5.2 Why is the ECA needed? Strengths and weaknesses of the Court ......................... 48
   5.3 The impact of the ECA’s audit reports, opinions and recommendations ................ 50
5.3.1 Transparency and accountability of the Court itself ........................................52
5.4 The ECA’s ethical guidelines, objectivity and accessibility .................................53
5.5 ECA and SNAO final thoughts ........................................................................54

6. Conclusions and final remarks ............................................................................56
References .............................................................................................................59
List of abbreviations

EC     Treaty European Community
ECA    European Court of Auditors
ECB    European Central Bank
ECJ    European Court of Justice
EEC    European Economic Community
EIB    European Investment Bank
EU     European Union
SNAO   Swedish National Audit Office
SVJT   Svensk Juristtidning
TEU    Treaty of the European Union
TFEU   Treaty on the Functioning of the European Union
Summary

The European Court of Auditors is the guardian of the EU finances and the external auditor of the EU. Its work is focused on the EU’s financial reporting, as well as on the implementation of its budget and policies. By highlighting gaps in the management of the EU funds as well as reporting suspected fraud to the anti-fraud agency, the Court aims to improve the public accountability in the EU. These control functions are fundamental especially in perspective of a reduction of the EU budget caused by Brexit. Furthermore, the European Court of Auditors encourages openness and transparency within the EU by disclosing information about its management and activities; moreover, it publishes the results of its audits. Regardless of its restricted accessibility to EU bodies like the European Central Bank and the European Investment Bank, the Court is needed because it pressures the EU institutions and the Member States to keep a sound financial management. However, gaps in the current legal structure are affecting the accountability, transparency, integrity and efficiency of the institution.

In fact, the European Court of Auditors does only have a consultative power, hence its recommendations to the audited bodies are not legally binding. Therefore, it lacks the jurisdictional power to impose sanctions to the audited recipients. The only way to verify whether the recommendations are implemented or have an impact is through systematic so-called special reports containing the results of the follow-ups. Therefore, it could be questioned whether the current sporadic follow-ups (which are carried out solely on the EU institutions’ and not the Member States’) are sufficient. The statement of assurance as to the reliability of the accounts in Article 287 TFEU which is the basis of the annual discharge given to the EU bodies responsible for the management of the EU finances are presented in the Annual Report of the European Court of Auditors. However, it should be noted that the language used in the reports is highly specific and complex, which potentially leads to misuse by EU-sceptic media. There is a need for clarity and simplicity to avoid misunderstandings that may harm the reputation of the EU. Furthermore, it could be argued that the vagueness of the current legislation regarding the requirements of the appointment of the Members at the European Court of Auditors in Article 286 TFEU affects the legal certainty. Member States could interpret these requirements broadly, using political influence to nominate candidates instead of nominating candidates which are more qualified for the position.

This thesis will analyse the current functions of the European Court of Auditors de lege lata, highlight some of the criticism directed towards the institution and propose some improvements in the structures and the current legislation managing the European Court of Auditors de lege ferenda. The aim of this thesis is to assess the reasons why the EU needs the European Court of Auditors.

Keywords: European Court of Auditors; EU Law; EU Institutions; EU finances; Transparency
Sammanfattning


Denna uppsats kommer att analysera Europeiska revisionsrättens funktioner de lege lata, lyfta fram kritik riktad mot institutionen samt föreslå om förbättringar i den nuvarande lagstiftningen som reglerar revisionsrätten de lege ferenda. Syftet med denna uppsats är att granska EU:s behov av europeiska revisionsrätten.

Nyckelord: Europeiska revisionsrätten; EU-rätt; EU:s budget; EU:s institutioner; Transparens;
1. Introduction

1.1 Background

“Transparency is about shedding light on rules, plans and actions. It ensures that responsible civil servants, managers, public officials and board members act visibly and understandably, and report on their activities. In this way, the responsible people and institutions can be held on account from the general public. This is an efficient tool for increasing the trust in the people and institutions in charge of public resources”.

According to Article 285 TFEU, the European Court of Auditors (hereinafter ECA or the Court) is established as an external auditor of EU’s finances. The aim is for it to act as an independent guardian of the financial interests of the EU citizens by helping improving the EU’s financial management. All the nationalities of the current 28 Member States are represented through the Members of the Court.

As mentioned above, the ECA was initially established to audit the EU's finances. However, as the tasks of the EU have grown, it grew the need to closely follow how the citizens' money is spent. The ECA has shed light on the management of the EU budget through its audits and annual reports. Moreover, to enhance clarity, the ECA has made several changes in its audit methodology. For instance, the method of giving the European Commission (hereinafter the “Commission”) the declaration of assurance (also referred to as statement of assurance) in the ECA’s annual report has been criticised by the Commission since it has affected the public’s trust in the EU’s way of handling the EU budget. In addition, the Court has been rebuked for lacking knowledge in the areas it is auditing. In 2014, as a result of this criticism, the Report “Future Role of the European Court of Auditors” was published. Drafted by the European Parliament, it proposed several changes in the ECA’s operating principles.

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3 See Article 285 TFEU.
One of the ECA’s main challenge is to find and gather the information needed to conclude its audits from various stakeholder. Several regulations restrict the Courts accessibility; for example, the Article 287 (3) TFEU limits the ECA’s ability to access information from the European Investment Bank’s (EIB). It could be argued that this behavior could be interpreted as an attempt from EU institutions to hinder the ECA by not providing it with the relevant background information needed to carry out its audits\(^8\), in a way that could affect the transparency in the EU.

Moreover, the Court has the power to give recommendations and opinions to other EU Institutions and Member States. The fundamental issue to consider when analysing the Court’s legal authority is that its recommendations and legal opinions are not legally binding and, furthermore, there are not enough requirements for follow-ups of these recommendations - the only way to verify whether they resulted in a tangible effect.\(^9\)

### 1.2 Aim

The purpose of this thesis is to examine the institutional role of the ECA from a legal point of view. In fact, the legal structures of the ECA are still underexplored. The need for further research is therefore essential to investigate and analyse some of the relevant existing functions of the Court and the impact they have on the EU’s institutions as an external auditor of the Union’s finances. Furthermore, one of the objectives is to grasp whether the other Institutions and Member States are following the recommendations and opinions contained in the annual reports published by the ECA, especially considering that they are not legally binding. The aim is to get a better understanding of the functions, the objectives and the challenges faced by the ECA. There will also be a comparison between the internal structures of the ECA and the Swedish National Audit Office (hereinafter SNAO) to analyse the most suitable structure. This comparison will clarify whether the European or the Swedish national system of examination is more efficient, transparent and accountable. Furthermore, the aim is to investigate how the role of the Court has changed and which impact the criticism from other EU institutions had on the guidelines and the operational activities of the ECA.\(^10\) The aim is to identify some of the gaps in the current legal system and propose some improvements. In doing so, the reasons why

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the EU needs the European Court of Auditors will be investigated, along with the following research questions:

- Why is the ECA needed and which impact does its audit reports and opinions have on the bodies it is auditing?
- Is the ECA’s operational system effective and transparent enough?
- Can the ECA be objective and does it have the accessibility it need to carry out its audits?

1.3 Method and material

EU law derives from numerous sources of law. The most significant sources to this thesis are primary law and secondary law. The EU treaties are the result of the negotiations between Member States and they represent EU’s primary law. The Treaties, including the Treaty of the European Union11 (TEU) and the Treaty on the Functioning of the European Union TFEU, build the most constitutive features and functions of the EU and are comparable to constitutional law at national level.12 The secondary law includes case law from European Court of Justice (ECJ).13

While the Treaties merely serve as a legal framework and creates the main principles of the norm system in the EU, both primary and secondary law stipulates the legal rules that Member States must follow.14 In fact, secondary law mainly consist of regulations, directives and decisions.15 While directives must be implemented into national law by the Member States within a certain time-period (as directives are not directly applicable and they do not have direct effect16), regulations become binding national law as soon as they are passed. They do not require any form of implementation, and consequently they have direct effect.17

To investigate the research questions, the most suitable materials to consult are the EU legislation, the Financial Regulation applicable to the general budget of the Union, reports and opinions mainly from the ECA but also other EU institutions. The legislative texts include both primary and secondary law. The main source of legislative text will be Section 7 TFEU regarding the Court of Auditors. However, since the EU legislative texts can be characterized by a certain vagueness, doctrine and other relevant documents have been used to facilitate the understanding and meaning of the texts and decisions. This thesis will also have influences

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13 See Art. 267 TFEU: The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: the interpretation of the Treaties, the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. See also Art. 19 TEU: The Court of Justice of the European Union (…) It shall ensure that in the interpretation and application of the Treaties the law is observed.
14 The Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect; The European Court of Justice, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Reference for a preliminary ruling: Tariefcommissie Judgment of the Court of 5 February 1963 in the case 26-62.
16 Art. 288 TFEU.
from non-legal sources such as official documents and reports from the Court and from other relevant EU institutions and EU agencies to further explain the aims and objectives of the EU. Even if the sources are non-legally binding, they can be instrumental to a better understanding of the legal context. Moreover, one of the aims is to obtain an interview with a legal expert in the ECA to get an overview of the legal powers of the institution. To some extent, the Swedish law regulating the management of the SNAO will also be considered. Therefore, elements of comparative methodology\(^{18}\) between the ECA and the SNAO regarding the laws related to their operational management will be presented. Lastly, there will be a comparison between ECA’s and SNAO’s audit functions and their actions on improving the transparency.

Since one of the objectives is to analyse the legislation regarding the functioning of the ECA, the EU legal method has been used. The EU legal method is based on the methods of interpretation recognised by the ECJ. These include *inter alia* the lexical, systematic, teleological and historical method of interpretation. The lexical method of interpretation aims at explaining the meaning of normative texts by examining the usual definition of the words. This method is often used by the ECJ to restrict a wide interpretation of a certain provision and guarantee legal certainty.\(^{19}\) The systematic interpretation focuses on the EU legal order as a system. This method of interpretation assumes that the authors of the Treaties have established a complete and consistent legal order and EU legislators and Judges shall act in accordance with this principle.\(^{20}\) Article 7 of the TFEU, expressly states that the EU shall ensure consistency in all its policies and activities. The aim of this method is to establish consistency and coherency in the EU’s policies and function, considering its objectives. The teleological method focuses on the objective and purpose of the EU and its policies. The ECJ has often given priority to this method when interpreting primary law. Furthermore, this method of interpretation is used by the ECJ to give meaning to general provisions and to fill in the gaps between precise and complex secondary law, and vague general primary law.\(^{21}\) Some additional sources to the law will be included, for instance ethics of the ECA and SNAO. The Ethical Guidelines of the Court will be used to clarify its objectiveness and they will also be used to identify whether there are any ethical concerns in the ECA’s management. Especially related to the Member States impartiality concerning the appointment of the Members at the ECA. The thesis will also include some Swedish sources of law to define the legal basis and of the SNAO and the appointment of the Auditors General and, furthermore, the international Code of Ethics ISSAI 30 which is used as an ethical framework for supreme audit institutions (SAI’s).

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\(^{18}\) The comparative legal methodology consists of comparison of different legal systems, aiming to identify their similarities, differences, treatment of methodological problems arising in connection with these tasks. See Lamberts, Göran, *om Michael Bogdans komparativ rättskunskap*, SvJT 1994, p. 200.


The aim is to propose some improvements (*de lege ferenda*) on the current legal framework (*de lege lata*) in the final conclusions of the thesis. Moreover, there will be suggestions on how to improve the current structures and the management of the ECA in the final conclusions.

### 1.3.1 Definition of Terms

This part explains some of the definitions used throughout the thesis to enhance clarity and understanding.

- **Performance audit**
  The Court’s performance audits whether the principles of sound financial management have been applied. They contain an examination of EU projects, operations, management systems and procedures of bodies and institutions that manage EU funds, to assess whether they are achieving economy, efficiency and effectiveness in the use of those resources.

- **SAI’s**
  The Supreme Audit Institutions (SAIs) are the highest Audit Institution of a country/state with the main role of overseeing the management of public finances.

- **Statement of assurance (also referred to as declaration of assurance)**
  The statement of assurance is an annual financial and compliance audit exercise where the ECA audits the reliability of the EU’s accounts and the regularity of the transactions underlying them. The findings and conclusions are published in the ECA’s annual reports.

### 1.4 Delimitation

The primary aim of this thesis is to analyse the institutional role of the ECA. Consequently, since the Court has a broad operating range, the focus will be on its functions relevant for this thesis, namely: reporting functions, auditing functions, legal opinions and recommendations. Moreover, to determine whether its system of reporting and recommending the bodies it is auditing is effective enough, issues that could arise when the ECA examines other EU institutions as an external auditor will be investigated. This will mostly be related to the ECA’s examination of the Commission and some Member States. The presentation of the legal framework will be restricted to the relevant EU-law related to the ECA and the EU-law related to the EU-finances. The decision not to focus on the cooperation between the ECA and the SNAO through the EU Contact Committee comes from the decision to look at these two bodies as two separate audit control functions. Furthermore, it will be provided an examination of ECA’s accessibility, to determine whether (and how) it is restricted to access essential information needed to complete the audits. Only relevant sources from primary and secondary

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22 *De lege ferenda* is a Latin expression that means “future law” used in the sense “of the law [that is] to be proposed”. (as opposed to *de lege lata* - “the current law”). See Fellmeth A. X., Horwitz M., Guide to Latin in International Law, Oxford University Press, 2009.

23 British English was used as the working language of this thesis, as the official documents of the ECA are written in British English.

EU-law will be used to answer this research question. A highlight of the criticism the Court has been subject to will finally be provided. However, the criticism will be related to the statement of assurance, some parts of the Court’s audit methodology, the follow ups on the performance audits and the transparency of the ECA itself. These topics are relevant to investigate the Court’s own actions and efforts seeking to improve its work methodology. Lastly, regarding the ethical issues, this thesis will exclusively investigate ECA’s objectivity.

1.5 Outline

This thesis will be divided into six main chapters. There will be a comparative element between the ECA and the SNAO throughout the thesis. The first chapter gives an introduction of the methods used to investigate the research questions. The thesis will introduce the legal financial framework relevant for this thesis in chapter two. Chapter two will also describe the functions of the ECA and the role it has as an external auditor of EU’s finances. Furthermore, chapter two will give a historical background the ECA and how the institution operates. This chapter will not only present the EU’s constitutional law; it will also provide a short description of the norm-hierarchy of the EU. This outline is meant to give the reader a better understanding of how EU’s finances are spent and which the existing control functions are. Chapter three will introduce the legal framework of the ECA, its consultative power and why the Court is needed. The chapter also includes an interview with a lawyer from the Court and moreover, an overview of the EU’s actions on fraud and corruption. Chapter four will present some of the main challenges and criticism the Court faces and has faced. In the same chapter, the ethical guidelines and the objectivity of the Court will be discussed and furthermore, whether the ECA can access all the information it needs to carry out its audits. I will also investigate to which extent the Court’s recommendations and opinions are binding and whether there are any follow ups. The thesis will end with an analysis in the fifth chapter and a conclusion with final remarks in the sixth chapter.
2. The EU, the ECA and the Financial Legal Framework

2.1 Introduction

This chapter will introduce some of the legal framework of the EU related to the EU finances and the functions of the EU institutions; mainly the ECA’s functions. It will also present the norm-hierarchy of the EU and give an overview on the different EU institutions. Considering that the main task of ECA is to audit and examine the EU budget there is a need to give a brief background information on EU finances and budget. This chapter will also give an introductory overview of the ECA and its functions. The aim with this chapter is to get a better understanding on what the EU budget is used for and the role of the ECA as an external auditor. This chapter will also include a comparative perspective between the ECA and the SNAO. There will be a comparison between the internal structure of these two bodies to assess the similarities and differences. This type of comparison will however occur throughout most the chapters in the thesis.

2.2 Brief overview of EU its institutions

The European Union is currently composed by 28 Member States, governed by supranational institutions. According to Article 13 (1) TEU, the EU’s institutional framework is composed by the European Parliament, the European Council, the Council of the European Union (hereinafter ‘the Council), the European Commission, the Court of Justice of the European Union (ECJ), the European Central Bank (ECB) and, finally, the Court of Auditors (ECA). All these institutions promote the EU values and collaborate to advance the Union’s objectives and swerve its interests. Moreover, they are in responsible for ensuring the effectiveness and consistency of the EU’s policies and actions. In brief:

- The European Council is body that defines the EU’s general political direction and priorities. It brings together the heads of state or government of every EU country;\(^{26}\)
- The European Parliament represents the EU citizens, as its members are appointed through elections;
- The Council represent the governments of the Member States (through the appointment of one minister for each state) and it is the main decision making body in the EU;
- The European Commission represents the Union altogether and it could be considered as a central administrative machinery of the EU;
- The ECJ oversees the upholding of the rule of European law;
- The ECB is the central bank responsible for the monetary policy of the Member States which have adopted the euro as a currency;

\(^{25}\) While there currently are 28 Member States within the EU, after the implementation of Brexit the number of States will be reduced to 27. See The European Union, The 28 member countries of the EU, last updated 26 June 2018, https://europa.eu/european-union/about-eu/countries_en, [accessed: 2018-06-26].

- The ECA, focus of this thesis, is responsible for checking the financing of the EU’s undertakings.²⁷

The obligations and powers of all the mentioned EU institutions are set in the Treaties. It should be noted that only three of the institutions hold law-making power, namely: the European Parliament, the Commission and the Council.²⁸

2.3 EU’s finances and budget

The EU budget consists of the money that Member States agree to entrust the Commission each year to enable it to carry out the various policies that are decided. Member States agree on the size of the EU budget and how it is to be financed several years in advance, according to the principle that expenditure must be matched by revenue.²⁹ For instance, 2016 total expenditure was approximately 136 billion EUR, which was met by 144 billion EUR.³⁰ The EU’s general budget for the financial year 2016 was adopted 24 January 2016.³¹

Ninety-eight percent of the EU budget is primarily funded from the EU’s own resources, which are divided into three different categories. The first category consists mainly of resources acquired through customs duties on imports. The second resource is based on value added tax (VAT). Lastly, the third resource is based on the transfers from each Member State’s gross national income (GNI) to the EU. Furthermore, there are also other sources of revenue. For instance, taxes on EU staff salaries, contributions from non-EU countries to certain programs and fines on businesses that fail to adhere with EU rules, for breaching competition laws.³³ For example, Google was recently fined with € 4.34 billion by the Commission for reducing rival manufactures ability to effectively compete with Android- and Windows Mobile devices.³⁴

The Commission is the institutions that tables a proposed EU budget. On that basis, both the European Parliament and the European Council decide whether the draft is compatible with the objectives of the EU. In case of divergence between the European Parliament and the European

²⁹ See Article 310 TEU.
³³ Directorate-General for the Budget (European Commission), EU publications: European Union Public Finance, 2014, pp. 189-197. See also: Council Regulation (EU, Euratom) No 609/2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements (Recast), 2014.
Council, a specific Conciliation Committee is assembled by the Council. The Committee has 21 days to find a settlement, which should be approved by both the European Council and the European Parliament. The EU budget is based on the principle that expenditure must be matched by revenue. For instance, 2016 total expenditure was approximately 136 billion EUR, which was met by 144 billion EUR.

2.3.1 2018 EU budget and future challenges

The EU budget supports various projects. Under the cohesion policy, it funds investments to help bridge economic gaps between the EU countries and regions. It also helps developing rural areas in Europe. On 30 November 2017, the European Council and the European Parliament separately approved the agreement reached on 18 November 2017 in the Conciliation Committee on the 2018 budget. As in the past, the European Council attaches extra importance to investments in competitiveness, employment and growth, focusing on areas that provide EU added value. To address migration and security-related challenges, agencies in the field of security and citizenship received 8.9% more funding compared to 2017. More money was also made available for environmental and climate measures. There have been some reductions in the budget, for instance, in the EU’s pre-accession assistance to Turkey in view of the situation regarding democracy, rule of law and freedom of the press.

However, the EU budget faces a challenge to finance more with reduced funds. The EU appears to be destined to play a new key role in policy areas like migration, internal and external security or defence. Moreover, the European Union is committed to maintain its role on the global stage both as a humanitarian and development aid donor and as a leading source of the fight against climate change. These objectives should be achieved with an EU budget that is likely to be reduced following the leaving of the United Kingdom.

2.4 Legal framework applicable to the financial system of the EU


36 See Article 310 TEU.


39 For example, the European External Action Service (EEAS) is a young EU body which carries out the EU’s common foreign and security policy. It was established 1 December 2010. See European External Action Service, about the European External Action Service, updated 1 March 2016, https://eeas.europa.eu/headquarters/headquarters-homepage/82/about-european-external-action-service-eeas_en, [accessed: 2018-02-22].

The European Union’s financial system is based on three types of legal instruments, namely: the provisions of the Treaties, secondary legislation and provisions adopted by agreement between the EU institutions (supplementary law). The latter is specific to the budget sector and has no real equivalent in the other fields of EU-law.\textsuperscript{41} The primary source of EU-law are the financial provisions of the Treaties.\textsuperscript{42}

The financial legal framework of secondary EU-law sources is divided into two different authorities. The first source is the Council decision on the own resources system of the EU.\textsuperscript{43} The Member States hold control over adoption of this decision, while the European Parliament is merely consulted. Not only must the European Council act unanimously, thus giving each Member State the right of veto according to the principle “one state one vote”, but the decision must also be ratified by the national parliaments in the same way as the Treaties. The second source is the financial regulation which is the one most frequently used by the ECA.\textsuperscript{44}

The third source of law consists of Interinstitutional agreements. The purpose of the agreements is to improve the functioning of the annual budgetary procedure and cooperation between the EU institutions on budgetary matters.\textsuperscript{45} The agreements have no legal basis in the Treaty. However, their legal significance may be considered far more than just a political commitment. Until now, the ECJ has not ruled on the legal value of the Interinstitutional Agreements. It has, nevertheless, recognised the usefulness of the agreement and the fundamental role they play in allowing the EU institutions to carry out the given tasks.\textsuperscript{46}

\textbf{2.5 The European Court of Auditors}

The ECA was established by the Treaty of Brussels\textsuperscript{47} of 22 July 1975 and started to be operative in October 1977, a time when the European Community (the foregoer to the EU) was seeking

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\textsuperscript{42} They deal with the five main aspects of the financial system: the general rules governing the budgetary procedure (Articles 310, 312, 313, 316 and 320), financing of the budget (Article 311); the stages in the budgetary procedure (Articles 313-315); execution and control of the budget (Articles 317, 318, 319 and 321) and additional provisions (Articles 322-325).


\textsuperscript{44} See further: EUR-Lex Access to European Union law, \textit{Sources of European Union Law}, last updated 30 of August 2015, http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=LEGISSUM%3AI14534, [accessed: 2018-02-23]. See also Article 295 TFEU which states: “The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be of a binding nature”.


to become more democratically accountable to its citizens.\textsuperscript{48} Two of the most important developments were the extension of the European Parliament’s powers in budgetary control and the financing of the European Community’s budget from its own resources. The Community recognised that it also needed an independent external auditor to assist the European Parliament and the European Council guarantee democratic control of its finances. Prior to the founding of the ECA, this task was in initially performed by a small audit board which, as the Community grew rapidly, did not have the sufficient resources to ensure the adequate audit of the rapidly-expanding budget.\textsuperscript{49}

The ECA took its place as a fully-integrated European institution on 1 November 1993, with the entry into force of the Maastricht Treaty.\textsuperscript{50} The Treaty gave the ECA equal status with the Commission, the European Council and European Parliament. The Maastricht Treaty also introduced the core responsibility and product of the ECA — “the annual statement of assurance on the reliability of the EU accounts and the legality and regularity of the transactions underlying them”.\textsuperscript{51}

The independence of the ECA was confirmed in Treaty of Amsterdam (1999), that extended its audit powers to more policy areas as well. Furthermore, the Treaty emphasised the ECA’s role in the fight against fraud and allowed it to apply to the ECJ in order to protect its prerogatives from infringement by the other EU institutions.\textsuperscript{52}

The 2003 Treaty of Nice set the principle that one Member from each Member State should be represented at the ECA, highlighting the importance of the institution’s cooperation with national audit bodies.\textsuperscript{53} There is, for instance, a cooperation between the ECA and the SNAO.\textsuperscript{54}

The Treaty of Lisbon, which came into force in 2009, confirmed the Court’s mandate and status as an EU institution. The TFEU also introduced changes to the way EU funds are managed and

\textsuperscript{48} The element of democracy in the role of the court is also underlined in: The European Court of Auditors, \textit{What is the role of the European Court of Auditors}, 2012: “Accountability is an essential element of democratic responsibility. It requires a strong external audit function.” The European Court of Auditors has fulfilled this role for the EU since 1977. http://www.audit.gov.cy/audit/audit.nsf/0/6294f1f95b982ab9c2257a4c003c161d/$FILE/15268739.PDF, See also: The European Court of Auditors \textit{Auditing the finances of the European Union}, 1995, p. 6: “Under the constitutional systems of modern States the auditing function is generally considered to be one of the elements which ensure that the activities of the public sector are conducted democratically”, http://aei.pitt.edu/39036/1/A3959.pdf.


\textsuperscript{51} Regarding the changes of the functioning of the ECA see: The Maastricht Treaty, Title III Provisions Amending the Treaty Establishing the European Coal and Steel Community: Articles 45a-45c.

\textsuperscript{52} See Treaty of Amsterdam, Part One- Substantive Amendments: Art. 2 regarding Art. 188 c.


examined by firming the budgetary powers of the European Parliament, emphasising the Member States’ responsibility for implementing the EU budget.

2.5.1 Structure and role of the ECA today

The main role of the ECA is to act as the EU's independent external auditor and monitor the interests of EU citizens. Moreover, it works to improve the Commission's management of the EU budget and reports on EU finances. The ECA achieves these objectives through audits on EU revenue and expenditure, determining whether the EU funds are correctly raised, spent and accounted for. The ECA’s audit work focuses primarily on the Commission which is the central body responsible for implementing the EU budget. Nonetheless, it also works closely with national authorities, as the Commission manages most EU funds jointly with them. The ECA also checks organisations handling EU funds, EU countries and countries receiving EU aid. Furthermore, it gives recommendations in audit reports for the Commission and national governments and draft reports on e.g. suspected fraud or corruption to the European Anti-Fraud Office (OLAF).55 The results of the ECA’s audit work are published in annual reports, specific annual reports and special reports depending on the type of audit. Other published products include legal opinions as well as observations on the risks to the EU financial management (landscape reviews). All the aforementioned products of the Court contain recommendations to the recipients in order for them to improve the management of their activities. The Court’s audits are complex and technical, therefore require significant resources to complete. Audit topics are selected based on risk, public interest and likely impact and are aimed at maximising the use of the ECA’s resources.56

The annual reports of the ECA are produced for the European Parliament and the European Council. The Parliament examines the report before deciding whether to approve the Commission's handling of the EU budget. The ECA publishes legal opinions to provide its views on preparatory legislation or updated laws that influence EU financial management. Usually by the request of the European Council.57

As an example of the latter, the Commission planned to modify the Financial Regulation, which governs the operation of the EU Budget. Having regard to the European Council's request for an opinion on the revision of the Financial Regulation, the ECA adopted the opinion that the Financial Regulation needed to be simplified further according to the ECA.58 Additionally, the Commission suggested to put together numerous existing reports into an “integrated financial reporting package”. The ECA warned that this would create a package that would run to thousands of pages and would include significant duplication. Furthermore, the Commission

55 The legal instrument used to set up the OLAF was 1999/352/EC, European Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC (1999) 802).
suggested detailed changes to budgetary management arrangements without questioning whether the at the time existing mechanisms still was appropriate. The ECA highlighted that there was scope for significant simplification and additional flexibility in the already existing arrangements.\textsuperscript{59}

To be enhance transparency, the Court must work independently without letting the other EU institutions and bodies influence or interfering with its audits. Therefore, it is free to decide on what it will audit, how to carry out the audits and when it will present its findings. The Court carries out financial audits where it examines that accounts accurately present the financial results, position and cash flow for the year. It also carries out compliance audits by checking that financial transactions follow the rules and lastly performance audits where it examines that the EU funds are achieving its goals with the fewest possible resources and in the most economical sustainable way.\textsuperscript{60} In a report from 2016, the Court found significant level of non-compliance with State aid rules in cohesion policy and stressed that changes were needed in the way projects for the Member States were approved and examined.\textsuperscript{61}

\subsection*{2.5.2 The Members}

The ECA operates as a collegiate body of 28 Members which are appointed by the European Council after consultation with the European Parliament. Each Member is appointed for a renewable term of six years.\textsuperscript{62} Furthermore, the ECA is divided into five chambers\textsuperscript{63}, to which Members and audit staff are assigned. Every chamber works on different focus areas and their main responsibilities are to adopt special reports, specific annual reports and opinions. However, their main task is to prepare the annual reports on the EU budget and the European Development Fund, for adoption by the ECA altogether.

The 28 Members of the Court meet twice a month (subject to exceptions) to discuss and adopt documents such as the ECA's main annual reports on the EU general budget and the European

\textsuperscript{59} Official journal of the European Union C 91, Court of Auditors, Opinion No 1/2017, https://www.eca.europa.eu/Lists/ECADocuments/OP17_01/OP17_01_EN.pdf., See also The European Court of Auditors, Opinion No 2/2016 (pursuant to Article 287(4) of the Treaty on the Functioning of the European Union (TFEU)), 1 July 2013, https://www.eca.europa.eu/Lists/ECADocuments/OP16_02/OP16_02_EN.pdf.: Commission planned to increase and extend the European Fund for Strategic Investments (EFSI) which is a joint initiative of the Commission and the European Investment Bank (EIB), only one year after its launch. It underlies the EU’s Investment Plan, also known as the “Juncker Plan” that aims to generate €315 billion in public and private financing for strategic investments. The ECA highlighted the fact that the Commission proposed an extension to EFSI only one year after its launch without carrying out a comprehensive impact assessment. And the auditors question the deletion of the provision linking the continuation of EFSI to the results of an independent evaluation.


\textsuperscript{62} Article 286 TFEU.

\textsuperscript{63} Namely: Chamber I – Sustainable use of natural resources; Chamber II – Investment for cohesion, growth and inclusion; Chamber III – External action, security and justice; Chamber IV – Regulation of markets and competitive economy; Chamber V – Financing and administering the Union. For further information about the Chambers and their areas of interest please see https://www.eca.europa.eu/en/Pages/OrganisationChart.aspx [accessed: 2018-03-10].
Development Funds are examined. Pursuant to Article 286 (1) of the TFEU, the Members at the ECA must have belonged to external audit bodies in their respective countries or be especially qualified for the position.

For the appointment of a Member of the ECA, the consultation procedure is applied. This means that the European Council appoints the Member after the recommendation of the Member States and after consulting the European Parliament. Candidates nominated as Members of the ECA will make a statement before the Committee on Budgetary Control and to answer questions asked by its members. The questions are divided in four categories: independence, professional experience, performance of duties and other questions. After the questioning, the Committee on Budgetary Control votes on each nomination and make a recommendation to the European Parliament as to whether the nomination should be approved. The vote in the plenary will determine the opinion adopted by the European Parliament. If it is unfavourable, the president of the European Parliament will ask the European Council to withdraw its nomination and to submit a new candidacy.

The Members of the Court need to be entirely impartial in the performance of their duties. They cannot take instructions from any government or any other body, moreover, they must avoid to take any actions incompatible with their duties. During their term of office, the Members of the ECA should not engage in any professional activities. Apart from normal replacement, the duties of a Member end when in case of resignation or when the Member is obligated to retire by a ruling of the Court of Justice. The decision-making procedure of the Court shall be decided by the majority of the Members.

2.6 Legal framework and hierarchy of norms for the ECA

The key legal framework of the Court are Articles 285-287 of the TFEU and the Financial Regulation for the general budget of the EU. Article 285 lays down the composition of the ECA and states the main tasks of the Court which is to carry out the Union’s audit. Article 286 lays down the duties of the Members at the ECA and Article 287 establishes the operative rules
regarding the tasks the ECA. Article 287 lays down the operative functions of the Court which includes, *inter alia*, the examination of the accounts of all the revenues and expenditures of the Union and the observation of the accounts of all the revenues and expenditures of bodies, offices and agencies within the Union. Furthermore, Article 287 lays down the basis of the ECA’s examination not only if whether all the revenues have been received and all the expenditures incurred in a lawful and regular manner, but also whether the financial management has been sound.\textsuperscript{72} The Article also states that the ECA may submit observations, in the form of special reports, on specific questions and deliver opinions at the request of any EU institution.\textsuperscript{73}

Regarding the references used for the principles and procedures governing the establishment, implementation and control of the EU budget, the most important tools are the Financial Regulation (FR) and the Rules of Application (RAP).\textsuperscript{74} The RAP, which contain more detailed and technical rules, accompanies the Financial Regulation, which was originally adopted on 21 December 1977, but has been amended repeatedly since then. The current versions of the Financial Regulation and the Rules of Application apply from 1 January 2016. The European Commission adopted on 14 September 2016 a proposal for a new Financial Regulation. This proposal merges FR and RAP into a single set of rules, improving significantly in terms of simplification. It primarily contains principles, establishment, structure, implementation and auditing of the accounts provisions applicable to the general EU-budget. FR and RAP respond to the need of increased transparency, considering the requirements for legislative and administrative simplification and rationalisation of the Union’s finances management. More specifically, transparency has been reinforced through the release of all the information regarding the recipients of all the EU’s financial allocations, regardless of the entity or authority involved in implementing the budget, thus including decentralised and joint management of the budget with non-EU countries and international organisations.

As an EU institution established by the Treaty, the Court’s operations must be governed by the appropriate rules and procedures. The ECA’s Rules of Procedure are required by Article 287 (4) of the TFEU and are approved by the Council of the EU. The ECA determines its own rules for implementing its Rules of Procedure.\textsuperscript{75}

According to Article 287 (3) TFEU, the Court of Auditors and the national audit bodies of the Member States shall cooperate in a spirit of trust while maintaining their independence. These bodies or departments shall inform the Court of Auditors whether they intend to take part in the audit. Therefore, the connection between the EU Court and the national court of Auditors is also established in the primary EU-law.


\textsuperscript{73} See Articles 285-287 TFEU. See also: The reference text concerning the financial provisions can be found under Articles 310 to 325 of the TFEU. But the most important financial provisions are Article 319 regarding the implementation of the budget and discharge, Article 322 which lays down the common provisions and Article 325 regarding combatting fraud.

\textsuperscript{74} Financial Regulation applicable to the general budget of the Union and its rules of application, July 2017, p. 7.

\textsuperscript{75} See Rules of Procedure of the Court of Auditors of the European Union, 2010, see also the Decision No 38-2016, laying down the rules for implementing the Rules of the Procedure of the Court of Auditors.
2.7 The Swedish National Audit Office

The SNAO is a Swedish authority under the Swedish Parliament, with the task of examining the activities of the state.\(^{76}\) It has a statutory independence to examine how state funds are used. The NAO is part of the Swedish Riksdag (Swedish Parliament) control authority. The main objectives and activities undertaken by the SNAO are, namely:

- Contribute to democratic transparency, enabling citizens to have an insight into the national decision-making process;
- Examine the government's activities, to contribute to the effective management of state administration;
- Conduct international development cooperation and reviews about 250 agencies' annual reports each year.\(^{77}\) The legal framework of the SNAO can be found in Regeringsform (Swedish Constitution 1974:152) SFS 1974:152 chapter 13, paragraphs 7-9, Lag (2002:1022) om revision av statlig verksamhet m.m. (Act on Audit of State Activities 2002:1022) and lag (2002:1023) med instruktion för Riksrevisionen (Act containing Instructions for the Swedish National Audit Office 2002:1023).

Similarly to the ECA, the SNAO is carrying out financial audits and performance audits. The financial audits involve, for instance, audit of financial reports produced by the Swedish government Offices and agencies under the supervision of the Riksdag and the Swedish government. The objective of the financial audit is to provide an opinion on whether the aforementioned financial reports portray a true and fair view the activities of each organisation subjected to audit. The performance audits intend to scrutinise the Swedish government undertakings and submit recommendations in order to improve the quality and efficiency of the activities.\(^{78}\) For instance, the SNAO criticised in a report the current and the previous Swedish governments for their inadequate impact assessments at the basis of migration policy. According to the report, the government failed to make economic analyses of immigration costs, which failed to make credibly forecasts about the number of asylum seekers, not considering the consequences of the policy on migration for citizens, authorities, municipalities and county councils.\(^{79}\)

The SNAO is led by three Auditors General (AGs) appointed by the Riksdag for a period of seven years, without the possibility of re-appointment. One of the three AGs is responsible for the administrative management of the SNAO.\(^{80}\) The AGs are proposed by Sweden’s constitutional committee and must have good professional and personal qualities, preferably

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acquired during a long-term and high-level service in state administration. According to a recent investigation by the Riksdagsförvaltningen (Parliamentary administration), there are no formal requirements of the appointment of an AG. However, it is stated that the person who is chosen for the position must be of great integrity and have a good reputation both within the administration and amongst political representatives. Moreover, an AGs cannot be employed or practice activities that may affect his/her objectivity.

The AGs autonomously establish how to share among them the responsibilities of the audit, and which areas of interest the audit should be focused on. However, this must be established through a prior consultation. Generally, AGs decide independently in their respective audit tasks. However, when deciding what should be reviewed, they must consider provisions in law. The objectivity of the AGs is of crucial importance for the audit work as well as for the reliability of their conclusions. However, the SNAO itself is not more independent than any other Swedish authority, since in economic and administrative terms it is subjected to the same regulations as other authorities under the Riksdag.

2.8 Conclusions

When examining the work of the ECA and the Member States, independence and objectiveness are emphasised respectively in the TFEU and the Rules of Procedure. The question is, however, whether working closely with other EU institutions is a simple task for the ECA. This will be discussed further in the following chapters. The European Union has developed a hierarchy in its organisation. All the EU institutions including the ECA have, theoretically, equal powers. Hence, the question whether this is a sufficient structure considering the future management of a decreasing EU budget. The Court currently has well-developed methods of auditing. However, it has been forced to adjust some of its audit methods because of criticism. This will be discussed further in the upcoming chapters.

The ECA and the SNAO are both independent control bodies that uphold transparency as a core value. Similarly to the ECA, the SNAO is free to decide the subject of the audit and it can carry out both financial and performance audits. However, there are some differences in regards to the hierarchy and the effectiveness of the two audit mechanisms. First of all, the ECA is equivalent to any EU institution, while the SNAO is working under the Swedish government. This fact may not have any impact on the SNAO’s authority in practice since it is part of the parliamentary control and the only body that can audit all state finances. However, the SNAO is theoretically not more independent than any other Swedish authority under the Riksdag (since they are all subjected to the same administrative and economic procedures) while the ECA is concurrently equal and independent to the other EU institutions.

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82 Riksdagsordning (2014:801) t.o.m. SFS 2018:94, Chapter 13, paragraph 5.
Both the Members of the ECA and Swedish Auditors General must have a relevant background to get appointed and they need to be entirely impartial in the performance of their duties. The latter is a vital requirement to avoid any abuse of their position. The professional requirements needed for the appointment as both ECA Member and Auditor General could be interpreted as vague. It is in the people’s interest to get clarification regarding these requirements, to enhance transparency. The condition “especially qualified for this position” should be further explained in Article 286 TFEU. This would not only enhance the surrounding issues of independence, but also expertise, experience, and political impartiality.
3. Role of the ECA

3.1 Introduction

This chapter will give an overview of the Court’s consultative and legal power. It will also clarify the function and influence of the legal opinions and recommendations to EU policymakers regarding the management of the EU finances. This chapter aims to assess whether the current operational and legal system of the Court is efficient. To achieve a global outlook, it is indispensable the opinion of someone with an insight of the ECA’s operational system. For this purpose, an interview with a legal expert from the legal service at the Court will be presented.

One of the ECA’s main task is to make sure that the reliability of the accounts and the legality and regularity of the underlying transactions can be accounted for through its statement of assurance.86 The ECA has found error in payment in the EU’s accounts which has been highlighted in the statement of assurance of the annual reports. However, a common misunderstanding is that genuine mistakes such as error in payment “in good faith” is equivalent to fraud or corruption. To clarify the specific issue, this chapter will give some examples of the EU’s and Sweden’s actions on fraud and corruption and the highlight some challenges the ECA and the SNAO face in their collaborations with other actors on these matters. The chapter will also include some examples the Court and SNAO have brought to light regarding fraud and corruption.

3.2 The ECA’s consultative role

The name ‘European Court of Auditors’ is considered to have be misleading since the institution, despite its name, does not have the traditional legal power of a court because it cannot declare the law or pronounce judgements.87 However, the Court gives its authoritative opinions to policymakers on how EU finances could be better managed and more accountable for citizens. Every time any legislation with financial implications is going to be adopted, the Court must be consulted.88

The ECA defines itself as an independent auditor. In accordance with the TFEU, the Court gives its opinion on the EU’s accounts; it checks whether the EU budget is used in accordance with applicable laws and regulations; it reports on whether EU spending is economic, effective and it counsel on suggested legislation with a financial impact.89

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86 The statement of assurance is defined in Article 287 (1) TFEU as an opinion on the legality and regularity of payments underlying the accounts as: “the annual statement of assurance on the reliability of the EU accounts and the legality and regularity of the transactions underlying them”.
This compulsory consultation of the ECA applies in three different instances. First, the Court needs to be consulted when the European Council decides on financial regulations. Second, when the budget revenue provided under the arrangements relating to the EU-budget is made available to the Commission. Lastly, when the European Council lays down rules regarding the responsibility of accounting officers, authorising officers and financial controllers. The ECA also needs to be consulted before the adoption of any legislation in the fields of the prevention of and the fight against fraud. Moreover, the ECA may deliver an opinion at the request of one of the other EU institutions. However, the ECA’s opinions are not binding. If the ECA is satisfied with the way the EU-budget has been spent, it sends assurances to the European Council and European Parliament that the citizens’ money is being used in a proper manner.

Although the Court must remain independent, it must stay in touch with the other EU institutions to fulfil its tasks. A fundamental one is the presentation of the ECA’s annual report to the European Parliament which is the basis of its decision on whether to sign off the Commission's handling of the budget for that year. There are some examples where the European Parliament refused to give discharge to the Commission. It refused for instance to do it in 1999, which forced the resignation of the Santer Commission.

The ECA carries out follow up-reports on the Commission’s implementations of the recommendations issued. The latest Special Report on the follow up of the ECA’s recommendations is the one published 2016 on the annual report from 2014. The Auditors reviewed the Commission’s follow-up of 44 recommendations from eight performance audits. The Court deliberated that the Commission had fully, or in most respects, implemented 89 percent of its recommendations. Following up performance audit reports is an important element in the cycle of accountability and, according to the Court, encourages the Commission to implement the ECA’s recommendations effectively. However, a follow-up report is a comprehensive initiative which need to be done in close co-operation with the Commission. So far it has only been done on the recommendations from the performance audits. Furthermore, the special reports on the follow-up have been criticised for being delivered too late for their findings to have any influence.

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90 See Article 287 (4) TFEU.
91 See Article 279 of the EC Treaty and Article 183 of the EAEC Treaty; see also Article 78 of the ECSC Treaty, which expired on 23 July 2002.
92 Article 280(4) of the EC Treaty.
93 See the second subparagraph of Article 248 (4) of the EC Treaty and the second subparagraph of Article 160c (4) of the EAEC Treaty; see also the second subparagraph of Article 45c (4) of the ECSC Treaty.
3.2.1 The SNAO’s consultative role

The SNAO provides the Riksdag and the government with decision-making guidance and well-substantiated conclusions and recommendations. To fulfil its mission, the SNAO must operate in an open and trustworthy way in relation to both the Riksdag, government, other authorities and the surrounding community. Transparency and clarity is a priority, both in terms of the SNAO’s goals as its working methods. Based on Article 287 (3) TFEU, the Swedish National Audit Office, being the external audit institution of the EU, shall cooperate with the European national Court of Auditors in a spirit of trustworthiness – maintaining, however, its independence. The SNAO collaborates with the ECA by informing the government offices and appointing its own observers to participate in the visits. After the visit has been completed the observers write a report, which is shared with the SNAO and others.

Depending on the scope of the audit, there will be different approach methods. For instance, if dealing with a performance audit, the SNAO submits its findings to the Riksdag, which in its turn submits it to the Swedish government. At this point, the government has four months to report what kind of measures it has taken and which measures it intends to take and the Riksdag, thereafter, decides on the matter. The financial report is submitted from the SNAO directly to the government and to the relevant authority it has audited. The SNAO is, similarly to the ECA, compiling its most important observations from the performance audit and financial audit in its annual reports which are submitted to the Riksdag. The SNAO’s recommendations in its reports are not binding, but are an instrument to encourage responsible economic policies and to meet common goals. Moreover, the SNAO is unable to oppose any sanctions on the addressees of the auditing: it is the Riksdag’s or the Swedish government’s responsibility. In other words, it can only impose sanctions in an indirect way through the Riksdag. However, the SNAO is carrying out annual follow-up reports which monitor what happened owing to its recommendations and findings.

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100 See Article 287 (3) TFEU the cooperation applies to all Member States national audit bodies. See also Swedish National Audit Office, EU cooperation, last updated 23 January 2018, https://www.riksrevisionen.se/en/international-operations/eu-cooperation.html, [accessed: 2018-02-22].
101 Act on Audit of State Activities etc. (2002:1022) paragraphs 9-11.
102 Act on Audit of State Activities etc. (2002:1022) paragraph 12.
3.3 Interview with Georgios Prantzos on the ECA’s functions and legal power

This interview with one of ECA’s lawyer aims to enhance some clarification regarding the Court’s functions and its consultative and legal power. The most efficient way to get answers concerning these questions is to interview an insider of the ECA that deals with this matters daily. The interview was carried out in English.

About the role of legal service in the ECA

The legal service produce legal opinions that provide our view on matters related to audit. For instance, the auditors might come across national law or EU-law when they are checking for compliance of a certain transaction and they might not be sure about the interpretation. In that case, they will turn to us at the legal service and ask about our view on that. However, the legal opinion issued by the legal service is not binding. Normally, it will be followed by the auditors, but they have no binding effect. The legal service is also in charge of “ECA fraud”. Fraud is a misuse of money that has a harming impact on the EU budget. Whenever the auditors come across cases with irregularities and there is a suspicion of fraud, the legal service puts this suspicion in a legal context and forwards it to European Anti-Fraud Office (OLAF). The legal service can also be consulted before a requested document of the ECA should be released in public.

About the ECA’s legal and binding power

The ECA does not have any legal power. The Court has been entrusted to produce an annual report on the reliability of the accounts and provide a statement of assurance on the reliability. This statement of assurance will be used by the European Parliament and the European Council to help them grant the Commission discharge for the management of the EU-budget. The opinion that the ECA provides, is just a presentation that is included in the report. But from a legal perspective the ECA has no binding power in this regard.

Although the findings that the Court may not have a binding power per se, it plays a significant political role since the Commission’s discharge relies on the Courts assessments. However, the ECA will not itself apply any corrections when there have been any errors in the management

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105 The interview was carried out at the European Court of Auditors on 27 March 2018. Georgios Prantzos is a lawyer working at the legal service in the ECA since 2016.
106 There is no legal basis or administrative internal rules for the legal service open for the public. However, there is some information of its role provided in: The European Court of Auditors, Administrative Procedures-Vacancy Note, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3AC2015%2F433A%2F01, “The Legal Service provides the Court with legal advice and support in all of its activities, including advice in relation to the institution’s powers and prerogatives, any legal issues that may arise from audit activities, and staffing and administrative matters. The Legal Service represents the institution in legal proceedings, in particular before EU courts.”
107 See also Article 8 regarding processing of requests for consideration of the Decision No 26-2010 laying down the rules for implementing the Rules of the Procedure of the Court of Auditors.
108 See Article 319 TFEU regarding the European Parliament’s discharge of the Commission.
of the EU funds; it is ultimately the Commission that will take the decision on whether to apply corrections. Apply corrections means that it asks Member States or fundal beneficiaries to pay back money entrusted to them. As said before the ECA cannot enforce any direct sanctions. The Commission has the exclusive power to sanction. Nevertheless, the ECJ has mentioned in Pippo Pizzo and Others v. CRGT\textsuperscript{109} that the findings of the ECA should not be disregarded since the observations of the Court helps improve the financial management. This means that the findings of the ECA does play a significant role even if it has no binding character. This also means that our findings have a safeguarding effect on the management of the citizens’ money.

**About the consultative power of the Court**

The ECA mainly gives its opinions on the financial regulation. For instance, whenever there is a revision of the financial regulation, it must be consulted. The new revised regulation must be put forward to the ECA for comments and observations. The TFEU lays down the rules concerning the areas where the different EU institutions need to give their consent through consultation. It depends on the type of amendment and there is a huge difference between consultation and the consent. When it is stated that the Court need to give its consent, it must agree with the amendment. However, when it states that that the ECA should be consulted it is mandatory as regard to the procedure and the results that the Courts consultation is taken in consideration.

The audit work of the ECA is mainly focused on reliability and irregularity. The purpose of the auditing is to present an error rate in the management of the EU funds. The Court can use three different types of opinions in the annual reports for the reliability of the accounts and the legality and regularity of the underlying transactions in its statement of assurance. The unqualified opinion has never been used since the establishment of the ECA. It means that there has not been any error rate in the management of the EU budget. A qualified opinion means that there has been smaller size of error rate and the adverse opinion,\textsuperscript{110} meaning that the Commission has been irresponsible in its management of the budget. The latter has not happened for a long time which indicates that the budget is well managed by the Commission the recent years. The increasing performance audits have contributed to a decreasing error rate. The auditors at the ECA are looking at the amounts spent on the different projects to

\textsuperscript{109} European Court of Justice, Opinion of the Advocate General Sánchez-Bordona of 21.01.2016 in European Court of Justice. Judgement of the Court of 21 January 2016 in the case C-27/15 (Pippo Pizzo and Others v. CRGT srl). ECJ has mentioned in Pippo Pizzo and Others v. CRGT CRL that the findings of the ECA should not be disregarded since the observations of the Court helps improve the financial management in the following statement: “As a final reflection on the Court’s responsibility for its audits, it should be noted that, when formulating an observation of non-compliance with applicable national rules, which may therefore result into recommendations made on this base, it is also worth considering whether legal certainty and legitimate expectations may be frustrated as a result thereof. Indeed, even if this may look a remote probability, since it is up to the Commission to decide on the follow up of the Court’s findings and the Court’s conclusions do not automatically lead to corrections, it is worth considering that the Court’s authoritative influence may nonetheless play a significant role in this.”

determine whether the projects reached the desired results in order to make sure that the money is not misused.

Final words

The Court have a consultative power and a controlling role but they do not have the power to impose sanctions. They work however with authorities that impose sanctions. This is the reason why the discharge of the auditors is required. The fact that the ECA is unable to enforce sanctions directly for the mismanagement of the EU budget is not a problem in my opinion. However, if our opinions or comments were binding it would increase our authority. They have a political power but lack of the legal power because they don’t have a binding effect.

3.3.1 Supreme audit institutions with legal powers

There are examples of Supreme Audit Institutions (SAI’s) that has an institutional position – which is equidistance between the executive and the legal powers – to preserve the independence of the audit institution. For instance, the Cour des comptes in France has a model which is based on the idea of mutual and non-hierarchical decision-making processes with jurisdictional attributions (sanction power) that the Cour des comptes can exercise by itself or through a closely associated court such as the Budget and Finance Disciplinary Court in France.\footnote{111 Eurosai Innovations, Sharing good practices among Supreme Audit Institutions, 2015, p. 5, https://www.nku.gov.sk/documents/10272/1273416/5.+EUROSAI+Innovations+volume+III.pdf/5252d2ef-0ba5-46ac-abc8-02bd8edfbb52, [accessed: 2018-03-10].}

3.4 The EU’s actions on fraud and corruption and the challenges for ECA

Corruption and fraud are perceived as a serious problem for the EU budget and for EU institutions. Therefore, a transparent system is required to detect irregularities. The Commission is responsible for protecting the EU’s financial interests. It must take the necessary measures to provide proper assertion that irregularities, fraud and corruption in the use of the EU budget are prevented, identified and corrected. This duty is shared with Member States. An irregularity in the EU budget is an action or omission which leads to disobedience with EU rules, and might have a negative impact on the EU’s financial interests. Irregularities and error in payments could be the results of genuine mistakes made in good faith by beneficiaries or by the authorities responsible for making outflows. However, fraud is the severest form of an irregularity. It refers to any intended act or omission aimed to mislead others, resulting in the victim suffering a loss and/or the perpetrator achieving a gain.\footnote{112 Directive (EU) 2017/1371 of the European Parliament and of the European Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.} Corruption is normally understood to comprise any act or omission that exploits misuse authority, or seeks to influence the misuse of official authority, to obtain an undue benefit.\footnote{113 The European Commission, Report from the Commission to the European Council and the European Parliament, EU Anti- Corruption Report, Publ. 3 February 2014, p. 2.}
In April 2017, the European Council adopted a Directive on the fight against fraud to the Union's financial interests by means of criminal law to better the criminal investigations and the prosecution of crimes against the EU’s financial interests. This Directive was adopted by the European Parliament in July 2017 and Member States have 24 months to implement the directive in their national law. Moreover, there are joint efforts managing the risk of fraud against the EU budget. These actors are involved at different stages (see Fig. 1) both at Member State and EU level.

According to Article 3 in the Directive (EU) 2017/1371 of the European Parliament and of the European Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, fraud that affects the EU’s financial interests consist of:

“(A) in respect of expenditure, any intentional act or omission relating to:
- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the EU budget or budgets managed by, or on behalf of, the EU;
- non-disclosure of information in violation of a specific obligation, with the same effect;
- the misapplication of such funds for purposes other than those for which they were originally granted.

(B) in respect of revenue, any intentional act or omission relating to:

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115 The European Court of Auditors, Audit Brief, Fighting fraud in EU spending, Fig. 4, Publ. October 2017, https://www.eca.europa.eu/Lists/ECADocuments/AB_FRAUD_RISKS/AB_FRAUD_RISKS_EN.pdf. p. 9.
- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the EU budget or budgets managed by, or on behalf of, the EU; 
- non-disclosure of information in violation of a specific obligation, with the same effect; 
- misapplication of a legally obtained benefit, with the same effect."

The Court is bound to report any issues in the audits to Member States and EU institutions. For instance, the ECA found irregularities in the management of EU funds in some regions of the UK. Because of the Court's reports, the Commission suspended funds to those regions and prepared to fine those who did not reach the acceptable standards of managing the EU funds. However, the ECA's estimate of the error rate in its annual reports does not measure the level of fraud or corruption. The level of errors in the reports is an estimation of the money that should not have been paid out because it was not used in accordance with the applicable rules and regulations.

The most central body dealing with fraud within the Commission, which also works closely to the ECA, is the OLAF. The ECA reports any suspected cases of fraud and corruption among these failures to the OLAF, which is the sole actor at an EU level with independent investigative powers. It executes investigations within EU institutions and external cases of corruption, fraud and any other illegal activities that damages the EU's financial interest. However, the OLAF does not have sanctioning powers. Nonetheless, it gives judicial recommendations to the appropriate national judicial authorities. Moreover, the OLAF gives administrative and financial recommendations to the Commission which is responsible for ensuring that the affected EU funds are recovered. Lastly, it gives recommendations to the specific authorities with sanction powers in the EU institution or other bodies concerned.

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116 The Directive specifically mentions the ECA. See recital no. 23: "The Court of Auditors and the auditors responsible for auditing the budgets of the Union institutions, bodies, offices and agencies should disclose to the European Anti-Fraud Office (OLAF) and to other competent authorities any fact which could be qualified as a criminal offence under this Directive, and Member States should ensure that national audit bodies within the meaning of Article 59 of Regulation (EU, Euratom) No 966/2012 do the same, in accordance with Article 8 of Regulation (EU, Euratom) No 883/2013." See also art. 15(3): "The Court of Auditors and auditors responsible for auditing the budgets of the Union institutions, bodies, offices and agencies established pursuant to the Treaties, and the budgets managed and audited by the institutions, shall disclose to OLAF and to other competent authorities any fact of which they become aware when carrying out their duties, which could be qualified as a criminal offence referred to in Article 3, 4 or 5. Member States shall ensure that national audit bodies do the same."


118 See 1999/352/EC, European Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (notified under document number SEC (1999) 802), Important provisions of the Decisions regarding OLAF are for instance Articles 1 and 2, Art. 1 states: "A European Anti-fraud Office (OLAF), hereinafter referred to as "the Office", is hereby established. The Office shall replace the Task Force for Coordination of Fraud Prevention and take over all its tasks." Article 2 states: "The Office shall exercise the European Commission's powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community's financial interests, as well as any other act or activity by operators in breach of Community provisions."

When the ECA is preparing any audit, the auditors carry out a risk analysis of the policy area or programs that they intend to examine. In the ECA’s audit of how the Commission manages fraud risks in EU spending, the Court identifies the possible risks associated to the area of fraud prevention. For instance, risk of fraud could be detected within the shared management area, in other words, the figures reported by Member States (and candidate countries) to the Commission. However, the challenge may be that the detected irregularities and fraud are not comparable between Member States due to divergences in interpreting what information should be reported, and when. Moreover, there might be gaps in the information gathered by the Commission which may, for instance, not be able to gather comparable and adequate estimates of possible undetected levels of fraud within Member States. This fact can indeed have an impact on the reliability of the Commission’s calculation regarding the amount of fraud that affects the EU budget. Additionally, the Commission may not use all the time-consuming available operational intelligence to gain an adequately detailed examination of the profiles and motivation of potential fraudsters and the main methods of defrauding the EU budget.

According to the Court, the unduly spent funds should be recovered and any criminal offence affecting the EU-budget should be punished. As mentioned before, the main responsibility for detecting fraud and corruption is through the OLAF. Nevertheless, there is a low level of implementation of the OLAF’s judicial and financial recommendations which might highlight the weaknesses of the EU’s current model of collaboration between judicial authorities in different Member States. Additionally, the current model might not provide the most effective action against crossborder crimes.

The Commission published its first EU Anti-Corruption Report in 2014, which showed that the corruption varied from one Member State to another and that the effectiveness of anti-corruption policies were contrasting. Moreover, the report showed that corruption is an anomaly affecting all Member States, highlighting the need of joined action across the EU. However, the Court criticised the report for being overly descriptive, offering little analysis and including no substantive findings, relying instead on the results of corruption perception polls. The ECA agreed that the Commission’s anti-corruption report was a start to a promising discussion market, enhancing good governance by improving transparency and accountability, as corruption and fraud erode trust in public institutions and democracy. However, the

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121 The European Court of Auditors, Audit Brief, Fighting fraud in EU spending, Figure 4, Publ. October 2017, https://www.eca.europa.eu/Lists/ECADocuments/AB_FRAUD_RISKS/AB_FRAUD_RISKS_EN.pdf, p. 16.
Commission did not provide in the report a link to the overall issue of fraud and corruption in the EU and its Member States.\textsuperscript{124}

3.4.1 Examples of Sweden’s actions on corruption and fraud

Currently, Sweden does not have a national anti-corruption strategy.\textsuperscript{125} However, it has carried out several risk assessment reports and studies related to corruption. These value assessments have, for instance, covered risks of corruption in Sweden’s local government sector, risks of corruption in public procurement and risks of corruption in the Swedish central authorities.\textsuperscript{126} Swedish criminal legislation covers most forms of corruption offences contained in the Council of Europe Criminal Law Convention on Corruption and the Additional Protocol. The Constitution, the Administrative Act (1986:223), and the Act on Public Employment (1994:260) set out exhaustive rules and principles of conduct, including provision on conflicts of interest. The Swedish Association of Local Authorities and Regions published the first guidelines on conflicts of interests and corruption for public personnel working in counties, municipalities and regions.\textsuperscript{127} There are low levels of perceived and experienced corruption in Sweden. The main reason for this is traditionally related to the openness and transparency of Swedish institutions and society.\textsuperscript{128} However, more recent studies suggest that citizens perceive their politicians and public officials as more corrupted and impartial compared to Sweden’s outstanding results in the corruption ranking in, for example, Corruption Perception Index and Rule of Law Index. This especially evident in regards to the corruption on a municipality level.\textsuperscript{129}

The political parties at the national level in Sweden are dependent on public funding from the government and Riksdag.\textsuperscript{130} In pursuance of transparency regarding political funding, the

\textsuperscript{125} European Commission, Report from the Commission to the European Council and the European Parliament EU Anti-Corruption Report, Sweden, 03/02/2014.  
\textsuperscript{130} Estimations of the total amount of public support to political parties at various levels indicate that 70-80 per cent of all party activities are financed through public means. GRECO Third Evaluation Round in 2009. p 12: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2008)4_Sweden_Two_EN.pdf., [accessed: 2018-04-13].
political parties have developed a voluntary Joint Agreement. The agreement lays down, for instance, that the parties’ sources of income need to be made as transparent as possible. According to the agreement, the voters have a right to know how the parties and candidates of the parties finance their campaigns and activities.\footnote{The agreement is not binding and the agreement does not contain any means, such as sanctions. \textit{GRECO Third Evaluation Round} in 2009. p. 12, http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2008)4_Sweden_Two_EN.pdf, [accessed: 2018-04-13].}

In Sweden, the debate regarding benefit fraud, which consists in falsely claiming money from the government, was initiated in 1995. The Swedish government appointed the SNAO to assess the rate of errors and over-usage of the state welfare systems. The SNAO discovered irregular indication of error and fraud, but the total of incorrect payments was still estimated as between 5 to 7 billion SEK. Moreover, the SNAO concluded that fraud control in state welfare system had been disregarded and its governance deemed unsatisfactory.\footnote{The Swedish National Audit Office, \textit{FUSK – systembrister och fusk i trygghetssystemen}, RRV 1995:32.} It also pointed out a weak legitimacy of the control system.\footnote{Socialförsäkringsutskottets betänkande 2011/12:SfU7, \textit{Statens arbete med att motverka bidragsbrott}, 2012, pp 7-12, https://data.riksdagen.se/fil/2B61787C-DE2E-494E-8FC2-08B98228B577, [accessed: 2018-04-13].}

The Benefit Crime Act was introduced in 2007, and since its adoption the SNAO has audited the government’s actions against welfare fraud. The leading conclusion has been that the actions on reducing welfare fraud has not been effective enough and that the current legislation has not brought any clear improvement. The SNAO highlighted the big gap between the formerly anticipated scale of benefit fraud and the number of suspected welfare fraud cases \textit{de facto} reported, which may have led to overestimation of the scale of welfare fraud. This might have led to incorrect prioritisation and excessive ambition in the fight against welfare fraud. The SNAO audit has indeed provided a lot of criticism towards the Benefit Crime Act.\footnote{The Swedish National Audit Office, \textit{Vad blev det av de misstänkta bidragsbrotten?} RIR 2011: 20, 2011, p. 77, https://www.riksrevisionen.se/download/18.78ae827d1605526e94b2e74b/1518435485485/Anpassad_11_20%20Vad%20blev%20det%20av%20de%20misst%C3%A4nkta%20bidragsbrotten.pdf, [accessed: 2018-04-13].}

3.5 Conclusions

Despite of its name, the \textit{Court} lacks of the power to sanction or give corrections. It only has a consultative power through its opinions and recommendations which are not binding. This technically means that the Commission and other EU institutions involved do not have to follow any opinions or recommendations that published by the ECA. However, the importance of its consultative role has been acknowledged by other EU institutions and the discharge it gives to the Commission through its annual reports plays a significant role for the safeguarding of the EU finances. The fact that the ECA cannot sanction any of the examined bodies could be counter-productive since it may not have the desired preventive effect.

Despite the absence of jurisdiction to apply sanctions; the ECA plays an important political role. However, the fact that it lacks of any legal power weakens its authority according to Georgios
Prantzos. The Special Reports on the follow-ups that the ECA is carrying out shows that the Commission is implementing the majority of ECA’s recommendations. However, these reports are delivered too late after the release of the original performance audits, which is not time-efficient. Similarly, the SNAO does not have any direct sanctioning power and its recommendations are not legally binding. These powers are delegated to the Riksdag and the Swedish government. On the other hand, the SNAO is carrying out annual follow-up reports which give a fair view on whether the recommendations are implemented. The follow-up reports could also be a validation on whether the SNAO has been efficient in their audits. The sanctioning power is more of a jurisdictional function which neither the ECA or the SNAO has. It makes sense that the SNAO cedes its sanctioning power to a body higher up in the hierarchy. However, the fact that the ECA, which is on the same level as the other EU institutions, must cede one of its potential functions to another body on the same hierarchical level probably is counter-productive.

The management of fraud and corruption is well-developed both in the EU and Sweden. The ECA’s role is not to measure any fraud or corruption within the EU, but it can highlight suspected fraud and alarm the OLAF. Even if the ECA does not have any sanctioning power, it plays the role of a whistle-blower since, although it does not a measure of fraud or corruption, it highlights the level of error in the annual reports, thus maintaining the clearness of the citizens’ money. It is important to make a distinction between the errors made in good faith and cases of fraud or corruption. This can easily be misinterpreted, affecting the public’s trust in the management of the EU budget. When it comes to providing audits and highlighting gaps and weaknesses in the current system, the SNAO plays a similar role as the ECA. However, although the SNAO is an actor under the Swedish government, its audits on the fight against fraud seem to have a huge impact on the institutions.

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135 See chapter 3.3 of this thesis.
4. Challenges for the ECA

4.1 Introduction

This chapter will present the main challenges and criticism that the ECA has faced as an objective and independent audit institution. Furthermore, this chapter will also highlight some of the actions that the Court has taken as a response to this criticism. The latter will be discussed from a lege lata approach, to enhance the lege ferenda analysis presented in the forthcoming chapters. Moreover, there will be an analysis regarding the Court’s accessibility to assess whether it has any difficulties to acquire necessary information it needs to carry out the audits. Lastly, this chapter will examine some of the ECA’s ethical guidelines and its principles of objectivity to distinguish whether there is any institutional incompatibility. The objectivity of the Court is regulated in the ethical guidelines and principles which are laid down both in primary and secondary legal sources.

4.2 Criticism towards the ECA

Some of the ECA’s most important functions are to provide assurance on the state of the EU’s financial management, to make recommendations for improvements and raise awareness about accountability and transparency.136 For this reason, since 1994 the Court has been required to provide the statement of assurance to the European Parliament and the European Council. The statement of assurance can be defined as a certificate that the entire annual budget can be accounted for.137 The ECA regularly gives the reliability of the accounts. In the last annual report, the ECA issued a qualified opinion (rather than an adverse one) on the 2016 payments, which is the first qualified opinion since the Court began to provide annual statements of assurance. The qualified opinion can be interpreted as that the auditors cannot give a clean opinion to the Commission without any errors, but the level of errors in the pay outs identified by the auditors are not pervasive. This statement reflected an important improvement in the management of EU finances and became the basis for the discharge of the Commission.138

However, except for the latest 2016 annual report, the ECA has found errors in the pay outs since 1995139, when it began giving statement of assurance. The method of signing off the reliability of the EU’s accounts has for this reason been criticised by the Commission as even relatively minor error (under 2 percent) requires the Court to refuse a declaration of assurance

137 The statement of assurance is defined in Article 287 (1) TFEU as an opinion on the legality and regularity of payments underlying the accounts as: “the annual statement of assurance on the reliability of the EU accounts and the legality and regularity of the transactions underlying them”.
139 Referred to the 1994 financial year.
for the entire budget, even if almost all of the budget is considered reliable. This has led to media reports of the EU budget being riddled with fraud, suggesting that the money is wasted in useless projects in underdeveloped areas. This is affecting the EU citizens trust in the Commission and the EU in general. However, according to the ECA, only a small quantity of its audits involves suspected fraud. In fact, the ECA clarifies that the estimate of the level of error is not a measure of fraud, inefficiency or waste. It is an estimate of the money that should not have been paid out because it was not used in accordance with the applicable rules and regulations.

The Commission has the final responsibility over the EU-budget, and almost 80% of the budget is spent on Member States. Therefore, the Commission claims that most irregularities on spending are committed on a national level. For this reason, there was a proposal from the Commission and the European Parliament to encourage Member States to issue national declarations to improve the accountability. This is a voluntary action from the Member States within the context of accountability to national parliaments. The ECA has welcomed the national declarations but has carefully emphasized that it could not rely on the declarations as such, only on opinions of the declarations produced by the national audit agencies. There are only four Member States (Sweden, the Netherlands, UK and Denmark) out of 28 carrying out the national declaration. Moreover, there are no follow-ups on the recommendations from the performance audits made to the Member States by the ECA; moreover, the recommendations are not published.

4.2.2 The Report on the Future Role of the ECA by the European Parliament

Following this criticism, in 2014 the European Parliament drafted the Report on the Future Role of the ECA. There, it endorsed the need for a clarification on, inter alia, the statement of assurance. The Report concluded that the Courts independence and impartiality was very important for the improvement of the financial management of the EU. Through its statement of assurance, it helps the European Parliament and the Council to contribute to the development of the EU. However, the European Parliament made some recommendations on how the

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statement of assurance could be improved. For instance, it pointed out that the assurance model did not capture the cyclical nature of multiannual arrangements. Therefore, there was the need of a summary report explaining the arrangements in addition to the statement of assurance. Greater effort also needed to be made in improving the performance audit work which, at the time, only provided results on how the EU budget was used. The performance audits needed a better explanation on whether the results been achieved and how they been achieved. Furthermore, the Court needed to form the statement of assurance based on the materiality threshold rather than the tolerable error rate alone, since this appeared to be more in line with international audit standard. The ECA also needed to devote more resources to the examination of whether economy, effectiveness and efficiency had been achieved in the use of the public funds entrusted to the European Commission. The Report also highlighted that follow-ups also needed to be included in the statement of assurance, to motivate the Commission and Member States to implement the recommendations.  

The Court has also been criticised for not having enough knowledge in the areas of its auditing and because the performance audits often took long to conduct, causing the reports to be less efficient. Moreover, the Court’s reports are often deemed as difficult to understand, even for those working inside the EU. These issues were highlighted in the Report on the Future Role of the ECA. The European Parliament claimed that the performance audits frequently lacked a clear analysis on the cause of its audit findings and that there was no system in place to ensure that the assigned auditors possessed the technical knowledge and methodology skills to carry out the audits. This fact decreased the reliability of the ECA’s findings in the performance audits. Furthermore, the performance audits take up to two years to complete. The Report recommended that the ECA should cut down on redundant procedural steps in the performance audits to make them more efficient. According to the Report, the writing choices made in the ECA’s works are too difficult to understand, urging that the language in its findings should be simplified. The European Parliament also wanted a closer cooperation between national audit institutions and the ECA about the auditing of shared-management arrangements.  

Because of the criticism and in response to observations made by the European Parliament on the ECA’s future role, the Court decided to reform its internal organisation. This lead to a change in the ECA’s operational role which instead became an audit-tasked based institution. The ECA has put efforts in developing new types of audit-tasks with a narrow scope and short reporting timeframe. It has also focused on improving its knowledge in the upcoming audit

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areas to develop individual expertise and to be more efficient.\textsuperscript{150} The ECA still puts efforts in trying to improve the statement of assurance. The progress of the efforts was reflected in its 2016 annual report, in which, the ECA gave a qualified opinion on the legality and regularity of the EU spending. The statement of assurance was constructed at a time when internal controls were weak, and the Commission could only provide the ECA with limited amount of information on the legality and regularity of the expenditures. The aim now is to develop the method of statement of assurance further by dividing into the areas of social, economic and territorial cohesion. The process is still ongoing and its audit results will be reported in the next annual report in 2018.\textsuperscript{151}

4.3 Accessibility of the ECA

Accountability, transparency and accessibility are three important principles for the ECA to carry out audits of the EU Finances. The ECA has several times called for greater accountability in the EU finances. In a recent briefing paper, there has been a proposal from the ECA that the Commission and the EU legislative authorities should develop principles to enhance transparency, effectiveness and a full democratic oversight.\textsuperscript{152}

The background of this matter is partly the agreement (Tripartite Agreement) between European Investment Bank (EIB), the Commission and the ECA. The agreement is also mentioned in Article 287 (3) TFEU:

“In respect of the European Investment Bank's activity in managing Union expenditure and revenue, the Court's rights of access to information held by the Bank shall be governed by an agreement between the Court, the Bank and the Commission. In the absence of an agreement, the Court shall nevertheless have access to information necessary for the audit of Union expenditure and revenue managed by the Bank.”

The agreement has the power to restrict the ECA from obtaining information that could have a negative effect on the EIB’s operation. This agreement is also applicable on the funds managed by the EIB, meaning that the Court is restricted to audit them.\textsuperscript{153}


The ECA’s powers to examine the ECB’s operational efficiency of the management of the ECB are also limited.\textsuperscript{154} The ECB has gained an important role through assessing plans for banks in potential crises. In a recent report by the ECA, stated that it couldn’t draw any final conclusions about the ECB’s banking crisis supervision activities. A limited amount of the requested information from the ECB was redacted. The Court could for this reason not provide proper indicators on guidance or recommendations in the report.\textsuperscript{155} The ECB also refused to give out requested information to the ECA regarding the role of the ECB in the Greek bailouts, citing banking confidentiality and the fact that the ECA lacked the mandate to audit this matter.\textsuperscript{156}

The limitations in the accessibility of the ECA were cited in a landscape review from 2014. According to the Court, this fact had important consequences as to accountability and public audit arrangements.\textsuperscript{157}

The Court has claimed, that if it was stated in the TFEU, that EU-related bodies should be incorporated into the EU budget. Then the rules regarding accountability and transparency should apply for these bodies as well. The ECA was referring to the ECB and the EIB in this comment, indicating that these bodies needed to be more transparent.\textsuperscript{158}

### 4.4 Ethical principles and objectivity of the ECA

The ECA has been subject to criticism by high-level EU profiles according to several media reports. For example, the Telegraph reported that former president of the European Council, Herman Van Rompuy, accused the ECA of being too strict and urged that it should tone down the criticism in its reports in order to avoid negative press from the media and instead focus on promoting the EU.\textsuperscript{159} This criticism puts the Court in a difficult position since it is challenging its independency and objectivity, principles laid down, \textit{inter alia}, in the Ethical Guidelines.

Key objectives of the Court are to serve the community and protect the public interest. Ethic is the root of trust in the public sector, while accountability and transparency are important elements to ensure a sound ethical behaviour.\textsuperscript{160} The Ethical Guidelines for the ECA are

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\textsuperscript{160} Journal of the European Court of Auditors, Bringing governments closer to citizens and
contained in Decision No 66-2011. The ECA’s audit policy and standards establishes that the Court conducts its audit in accordance to the INTOSAI Code of Ethics (ISSAI 30). These guidelines are intended to help ensure that the ECA’s daily decisions, both in auditing and in running the institution. The Ethical Guidelines applies to all the ECA’s personnel. Failure to respect ethical principles may constitute negligence of duty and result in the opening of disciplinary procedures. According to the Ethical Guidelines, the Court needs to audit the budget impartially and independently. It takes to consideration the views of the stakeholders in the audit process, such as the European Parliament, the Commission and other national authorities in Member States. However, it cannot seek any instructions from the institutions or the examined Member States nor give in to pressure from any of them. Furthermore, the Ethical Guidelines states that the ECA shall behave in a manner which promotes confidence in its objectivity, independence and impartiality. Therefore, it is important that the personnel at the ECA not get involved in professional matters that they might have a personal interest in.

Some of the ethical principles are expressed in primary EU-law. The most fundamental Article is 286 TFEU which is laying down the duties and responsibilities of the Members of the Court. The Members shall not seek any instructions from any government or any other body and they shall reject any action which is conflicting with their duties. Furthermore, during their term in office, the Members cannot engage in any other occupation and after their term in the office finishes, they need to still behave with integrity and discretion of certain matters. The Members, officials or other servants of any EU institution may not disclose any information that could harm the institution they have worked for. A Member can only be deprived from his or her office, alternatively, the right to pension or benefits through a ruling from the ECJ at the request of the ECA. However, the Member concerned shall have an opportunity to present his or her explanation orally to the ECA.

The Members shall refrain from outside activities which undermine the ECA’s impartiality, creating conflicts of interest, taking up an excessive amount of time or bring any financial gain. Each newly appointed Member should declare their outside activities within thirty working days. The declarations are then forwarded to the Members and the Ethics Committee. The
Ethics Committee is responsible for assessing the outside activities of the Court. It considers any ethical matter of relevance which could affect the reputation of the ECA.\textsuperscript{167}

### 4.4.1 Size of the Court and appointment of its Members

Many have discussed over the ideal size and profile of the ECA, which now operates with 28 Members, one from each Member State. In fact, there have been claims that the ECA has too many Members, suggesting the need of a smaller Court with Member States filling the Members positions through rotation\textsuperscript{168}, hence improve the decision-making efficiency. Furthermore, there has been criticism towards the appointment method of the Members of the Court.

The criteria in Article 286 (1) of TFEU which requires that nominated Members “belonged to external audit bodies in their respective countries or be especially qualified for the position” is especially vague.\textsuperscript{169} According to media reports, the ECA is not living up to its potential, because individual Member States use the EU institutions in general as a form of political benefaction for long-time serving officials instead of appointing the ones most qualified for the position. These issues highlight several questions regarding the method of appointment and the size of the Members in the Court, not only regarding the Members’ expertise but also their independence and political impartiality.\textsuperscript{170}

### 4.4.2 Who is examining the ECA?

In order to maintain the objectivity as well as gaining input and guidance on work it has done, the ECA let other Supreme Audit Institution’s (SAI) conduct an independent peer review. This has happened two times since 2008. In the latest peer review from 2013, the ECA invited the SAI’s of France (Cour des comptes), Germany (Bundesrechungshof) and Sweden (SNAO) to assess the Courts performance audit in practice, and follow up the recommendations made in the previous peer review from 2008. The specific terms and conditions are laid down in a Memorandum of Understanding. The peer review highlighted that the ECA, among other things, needed more efficiency and a better overview of the organisation. Additionally, the peer review showed that there was a need for a reform to improve the value-added and increase it impact in audit evaluation.\textsuperscript{171} The reform transforming the Court to an audit-task based organisation (mentioned in section 4.2.2) was also a response to the observations made by the peer review.\textsuperscript{172}

\textsuperscript{167} European Court of Auditors Decision No 14-2015 establishing the Ethics Committee envisaged by the Code of Conduct for the Members of the Court, 2015, Articles 1, 2.


Furthermore, the Court appoints an external auditor from the private sector to audit its annual accounts every year. The most recent report on the accounts from 2016 was carried out by PricewaterhouseCoopers (PWC). According to the report, the financial statements gave a true and fair view of the financial position of the ECA and its financial performance in accordance to the Financial Regulation.  

4.5 Ethic of the SNAO

Specific regulations govern the independency of the Auditor General. For instance, an Auditor General is not allowed to own any property which entails that he or she has a direct or indirect financial interest in the activities of a company.  

The SNAO does also follow the international Code of Ethics ISSAI 30 for auditors in the public sector (INTOSAI). The Code of Ethics is directed to the SAI’s and, to satisfy the diversity of culture, social and legal systems, each SAI is encouraged to develop or adopt ethical principles. The Code of Ethics require that the SAI shall promote, support and demonstrate integrity. This means that staff of the SAI should avoid situations that could affect their integrity. These circumstances may relate to personal, financial, personal or other interests that conflict with the SAI’s interests. Abusing power for personal gains. Furthermore, the SAI and its staff shall be independent and objective in regards to political influence. The SNAO does not have any own ethical guidelines published, however it refers to the ISSAI 30 in regards to its independence. Moreover, the integrity, objectivity and independence for the Swedish agencies are regulated in chapter 1 paragraph 9 of the Swedish Constitution, while the rules laid down regarding conflicts of interests applied on the staff in the Swedish agencies is in section 11 of the Administrative Procedure Act (1986:223).

4.5.1 Criticism towards the SNAO

In 2017, the constitutional committee proposed three new Auditors General to replace those that resigned following the disclosure in 2016 of alleged conflicts of interest and cronyism that took place at the SNAO. One of the Auditors General gave access to unauthorized outsiders the SNAO’s internal documents and offered favors to former colleagues which impaired on her independency. Another Auditor General had intervened in a national audit review of an authority which he had served as a board member just a year earlier.

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175 See INTOSAI (ISSAI 30), Code of Ethics and Auditing Standards, 2016, Preamble, paragraph 7.
176 INTOSAI (ISSAI 30), Code of Ethics and Auditing Standards, 2016, Article 1 paragraphs 24, 25, 28, Article 2 paragraphs 34, 35.
4.5.2 Who is examining the SNAO?

The Riksdag Finance Committee is responsible for following up the activities of the SNAO. The committee appoints an audit firm that reviews and annually reviews the annual report of the Auditor General. The auditor pronounces on the annual report in an audit report submitted to the Riksdag Finance Committee. The Finance Committee comments on the SNAO’s accounts and results in a report. The Riksdag can review the SNAO’s organisation and activities by appointing parliamentary investigations. The parliamentary inquiry into the activities of the SNAO has taken place on two occasions since its establishment.

The SNAO also initiates investigations on its own organisation. The investigation consists of a peer review where overseas audit agencies reviews its operations. Additionally, the SNAO has on several occasions appointed researchers from Uppsala University to carry out "cold reviews” on the quality of the performance reports.

4.6 Conclusions

This chapter analysed the challenges and criticism that the ECA and SNAO have faced. The main criticism the ECA has faced is from the Commission regarding its statement of assurance. High level commissioners have implied that the statement of assurance creates press backlash which does not give a fair view of the management of the EU spending. This circumstance puts the Court in a difficult position considering that it is an important method used to assure that the EU- budget is used for the right purposes. The Commission has the main responsibility of the budget, which also draws more attention from the media. For instance, some media reports have used the Courts findings and reports in order to undermine the confidence in the EU, claiming that the budget is riddled with fraud. However, the ECA needs to be objective according to the ethical principles and guidelines, which means that it has to give an impartial view of the EU spending in its reports. Furthermore, the Court’s reports are often criticised as being difficult to understand which the media can exploit.

It could be argued that 28 appointed Members are too many, therefore slowing down the decision-making process at the ECA. Furthermore, the requirements of appointing the Members are vague and can therefore be misused to propose auditors which are connected to political


parties. It could therefore be questioned whether the current system of Member’s appointment is the best one.

The Court’s knowledge in the areas it is auditing have been questioned in the European Parliament and other EU institutions which might have affected the credibility of its performance audits. Furthermore, there have been some criticism directed at the ECA regarding the efficiency and structure of the Court, as well as its ability to follow up opinions recommendations it gives to institutions and Member States. Nevertheless, the Court has carried out several actions to improve its operations, especially after the report from the European Parliament and the most recent peer reviews. The actions have been carried out through own initiatives which reflects the Court’s willingness to develop its operational and examining methods.
5. Discussion and analysis

5.1 Introduction

The two forthcoming chapters will highlight the current gaps in the ECA’s organisation (*de lege lata*) and propose improvements (*de lege ferenda*). There will be a discussion regarding the strengths and weaknesses of the ECA to assess the importance and impact of Court’s examining powers. Chapter five will also discuss the transparency, objectivity and the ethical guidelines laid down within the Court and moreover, the ECA’s accessibility. The last chapter consists of a conclusion with final remarks where propositions for improvements will be laid out.

5.2 Why is the ECA needed? Strengths and weaknesses of the Court

Public spending and, generally, the management and allocation of taxpayers’ money, is usually a sensitive topic. Actors issuing public budgets must therefore be held accountable for how it is managed. On the European level, the ECA oversees carrying out this task. The duty of the ECA is to examine if the EU budget was issued the way it was supposed to be spent. Consequently, it holds the decision-making actors accountable for their budgetary actions.\(^{183}\)

The creation of the Court coincided with an essential event, the extension of the European Parliament’s powers in budgetary control and the resource to finance the entire EU budget. Furthermore, the Treaty which created the ECA also gave the European Parliament the power to grant the Commission discharge after the observations from the Court regarding the Commissions implementations of the EU budget.

The EU budget supports various projects and is the key instrument for implementing EU policies. Under the cohesion policy, it funds investment to help bridge economic gaps between EU countries and regions.\(^ {184}\) However, the EU budget faces a challenge to finance more with less money following the departure of the United Kingdom. The observations made by the ECA as an external auditor are therefore a necessary control-function of the management of the EU finances; especially in times when the EU budget is decreasing. The external auditing by the Court makes sure that there is value in the projects the EU is financing.\(^ {185}\)

The existence of an autonomous EU budget independently managed by the EU institutions is an argument in favor of the creation of objective external auditing. This is necessary to maintain the management transparent, as transparency functions are a supporting element of

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\(^{183}\) See Art. 285 TFEU.


accountability.\textsuperscript{186} The Court has the obligation to publish the results of its audits. The EU citizens, which are ultimately financing the activities of the EU through various taxes, need to know the results of the financial management by the Commission. Especially in the actions regarding tackling fraud, the information provided to the citizens can make them acknowledge the fraudulent flow of their own money. Any suspected cases of fraud and corruption are reported to the OLAF, the sole actor at EU level with independent investigative powers. It executes investigations within the EU institutions and external cases of corruption, fraud and any other illegal activities that damages the EU’s financial interest.\textsuperscript{187} However, the ECA highlights the error rate in the statement of assurance through its annual reports. Cases of fraud and corruption are also of high interest for the Member States’ media. In fact, the press is very observant to such phenomena, since the EU’s public opinion is particularly fragile, especially in times of an increasing EU skepticism and an unstable political climate in Europe.

The EU’s citizens are entitled to know more about the financial management of the EU funds. Hence, openness, transparency and accountability are no longer just a slogan of but also the basis for practical action. The Court play an important role in the area on maintaining the budgetary discipline not only through its audit functions, but also through its influence on the financial regulation. Furthermore, the ECA does not merely play the part of the EU’s finances guardian; it also makes sure that the money is used for the right purposes through its performance reports.\textsuperscript{188} The Court provides its expert opinions to policymakers on how EU finances could be better managed, improving accountability. Every time a legislation with financial implications is going to be adopted, the Court must be consulted.\textsuperscript{189}

Something that has been brought to the attention of the media is the ECA’s statement of assurance. It can be said that it is an important tool since it gives to the citizens and public opinion a fair view of the quality regarding the financial management of the Commission. Some might argue that the statement of assurance alone does not provide the whole picture of the financial management, since it is only a conclusion of the Court’s findings. However, the statement has given rise to heavy criticism towards the Commission, which has also reflected negatively on the Union as a whole. The Commission has criticised the ECA’s method of signing off the reliability of the EU budget claiming that the system is too strict and undifferentiated. However, the procedure of the statement of assurance as to the reliability of


the accounts, along with the legality and regularity of the underlying transactions are still the basis of the discharge of the Commission.\footnote{190}{Article 287 (1) TFEU.}

Since it became a task-based organization, the Court has put efforts in developing new types of audit-tasks with a narrow scope and short reporting timeframe. Moreover, it has also focused on improving its knowledge in certain audit areas to develop individual expertise after the criticism regarding its lack of knowledge in certain fields.\footnote{191}{The European Court of Auditors, \textit{Strategy 2013-17}, pp. 9-12, 2013, \url{https://www.eca.europa.eu/Lists/ECADocuments/STRATEGY2013-2017/STRATEGY2013-2017_EN.PDF}, \[accessed: 2018-05-10\]. See also The European Court of Auditors, Background paper: \textit{The ECA’s modified approach to the Statement of Assurance audits in Cohesion}, 2017, pp. 4-10, \url{https://www.eca.europa.eu/Lists/ECADocuments/BP_SOA_COHESION/BP_SOA_COHESION_EN.pdf}, \[accessed: 2018-05-10\]. See also chapter 4.2.2 in this paper regarding the improvements of the ECA.}

Furthermore, the ECA still puts efforts in trying to improve the statement of assurance. The progress of the efforts was reflected in its 2016 annual report, in which the ECA gave a qualified opinion on the legality and regularity of the EU spending. After the criticism in the report by the European Parliament 2014, the ECA aimed to further develop the method of statement of assurance by dividing it into the areas of social, economic and territorial cohesion.\footnote{192}{The European Court of Auditors, \textit{Background paper, The ECA’s modified approach to the Statement of Assurance audits in Cohesion}, 2017, \url{https://www.eca.europa.eu/Lists/ECADocuments/BP_SOA_COHESION/BP_SOA_COHESION_EN.pdf}, \[accessed: 2018-05-10\].}

5.3 The impact of the ECA’s audit reports, opinions and recommendations

The Court has no jurisdiction to enforce its findings or investigate suspicious irregularities arising from its examinations, nor can it impose any legal sanctions on the officials that are responsible for the mismanagement of the EU budget. The Court’s only power is the moral influence it can bring through the recommendations and opinions in its financial examinations, performance and compliance audits. However, this does not mean that its recommendations or opinions are not taken into account by Member States or institutions, as they have an important political power. Nevertheless, the targeted institutions or Member States need to do take voluntarily action which also could considered as the weakness of this audit system. It seems like the whole idea of having an efficient audit in the EU is based on goodwill. The ECA relies on the fact that the various entities it is auditing will implement its recommendations or opinions. The question is whether this system is compatible with the need for an effective audit system, especially now that the EU budget is destined to decrease.\footnote{193}{The European Commission \textit{Reflection paper on the future of the EU finances}, publ. 28-06-2017, \url{https://ec.europa.eu/commission/publications/reflection-paper-future-eu-finances_en}, \[accessed: 2018-02-22\].}

In other words, the ECA only has an advisory function and no jurisdiction to impose any sanctions on the bodies it is auditing. For instance, the SAI Cour des comptes in France has a model which is based on the idea of mutual and non-hierarchical decision-making processes
with sanction power that it can exercise.\textsuperscript{194} However, it is only the Commission that can apply corrections for the mishandling of the EU budget at the EU institutional level. The Commission is simultaneously also responsible for the management of the EU budget.\textsuperscript{195}

To make sure that its audits have an impact, the ECA is carrying follow-up reports assessing whether the Commission is implementing the recommendations contained in the performance reports.\textsuperscript{196} Ensuring follow-ups and measuring the impact of the Court’s recommendations is crucial to guarantee the efficiency and effectivity of the audit works. However, there are no follow-ups carried out by the ECA on the actions that the Member States have taken to implement the recommendations, which can be considered counter-productive. The following up is one of the most important methods to indicate that the ECA’s examination have an influence in the Member States. This is particularly important when the Court examines whether the EU funds are achieving the objectives with the fewest possible resources and in the most economical sustainable way.\textsuperscript{197} Furthermore, the special reports on the follow-ups have been criticised for being delivered too late for their findings to influence any policy decisions.\textsuperscript{198}

The follow-up of audit reports should be of primary importance to ensure accountability and to assess the effectivity of the ECA’s audit work. One could therefore ask if the ECA’s current system of following up recommendations is efficient enough and, furthermore, how many financial recourses the EU’s watchdog is spending to carry out its audits. Moreover, the follow-up reports will not add any value if they are not time-efficient, therefore there is a need for more consistency in the publication than the average of 2 years after the investigation took place.

Many have discussed over the ideal size and profile of the ECA, which now operates with 28 Members, one from each Member State. In fact, there have been claims that the ECA has too many Members, suggesting the need of a smaller Court with Member States filling the Members positions through rotation\textsuperscript{199}. This could improve the decision-making efficiency, as getting a consensus by a majority is currently difficult. Moreover, the language in the ECA’s reports have been criticised for being too difficult to understand.\textsuperscript{200} EU-sceptic press has been taking

\textsuperscript{194} Eurosai Innovations, Sharing good practices among Supreme Audit Institutions, 2015, p. 5, https://www.nku.gov.sk/documents/10272/1273416/5.+EUROSAI+Innovations+volume+III.pdf/5252d2ef-0ba5-46ac-abc8-02bd8edfb52, [accessed: 2018-03-10]. See also chapter 3.1.1 in this paper.


\textsuperscript{198} Stephenson, P., Reconciling Audit and Evaluation? Symposium on Policy Evaluation in the EU, 2015, Cambridge, pp. 86-87. See also chapter 4.2.2 in this paper regarding the follow-ups.


advantage of this fact by only pointing out information which for instance harms the reputation of the Commission and indirectly the EU.

The Court of Auditors examines the accounts of all revenue and expenditure of the EU and of all bodies set up by it. Insofar, the relevant constituent instrument does not preclude such examination. The audit is therefore an *ex post* audit of financial transactions involving expenditure and revenue already undertaken. This means that there is no examination made prior to a transaction to assess the potential risks *ex ante*.

### 5.3.1 Transparency and accountability of the Court itself

Accountability cannot be implemented, before having created transparency. The ECA does not only rely on transparent structures, it also creates them, for example by carrying out its financial, compliance and performance reports. Additionally, it is equally important to question the transparency of the institution itself. The right to information for the EU citizens is regulated in Article 11 of Charter of Fundamental Rights of the European Union. The right to access documents is regulated in Article 42.

One example is related to the appointment of the Members of the Court. When candidates are nominated as Members, they are invited to make statement before the responsible selection committee and answer questions asked by its members. After the questioning there will be a vote and a recommendation to the European Parliament on whether the nomination should be approved. If the vote is unfavorable, the European Council will withdraw its nomination and suggest a new one. However, the candidate can be approved by the Council despite an unfavorable vote in the European Parliament. The nomination has a political influence which can create tension between the European Parliament and the European Council. The procedure of the appointment of the Member creates publicity and transparency for the nomination process in the European Parliament. However, the impact of the European Parliament regarding the appointment of the Member is limited since the Member States can ignore the outcome of the voting and keep their candidate. The weakness of this system is that the entire transparent procedure is in the European Parliament, however the final decision regarding the appointment is made by the European Council which procedure is not as open as the one in the European Parliament.

Furthermore, the data that the ECA collects to carry out the audits comes from European bodies, Member States and institutions. While much of the information examined by the ECA is

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201 See Article 248(1) of the EC Treaty and Article 160c of the EAEC Treaty (Treaty of Rome); see also Article 45c of the ECSC Treaty (Treaty of Paris).
204 Art. 286 TFEU.
accessible for the public, significant data is often in possession of the stakeholders. Hence this data cannot be published by the Court. The ECA handles such documents and information in line with applicable standards and rules of data protection. It would, from a transparency perspective, be valuable to clarify to which extent the Court could publish the underlying data used in its audits.\textsuperscript{206}

The follow up reports are important tools, not only to access whether the recommendations have an impact, but also in regards to the transparency purposes (as they allow access in the performance of the Court and the impact of its examination). At the moment, there are only follow-ups on the Commission’s action. Additionally, it is unclear which are the consequences in case of not implementing the recommendations. Moreover, the delay in the publication of the follow-up reports has the effect of making the public aware of the compliance of the Commission several years after the recommendation were first made. The lack of consequences combined with the late publication of the follow up-reports of the Commission undermines the credibility of the work of the Court.

The criteria in Article 286 of TFEU which requires that nominated Members “belonged to external audit bodies in their respective countries or be especially qualified for the position” is especially vague.\textsuperscript{207} According to media reports, the ECA is not living up to its potential, because individual Member States use the EU institutions in general as a form of political benefaction for long-time serving officials instead of appointing the ones most qualified for the position. These issues highlight several questions regarding the method of appointment and the size of the Members in the Court, not only regarding the Members’ expertise but also their independence and political impartiality.\textsuperscript{208} Clearer requirements regarding the qualifications of the candidates would therefore enhance a more transparent selection process. The same applies on the appointment of the Swedish Auditor Generals.

\subsection*{5.4 The ECA’s ethical guidelines, objectivity and accessibility}

The core slogan of the ECA is that it is the EU’s independent guardian of the EU budget. Regardless of the EU’s reputation or the scepticism that exists in the Union, the ECA needs to be objective and not turn a blind eye at the management of the budget. Ethic is the root of trust in the public sector, while accountability and transparency are important elements to ensure a sound ethical behaviour. The ECA has several guidelines to follow to maintain its independence.

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The most important guidelines are the Ethical Guidelines which are laid down by Decision No 66-2011 and the guidelines in Article 286 TFEU.209

In order to enhance transparency, objectivity as well as gaining input and guidance on its work, the ECA let other SAI’s conduct independent peer reviews.210 Furthermore, every year the Court appoints an external auditor from the private sector to audit its annual accounts.211 The question is, however, if it is appropriate from an objectivity perspective that the ECA itself appoints an external auditor to examine its own accounts. Perhaps it would be more reasonable to let another EU institution decide who should examine the ECA’s accounts.

As already mentioned before, accountability, transparency and accessibility are three important principles for the ECA to carry out audits of the EU Finances. The ECA has several times called for greater accountability in the EU finances. The EIB is currently blocking the ECA’s accessibility through the Tripartite Agreement.212 This Agreement has the power to restrict the ECA from obtaining information that could have a negative effect on the EIB’s operation.213 One might say that this is a weak argument from the EIB and it could furthermore be discussed on which premises it is exempted from the examination of the Court. The ECA has already proposed that the Commission and the EU legislative authorities should develop principles to enhance transparency, effectiveness and a full democratic oversight.214 The same applies on the ECA’s powers of examination on ECB’s operational efficiency of the management.215

5.5 ECA and SNAO final thoughts

Equally to the ECA, the SNAO does not have any jurisdiction or direct sanctioning power. These powers are delegated to the Riksdag and the Swedish government, which can impose sanctions and request corrections. Furthermore, the recommendations of the SNAO are not legally binding; however, they have a valuable political influence similarly to the

209 See Decision No 38-2016 laying down the rules for implementing the Rules of the Procedure of the Court of Auditors, Anex III Decision No 66-2011 laying down Ethical Guidelines for the European Court of Auditors, Preamble. See also TFEU Art. 286.
212 See Article 287 (3) TFEU.
recommendations and opinions provided by ECA. On the other hand, the SNAO is carrying out a follow-up report on the performance reports every year, which gives a fair view on whether its recommendations are implemented.\textsuperscript{216} This continuity pressures the addressed bodies to implement the recommendations, which is more efficient than the two- or three-years’ timeframe of the ECA’s follow-ups. However, the decision-making and the effectiveness at the SNAO is certainly more efficient because of its smaller size. Finding consensus amongst three Auditor Generals regarding the scope and focus of the audits is unquestionably more effective in comparison to the 28 equal Members of the Court.

Furthermore, the ECA has followed the recommendations in the ISSAI 30 and has laid down ethical guidelines compatible with its organisation. The SNAO have on the other hand not adapted its own ethical guidelines, as it already has several ethical guidelines in the Swedish law. However, the rules in the Swedish law are very general since they apply on all the agencies under the Swedish government. However, the SNAO is not more independent than any other Swedish authority under the Riksdag, since it has the same administrative and economic procedures, while the ECA through its hierarchy is completely independent in relation to the other EU institutions.

Similarly to the ECA, there are no formal requirements for the appointment of an Auditor General at the SNAO except that the person who is chosen for the position must have great integrity and have a good reputation both within the administration and amongst political representatives. Furthermore, the Auditor General must have good professional and personal qualities, preferably acquired during a long-term and high-level service in state administration.\textsuperscript{217} The professional requirements for the appointment of the Auditor General could, equally to the ECA’s requirements be interpreted as a bit vague. It could be of interest for the public to get more clarification regarding the requirements to enhance transparency and clarity regarding the appointment of auditors in the public sector.


6. Conclusions and final remarks

There is no doubt that the ECA plays an important role in improving transparency and public accountability in the EU. The results of the Court’s work are used to oversee the management of the EU budget and is an essential basis for the annual discharge of the Commissions implementation of the previous year’s budget. Moreover, the reports carried out by the Court contributes to add value and improvement of the EU’s financial management since its reports have an important political impact on the EU policymakers. There should be obedience to the rules that are enhancing transparency and accountability, considering that these functions strengthen the democratic values in our society. However, there are some issues that may put the Court, and indirectly the EU, in a compromising position if they are not dealt with. In fact, the Court’s role might be more important than ever because of the projected decrease of the EU budget. The time and the conditions of the current situation in the EU with events like Brexit and Member States financial crisis require improved and more updated laws regulating the ECA to enhance legal certainty and transparency.

Being an institution which strives to improve transparency and accountability in the EU requires that the institution itself is transparent. Although the ECA has put efforts in developing the efficiency, clarity and knowledge in its audit methods, it still must some areas to enhance clearness, effectiveness and legal certainty. The criteria in Article 286 (1) of TFEU which requires that nominated Members “belonged to external audit bodies in their respective countries or be especially qualified for the position” is especially vague. More strict and detailed instructions need to be formed for the Member States to eliminate the political influence this position may have. Although the situation has been improved recently, candidates need to be chosen for their competence and not for the political impact they might have. The Members need to be neutral and independent to represent the EU’s best interests since politics is not in favor of independency.

Furthermore, the fact that the Member States can ignore the voting made in the nomination process by the responsible committee and still nominate their candidate regardless of an unfavorable vote is beneath contempt. Consequently, one could ask if the Member States have too much impact on the nomination process and, furthermore, if it is possible to eliminate the political influence through this system. There is a need for a more open and strict nomination process to ensure a legal standard which would improve the level of predictability and legal certainty. One example could be that the Member States withdraw the nomination if the candidacy is unsuccessful, not ignoring the recommendation made by the committee.

Many have discussed over the ideal size and profile of the ECA, which now operates with 28 Members, one from each Member State. In fact, there have been claims that the ECA has too many Members, suggesting the need of a smaller Court with Member States filling the Members positions through rotation, hence improve the decision-making efficiency. This would, of

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218 See chapter 5.2.1 in the paper regarding transparency and accountability within the Court.
course, require a shorter term in office for the Members but on the other hand, they would achieve more during their term.

The language in the Court’s reports have been criticised for being hard to understand. EU-sceptic media take advantage of any misinterpretation in the complexity of the ECA’s reports, which harms the EU’s reputation. There is a need to improve simplicity and clarity at the ECA, which are general principles of the rule of law. This does not mean that ECA should censor or manipulate the information in the reports in favor of the EU. Media reports are however easier to read than technical reports produced by the EU institutions. If the presentation in the reports becomes clearer with a more conspicuous language, it might be possible to reduce the misunderstandings about the misuse of the EU budget without overstepping the ECA’s objectivity. There is no need for the ECA to soothe or sensor the management of the EU budget, just adjust the way it presents its findings so that it becomes clearer.

The ECA cedes its sanctioning power although it is on the same level as the other EU institutions. Since it is carrying out the examination of the EU budget and therefore already has an insight in the management of the EU funds, it would be more efficient if the ECA could directly issue sanctions. However, to apply sanctions is a jurisdictional function which the Court does not enjoy. Perhaps it would be appropriate for the Court to have the power to propose a sanction. To apply a sanction is a question related jurisdiction but to propose a sanction is something different. The recipient would then have the option to appeal against this proposal from the ECA. This would save time for the Commission and give the ECA an opportunity to give its opinion. Furthermore, it could be discussed whether the workload is too heavy for the Commission and if there is a need for an external, independent body with sanctioning powers since neither the OLAF nor the ECA has jurisdiction to sanction. The OLAF is the only body with investigating powers for misconducts related to corruption or misuse of funds by organised crime. Perhaps a re-formulation of the competences of the OLAF would be desirable in the future so it could assist the Commission with the sanctions.

The audit carried out by the ECA is an ex post audit of financial transactions involving expenditure and revenue already undertaken. This means that there is no examination made prior to a transaction to assess the potential risks ex ante. Perhaps prior examinations should be carried out to enhance more certainty of the potential risks before the actual transactions involving expenditure and revenue are undertaken. Moreover, since the recommendations and the opinions of the Court only have an advisory function and no binding power, there should be more continuous follow-ups carried out to assess whether the recipients of the audits are implementing them (especially the recommendations directed to Member States). It would certainly be time-consuming for the ECA to carry out the follow-ups on a more regular basis, but it is a necessary evil to measure the impact of the audits.

There is a need to improve the transparency, accountability and accessibility within the EU. The ECA operates in the interest of the EU citizens and should therefore be able access any necessary information it needs to give a truthful picture about the financial and political situation in the EU. The EU institutions should for this reason be cautious when they censoring
information that might have an impact on the EU-citizens. The Tripartite Agreement in Article 287 (3) TFEU restricts the ECA’s to access information that could have a negative effect on the EIB’s operation. The criteria “negative effect” needs to be further explained by the legislative authorities since it can be interpreted widely. It would enhance the predictability and a full democratic oversight in the future as well as putting pressure on institutions to further motivate their desire to censor information to the public. The same applies on the rules in the Protocol No. 4 which are restricting the ECA’s accessibility of the ECB’s operational efficiency. The limitations of the Court’s accessibility have consequences as to accountability and public audit arrangements.

The final conclusion of this thesis is that the Court is needed because it pressures the EU institutions and the Member States to keep a sound financial management. The ECA have carried out serveral actions to improve its audit methods, as well as to meet the standars required by the other EU institutions. This can be seen as a symptom of the Court’s flexibility and willingness to keep up with a dinamic and ever-changing environment such as the EU. The issue lies in the difference between adapting and follow the EU’s proposals (both at institution and Member State level) while preserving its independence. Nevertheless, it is worth noting that the ECA was founded only in 1977 and, therefore, the situation might be reflecting the fact that the ECA still has to reach the maturity of other institutions.
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