

The Contribution of the European Court of Auditors to EU Financial Accountability in Times of Crisis

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Abstract²: *Financial accountability, as the obligation of public institutions to explain the way in which they manage public funds before the citizens or their representing fora, is undoubtedly linked to systemic legitimacy in any political system, especially in times of economic harshness. Within the European Union, the institution embodying financial accountability is the European Court of Auditors (ECA). This paper represents a critical appraisal of the contribution of the ECA to restoring trust among European citizens. After recalling the theoretical link between financial accountability and legitimacy, a section highlights the particularities of financial management in a system of multilevel governance as the EU. The ECA's institutional setup is then revised, in order to pinpoint potential gaps in its design that would reduce its effectiveness as the EU financial watchdog. Finally, attention is brought to the increased involvement of the ECA in solutions aimed at coping with the financial crisis. Recent developments show that the ECA is fully embarked in an institutional strategy to help cope with the financial and legitimacy crisis in the European Union.*

Keywords: *financial accountability, public management, systemic legitimacy, European Union*

JEL Classification: K00

I. Introduction

“The European Court of Auditors is an audit institution that is unique in the world – every bit as unique and inimitable as the European Union itself. Succeeding in carrying out the ECA’s mission should not just be an internal challenge facing the Court. It should be the wish of every EU citizen that the ECA carry out its mission par excellence.”³

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² This article was submitted to RJEA editors in 2014.

³ Former Member of the ECA and current Vice-President of the Polish supreme audit institution Jacek Uczkiewicz, ‘The Court as I remember it, the Court as I see it’, in European Court of Auditors, *Reflections. 35th Anniversary of the European Court of Auditors*, Luxembourg, 2014, p. 40.

The ECA was established as a European Community institution by the Treaty of Brussels of 22 July 1975⁴ and was promoted to the status of EU institution by the Maastricht Treaty⁵. Its headquarters are in Luxembourg. Since its inception, the ECA has claimed to be the “financial conscience” of the European Union⁶. The ECA is entitled by the Treaty to watch over sound financial management of EU funds in a twofold way: *ex ante* through its consultative function in the course of legislative reform and *ex post* through audit of the EU budget implementation.

This paper examines the role of the European Court of Auditors as a supranational audit institution in providing solutions that help alleviating the effects of the severe economic crisis that has hit Europe since 2008. This crisis, the worst since the Great Depression of the 1930s, has urged audit institutions to take on new challenges in order to strengthen financial accountability, which is acknowledged as a complementary dimension of legitimacy in any political system.

This paper is structured around three main parts. Firstly, section II aims at conceptualising financial accountability and the link between financial accountability and legitimacy from the European Union perspective. Section III then concisely explains the basic features of financial management in the EU, with a particular focus on various shortcomings that arise from the difficulties to establish sound budget management in a multilevel governance system as the European Union. Initiatives put in place by the ECA are then revised in Section IV, in order to ascertain the contribution of this institution to better accountability in a post-crisis scenario. The final section summarizes the main conclusions of the paper and suggests paths for further research.

II. Financial accountability and legitimacy in the European Union

Neither the fragile external action, nor the lack of consistency of EU policies embodies the archenemy of the European integration process. If something can really undermine the long-lasting project of an “ever closer union among the peoples of Europe”⁷, it is certainly the existing lack of ownership among European citizens as regards common institutions. It is now widely accepted that the EU can aspire at enjoying some kind of democratic legitimacy even in the absence of a coherent polity⁸, but scholars have identified different dimensions of legitimacy throughout time. Friedrich Scharpf coined the terms *input* and

⁴ Treaty amending certain financial provisions of the Treaties establishing the European Economic Communities and of the Treaty establishing a single Council of the European Communities, signed in Brussels on 22 July 1975, in force since 1 July 1977, OJ L 359 of 31 December 1977.

⁵ Article G.6 of the Treaty on European Union, signed at Maastricht on 7 February 1992, OJ C 191 of 29 July 1992.

⁶ This expression was coined by Hans Kutscher, the President of the European Court of Justice, at the swearing-in ceremony of the first European auditors in 1977.

⁷ Preamble of the Treaty establishing the European Economic Community (TEEC), signed in Rome on 25 March 1957, http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf.

⁸ Andreas Follesdal and Simon Hix, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, *Journal of Common Market Studies*, vol. 44, no. 3, 2006, pp. 533–62; Robert O. Keohane, ‘Accountability in world politics’, *Scandinavian Political Studies*, vol. 29, no. 2, pp. 75–87 at 78.

*output legitimacy*⁹. EU's legitimacy lay for a long time in its ability to govern "for the people", namely, to provide citizens with solutions to problems related to the economy and the internal market (*output legitimacy*). As accusations of democratic deficit soared in the eighties, the focus of public opinion shifted from *output legitimacy* towards concerns that the EU system was not governed by the people (*input legitimacy*). Filling the gap proved arduous and it unfolded throughout several reforms of the constitutional treaties. The citizens' initiative represents the most specific feature of deliberative democracy in the EU nowadays¹⁰.

Yet another type of democratic legitimacy was singled out by Laffan under the label of *systemic legitimacy*¹¹. Systemic legitimacy brings to the fore the efficiency of the structures, rules and processes of accountability, with a view to increasing citizens' trust in the functioning of the political system¹². Theoretical frameworks on legitimacy have generally failed to pinpoint indicators of EU performance that might help measuring gains and losses of citizens' trust, as well as anticipating the consequences whenever a crisis of the model breaks out¹³. The economic crisis that burst in 2008 provides a good example of it.

The link between accountability and democratic legitimacy in the European Union is emphasized in periods of crisis¹⁴; yet accountability proves to be an elusive concept. For all definitions, we recall the one proposed by Bovens "a social relationship between an actor and a forum in which the actor explains his conduct and gives information to the forum, in which the forum can reach a judgment or render an assessment of that conduct, and on which it may be possible for some form of sanction (formal or informal) to be imposed on the actor"¹⁵. This definition provides a clear framework suitable to any kind of accountability because it focuses on the relationship between the actor and the forum. However, the term "public accountability" is more often used to refer to the set of constitutional controls on the executive¹⁶. Financial accountability, in turn, has traditionally lagged behind in scholarly attention¹⁷. This trend is being slowly reversed in

⁹ Friedrich Scharpf, 'Problem-solving effectiveness and democratic accountability in the EU', Max-Planck-Institut für Gesellschaftsforschung Working Papers, no. 1, 2003, available from <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp01-4/wp01-4.html> (accessed 31 July 2014).

¹⁰ Oana - Măriuca Petrescu, 'Strengthening the Idea of "By Citizens, for Citizens" in the Context of the European Citizens' Initiative – Brief Analysis of Initiatives –', *Romanian Journal of European Affairs*, vol. 14, no. 2, 2014.

¹¹ Brigid Laffan, 'Auditing and accountability in the European Union', *Journal of European Public Policy*, vol.10, no. 5, pp. 762-777 at 763.

¹² Maria-Luisa Sánchez-Barrueco, 'The 2012 Financial Regulation: Building the cathedral of EU legitimacy?', in CKS e-book 2014, pp.842-860.

¹³ Erik Jones, 'Output Legitimacy and the Global Financial Crisis: Perceptions Matter', *Journal of Common Market Studies*, vol. 47, no. 5, pp. 1085–1105 at 1091.

¹⁴ For instance, after the 1999 collective resignation of the Santer Commission, the Prodi Commission whole-heartedly embraced accountability in its 2001 White Paper on Governance, COM (2001) 428 final, 25 July 2001.

¹⁵ Mark Bovens, 'Analysing and assessing public accountability. A conceptual framework', *European Governance Papers (EUROGOV)*, n° C-06-01, 2006, available from <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf> (accessed 31 July 2014).

¹⁶ Carol Harlow, *Accountability in the European Union*, Oxford University Press, New York, 2002, p.7.

¹⁷ Staffan I. Lindberg, 'Mapping accountability: core concepts and subtypes', *International Review of Administrative Sciences*, vol. 79, no. 2, 2013, pp. 202-226.

the wake of the economic and financial crisis. Pressure on public finances in all Member States has prompted the EU to provide assurances that its institutions are mobilising and spending their resources even more wisely on behalf of its citizens and taxpayers.

III. Breaches of financial accountability in the legal framework of EU budget management

The basic features of budget management and financial control in the European Union are examined in this section, as a means of paving the way for analysis on the contribution of the ECA to better financial accountability. It is worth noting that articulating a consistent model of financial control in a multilevel management environment has posed difficulties from a constitutional viewpoint. Therefore, a number of shortcomings in financial accountability stem directly from the legal framework itself.

Cipriani notes that the specific features of the EU budget have weakened the link between the Community budget and the European taxpayers. Two false ideas have arguably spread among EU citizens. On the one hand, that European “funds ‘grow on trees’ and that they therefore constitute a kind of ‘manna’ to be taken advantage of”¹⁸. On the other, that the Brussels bureaucratic system is a monstrous pitfall in which moneys are squandered without control. Both harmful perceptions undermine trust on the system as a whole and trigger broad public frustration. According to Neyer, traditional mechanisms of institutional engineering, such as further expanding the competences of the EP or opening additional doors to transparency, are not the key to redressing such frustration. On the contrary, the EU should provide a truly accountable management of shared funds which is accordingly communicated to the average citizen¹⁹.

Budgetary implementation starts with the adoption of the annual budget by the Parliament and the Council, following a complex procedure enshrined in articles 314 to 316 of the Treaty on the Functioning of the European Union (TFEU)²⁰. The fundamental scheme has remained unchanged from the outset. Member States designed the Community budget to respect the principle of budgetary equilibrium, meaning that the organization’s running costs should always be financed by its revenues and not by debt. Budgetary equilibrium is a well-established principle that applies also to national institutions. The fundamental difference at the EU level lies in the fact that the principle of budgetary equilibrium has always enjoyed constitutional guarantees in the European Union, enshrined with binding force in the Treaty²¹, whereas it remained a bare principle at the national level. The lack of legal constitutional measures to ensure a balanced budget (“golden budgetary rule” or, following the German expression, “debt brake”) led several governments to accept ever growing public deficit as normal. In the wake of the economic

¹⁸ Gabriele Cipriani, ‘*The responsibility for implementing the Community budget*’, CEPS Working Papers, no. 247, 2007, p.18.

¹⁹ Jürgen Neyer, ‘Justice, not democracy: legitimacy in the European Union’, *Journal of Common Market Studies*, vol. 48, no. 4, 2010, pp. 903-921 at 907.

²⁰ Treaty on the Functioning of the European Union, signed in Lisbon on 17 December 2012, OJ C 306 of 17 December 2007.

²¹ Article 199 TEEC, currently 310.1 TFEU.

crisis, however, budgetary balance was advocated by many as a key factor to capping the sovereign debt and therefore recovering sustainability and stability in the euro zone. It is the reason why article 3 of the Treaty on Stability, Coordination and Governance (TSCG), also known as the European Budgetary Pact or “fiscal compact”²², now imposes the “golden rule” to its signatory parties. Hence the introduction of budgetary balance in many national constitutions or similar legal measures, the legality of which can be referred to the Court of Justice (ECJ)²³.

Further to the constitutional principle of budgetary balance, Member States have legally prevented the European Union from entering into budgetary deficit through the imposition of annual financial ceilings grouped in a seven-year financial framework also known as the Multiannual Financial Framework (MFF) or the ‘financial perspectives’. The MFF thus provides assurances to national treasuries that the European institutions will not engage in activities for which not enough money has been budgeted. However, the MFF also serves an often hidden goal: that of allowing EU institutions to pursue effective policies over a relatively long timeframe by means of strengthening the predictability of EU revenues. According to article 312 TFEU, the MFF is enacted in the form of a regulation proposed by the Commission, then adopted by the Council by unanimity, following assent of the European Parliament (EP). Under such procedure, Member States hold stiffly the key to deciding the priority areas for EU expenditure in the upcoming years; therefore, negotiations are tough before reaching agreement. The MFF currently in force covers the 2014-2020 period²⁴.

Beyond the treaties, the Financial Regulation (FR) is the main rule governing the adoption and management of the EU budget. The “financial bible” of the EU was adopted in 1977, and has been subject to two major revisions since then. The first reform was enabled by Council Regulation 1605/2002²⁵ and represented an attempt to regain citizens’ trust on financial accountability following the collective resignation of the Santer Commission in 1999. More recently, the FR has been revamped through Regulation 966/2012 of the EP and the Council²⁶.

Budgetary management is the task of the European Commission, following Articles 17 TEU and 317 TFEU. The Commission executes the budget “on its own responsibility” but not on its own. Four different methods of managing the EU budget are identified (Article 58.1 FR): centralised (by the Commission), shared (by national administrations),

²² Treaty On Stability, Coordination and Governance in the Economic And Monetary Union, signed in Brussels on 2 March 2012, http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf. To date, all Member States but the United Kingdom and the Czech Republic have ratified the Treaty.

²³ Laura Gómez, ‘El Tratado de Estabilidad, Coordinación y Gubernanza dentro del nuevo marco condicional de cohesión social en la Unión Europea’, *Revista de Derecho Comunitario Europeo*, vol. 16, no. 42, 2012, pp. 521-541; Alberto De Gregorio, ‘El Derecho de la Unión y el Tratado de estabilidad, coordinación y gubernanza en la Unión Económica y Monetaria’, *Revista española de derecho europeo*, no. 45, 2013, pp. 27-60.

²⁴ Council Regulation (EU, EURATOM) no 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347 of 20 December 2013.

²⁵ Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248 of 16 September 2002.

²⁶ Council Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, OJ L 298 of 26 October 2012.

decentralised (by third countries) and joint with international organisations. Interestingly enough, the lion's share of the EU budget (some 76%, according to the Commission estimates²⁷) is implemented by national authorities under shared management. The legal design devised by the Treaty results in a clear asymmetry of respective rights and obligations of the Commission and Member States. To put it bluntly, whereas the Commission executes directly only a meagre 22%, it is held accountable for sound financial management of the EU budget in its entirety. Since the Commission has not been endowed with power to subject national payments to *ex ante* authorization, but can only carry out *ex post* controls in Member States, national authorities are not portrayed as fully responsible for financial accountability, but rather as mere bystanders that "cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management" (Article 317 TFEU).

Taking into account that the bulk of EU expenditure is managed at the national level, the EU legal framework contains a system of checks and balances in the form of specific obligations that bind Member States when implementing EU funds, but it leaves room for breaches in accountability that jeopardize the protection of the EU's financial interests.

The legal framework does require Member States to carry out regular checks to ensure correct management, to prevent irregularities and fraud and to recover funds wrongly paid under Article 59.2 FR, but the system does not embrace a model of 'shared responsibility'. It does not follow a 'delegation' logic either, contrary to what Article 61 FR suggests. Under a delegation model, the Commission would hold fundamental responsibility while wielding power to precise the implementing tasks of Member States and supervise the use of funds. This is missing in the EU framework for budget management. The Commission provides general orientations in the form of handbooks, before the funds are spent by national authorities; however, neither exploratory visits nor *ex ante* authorization for the appropriations of funds are carried out on a regular basis. Once the funds have been spent, the model establishes a presumption of sound financial management unless the Commission finds out evidence of committed irregularities during regular checks or on-the-spot audits. In practice, the Commission relies on national authorities' own statements on the legal and regular use of funds. Accordingly, the framework for internal control of budget management, which should be guaranteed by the Commission as the ultimate manager, is far from optimal.

The lack of ownership among national authorities as regards EU funds is therefore a source of concern. In a true system of shared management, the internal audit service of the Commission would play the role of the internal control on the national authorities, just as the relevant department in the government as regards the national budget. But this is not the case: national authorities distrust the Commission's audits as yet another 'external control' adding up to that carried out by the ECA. Answering stiff pressure from the EP, several Member States started to issue "national declarations" in the late 2000s. A "national declaration" is a statement of assurance issued by the national finance minister, in support of the legality and regularity of the underlying transactions implemented in that Member State. In turn, the national supreme audit institution assesses the declaration.

²⁷ http://ec.europa.eu/budget/budget_glance/how_managed_en.htm.

So far, the Council has blocked all attempts at introducing a legally binding obligation to issue national declarations. They thus remain voluntary (Article 59.5 FR). Only four Member States (Netherlands, Denmark, United Kingdom and Sweden) release national declarations on a regular basis. Whether these declarations produce a noticeable improvement in the level of financial accountability, through increased transparency on the use of EU funds, remains subject to discussion²⁸.

It seems fit to bring attention to gaps in the legal framework of recovery of funds unduly spent or revenues not perceived at the national level. It should be noted that undue payments or revenues not perceived are not forcefully intentional or fraudulent, but may well result of a wrong interpretation of the complex legal framework. Essentially, every payment unduly authorized by a national authority must be recovered from the beneficiary, in order to protect the EU financial interests and to allow the Commission to get acquitted of its responsibility. It might happen, though, that the beneficiary is not in a position to reimburse the money. Should this occur, the Member State would be obliged to cover the loss to the EU budget by its own means. In practice, however, the recovery procedure shaped by the Financial Regulation represents a lengthy mechanism which allows for a belated restoration of budgetary balance, if any (Article 80.4 FR)²⁹.

When the Commission questions the compatibility of a national financial measure with the EU legal order, it may adopt a decision imposing financial corrections on that State, meaning that a variable share of its expenditure will be excluded from EU financing. However, two features reduce the effectiveness of the financial corrections procedure as a mechanism for safeguarding financial accountability in the EU.

The first shortcoming stems from the lack of a coherent regulatory framework to cope with irregularities in the national implementation of EU funds. A myriad of specific sectorial rules governing shared management in the main fields of EU expenditure contain procedures for financial corrections³⁰, which may give rise to differences in the scope and

²⁸ House of Commons (Public Account Committee), Financial Management in the European Union, 32nd Report, Session 2008-2009, 15 June 2009, <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmpubacc/698/69802.htm2009>.

²⁹ A final sentence in Article III-407 of the late Treaty establishing a Constitution for Europe referred to the FR the regulation of “the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities”. That expression is missing in 317 TFEU.

³⁰ Among other, Articles 99 and 100 of Council Regulation (EC) N° 1083/2006 of 11 July 2006, laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, OJ L 210, of 31 July 2006; Articles 97 and 98 of Council Regulation (EC) N°1198/2006 of 27 July 2006 laying down general provisions on the European Fisheries Fund, OJ L 223, 15 August 2006; Article 44 of Council Decision 2007/435/EC of 25 June 2007 establishing the European Fund for the Integration of third-country nationals for the period 2007 to 2013 as part of the General Programme ‘Solidarity and Management of Migration Flows, OJ L 168, 28 June 2007; Article 46 of Decision 573/2007/EC of 23 May 2007 of the European Parliament and the Council establishing the European Refugee Fund (ERF III) for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows, OJ L 144, 6 June 2007. Most recently, Article 55 of Regulation (EU) No 223/2014 of the European Parliament and of the Council on the Fund for European Aid to the Most Deprived, 11 March 2014, OJ L 72 of 12 March 2014.

intensity of the Commission's oversight. The Commission has only recently adopted a decision establishing basic guidelines on the financial corrections procedure³¹.

Additionally, it must be highlighted that procedures unfold over a long timeframe, a feature that severely weakens the effectiveness of this procedure as a dissuasive mechanism for national authorities. Indeed, the Commission pursues irregularities in Member States and menaces them with financial corrections. Former Commissioner Dacian Cioloş noted earlier in 2014 that net financial corrections imposed in the framework of EU agriculture policy alone amount to around 1 billion euro per year³². What he failed to acknowledge is the fact that these funds are not automatically reimbursed to the EU budget. In practice, the implementation procedure of financial corrections often gets trapped in legal quagmires between the national authorities and the Commission throughout a long time-frame, let alone if the matter is referred to the ECJ. The amount of funds whose recovery is deemed impossible should not be underestimated³³. The ECA recently denounced that, whereas financial corrections would have tripled between 2011 and 2012, the rate of recovery remained essentially constant³⁴.

A system in which financial irregularities can be committed but proper punishment luckily arrives several years afterwards cannot contribute to dissuade wrongful or unlawful behaviour among national authorities. Some of them might even be inclined to include potentially ineligible grant payments in their accounts and wait for the Commission's financial corrections to arrive, as the UK National Audit Office once pointed out³⁵. Overall financial accountability and legitimacy of the EU suffer as a result.

The economic crisis is the worst since the Great Depression of the 1930s. It originated at the national level, due to unreasonable practices in public procurement and ill-advised links between the public and private spheres; therefore, the contribution of budget management at the EU level to the global economic crisis is statistically irrelevant. Nevertheless, only the gullible believe now that the crisis was a question of fate. Most analysts affirm that the main risks would have been detected, had proper assessment of the convergence criteria laid down in the Growth and Stability Pact been carried out. A firmer attitude of audit institutions before deviations in public management might have avoided,

³¹ Commission Decision of 19 December 2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement, C(2013) 9527.

³² Answer given by Mr Cioloş on behalf of the Commission to the question for written answer E-013204/13 to the Commission by Patricia van der Kammen, 8 January 2014, OJ C237 of 22 July 2014, p.160.

³³ A practical example may well illustrate this. Following on-the-spot audits in the Spanish tomato sector in early 2004 as regards funds implemented in 2003, the Commission opened a confirmation clearance procedure against this Member State which ended with a decision containing financial corrections in April 2007. By then, four years had been spent in to-ing allegations and fro-ing replies, a Conciliation body in-between, before the final decision was issued. Spain then sought annulment of the decision by the Court of First Instance in June. The General Court confirmed the Commission's decision in its ruling of 28 October 2010 (Case T-227/07 *Spain v. Commission* [2010] 28 October 2010). Yet over €4 million remain subject to recovery more than ten years after the funds were unduly spent.

³⁴ European Court of Auditors, 2012 Annual Report, OJ C 331 of 14 November 2013, point 1.19.

³⁵ A national department would have included a provision of £72.9 million in its accounts for 2007-8 to cover ineligible funds, aware that it would be subject to correction sooner or later. National Audit Office, Financial Management in the EU, Report by the Comptroller and Auditor General, HC 349 Session 2008-2009, 27 March 2009, point 13.

or at least reduced the dimension of several bail-outs. As always, audit institutions feel compelled to reduce the negative impact on financial accountability caused by breaches in budgetary management. However, new salient challenges have emerged as a result of the management of the euro crisis. All across Europe, citizens are demanding effective oversight of the accuracy of macroeconomic statistics provided by governments and private sector entities, as well as transparent accountability of the way in which financial assistance has been spent.

The crisis has thus created new challenges for supreme audit institutions. A report jointly published by several audit institutions (including the ECA) pinpointed five new areas in need of their contribution³⁶: a) audit of sustainability of public finances with a particular focus on fiscal transparency, in order to press political authorities to consider long-term fiscal stability when taking short-term decisions; b) audit of governments' implicit guarantees for large financial groups, to prevent their risks becoming systemic; c) audit of the operations of the central banks aiming at financial stability, within the new regulatory and supervisory framework, to help parliaments ensuring accountability; d) better international coordination and cooperation, to prevent the perverse effects of fragmented accountability in a globalised scenario; and e) devising accounting standards that contribute to transparent and reliable financial reporting by executive authorities. The next section will precise the ECA's contribution to restoring trust in EU financial management.

IV. The contribution of the European Court of Auditors

An honest appraisal of the ECA's contribution to restoring trust in EU financial accountability in the aftermath of the economic crisis can only be accomplished on the basis of its own *marge of manoeuvre*. We will thus offer a synthesis of ECA's competences and powers (a) before delving into its specific initiatives (b).

a) *The competences of the ECA*

The Treaty endows the ECA with audit and consultative powers.

First and foremost, the ECA must carry out the 'external control', under article 285 TFEU. The results of audit on the accounts of all revenue and expenditure of EU institutions and agencies (article 287.1 TFEU) are reflected in an Annual Report and several special reports every year, which are taken note of by the Council and the Parliament in the framework of the discharge procedure (Article 319 TFEU).

The trigger of the ECA's audit power lies in the origin of the funds as Union's funds, the ECA can then follow the money downwards to the very last recipient, unlike other national accounting offices and courts of auditors whose powers are defined *ratione personae* (i.e. they can control the funds of sole national public administrative bodies, regardless of where they come from). In the framework of its audit power, the ECA carries out frequent on-the-spot missions both in its fellow European institutions and in Member

³⁶ Riksrevisionen (Swedish supreme audit institution, coordinator), *The causes of the global financial crisis and their implications for Supreme Audit Institutions*, Stockholm, October 2010, available from <http://www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf> (last accessed 31 July 2014).

States. In the latter case, it must liaise with national audit bodies; therefore, no room is left for surprise inspections. Article 287.3 TFEU calls for cooperation with national authorities “in a spirit of trust while maintaining their independence”. Although the ECA benefits from an extended right of access to national files according to Article 287.3 paragraph 3, it can neither impose penalties should local authorities refuse to cooperate, nor bring the non-compliant State before the ECJ, for it lacks standing to initiate an infringement procedure (article 260 TFEU) and it hinges on the Commission’s will in this regard. This is but an example of the lack of adaptation of judicial remedies to an institution created two decades after the Treaties of Rome were signed³⁷. Fortunately, the ECA has been reassured by the Commission and the ECJ when a Member State has refused to release information relevant for a specific audit³⁸.

Two are the main insufficiencies suffered by the ECA to fulfil its audit role: the lack of sufficient human resources and its consultative nature. Firstly, the ECA faces a long-standing work overload that the Parliament and the Council seem unwilling to redress, even less under current economic conditions. As a result, the ECA does not ensure a thorough audit of budget implementation of the whole EU budget and the European Development Fund. Instead, extensive control only targets policy areas prone to irregularities, according to samples. On the other side, the Court remains a consultative body, despite its name. The results of ECA’s audits strengthen the diffuse system of oversight on the Commission as the manager of EU funds. However, the ECA’s reports remain prisoner of the attention paid by the controlled bodies, on the one hand, and the Parliament and the Council, on the other. For obvious reasons, the Council is not keen to name and shame Member States in which financial irregularities are committed, but deviates attention towards the Commission’s responsibility as regards internal control.

In the framework of its consultative function, the ECA takes part in the legislative procedure through non-binding opinions which aim at improving the legal framework of budgetary management. In doing so, it contributes to rooting out financial irregularities long before they are committed. The underlying philosophy builds on the ECA’s privileged place to detect, through its audit function, which flaws should be corrected as regards EU budget management. However, this function is shaped in a non-binding fashion, thus hampering the likeliness of a significant impact of ECA’s opinions in the final text adopted by the Legislative authority. Consultation to the ECA may be compulsory or voluntary, but no clear boundaries between them are set in the Treaty³⁹. As a result, the Council has failed to consult the ECA every now and again⁴⁰.

³⁷ María-Luisa Sanchez-Barrueco, *El Tribunal de Cuentas Europeo. La superación de sus limitaciones mediante la colaboración institucional*, Madrid, Dykinson, p. 119.

³⁸ See notably Judgment of the Court (Grand Chamber) of 15 November 2011, *European Commission v Federal Republic of Germany*, C-539/09.

³⁹ Article 322 TFEU establishes an obligation to consult the Court before adopting “the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts”. Furthermore, the ECA must be consulted prior to reform of the regimes applicable to own resources, responsibility of financial actors, and the fight against fraud or protection of the EU’s financial interests, according to the Treaty. Finally, the ECA is given a say on the financial regulations of the EU’s various agencies, depending on the relevant constituent act.

⁴⁰ However, the ECA has never brought an action for annulment before the ECJ for lack of consultation.

b) *Lessons learned and new initiatives adopted by the ECA in the framework of the economic crisis*

At the June 2012 European Council, the Member States tasked the Herman van Rompuy, as President of the European Council, to draft a document setting a roadmap towards a genuine economic and monetary union (EMU). The report, prepared in close collaboration with the presidents of the Commission, the Eurogroup and the European Central Bank (ECB) was eventually submitted at the December 2012 European Council⁴¹. The roadmap identifies three stages in the development of a true EMU and five building blocks. The last one refers to “Democratic Legitimacy and Accountability” which contains calls for new contractual agreements that help guaranteeing adequate accountability of the ECB and the Single Resolution Board within the new framework of the banking union, as well as parliamentary oversight at the pertinent level according to the principle of subsidiarity. No explicit mention was made to the ECA; however, on the occasion of an event commemorating the 35th anniversary of that institution in September 2013, its president picked the glove up and expanded on the potential role of the auditor under the new framework⁴². He seized the opportunity to claim changes in the role of auditors. Specifically, providing the citizens with effective accountability for results would require firmer steps towards evaluation of public policy performance (value-for-money audit) instead of the current focus on legality and regularity. As President Van Rompuy has recently affirmed, *“the focus has to be above all on results. We need to show how this money is making a difference for citizens across Europe. That’s why the growing emphasis in the Court’s work on performance auditing is to be encouraged and developed. Because it helps politicians and policy makers answer the two key questions they continually ask themselves: first, is the money allowing us to achieve our agreed objectives and second, could we do it more efficiently? At the end of the day, I’m convinced it’s above all through results that we will convince citizens”*.⁴³ Accordingly, a core challenge for the ECA in the coming years will be the definition of adequate indicators to measure performance in complex budget management areas, such as youth employment or research and development, which have received a boost under the 2014-2020 Multiannual Financial Framework. For the time being, the ECA has fixed, as a key priority, the improvement of its own capacity to carry out performance audits⁴⁴.

We examine now the increasing role acquired by the ECA in the framework of the new financial regulatory framework. The new economic governance is as new for the ECA as it has been for the rest of institutions. Structural changes within the institutions have thus been necessary to cope with the new challenges. A special team composed of trained auditors from within and outside the Court has been recently set up⁴⁵. Three issues

⁴¹ Herman Van Rompuy, Towards a genuine Economic and Monetary Union, 5 December 2012, available from http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf (last accessed 31 July 2014).

⁴² Vítor Caldeira, Speech at the Conference on European governance and accountability, 13 September 2013, ECA/13/26.

⁴³ Keynote Speech by President of the European Council Herman Van Rompuy at the closing event of the celebration of the 35th anniversary of the European Court of Auditors, Luxembourg, 12 September 2013, EUCO 183/13.

⁴⁴ Vítor Caldeira, Presentation of the ECA 2014 Annual Work Programme to the European Parliament Committee on Budgetary Control, Brussels, 18 March 2014, ECA/14/09.

⁴⁵ Ibid.

advance the involvement of the ECA in this domain, namely: its participation in the Board of Auditors of the European Stability Mechanism as of 2012, its close examination of the European Banking Authority in May 2014, and accountability of the Single Resolution Board established in July 2014.

The ECA lacks specific powers regarding the European Stability Mechanism (ESM) that superseded the temporary European Financial Stability Facility (EFSF)⁴⁶ from October 2012 on⁴⁷, due to the intergovernmental nature of the funds that feed the ESM, completely apart from the EU annual budget. Nevertheless, the ECA will have a relevant impact on the accountability of this financial facility through the ESM Board of Auditors, for the ECA appoints one of the five members of this body which, in turn, fulfils a chairing role, under Article 30 of the ESM constitutive treaty.

Secondly, the ECA published in May 2014 a Special Report on the establishment of the European Banking Authority (EBA)⁴⁸ which shows its willingness to stay involved in all processes and mechanisms that may have an impact on the new financial regulatory framework. In this case, the ECA's audit was aimed at assessing "*whether the Commission and EBA had satisfactorily carried out their responsibilities in setting up the new arrangements for the regulation and supervision system of the banking sector and to examine how successfully those new arrangements were functioning*". As a result, six recommendations for improvement were made to the EBA and the Commission, which were generally accepted by these two bodies.

The Single Supervisory Mechanism (SSM) was established in 2013⁴⁹ to ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, and that those credit institutions are subject to supervision of the highest quality. A further step forward, earlier in 2014, has been the launching of a Single Resolution Mechanism (SRM) to harmonise the rules relating to the consequences of failure of cross-border banks⁵⁰. Eventually, the EP and the Council

⁴⁶ The European Financial Stability Facility (EFSF) was created by the euro area Member States following the decisions taken on 9 May 2010 within the framework of the Ecofin Council. The EFSF's mandate is to safeguard financial stability in Europe by providing financial assistance to euro area Member States within the framework of a macro-economic adjustment programme, <http://www.efsf.europa.eu/about/index.htm>.

⁴⁷ Following the amendment of Article 136 TFEU on 25 March 2011 by the European Council (Decision 2011/199/EU, OJ L 91, 6 April 2011), the Treaty allowed the creation of a stability mechanism that could be "*activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality*". The European Stability Mechanism was thus created by means of an international treaty (Treaty establishing the European Stability Mechanism, Consolidated version following the accession of Latvia <http://www.esm.europa.eu/pdf/ESM%20Treaty%20consolidated%202013-03-2014.pdf>). Despite its obvious link with the EU, the ESM presents the legal nature of an international organization.

⁴⁸ European Court of Auditors, Special Report: European banking supervision taking shape — EBA and its changing context, SR 05/2014, adopted on 14 May 2014.

⁴⁹ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

⁵⁰ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p. 190).

adopted on 15 July 2014 a regulation that sets uniform rules and procedures to be applied by the SRM⁵¹. A Single Resolution Board (SRB) is created and entrusted with a centralised power of resolution of banks and other financial entities covering varied and essential tasks. The SRB will become fully operational by 1 January 2015 and will have its headquarters in Brussels. Interestingly enough, Article 45 of Regulation 806/2014 provides a basic framework for the accountability of the decisions adopted by the SRB, and the ECA features among the EU institutions that will examine the SRB's annual report on the performance of its tasks. It should be noted, however, that accountability of the SRB will not be carried out directly by the ECA, but by the EP, the Commission and the Council. Regulation 806/2014 remains silent as to the exact role of the ECA and the new interinstitutional relations that the new mechanisms will originate. Since the legal framework of the SRB assimilates it to an EU agency –safe the necessary divergences due to the nature of its tasks – we assume that the ECA will draw an annual report on the activities carried out by the SRB that will in turn be handed in to the European Parliament for political oversight and accountability.

This brings to the fore the need to recast the interinstitutional relations between the EP and the ECA. Although the EP remains the natural client of the ECA in the EU institutional framework, mutual relations are usually channelled through the COCOBU (Committee for Budgetary Control, following the French acronym). It seems that this committee is not performing as expected as liaison agent between the ECA and the EP. A former member of the ECA went so far as to affirm that the committee had become “a kind of firewall between the Parliament and the Court”⁵², which prevents the ECA from reaching other committees. However, a structure that allowed the Court to work in close contact with expert committees *ratione materiae* would improve planning and coordination of the financial audit and the political control. Taking into account the new involvement of the ECA in the supervision of activities linked to the banking union, for which the COCOBU is not specifically competent, the ECA has great interest in building mutual trust and new links with other committees, and more notably with ECON (Committee for Economic and Monetary Affairs), competent in the field of financial supervision.

A final challenge that remains unsolved points at international coordination and cooperation between the ECA and the SAls of the Member States. As mentioned above, proper accountability cannot be achieved in a multilevel governance system if each supreme audit institution does not carry out effective oversight of funds managed in its Member State. Additionally, uniform accountability across Europe requires effective coordination between the SAls and the ECA.

The lack of common standards for auditing the execution of the EU budget at European and national level is clearly a major gap hampering international cooperation. There have

⁵¹ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 30 July 2014.

⁵² Jacek Uczkiewicz, ‘The Court as I remember it, the Court as I see it’, in European Court of Auditors, *Reflections. 35th Anniversary of the European Court of Auditors*, Luxemburg, 2014, p. 40.

been several initiatives to fix this shortcoming, the most relevant of which is the Bonnici Working Group, but discord among Member States keeps this issue in deadlock⁵³.

Recent times have witnessed greater awareness among SAIs of their role in countering the financial crisis. Therefore, a number of initiatives have been launched. For instance, the Contact Committee (the body that groups both the ECA and SAIs) has established two task forces to analyse ways for improving current arrangements. The first one deals with the Commission proposal to develop government accounting frameworks in the EU by introducing European Public Sector Accounting Standards; whereas the second one reflects on the new tasks and roles of the external public audit function following reform of the EU economic governance⁵⁴.

V. Conclusions

The economic and financial crisis that haunts Europe since late 2007 has put a great stress on EU institutions, which have been forced to adapt their internal structures to new paradigms and create new bodies to cope with challenges that were unknown to date. This paper has placed the European Court of Auditors at the centre of institutional adaptation and has explored the way in which this institution is, slowly but firmly, getting involved in the new framework for economic governance. The research question required devoting attention to the specific features of financial management in the European Union, which is a multilevel governance system in which rights and responsibilities are not fairly shared between the Commission and national managing authorities. The insufficiencies detected in the procedures for internal control and recovery of funds missed at the national level highlighted the need for more effective involvement of national audit institutions in the financial accountability of EU funds implemented at the national level, as well as greater coordination with the ECA. However, the ECA itself is prisoner of its own institutional shortcomings as a technical and consultative body, which prevent it from provoking a more relevant impact. The economic crisis widened the breaches in accountability and weakened, in turn, the citizen's trust in the legitimacy of the financial management architecture at the EU level. As shown in the last section of this paper, the ECA has put in place new institutional strategies which represent its contribution to a post-crisis paradigm in which proper accountability before the European citizen is placed at the centre of the public debate. Only time will tell if these new challenges are met.

⁵³ Jacek Uczkiewicz, 'The Court as I remember it, the Court as I see it', in European Court of Auditors, *Reflections. 35th Anniversary of the European Court of Auditors*, Luxemburg, 2014, p. 40.

⁵⁴ Vitor Caldeira (President of the ECA), Speech at the 150 year anniversary of the Romanian Court of Accounts, Bucharest, 6 June 2014, ECA/14/23.

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