Audit Bases of Soundness in EU Budgetary Governance

Volume II

The Politics of Audit within the system of EU Budgetary Governance

Prof. Dr. Dimitrios V. Skiadas, LLB, MJur, PhD

Dept. of International & European Studies, Univ. of Macedonia
Jean Monnet Chair on EU Budgetary Governance and Audit

JEAN MONNET CHAIR
EU BUDGETARY GOVERNANCE
AND AUDIT

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Preface

The Jean Monnet Chair on EU Budgetary Governance and Audit is hosted at the Department of International and European Studies of the University of Macedonia in Thessaloniki, Greece. The Chair was awarded by the European Commission and the Education, Audiovisual, and Culture Executive Agency (EACEA), under the Jean Monnet Scheme within the Erasmus+ Programme of the European Union, which supports university initiatives aimed at creating teaching activities in European integration.

The purpose of the Chair is to enhance the limited, so far, academic work, in terms of teaching and research, with regard to EU Budgetary Governance and Audit, by increasing the interest and deepening the knowledge in the field of studies related to EU (legal, economic, political), as well as, to address the University's outward orientation by providing the general public and the specialised groups of stakeholders in the public and private sector, information and (when requested) specialised knowledge on issues regarding EU Budgetary Governance, as a means of interpretating the developments in the EU. Understanding at least the fundamentals of EU Budgetary Governance allows for a new look on the benefits of European integration, a look based on academically verified evidence that will enhance the dialogue and the cooperation between the academia and the civil society.

One of the tasks of the Chair is the production of materials regarding its academic topics. These materials entail a variety of texts such as Notebooks, Papers and Books.

This book aims to provide a point of reference on some very technical and specialised issues pertaining EU Budgetary Governance and Audit. It will entail a focused analysis of the

institutional and legal framework of the audit function, within the overall system of EU Budgetary Governance. The 1999 developments and the subsequent political and institutional options on EU governance, as well as the Lisbon Treaty have established several schemes pertaining the management of EU funds and the corresponding audits. Furthermore, the EU's response to the financial crisis lead to new schemes of providing financial support to Member States, establishing new lending mechanisms and using the EU budget as collateral. These new arrangements set significant challenges for the EU's control and audit system at all levels. The book will seek to establish that all these activities and the relevant transactions are being audited in an appropriate and efficient manner, and to examine whether these audit schemes are actually in a position to provide a substantive assurance on the soundness of the EU Budgetary Governance. The entire analysis will seek to establish the legitimacy of EU Budgetary Governance in the weberian perspective (traditional, charismatic and rational-legal legitimacy).

Given the extent of the EU's control and audit schemes, the book will comprise three volumes.

The first volume will examine the schemes of internal and external control and audit within the system of EU Budgetary Governance, their advantages and disadvantages, especially vis-a-vis each other, and their potential to establish the EU Budgetary Governance's soundness. These schemes are examined as an integrated system of control and audit.

The second volume will examine the political element of the audit schemes included in EU Budgetary Governance. The increased role of the European Parliament, as well as the involvement of national parliaments, on issues relevant to the management of EU funds, have pointed out, quite emphatically, that it is necessary for all budgetary activity to be explained and justified as the parliamentary institutions are becoming

more and more demanding with regard to being well informed on such issues before approving or discharging the executive's actions with regard to the EU budget's implementation at EU and national levels.

The third volume will focus on the comparison between the classic/traditional types of audit (financial and compliance audit), as these types have been maintained in certain EU member states as the sole audit method, and the performance (value for money) audit, used by the European Court of Auditors and other national audit institutions as additional audit method. This comparison will help identifying the more suitable type of audit (including the possibility of combining their elements) taking into account the nature of the transactions and policies to be audited.

Professor Dimitrios Skiadas

Jean Monnet Chair
on EU Budgetary Governance and Audit

Introduction

The relationship between the political element and the budgetary element in the field of public finance has always been very strong. Based on the traditional theoretical approaches of the theory of public goods and the theory of incidence, James M. Buchanan formulated the theory of fiscal choice, a concept which is based on the assumption that fiscal choices are made through the people's participation in the political process, presuming that the relevant political regime is workably democratic (see Buchanan, 1999, p. 282). In this approach, the political framework of fiscal choice-making, formulated in a constitutional form and comprising a whole set of political institutions along with rules and procedures, is seen as being so influential with regard to the actual contents of the fiscal choice (even in the case of absence of rules regarding such a choice), that the term "political-fiscal order" is used to describe the entire scheme (see Buchanan, 1999, p.289-290 & 293).

The main institutional tool of Budgetary Governance, the budget itself, when seen in the context of the state or any other public entity (subnational, national, supranational and international), has a very strong political element as it operates as the tool for the principal political objective of the public entity, which is the improvement of the welfare of the entity's beneficiaries (in the case of the state, its population). Actually, in the public sector, budgets have three broad functions: economic, political, and legal. The economic function entails the exercise of planning, controlling, and administering activities, aiming at balancing revenues and expenditures, and at allocating available resources efficiently in order to maximize social welfare. The political function of the budget derives from the process adopted for its enactment in the democratic regime:

budget proposals are being put forward by the executive (government) and they must be approved by the elected representatives of the people (parliament). Furthermore, with regard to the implementation of the budget and at the end of the fiscal period, the competent authorities are legally obliged to prepare reports of their actions and these reports must be submitted for approval by the parliament. Finally, the budget's legal function is the result of the fact that a budget is regulated by laws, rules and regulations and, in some cases, it has a legal status being considered a typical law. Thus the budget establishes limits to managerial decisions and actions of the executive, and any violations may lead to penalties (see Veiga et al., 2015, p. 26-27).

These functions highlight the budget's essence: budgeting is practically the translation of financial resources into human purposes. Given that the resources of a state are, by definition, limited, the budget represents the tool to apportion available funds among "competing" people and desires. This allocation process has very distinct political characteristics, reflecting a variety of points of view, of cultures, of ideas, which refer even to how one understands life itself. Thus, as a means to record the outcome of the struggle among these views, the budget is perceived as an attempt to allocate financial resources through political processes in order to serve different ways of life (see Wildavsky, 2002, p. 7-9).

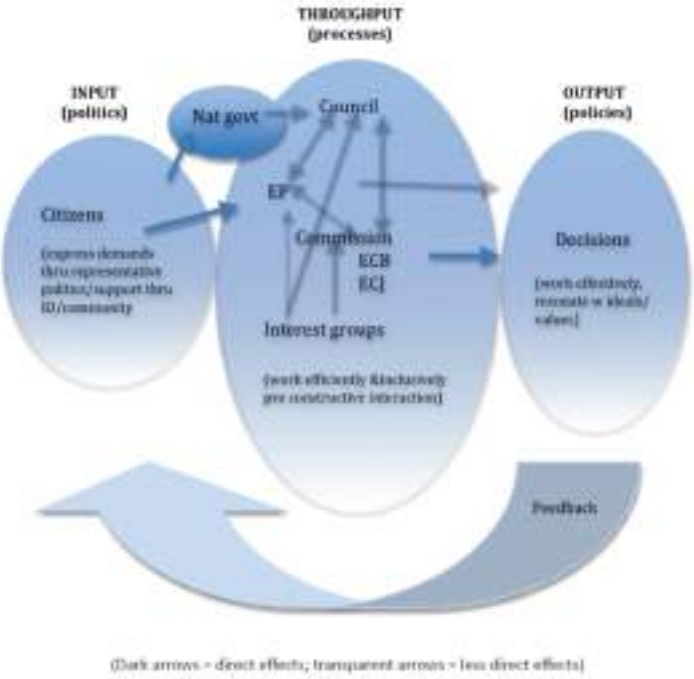
Bringing these approaches in the context of the European Union, it is very important to understand the substance and the limits of the Union's political aspects. The EU is a political system as a) it is equipped with a stable and clearly defined set of institutions responsible for the production of policies and the exercise of governance, b) it allows for social groups and individual citizens to pursue and achieve their political goals, c) its collective decisions affect crucially the distribution of economic resources among and within its Member States, and

d) it provides the forum for a constant interaction between actors from all levels of power and all fields of policy. But this political system is highly decentralized at it is based on the voluntary commitment of the member states and its citizens, and relies on sub-organizations (the existing nation-states) to administer coercion and other forms of state power, despite the gradual transfer of authority to the EU institutions over the historical course of the European integration effort. The lack of monopoly on the legitimate use of coercion, on behalf of the EU, deprives the Union from being a "state" in the traditional Weberian meaning of the word, but still the EU constitutes a unique and complex political system (see Hix, 1999, pp.2-5).

This system comprises substantial elements of developing and implementing policies with significant economic impact either for the Union itself or for the EU Member States. It is on these instances that extensive and in-depth debates, at political and academic level, have been developed, their focus being on the democratic legitimacy of the competent bodies and institutions involved as well as of the relevant actions. The Economic and Monetary Union is one such case as it has been found to be neither democratically legitimate nor technocratically efficient (see Moravcsick, 2018, and the references therein). The constantly increasing demand put forward by the European Parliament to be involved in policy making proceedings (seeking to assimilate, to an extent, the co-decision process) especially in policy fields with a strong economic element, enhances the political nature of the dynamics deployed in the EU context as it demonstrates a intense politicisation, in the sense of interaction between the various actors which formulate and exercise "policy *with* politics" (see Schmidt, 2018).

In other words, the institutional scheme of the European Union seeks to acquire a legitimating element that would allow it to proclaim that it operates, it formulates and implements policies, "for the people" (output legitimacy which is con-

cerned with the effectiveness and efficiency of the executive's action) and "of and by the people" (input legitimacy which is concerned with the representation and participation of the people in the executive's action). These two types of legitimacy have dominated traditional political analysis and action in the EU in a continuous effort to address the concerns identified for each one of them (see Sanchez-Barrueco, 2015, p. 71-72 and the references therein, Schmidt, 2010, p. 11-20 and the references therein). But these approaches have left a gap in examining the theoretical basis of the quality required for the processes of EU governance, a quality measured by these processes' efficiency and accountability. This theoretical approach has been called "throughput legitimacy", as it focuses on shedding light on the "black box" of the Union's political systems, on the workings of the EU institutions through which results are delivered, thus putting forward the people's understanding of these workings (see Schmidt, 2010, p. 7 & 20-25). Another term used to describe similarly the analysis of the structures, norms and processes of accountability in a political system, such as the EU, is "systemic legitimacy", which seeks to describe the measure of the people's trust in the functioning of the political systems (see Laffan, 2003, p. 763, Sanchez-Barrueco, 2015, p. 72). The following figure provides a good picture of these legitimacy types:



Source: Schmidt, 2010, p. 10

As it can be derived from this figure, the finances of the EU, being at the center of the EU institutions' workings, constitute a policy area in which the political element is not just obvious due to its importance, but also deeply rooted in the processes involved therein and the substance of the action taken, given that making choices for the allocation and use of resources, as well as the audit of these choices, entail the formulation and employment of a nucleus of political thoughts and ideas. There are several instances in the historical course of the development of the EU that the political nature of the budgetary choice and decision-making process has been placed in the foreground of

EU affairs, as there are constraints of a political nature such as the setting of the total EU budget revenue and the approval of the categories of the expenditure to be included in the EU budget (see Strasser, 1992, p. 184). Exerting influence on such issues has always been, and still is, one of the primary goals in the interinstitutional competition developed between the various actors of the EU institutional universe.

In such a competitive environment, the establishment of an institutionalized audit mechanism should not come as a surprise, taking into account the output of this mechanism and its usefulness for the competing actors. However, it was not but only after a few years that this audit scheme developed an agenda and a "conscience" of its own, seeking its own place in the EU institutional constellation. And it got it. This development created new conditions in the political arena of the EU, not because that the audit institution of the Union was a political one (which is not, as it will be analysed further below), but because the results of the audits, due to the audit scope (financial and compliance audit as well as performance audit), provided very interesting insights for the Union's budgetary governance, and these insights were the basis for political arguments and political action.

Based on these considerations, the structure of this analysis entails at first a presentation of the course of the institutionalization of audit in the EU legal order, taking into account the provisions of EU primary law. Following that, the analysis will shift its focus on the auditing activity in the EU interinstitutional arena, highlighting the political elements of this interaction. In that regard, the relevant provisions of EU primary and secondary legislation (namely the provisions of Regulation 2018/1046 on the financial rules applicable to the general budget of the Union, [2018] OJ, L 193/1 – hereafter the current Financial Regulation), the provisions of the 2013 Interinstitutional Agreement between the European Parliament, the Council

and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, [2013] OJ, C 373/1, the provisions on the rules of procedure of the Council of the EU and of the European Parliament as the two political arms of the so called "budgetary authority", the Memorandum of Understanding between the European Court of Auditors and the European Central Bank as an example of audit arrangement, and the European Court of Auditors' Decision No 35-2014 on its cooperation with the European Anti-Fraud Office concerning audit related matters) will be examined. The final chapter will focus on the importance of audit regarding the protection of the EU financial interests, given the political dynamics involved in that process. Again the relevant provisions of EU primary and secondary law will be used as points of reference for the analysis. All these provisions are also included in the Annex of this analysis in order to provide a complete picture of the materials on which the arguments put forward are based.

Finally, as in the first volume of this book, it must be stated that the use of legal provisions as points of reference of the analysis, provides the basis for an overall evaluation of the existing arrangements de lege lata, as well as for the formulation of proposals, de lege ferenda, given the law's function as the legitimating basis of the EU institutions and their actions, which provides them with governing principles and sets their boundaries (see Skiadas, 2020, p. 9-10 and the references therein). Furthermore it has been deemed more appropriate to avoid adopting a merely linear temporal narrative but to focus, instead, on the process of institutionalizing as comprising various patterns of interaction between institutions/groups in different political and social environments. This functional, interactions-based, actor-centred perspective, allows for a more comprehensive analysis for the day-to-day operation of the institutions concerned as well as their effort to assert their legit-

imacy vis-a-vis other institutions. Of course, consideration is given also to the wider political/institutional context and the temporality of the case. Thus, it is possible to trace patterns, practices, forms of interaction, which lead to rules and norms regulating the activity in question (see Stephenson, 2016, p. 1497).

1

Institutionalizing Audit in the EU political system

I.I. The need for institutionalized audit

Perhaps the most straightforward declaration of the need to establish a scheme that would efficiently and effectively undertake the function of audit in the scheme of financial management of the European integration effort was the argument put forward in 1973, by H. Aigner, then Vice-chairman of the European Parliament's Budgetary Committee, who, in view of granting (at that time) increased power to the Parliament over the European budget's enactment and implementation, and taking into account the changes in the composition and the size of this budget, called for an independent body that would undertake the task of auditing the activities of financial management in the (then) European Communities (see European Parliament 1973, Skiadas, 2000, p. 4, Laffan, 2002, p. 125, Laffan, 2017, p. 261). This was also the view expressed by the European Parliament itself since the early years of the Communities' operation (see European Parliament, 1964).

The predecessors of the existing institutional external audit scheme in the EU did not manage to perform their duties in a manner that would satisfy the political needs of the European institutional system, thus their abolition was hot a surprise (for

more details on these issues see Skiadas 2000, p. 2-4, Skiadas, 2020, pp.27-30, Stephenson, 2016, Issac, 1977, Wooldridge & Sassela, 1976, and the references therein). The notion of having an independent external audit scheme, equipped with all guarantees and means necessary for exercising its duties, as a mechanism that would provide the European Parliament with well documented reports on the management of the European budget had become during the 1970s the main political issue dominating the agenda of the European institutions and the Member States of the (then) European Communities (for more details see Skiadas, 2016a, pp. 285-1 to 285-7, Price, 1982, Toth, 1990, Wooldridge & Sassela, 1976, Issac, 1977, Emerson & Scott, 1977, Sopwith, 1980, Dankert, 1983, Wallace, 1986, Zangl, 1989, Issac 1994). The relevant negotiations between the Commission, the Council and the Parliament, from 1973 till 1975, resulted in the establishment of the European Court of Auditors as the external auditor of all three European Communities (see Strasser, 1992, p. 270, Wooldridge & Sassela, 1976, p. 19-23).

This development is seen as a systemic and institutional reply to a fundamental question which applies not only for the EU but for any democratic regime: why is it necessary to have an audit institution? (see Skiadas, 2000, p.1-2)

In the context of the European Union the reply is given by the necessity of the Union to audit its financial management, since accounting mistakes (which some times are deliberate) are constantly discovered, concerning the collection of revenue or the payment of expenditure (see Stefanou, 1991, p. 71).

In a more theoretical (and mainly political) context, attention should be drawn to the Preamble of the EU Treaty (the current one as well as its previous versions), according to which the Member States decided to establish a European Union based on the principle of democracy and the democratic functioning of the European institutions. One of the most

basic elements of democracy is the notion of controlling the Executive. This control has three dimensions: Legality Control, Political Control and Financial Control (Audit), the context of the latter being that the Executive has to justify its budgetary choices in terms of preparing as well as implementing a budget: The resources created by the revenue have to be spent for purposes approved by the Legislature in the most efficient and effective way possible. This control is to be performed by an independent audit institution, established for that purpose, namely to examine thoroughly and on a professional basis all kinds of expenditure (see Beetham & Boyle, 1995, pp. 86-88).

In the EU context, the corresponding accountability framework, with regard to financial management and financial control includes three key elements: the European Parliament and Council, which provide democratic oversight; the Commission and other bodies of the EU and the Member States that perform executive functions; and the ECA as the EU's auditor, These elements interact, as shown in the following graph (see European Court of Auditors, 2014a, p. 14):

So, the European Court of Auditors (ECA) is charged with the task of auditing all financial activity within the European Union. Its existence in the institutional scheme of the European Union is required by the democratic nature of the Union. It guarantees the financial control of the Union's operations and this guarantee is incorporated in the Statement of Assurance provided by the ECA to the Council and the Parliament. After all, it is commonly accepted that external audit is essential in an organization because it ensures the effective management of public money and the accountability of those who make decisions about it (see Harden, White & Donnelly, 1995, p. 626).

This approach has been seen as the most reasonable approach to acknowledge the existential reason of the ECA in the landscape of the EU institutions. The theoretical approaches regarding the EU, such as liberal intergovernmentalism, new institutionalism (highlighting the supranational governance element), or even social constructivism, do not provide further bases for justifying the existence of such an institution, of a non-majoritarian nature (meaning that it is not directly subject to political oversight or the popular vote) and whose role is to act as the guardian of the EU money (Laffan, 2017, p. 275). It has been argued, in a historical institutionalist approach, that the ECA's existence, as it has been shaped and formed, is to be attributed to the EU copying the corresponding bodies of its Member States, leading to an isomorphic institutional result (see Kourtikakis, 2010, p. 27-30). However, taking into consideration the Union's above mentioned need to establish its legitimacy through the accountability of its actions, the ECA has been seen as part of the Union's relevant effort, given that financial accountability should be understood as an essential element of democratic accountability, as the importance of the public funds in question and the links between the financial accountability and administrative and parliamentary accountability are quite substantial (see Laffan, 2003, p. 763-764).

I.2. The institutionalization of audit in the EU

Establishing the European Court of Auditors provided the European integration effort with an embodiment of the audit function it required. However, this new body had to find its proper position in the institutional landscape of the European Communities at first, and afterwards of the European Union.

The first issue to be addressed had been to provide a reply to the question of whether the ECA was an EU institution, such as the Commission, the Council, the Parliament or the Court of Justice, or was it just another body or organization of the many such schemes established by the Union. The lack of any relevant provision in the founding provisions of the ECA lead to the prima facie conclusion that the ECA was not recognised as equal to the other European institutions (see Wooldridge & Sassela, 1976, p. 49). Thus, its status was considered to be more similar to that of the Economic and Social Committee, i.e. an advisory body supporting the workings of the Union's institutions, as the only reference to the ECA originally was that it would carry out the audit, acting within the limits of the powers conferred upon it by the Treaties (see Issac, 1977, p. 792). This approach was further supported by the fact that the ECA's members were appointed through a procedure different from the corresponding procedure for the EU institutions, something that was seen as an element of differentiation (see Strasser, 1992, p. 270).

These views were contradicted by another approach, based on the background which had lead to the ECA's establishment. Given that the European Parliament had advocated for the creation of an independent audit body to be placed alongside the other European institutions, the ECA had to be treated as such. The fact that the provisions of the Treaties naming the European Institutions had not been amended accordingly was attributed to their general, historical (1957) and there-

fore "declarative" nature (see Lelong, 1983, pp. 100-101). This approach was reinforced decisively by the argument that the Member States did not intend to create just another insignificant audit body (taking into account the negative experience of the ECA's predecessors), therefore they equipped it with all the main prerogatives of a European institution. The ECA has budgetary autonomy as it can draw up, modify and audit its budget, it has administrative autonomy as it can appoint its own staff, the status of which is governed by the Staff Regulations, and it has operational autonomy as it can adopt its own Rules of Procedure and regulate the methods of performing its duties by itself (see Lelong, 1983, p. 101, James, 1984, p. 471, Strasser, 1992, p. 270, Orsoni, 1991, p. 78).

Interestingly, the European Court of Justice at that time seemed to accept the first of the above mentioned points of view in its case-law. According to its understanding, as the ECA was not mentioned in the dispositions specifying the European institutions, it was not possible to consider the ECA as such an institution. In the Court's judicial reasoning, the ECA was treated as a European institution with regard to the Staff Regulations just in order to have these Regulations applied to the ECA's officials and employees, and this treatment did not extend to the application of the Treaties' provisions regarding the institutions (see Case 828/79, *Adam v Commission*, [1982] ECR, p. 269–295 at p. 290-291).

Given the dangers that this dispute was harbouring, especially with regard to the ECA's capacity to perform its duties in an effective manner that would meet the needs which lead to its establishment, it was suggested that the Member States should "elevate" the ECA to the status of a European institution, thus eliminating any doubts about its authority and other undesirable side-effects (see Kok, 1989, p. 347).

The issue was settled irrevocably by the Maasstricht Treaty. The provisions relating to the European institutions were

amended, and they formally included the ECA as one of these institutions. It is noteworthy that even the Articles concerning the ECA were moved from the Treaty's Chapter concerning the financial provisions to the Treaty's Chapter concerning the European institutions (see Shaw, 1996, p. 132). This systemic amendment of the Treaties' provisions highlights the importance attributed to the ECA's role in the EU political and operational system, as its "elevation" proved the Member States' will to rationalise the Communities' financial management system and intensify the protection of their financial interests against actions such as fraud and corruption (see Anastopoulos, 1993, p. 134, Tsinisizelis, 1995, p. 92).

This development, however, was not an easy one. It has been preceded by complicated negotiations as the Commission and the European Parliament had not included in their final proposals such an amendment of the Treaties, and it was the representatives of the Member States that asked the ECA to state its opinion on becoming the institution of external control of the European Union (enlarging thus the object of audit). The ECA's reply demonstrated its willingness to be recognised as an institution of the European Communities (thus reducing its auditing competence only to the first pillar of the Union) and to be able to take action before the Court of Justice of the EU. This has been the solution finally adopted by the Intergovernmental Conference and reflected in the Maastricht Treaty (see Strasser, 1994, p. 196).

At first this arrangement seemed satisfactory, but it was not long after the provisions' entry into force that the ECA found itself in a very strange position as the scope of its auditing mandate covered the administrative expenses caused by the remaining two pillars of the then structure of the EU (i.e. the Common Foreign and Security Policy and the Cooperation in the fields of Justice and Home Affairs) but not their respective operational expenditure. The ECA's scope of action was

limited to the budget of the European Communities, as the second and thirds pillars of the EU, at that time, did not have a budget at EU level, and thus the ECA was not mentioned in the relevant provisions of the EU Treaty (see Harden, White & Donnelly, 1995, p. 600). The Intergovernmental Conference of 1996–1997 which lead to the Treaty of Amsterdam provided the ECA with an opportunity to improve its legal framework by expanding its scope of action and thus including under its jurisdiction the other two pillars of the EU. The outcome of the relevant negotiations was favourable for the ECA, as it was formally acknowledged as an EU institution, and its audit mandate covered formally all EU expenditure incurred in all three pillars of the Union. Furthermore, the ECA acquired the status of a "semi-privileged" applicant before the European Court of Justice, as it was given the right to seek judicial review in order to protect its prerogatives, just like the European Parliament and the European Central Bank. This new institutional status was further enhanced by significant changes in the ECA's competences, as the ECA's Statement of Assurance became a crucial document in the discharge procedure, its auditing mandate was extended to EU agencies as well as the European Investment Bank, and its reporting activities, thereafter, could formally cover cases of irregularity, thus increasing the ECA's role in protecting the Union's financial interests (see Laffan, 2002, p. 129-130).

These developments were significant for the ECA's position in the EU institutional landscape, as the ECA, like any other institution of the Communities which was also an institution of European Union, was responsible - within the limits of its competence of course - for the consistency and the continuity of the activities carried out within the framework of all three pillars of the Union (See Stagkos & Sahpekidou, 1994, p. 116)

The institutional status of the ECA remained unchanged after the amendments caused by the Treaty of Nice as well as the Treaty of Lisbon, which abolished the three-pillar scheme of the Union. The ECA is now undisputedly an institution of the European Union, according to Article 13 (1) TEU. This was confirmed by the case law of the Court of Justice of the European Union when it adjudicated a case referring to a claim for damages against the ECA due to the contents of Special Report 1/1996, regarding the management of the MED Programmes. It was found that such an action is admissible before the judicial bodies of the EU because the ECA is an EU institution and its actions, as actions of an EU institution, could influence the administrative activity of other EU institutions (see Case T-277/97, *Ismeri Europa Srl v Court of Auditors of the European Communities*, [1999] ECR, p. II-1828–II-1870, at p. II-1845–II-1846 & II-1848).

Another relevant issue refers to the nature of the ECA (for a brief discussion see Skiadas, 2000, p. 6). Usually the methods used in order to assess this issue entail either an assimilation/equation of the European institutions with the respective national institutions, or the interpretation of the Treaties' dispositions concerning these institutions. The first method has been characterized as "deeply misconceived," as the Community/EU legal order has a unique and "sui generis" nature and its features have their own function (see Dashwood, 1996, p. 127). Consequently, any attempt to try to understand the operation of an institution of the EU, having as a model the operation of a respective national institution might be misleading. But of course this does not mean that such an assessment must be completely excluded. After all, when the representatives of the Member States established the various European institutions, they used as

models, at least at a very basic level, the respective national institutions of their countries.

In the case of the ECA, however, such an assimilation was practically impossible as in some Members States (Italy, Greece, France) the state's audit is being performed by lawyers in a judicial context while in other Member States (United Kingdom, Ireland) by accountants in a parliamentary/administrative context (see Price, 1982, p. 240).

The use of the term "Court" has been considered rather misleading, as the ECA does not have the traditional judicial authority, i.e. it cannot declare the law and it cannot pronounce judgments (see Harden, White & Donnelly, 1995, pp. 601-602, Strasser, 1992, p. 270). Its role is not seen as judicial and its tasks have been called "supervisory" (see Shaw, 1996, p. 132). Its functions are considered to be administrative rather than judicial, thus the ECA has been characterised as a "specialised court" (see Charlesworth & Cullen, 1994, p. 32). It cannot impose any legal or administrative sanctions upon audited bodies or individuals (see James, 1984, p. 478). It is thus clear that the auditing activities of the ECA are considered to be deprived from any judicial nature, depriving thus this institution of any judicial nature (Stagkos & Sahpekidou, 1994, p. 112). Even in the ECA's view its pronouncements do have any "res judicata" value and it has no judicial powers (European Court of Auditors, 1996, p. 30). The ECA cannot enforce its controlling measures nor can it perform investigations, in a judicial sense, regarding suspicions of irregularity arising from its examination (see Borchardt, 1994, p. 30). It is noteworthy that the ECA cannot even invoke legal sanctions against national officials who obstruct its work, but it may point out this obstruction in its reports (Harden, White & Donnelly, 1995, p. 626).

A former President of the ECA made a attempt to assess its legal nature, in January 1989, during a public hearing organized by the Commission, by stating (see Strasser, 1992, p. 297):

"The Court. … is not an administrative or a legislative body *… , it does not play the role of the public prosecutor …"*

The negative approach used in this statement clarifies what the ECA is not, but it provides no further hint or assistance in order to define the ECA's exact position in the institutional framework of the European Union. The resulting situation is granting the ECA, as the only means to operate in an effective and productive manner, the influence or moral effect it can bring to bear upon the financial management of the Union (see James, 1984, p. 478). Actually, the fact that the ECA cannot directly impose sanctions does not mean that its observations are not taken into account by the other institutions, national or European, which are often obliged to take the necessary corrective actions concerning their management, based on the ECA's findings (see European Court of Auditors, 1996, p. 30). The events of the 1999 crisis which lead to the Commission's resignation due to criticisms of mismanagement, corruption, fraud and nepotism are quite revealing (for more details on this case see Skiadas, 2000, pp. 64-76).

Nevertheless, it is quite striking that the aim to have an effective audit scheme in the European Union is based on the "good will," the sense of responsibility and the political sensitivity of the various institutions and organizations managing the finances of the Union. Such a concept leaves a lot to be desired, at least in terms of efficiency guarantees. If the auditor cannot impose the measures necessary for enforcing a sound financial management system to the auditees, then the whole system is by definition defective. Of course the ECA is not going to dictate the policies to be followed (that is a political task) but it can and should prescribe, from a financial and legal point of view, the sound ways of achieving the political goals set.

In a more general approach, the institutional landscape regarding the finances of the EU can be represented in four geo-

metrical patterns (see Strasser, 1992, p. 39-40):

- The first is the core supranational binomial, comprising the Member States and the European Union as their creation, with the former deciding whether or not to transfer powers and financial resources to the latter.
- The second pattern comprises the triangle of the budgetary authority which is formed by the European Commission, the Council of the EU and the European Parliament, as the institutions involved in establishing and enacting the Union's budget (commonly known also as "budgetary institutions").
- Thirdly, one can note the transformation of the triangle employed for the budgetary process into an EU square on matters concerning control of the implementation of the budget, which consists of the budgetary institutions and the European Court of Auditors, which exercises external audit.
- The fourth pattern is an institutional pentagon concerned with the implementation of the budget, as the two main political institution of the Union, the Council and the Parliament seek to affect the Commission's implementation of the budget, while the Member States come into play as some implementing budgetary powers are conferred upon national bodies and organizations by the Commission (e.g. in the field of the Common Agricultural Policy). The Court of Justice of the EU comes as a last instance resource to adjudicate in cases concerning the implementation of the budget (e.g. the collection of the Union's own resources).

These schemes confirm the undeniably institutionalized place of audit in the EU. The ECA has become a central node in the matrix of the EU financial accountability, embracing the

internal auditing units in each EU institution, the Budgetary Control Committee of the European Parliament, and the national audit authorities (see Laffan, 2003, p. 766)

2

Audit in the EU political arena

The institutionalization of audit in the EU political system was part of a wider initiative which started in the 1990s and aimed to change the Union's financial framework. It was undertaken at EU primary law level, thus acquiring "constitutional" significance for the Union. The introduction of direct references to concepts such as "budgetary discipline" and "sound financial management" in the text of the Treaties, thus upgrading them to principles regulating the Union's finances, as well as the reinforcement of EU and national competences, with regard to the protection of the Union's (then Communities) financial interests are indicative (see Laffan, 2002, p. 129).

Analysing briefly these developments will provide the necessary background for the detailed examination of the auditing operations and their impact in the political arena of the EU.

2.I. Budgetary powers and Political Powers: a constant interaction

Usually, when the interaction between political and budgetary elements in the EU context is being discussed, the first issue that springs into anyone's mind is the so called "budgetary procedure", i.e. the enactment of the EU budget as described in Art. 314 TFEU. The detailed analysis of this procedure falls

beyond the scope of the present analysis, however certain relevant aspects will be employed.

Preparing the Union's annual budget is considered by some to be a mere accounting and recording exercise while others consider it a significant exercise of policy planning and making. Historically the European Parliament has sought repeatedly to use the budget as a means to establish policies and programmes through the inclusion of appropriations, even without the previous enactment of relevant legislative instruments. The Council of the EU has been more cautious by always seeking to set the budget (i.e. the financing of policies and programmes) on the basis of already existing relevant legislative instruments, thus bounding the budgetary power to the legislative power. The Parliament, occasionally supported by the Commission, has argued that the figures in the relevant legislative decisions for the resources required for the implementation of the various policies were merely assessments of the costs and, therefore, not binding on the budgetary authority. This issue has caused serious conflicts between the institutions comprising the budgetary authority and lead to repeatedly raising the question of the demarcation of legislative and budgetary powers (see Strasser, 1992, p. 207-209).

The issue has been settled irrevocably in Art. 310 (3) TFEU according to which:

> *3.The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.*

This provision was introduced into EU primary law by the Lisbon Treaty. Its contents refer to the doctrine of "actions

ponctuelles", according to which expenditure on such actions does not require legislative authorisation because "*it falls within the scope of the inherent powers which are incidental to the Commission's executive role*" (see Dashwood, 1996, p. 127). This doctrine is based on the distinction between budget lines which authorise expenditure for measures forming part of an EU policy but which cannot be precisely described and specified in the budget, and appropriations destined for clearly defined and specific measures. In the case of the former, another legal basis besides inclusion in the budget is necessary while in the latter case inclusion in the budget is sufficient (see Kapteyn & Verloren van Themmat, 1998, p. 372). The Court of Justice of the EU had also stated that the conditions under which the legislative powers (i.e. formalising a policy) and the budgetary powers (i.e. financing a policy) are exercised are not the same, therefore care must be taken in exercising them as they can influence each other (see Case 242/87, *Commission v. Council*, [1989] ECR 1425, at p. 1454). The lack (until the Lisbon Treaty) of any relevant provision in EU (and before that the Communities') primary law was considered (see Kapteyn & Verloren van Themmat, 1998, p. 371) to prohibit the formulation of policies with normative provisions within the budget (this refers especially to the European Parliament), as well as the development of normative provisions in financial terms in such a way that any discretion within the budgetary procedure practically disappears (this refers especially to the Council). The provision of Art. 310(3) TFEU introduced the concept of the "dual basis" in EU primary law, by requiring both the legislative and the budgetary provision for an activity of the Union to be implemented. This choice has significant consequences for the achievement of

budgetary discipline in the Union's public finance.

The concept of budgetary discipline has been introduced in the financial system of the European Communities in 1984 as a means to resolve the problems identified in financing sufficiently their activities through the own resources scheme (see Strasser, 1990, pp. 209-210). The need to limit the Union's expenses so as they meet the available revenue necessitated measures to ensure that any action relating to the initiation of Community legislation has been preceded by an estimation of the financial limitations within which the European Union must operate (see Cairns, 1997, p. 56). The above described competition between the Council of the EU and the European Parliament in the budgetary procedure increased the necessity for the adoption of legislative measures to achieve budgetary discipline (see Kapteyn & Verloren van Themmat, 1998, p. 355). Thus a series of Council Decisions and Interistitutional Agreements have been enacted in that direction, during the last forty years. The Maastricht Treaty introduced a provision in the EC Treaty (original numbering Art. 201a and then Art. 270) on budgetary discipline, which was incorporated, by the Lisbon Treaty, as the fourth paragraph in Art. 310 TFEU, with the following wording:

> *4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.*

The current legislative instrument on budgetary discipline, for the programming period 2014-2020, is the 2013 Interinstitutional Agreement on budgetary discipline, on cooperation in budgetary matters and on sound financial manage-

ment ([2013] OJ, C 373/1) along with Council Regulation 2007/1248/EC on budgetary discipline ([2007] OJ, L 282/3). It must be noted that the use of Interinstitutional Agreements, not only in the area of the budgetary discipline and procedure but also in other areas of European Union Law, has become very common, as these Agreements have been acknowledged as very important legislative instruments, which even though they do not supplement the provisions of the Treaty, they can be used for their implementation (see Opinion of Advocate General La Pergola in Case C-41/95, *Council of the European Union v. European Parliament*, [1992] ECR I-4411, at p. 4427). The Interinstitutional Agreements are considered to be *sui generis* acts, having a legal status somewhere in between a political undertaking and a legal obligation and they are often described by the term "soft law", something that is especially the case for the Agreements on budgetary discipline (for more details see Mönar, 1994, Eiselt, Pollak & Slominski, 2007).

The main idea of the substantive contents of these instruments was that the Council, the Commission and the Parliament have a shared responsibility for budgetary discipline, without affecting their competences. Practically the budgetary discipline is maintained by setting financial perspectives, i.e. by preparing a harmonious and controlled development in the broad sectors of expenditure and by establishing a balance in the allocation of expenditure, especially between the expenses on agriculture and those on social and economic cohesion. The financial perspectives are regarded as binding expenditure ceilings for committing appropriations and for making payments (see Kapteyn & Verloren van Themmat, 1998, p. 356). They have been the predecessor of the Multiannual Financial Frameworks which are now provided for in Art. 312 TFEU.

The starting point for the application of budgetary discipline is to regard the budget as the legislative basis for the collection of the revenue or the payment of expenditure. Only

when the relevant budgetary lines include authorisation of revenue or expenditure, the relevant transactions may take place. And such transactions may not exceed the limits set by the budget. It is also a logical prerequisite that all appropriations entered in the budget should be justified, with their necessity explained and analysed. Thus the budget will offer an overall expression of the policies promoted by the Union. For some this approach is erroneous as the budget is merely supporting the Union's policies, being formed after these policies have been established (see Kolte, 1988, p. 488). This estimate is correct in so far as it states that the budget does not precede the decision of establishing a policy. The budget is the necessary legal basis for all expenditure but it cannot go beyond the context of the provisions of the Treaties. However, there have been examples of policies such as humanitarian aid to victims of disasters or pilot projects, whose existence is based solely on being included in the budget and not on previous political decisions by the Council (see Kapteyn & Verloren van Themmat, 1998, p. 370-372). Consequently, as all EU policies are financed through the budget, it is fair to assume that the budget is an overall expression of these policies.

Usually EU policies are expressed in rather vague terms, thus their merits are difficult to be evaluated and the achievement of value for money during their implementation cannot be easily verified. This vagueness in defining policy objectives allows those who are politically responsible for policy matters to reduce or even avoid criticism for their actions (see Harden, White & Donnelly, 1995, pp. 615). Furthermore this is a classic case of "abuse of budgetary powers", i.e. the use of vague terms in describing a policy aims to include in the budget the financing of activities that are doubtfully within the Union's competence. This has been caused by the fact that some policies may fall beyond EU competence but their contents are laudable, thus making them popular choices, especially by national

governments when acting in the context of the Council of the EU, or by parliamentarians seeking political gains in their national electorate (see Dashwood, 1996, p. 126). This tendency had been further "fueled" by the distinction between compulsory and non-compulsory expenditure, now repealed by the Lisbon Treaty (see below).

Actually, the distinction between compulsory and non compulsory expenditure has been the core of the institutional conflicts regarding the EU budgetary procedure. The rational of this distinction was to safeguard the powers of the Council as legislator and policy maker, having caused, nonetheless, considerable political debates with regard to prioritizing policies in the EU context, for instance agricultural policy (compulsory expenditure) over cohesion policy (non compulsory expenditure) or vice versa (see Kapteyn & Verloren van Themmat, 1998, p. 379-382). According to the wording of the relevant provisions of the Treaties before the Lisbon Treaty amendments (i.e. Art. 272(4) EC Treaty), the Council of the EU had decisive authority over expenditure necessarily resulting from the Treaties or from acts adopted in accordance therewith (compulsory expenditure) while the European Parliament had decisive authority over all the other expenditure of the Union (non compulsory authority). The vagueness of these definitions caused serious conflicts between the two institutions involved and in order to settle them several political compromises and legal Interinstitutional Agreements were reached. Thus, for instance, the 1982 Agreement provided a definition for compulsory expenditure as the (then) Community's legal obligations towards third parties, who may be either third countries or Member States, individuals or corporations, e.g. expenditure about the Common Agricultural Policy or the administrative expenditure of the institutions (see Dankert, 1983, p. 705), or the 1988 Agreement which acknowledged the expenditure incurred for the Structural Operations and the policies with

multiannual allocations such as the Integrated Mediterranean Programmes and the research policies as non compulsory expenditure (see Zangl, 1989). Interestingly some differences of opinion were never resolved, the most notorious being the case of the UK's budgetary rebate which was considered by the Council as compulsory expenditure while the Parliament considered it as non compulsory expenditure (see Dankert, 1983, p. 708). In any case however, the conciliation procedures provided for in the various Interinstitutional Agreements did not always succeed in reducing the tensions between the institutions involved but they provided a politicisation process of the issues discussed, thus increasing the participants' legitimacy, their negotiation leverage and their possibilities to shape the negotiations outcomes (see Dankert, 1983, pp 706-712, Bunea, 2020). The current wording of Article 314 (ex 272) of the Treaty makes no reference to the distinction between compulsory and non-compulsory expenditure.

All these developments reflect the constant quest of the Union's institutions to acquire as much authority as possible in the EU budgetary governance. This authority entails a series of rights/powers, as follows (see Strasser, 1992, p. 23):

- the right/power to create revenue;
- the right/power to authorise expenditure;
- the right/power to approve the budget as a total; and
- the right/power to control the budget's implementation.

The importance of these powers is easily understood if the EU budget's function as the global expression of the Union's ideological content, in political and economic terms, is taken into account, and the budget is perceived as the point of testing the overall institutional balance within the European Union, as well as the point of balance of the conflicts of interest of the various Member States, taking into account the various levels of political sensitivity demonstrated by all actors concerned

(see Ioakimidis, 1988, pp. 45-46, Seremetis, 1995, p. 318). Having authority over the Union's budget improves the positioning in the institutional and political system and hierarchy of the European Union.

2.2. The Audit activity in the EU political system

In the early years, after its establishment, the ECA had great difficulty in making its presence felt and it remained on the margins in the EU institutional environment (see Laffan, 2002, p. 132). Right from the start there have been tensions with the Commission. The transformation of the "budgetary triangle" to a "square" with the addition of the auditing institution, although publicly heralded as a significant improvement, was seen by the Commission (as the main auditee) with suspicion. The mere existence of an auditing authority caused uneasiness to the Commission as it had to come to terms with such an institutional reform which was inevitably set to test its managerial performance (see Laffan, 2002, p. 132), especially as there were no corresponding changes to the internal financial management and control schemes and operations of the Commission. Thus, despite several political declarations, the Commission has always understood the ECA as a Parliament's tool to limit its executive authority and, therefore, it did not provide the ECA with all the documentation necessary for its audits (see Orsoni, 1991, pp. 88-89). Even since the ECA's first Annual Report for 1977, there have been problems with regard to the so called "adversarial procedure", i.e. the exchange of views between the ECA and the auditees, as in the Commission's view the ECA should not comment on the replies given by the auditees with regard to the findings of the audits. There have been strong conflicts over this issue during the 1980s, with the Commission claiming that the ECA was seeking pub-

licity for its activities and the Parliament seemingly supporting the ECA, but finally such arguments over audit assessment came to an end, as each party started to respect the other's point of view on irreconcilable matters (see Strasser, 1992, p. 280, Laffan, 2002, pp. 132-133). A possible explanation for this situation was attributed to the Commission's prestigious status as "guardian of the Treaties", which did not allow for the EU's executive to be used to thorough investigation of its management and accounts, thus necessitating a more tactful approach by the ECA on its remarks and a more positive approach by the Commission, by considering the ECA's findings not as criticism but as opportunities for reform (see Price, 1982, p. 243). Another occasion which caused a serious conflict between the ECA and the Commission was during the early 1990s, when there was a political effort of the Commission to increase the size of the EU budget and, at the same time, there were reports by the ECA highlighting critical shortcomings of financial management in the fields of common agricultural policy and cohesion policy (two major categories of EU spending). This caused several political reactions to the Commission's initiatives, and the latter accused the ECA of inaccuracies and erroneous conclusions, pointing out at the same time that both these fields of policy felt under the shared management scheme of EU budgetary governance, i.e. the Member States were critically involved (see Laffan, 2002, p. 133). It is obvious that a good relationship between an auditor (ECA) and an auditee (Commission) is difficult to be established, let alone maintained, in a complex financial system like the Union's, in which the Commission exercises little managerial control over the EU resources' use by the final recipients in the Member States, thus being unable to establish a robust managerial system that the ECA could monitor through its "systems based" audit. The addition of the procedure relating to the Statement of Assurance made things worse as the sampling method used

in order to draw up this document gives room for disagreement between the ECA and the Commission concerning the real meaning of the results of the audit (see Harden, White & Donnelly, 1995, pp. 619-620). Nevertheless, all these conflicts did not prevent the Commission from accepting as positive the fact that the ECA has been reinforced with regard to its competences and its status as a European institution after the Maastricht Treaty (European Commission, 1995, p. 28).

The ECA had difficulties in gaining the attention of other key players in the Union's institutional system as well. The European Council has been one such case. In 1983, during its meeting in Stuttgart, the European Council asked for the first time the ECA to review the systems of financial management employed at the time in the European Communities. The ECA took this opportunity aiming to raise its profile and it provided a full scale analysis, covering all areas of expenditure, highlighting the key problems identified and putting forward a series of suggestions in order to improve the effectiveness of the expenses of the Communities. It included also references to previous reports. Yet, the European Council did not discuss anything of the ECA's report and took no follow-up, thus demonstrating not only its limited interest in the ECA's workings but also that improvements in the financial management scheme were not included in its priorities at the time (see Laffan, 2002, p. 132, Laffan, 2003, p. 767, Kok, 1989, p. 358).

An interesting instance of the audit function in the EU has been its interaction with the two main banking institutions of the Union, the European Investment Bank (EIB) and the European Central Bank. Generally, banking institutions are being audited by external auditors in order to provide their stakeholders with reports and assessments of their financial conditions and statements, given the central role they play in the economy and the subsequent need, for the governments concerned, to maintain their economic "health" (see Gaganis Chr,

Pasiouras, F & Zopounidis, C., 2006, Gaganis Chr, Pasiouras, F & Spathis, Ch, 2013).

This reasoning has formed the basis for the provision of Art. 287(3) TFEU which refers to the cooperation between the ECA and the EIB, as auditor and auditee (see Skiadas, 1999 for more details). However this cooperation has been quite difficult throughout the years. The ECA has described the problem as follows (European Court of Auditors, 1988, p. 19) :

> *"The Court has never attempted in any way to audit operations carried out by the European Investment Bank from its own resources. The Court has nevertheless been obliged to observe that greater and greater obstacles have been put in the way of the exercise of its audit prerogatives, as defined in the Treaties, over the Community resources used under the Commission's responsibility to finance operations in which the EIB is, in one way or the other, involved (EIB management of funds as the Commission's agent, interest subsidies, co-financing, etc.)*
>
> *The most substantial, in terms of volume, of the resources that are managed by the EIB are borrowed on the financial markets by the Commission and redistributed by it, with the help of the EIB. In its annual Report on the financial year 1986 the Court noted that when it "came to carry out its audit of the NCI loan transactions for the financial year 1985 it turned out that the information and documents requested from the Commission and supplied by it were not adequate for the Court to be able to express an opinion as to the extent to which the objectives set out by the Council of Ministers in its Decisions had been achieved". These repeated observations have led the Court to be especially vigilant as regards the way in which the Commission fulfils its obligations as manager of the funds in question and, consequently, the procedure by which it exercises its own powers of control….*

> *The fact however is that the Court was obliged to observe during audit visits in October and November 1987 that the EIB had approached beneficiaries of NCI loans managed by the Bank on behalf of the Community in order to prevent the Court from exercising its audit prerogatives on the spot. The argument put forward was that, as the funds in question were being managed by the EIB as the Commission's agent, the beneficiaries could not permit an audit visit from the Court without having received prior "audit authority" from the Bank …"*

The Commission intervened between the ECA and the EIB and the result was the conclusion of an agreement which is being renewed at regular intervals (see Strasser, 1992, pp. 130-131). According to the agreement, the ECA may perform audits based on documents and records placed at its disposal by the EIB and the Commission, their contents being suitable for the "systems based" audit method employed by the ECA. It may also perform on-the-spot audits during pre-arranged time-schedules. During the audits all participants (ECA, EIB, and Commission) must respect the obligation of professional secrecy and the banking secrecy. The audit is concluded with the ECA's report which is published along with the EIB's and the Commission's replies. There is also a conciliation procedure in case of disputes among the participating parties. It should be noted that in case of co-financed projects, the ECA makes no use of any information relative to the part of the project not financed by the European budget. The usefulness and the importance of this agreement have been confirmed by its inclusion in Art. 287(3) TFEU.

As for the ECB, there have been various instances of lack of cooperation between this banking institution and the ECA. In a recent case, the ECA published a series of Special Reports on the Single Supervisory Mechanism (Special Report

No 29/2016), the Single Resolution Board (Special Report No 23/2017), the ECB's crisis management operations in relation to its banking supervision tasks (Special Report No 2/2018). In the auditing activities leading to the corresponding reports, the ECB did not provide many of the required documents, thus the scope of the audit was of necessity limited and a number of important areas remained unaudited. In the context of the 2016 Commission discharge (discussed in 2018), the European Parliament took notice of the ECA's relevant remarks on the ECB's behaviour and it declared as unacceptable, from an accountability point of view, the situation in which the auditee decides single-handedly which documents the external auditor may have access to (see European Court of Auditors, 2018, p. 2-3). There have been several efforts to establish a modus operandi regarding the cooperation between the ECA and the ECB, the former pointing out that its mandate as stated by the Treaties grants it a broad right of direct access to all information deemed necessary for its audits, and the latter highlighting the confidentiality requirements of its operations (see European Court of Auditors, 2018, p. 4-8). There has been a ruling of the Court of Justice of the EU which has confirmed, in general terms, the controlling authority of the ECA over the ECB, without however providing details on the modalities of exercising this authority (see C-11/2000, *Commission of the European Communities v. European Central Bank*, [2003] ECR, p. I-7147, at para 135). The ECA asked for the European institutions' support in its efforts to reach an agreement with the ECB (see European Court of Auditors, 2018, p. 9), and the result was the signing, on 9 October 2019, of a Memorandum of Understanding (MoU) setting out the practical arrangements for sharing information during the ECA's audits of the ECB's supervisory activities. The document, while reaffirming the independence of the ECB and the ECA in the exercise of their functions, sets out the arrangements for document and

information exchange to guarantee the ECA full access to all the information needed to perform audits on the ECB's banking supervision. It contains provisions to protect confidential and market-sensitive material, including bank-specific data. The MoU covers solely the ECA's audit of the ECB's supervisory tasks conferred on it by the Single Supervisory Mechanism (SSM) Regulation, in line with the ECA's mandate under EU law (see European Court of Auditors, 2019b).

The ECA has always been trying to affirm its auditing prerogatives with regard to all institutional developments in the EU. However, the limits of the extent of ECA's audit are set by the EU legislative instruments establishing each agency (see Art. 287(1) TFEU). There have been cases of some EU agencies or bodies wishing to remain outside the ECA's sphere of control. One of them has been the European Stability Mechanism (ESM), the financing scheme adopted by the Member States of the Eurozone as a means to provide financial support to Eurozone Member States facing severe financial difficulties. The original version of the ESM Treaty provided in Articles 24 and 25 that all audit operations were to be undertaken either by an Internal Audit Board (for internal audit purposes) or by independent external auditors appointed by the ESM Board of Governors. The ECA expressed serious concerns regarding the lack of any public audit arrangements in the ESM Treaty, as there are no provisions for public external audit, which normally would fall within its purview (see European Court of Auditors, 2011, p. 7). Despite the fact that the relevant funds available for the operation of the ESM will originate from EU Member States contributions and not the EU Budget, thus falling beyond the scope of the ECA's audit, the source of this money are the European taxpayers, thus it is necessary to establish a scheme of public audit that will reflect the democratic accountability principle with regard to the funds used by the ESM. This reaction resulted in amending of the relevant

provisions of the ESM Treaty, which, in its final version, provides (in Articles 28, 29 and 30) that internal audit procedures will be undertaken according to international standards, the external audit will be performed by independent external auditors appointed by the ESM Board of Governors, and there will be a Board of Auditors, comprising, inter alia, of two (rotating) members of supreme audit institutions from the ESM Treaty signatory states and one member from the ECA, thus granting the latter the possibility to have a relevant impact on the accountability of the ESM. This Board shall draw up independent audits, inspect the ESM accounts and verify that the operational accounts and balance sheet are in order, and prepare an annual report which will be accessible to the national parliaments and supreme audit institutions of the ESM Treaty signatory states and to the ECA (see Skiadas, 2016b, p. 287-6, Sanchez-Barrueco, 2015, p. 81).

Interestingly, there have been tensions also between the ECA and the European Parliament, despite the fact that the Parliament is the "natural recipient" of the ECA's "products" in the EU institutional framework. Their interaction is usually made through the parliamentary Committee for Budgetary Control. It has been estimated that this committee is not performing as expected as liaison agent between the ECA and the Parliament, as it operates as "*a kind of firewall between the Parliament and the Court*", preventing the ECA from reaching other committees. Yet, allowing the ECA to work closely also with other expert parliamentary committees *ratione materiae* would improve planning and coordination of the financial audit and the political control. Especially in cases of examining policy fields, such as the banking union, in which the ECA is becoming increasingly involved with its auditing capacity, and given that the parliamentary Committee for Budgetary Control has no relevant substantive expertise, the possibility of the ECA to develop mutual trust and new links with other par-

liamentary committees, such as the parliamentary Committee for Economic and Monetary Affairs which has extensive knowledge in the field of financial supervision, would be of catalytic significance for both the ECA's and the Parliament's controlling effectiveness (see Sanchez-Barrueco, 2015, p. 82).

The means of communication between the ECA and the other EU institutions and bodies are the main "products" of the ECA (Annual Report, Statement of Assurance, Special Reports), which are quite significant instruments of interaction.

Even from the first two Annual Reports, the ECA demonstrated its will to use these documents as tools of substantive analysis of the issues identified during the audits. Thus, it included in the body of these reports in depth analyses with statistical information concerning the Communities' finances and, in order to facilitate the authority for the budget discharge, some comments on the institutions' responses as a rejoinder. Both initiatives were welcomed by the Parliament as correct but the Commission contested the ECA's rejoinders, claiming that it should be allowed to respond again to the comments included therein. The ECA has refrained, since that, from making additional comments but it considers this prerogative of additional comments as a valid right that can be used at its own discretion (see Isaac, 1980, p. 351, Strasser, 1992, p. 1992). Furthermore, the ECA cooperated with Commission in developing a procedure for preparing the Annual Report, and the result of this effort has always been reflected in the relevant provisions of the Financial Regulations (including the current one). This procedure entails preliminary informal meetings between the two institutions, with the involvement of higher levels of hierarchy if necessary, in order to resolve points of conflict between the two institutions. The ECA also refrains from including in the Annual Report issues that have not been elaborated during this procedure (for more details see Vitalis, 1984, p. 131, Harden, White & Donnelly, 1995, p. 617, James,

1984, p. 480, Lelong, 1983, pp. 112-113, Price, 1982, p. 241). The ECA's Annual Reports are also received by the national Parliaments, in order to improve these institutions' contribution to the good functioning of the EU (see Art. 7 of Protocol No 1 to the TFEU on the role of national Parliaments in the European Union). Thus, the national Parliaments are formally informed about the ECA's findings and they may use this knowledge in order to undertake political initiatives, in their respective countries, regarding the development of the Union's budgetary governance (see Skiadas, 2016b, p. 287-14).

The production of the Statement of Assurance, according to Art. 287(1) TFEU, obliged the ECA to extend its audit activities across the entire range of EU expenditure, especially as the ECA considered itself obliged to audit expenditure down to the level of the final recipient of EU spending (see Statement of Assurance of the Court of Auditors for the Financial Year 1995, [1996] OJ, C-395/19). In this Statement the ECA declares that after having conducted all the necessary audits, it has reached a point of assurance that all the accounts presented reflect the reality and that all underlying transactions are legal and regular. But if the ECA cannot conduct all the audits that it thinks necessary in order to assure the legality and regularity of the accounts or if, during its audits, it locates important anomalies that effect a substantive part of the accounts, then it has the right to refuse to produce the Statement of Assurance (see Strasser, 1994, p. 200). As before 1993 such a Statement was not deemed as essential or even necessary because the European Institutions were presumed to keep accurate accounts (see Strasser, 1992, p. 278), the prospect of the ECA's refusal to produce the Statement was considered to provide the ECA with a significant power of sanction as the institution(s) concerned must take action to improve their performance in order to avoid receiving negative remarks by the ECA or even grant it the reason to refuse to produce a positive Statement

of Assurance (see O' Keeffe, 1994, p. 187). Extending, through the requirement for the Statement of Assurance, the ECA's audit to all EU expenditure eliminated also the criticism against the ECA that it looked only in areas where it expected to find mistakes and did not praise areas of management where things were satisfactory (see House of Lords, 1994, para 30).

With regard to the ECA's Special Reports, it has been noted that due to their analytical and focused approach, the Parliament (which is their main recipient) often has neither the means nor the time to assess the points made in them (see Strasser, 1992, p 276). However, the ECA's special reports are examined by ad hoc parliamentary committees, whose own reports lead to a resolution by the Parliament stating the issues identified and upon which the European institutions concerned must take action (see National Audit Office, 1996, p. 227). It is indicative that one of the first Special Reports by the ECA (in 1979) focused on the expenses of the members of the Commission and its impact was so substantial that led to changes in the methods by which such expenses are controlled (see Issac, 1980, p. 352, James, 1984, p. 480). Even the Commission itself has recognized the importance of these Special Reports by noticing their usefulness in the discharge procedure and by acknowledging the recommendation of the European Council at Essen to the European institutions about taking action to make use of these reports (see European Commission, 1995, p. 27).

One particular point to be made, with regard to the ECA's Reports, is that the ECA's audit mandate is widely interpreted, thus providing it with the right to make full reports on the facts, including names, identities, and details of third parties involved, especially in cases of malfunctions affecting the lawfulness and regularity of revenue and expenditure or the requirements of sound financial management. The exercise of such a right by the ECA is subject to judicial review on the

grounds of possible maladministration (see Case T-277/97, *Ismeri Europa Srl v Court of Auditors of the European Communities*, [1999] ECR, p. II-1828–II-1870, at p. II-1860). More specifically, although adopting and publishing a report is not an administrative act per se, directly affecting the rights of persons mentioned therein, such actions may have consequences for these persons, so the adherence of the right to a hearing for these persons is imperative, and it should take place before the reports are definitely drawn up. Any omission in that respect is an infringement of the right to a hearing and cannot be remedied by allowing the persons concerned to submit their observations to the ECA after the report's publication (see Case C-315/99, *Ismeri Europa Srl v Court of Auditors of the European Communities,* [2001] ECR, p. I-5315–I-5331, at p. I-5323–I-5324).

The ECA's reporting activity is an expression of its right as well as its obligation to make known the results of its audits (see Mayenobe, 1993, p. 153).

Its reports are addressed to two large categories of recipients. The first includes the European institutions and the Member States. The European Parliament uses the ECA's Reports in order to form its opinion on giving a discharge to the Commission with regard to the implementation of the budget. The Council is, along with the Parliament, the recipient of the Statement of Assurance, in order to have a certification of the accounts of the European Union. The Commission, being the main auditee, must have all the reports adopted by the ECA, in order to be able to reply to the observations included in them. Finally the Member States's authorities (governments, national audit institutions, organisations handling European Union's resources etc) must be informed of the ECA's findings since they can benefit from them by improving their financial management performance. The second category includes the so called "European Public Opinion" and the Media that are

sometimes forming this opinion. The citizens of the Member States, who, ultimately, are financing all the effort for the European Union have the right to know the results of the financial management of the Union's resources. The Media, in order to provide this kind of information, are organising debates between specialists or are asking from journalists to analyse the technical and sometimes incomprehensible information provided by the ECA. But there lies the danger of distortion, meaning the use of the Court's information by the journalists in order to produce an important piece of news. Another danger is the premature spreading of information concerning some ECA audits before the completion of the relevant procedures. These so called "leaks" may have disastrous effects since any information provided through them is incomplete and therefore inaccurate. The ECA, like any other audit institution, has to face a increased demand for providing information which itself has provoked by publishing its reports. Thus a very good understanding of these dangers is required, in order to eliminate them and present findings which are accepted and respected by the auditees and the public. The recognition of the ECA as a serious, reliable, trust-worthy public institutional interlocutor is crucial for its effective operation, as that the ECA cannot impose any sanctions and it is up to the "good will" of the auditees to follow its remarks (see Mayenobe, 1993, p. 156-157).

Of course the ECA has to "chase" the publicity of its findings, because, as it has been very successfully pointed out, their publication in the Official Journal does not automatically imply bringing them to public attention or publicise (see Kok, 1989, p. 348). For instance in the case of protecting the EU's interests against fraud and corruption, the ECA's findings will provide invaluable information to European taxpayers and will mobilise the European public opinion and the taxpayers' reaction to such risks, thus creating the necessary political

pressure that will compel the competent institutions (national and European, mainly the Council) to act more effectively (see House of Lords, 1994, para 52). Therefore, the ECA has adopted an alternative method of publication of its audits' findings. It is called "restrained publication" and it consists of publishing mainly summaries of the ECA's observations, reports and opinions. There are two objectives obtained by this method: First, since some information included in the reports and opinions of ECA is confidential, this information is not presented in the summaries, avoiding thus the violation of any confidentiality rules and principles. Second, the impact of the ECA's summarised reports or opinions either directly on the citizens of the Member States or on their parliamentary representatives, may constitute a very efficient mean of pressure in order to face the reaction of an audited organization (see Lelong, 1983, p. 114).

Of significant importance, with regard to the audit's function in the Union's political environment, is also the issue of the performance audits employed by the ECA. These audits are used to verify the soundness of the EU financial management i.e. whether the Union manages its financial resources in an economic, efficient and effective manner (see Strasser, 1992, p. 279, James, 1984, p. 475). Their legal definition is provided by Art. 33(1) of the current Financial Regulation and it entails the following: a) the economic management relates planned input of resources to the actual input, determining whether the least expensive means of achieving a given target have been used or not (examination of alternatives), b) the efficient management concerns the relationship between actual input (resources) and actual output (results achieved), determining whether the means adopted were employed in the most appropriate manner (examination of performance), and c) the effective management refers to comparing actual output with planned output, determining whether the purpose has been

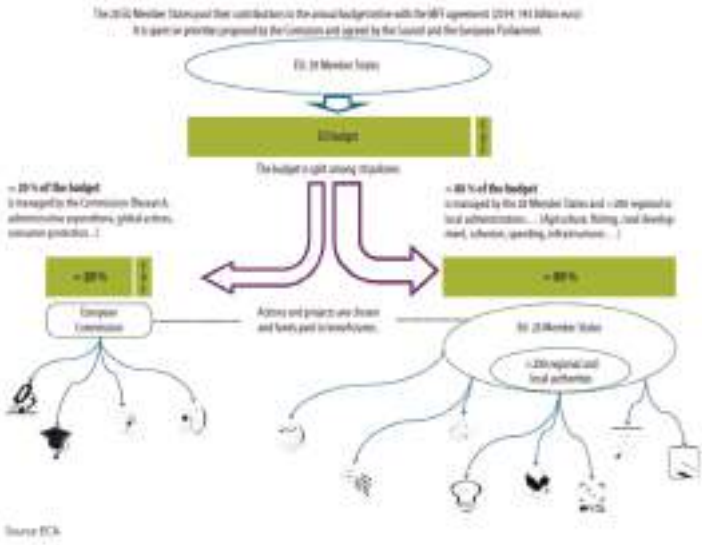
achieved or not (success rate). Performance audits however do not include the evaluation of the purpose selected which is a question of political choice (see Orsoni, 1991, p. 83). The ECA is not entitled to question policy decisions but it investigates the financial and other consequences of such decisions and their implementation (see O' Keeffe, 1994, p. 188). Thus, the ECA is not empowered to decide whether the Union should introduce a particular kind of policy but only to report as to whether that chosen line of policy is being conducted in a cost effective way (see Swann, 1995, p. 65).

The successful delimitation of this audit's scope requires the use of the so called "effectiveness auditing," i.e. "*auditing that focuses on the extent of goal achievement, the effects and/or effectiveness of the policy as well as the efficiency of its implementation,*" thus a) refraining from evaluating policy goals and b) distinguishing between goal achievement and effectiveness, as not every goal achievement can be the result of the implemented policy (see Leeuw, 1993-1994, p. 17).

An imperative condition for the ECA to conduct its performance audits is that the political authorities have set clearly the objectives of their selected policy (see Lelong, 1983, p. 105). This is done by accompanying all appropriations in the budget with a commentary in which there is an analysis of the legal basis of the respective expenditure, as well as a statement of political aims or a reference to an act of political context, like a resolution (see Dashwood, 1996, p. 126). If such an arrangement is not achieved the audit of economy and efficiency cannot draw the necessary attention to misuse of resources, while effectiveness in achieving policy aims cannot be judged (see James, 1984, p. 476). The less the auditee is defining precisely the objectives, the more difficult it is for the auditor to distinguish between questioning the merits of policy objectives (which falls beyond the limits of audit) and assessing whether value for money has been achieved in the pursuit of

those objectives (see Harden, White & Donnelly, 1995, p. 615). This is a very "delicate" issue as the ECA's mandate refers only to the financial management of the Union's resources and even the hint of the Court's "overstepping the mark" by indirectly dictating policy decisions, based on its findings, would lead to a political positioning of the ECA, thus threatening its credibility as an independent auditing body (see Skiadas, 2000, p. 24).

A final issue that should be examined is the realisation of audit activities at national level in the context of the EU budgetary governance, a scheme that causes significant interaction between the ECA and the national audit authorities of the EU Member States. This interaction is justified by the various types of financial management at EU level, i.e. centralised or direct management, decentralised management and shared management (see Art. 62(1) of the current Financial Regulation). About 19% of the EU budget is managed under the centralised or direct management type, about 79% of the EU budget is managed under the shared management type, and about 2% of the EU budget is managed under the decentralised management type, as shown in the following graph (see European Court of Auditors, 2014b, p. 18):



According to the centralised or direct management concept, the Commission -or any other institution as appropriate- manages the appropriations directly and completely, in five possible modes: a)directly by the Commission, b) management tasks can be undertaken by executive agencies, c) implementation can be entrusted to a EU body or agency, d) delegation of tasks to networks or national agencies, and e) contracting out certain activities (see Strasser, 1992, p. 218, Craig, 2006, pp. 32-34, European Commission, 2014, pp. 223-224). The decentralised management concept allows the Commission to operate through national government departments, meaning that such a department is interposed between the Commission and the interested third party (see Strasser, 1992, p. 219, Craig, 2006, p. 27, European Commission, 2914, pp. 225-226). The shared management concept refers to cases where the Commission works alongside national government departments on a complementary basis with regard to policies jointly financed

(see Strasser, 1992, p. 219, Craig, 2006, pp. 58-97, European Commission, 2014, pp. 224-225).

The ECA has been always seeking to develop as much as possible its relations with the national authorities responsible for auditing the management of EU funds at national level, especially under the concept of shared management. This co-operation is called "liaison" and it entails the following: Each member of the ECA, within the sector allocated to him/her, notifies in timely manner the respective national audit institution of the date and nature of the audits planned. The frequency of these contacts depends on the ECA's annual programme of work and the organisation of audits in each sector. There are several levels of communication, starting from the heads of the audit institutions and entailing a series of liaison officers, i.e. officials responsible for day-to-day contacts, the ironing out of any difficulties regarding ECA audits in the Member States, the exchange of information and reports of mutual interest, the arrangements for upcoming audits etc (see James, 1984, pp. 481-483, Strasser, 1992, p. 281). The objective of these contacts is to establish a functional link between the ECA and the national audit institutions (see European Court of Auditors, 1996, p. 24). The provisions of Art 287(3) TFEU set the standards for such cooperation. And the most common case necessitating the ECA's link with the national audit institutions is the case of on-the-spot audits in the Member States. As the ECA's objective is to verify the legality and regularity of the audited transactions and the soundness of the financial management, the national audit authorities that participate in the audits familiarise themselves with the relevant methods and concepts, thus gaining invaluable experience in auditing the management of EU resources (see Lelong, 1983, p. 111). At the same time, the ECA auditors are able to be informed about the national audit systems in each Membet States, thus being also able to adjust their systems based audit approach. Fur-

thermore, when the ECA's findings refer to the performance of national authorities (in terms of management or audit), it informs the Commission, which, in its capacity as guardian of the Treaties, will work with the Member State concerned on undertaking remedial action (see Price, 1982, p. 245). Similar information is provided by the ECA also to the national audit institutions, especially when defaults in the national administration's management of EU resources are detected, and any relevant comments provided in return by the national audit authorities are taken into account when the ECA prepares the relevant Report (see James, 1984, p. 484).

Article 287(3) TFEU provides also for the possibility for the national audit institutions to take part in audits performed by the ECA in the Member States, establishing the so called "Joint Audit" scheme. This scheme has been defined as (see Strasser, 1992, p. 281-282):

> *"an audit carried out jointly by a national audit institution and the European Court of Auditors on Community revenue and expenditure on the basis of a common plan and approach by a joint team with a view to reaching joint conclusions which may lead to a joint or separate report."*

A joint audit requires the formation of an audit team by auditors from the ECA and a national audit institution. This team has common audit plans and approaches with regard to the objectives and the methods of audit. While the team's conclusions are common, the reports must be separated, as they are submitted to different authorities. This may affect their homogeneity, causing confusion and varying impressions about the audit in question (see Skiadas, 2016b, pp. 287-24).

Given that the cooperation between the ECA and the national audit institutions occurs usually in cases of shared management, the ECA has suffered refusals from national authorities, either at management or audit level, to cooperate

with it (see Kok, 1989, p. 362). It has expressed its concerns on shared management of EU resources in detail (see European Court of Auditors, 1988, pp. 17-18):

> *"Most Community budgetary expenditure is managed either by entrusting management responsibilities to authorities or economic agents in the Member States (for example, agricultural guarantee spending or the collection of own resources) or is managed jointly with the Member States (e.g. in the case of the structural policies). The consequences of sharing management responsibilities in this way are felt when the time comes to audit them. The checks are carried out by and in the Member States, acting in association with the Commission. Although different in nature, these management procedures have this much in common, that they presuppose, in accordance with Art. 5 of the EEC Treaty, active cooperation between the Commission and the Member State authorities concerned, particularly as regards monitoring, exchanges of information, coordination and the follow-up to any results thus obtained.*
>
> *… the Court must emphasise that the Commission has not always been sufficiently active in the matter of coordination and supervision, in particular as regards the question of ensuring that national controls are carried out on an integrated basis from the Community point of view. Serious shortcomings in this area lead not only to a yawning gap between the intentions of the legislator and the practical application of the measures at local level, but may also have by no means negligible consequences for the Community's finances."*

It is obvious that the cooperation between the ECA and the national audit authorities is not a mere legal obligation or formality but also a necessity dictated by the fact that EU and national management competences have become intimately linked (see European Court of Auditors, 1996, p. 24). Thus the

ECA and its national counterparts work together, in a spirit of trust, while maintaining their respective independence. The European auditors trust that the national auditors will do their job correctly and vice versa. Within this auditing scheme there is no hierarchy between the ECA and the national audit institutions. The auditors are independent from each other and they cooperate on equal terms. This equilibrium is based on the following elements: The European auditors are more accustomed and informed in everything that concerns the ECA audit methods and requirements. The national auditors are well aware of the national financial systems and auditing requirements. So, each side contributes with its knowledge and experience to the joint audit (see Skiadas, 2016b, p. 287-26).

This approach, putting the ECA and the national audit authorities on a parity basis, was put at risk by a proposal providing for the explicit elimination of the option of national audit authorities to refuse to cooperate with the ECA (see Duff, 1997, p. 170). This was rejected as it would signify a quasi-hierarchy between the national audit institutions and the ECA, giving precedence to the latter. Given the context and the spirit of the joint audit procedures and methods, such an option would change the spirit of mutual trust developed between the parties concerned. The volume of transactions and the significance (in political and economic terms) of auditing the management of EU funds at national level necessitate a genuine and not imposed cooperation between the ECA and the national audit authorities.

Nonetheless, there are limitations to this cooperative link. For instance, given the vast amount of transactions that must be audited, it has been suggested that the ECA could ask the national authorities to actually carry out on-the-spot audits on its behalf and report directly to it the results. But such an effort would have to overcome two very important difficulties. First, the different traditions of public audit controls in the various

Member States. Second, in most Member States, the national audit authorities are part of the administrations, the management qualities of which are going to be audited. So, problems of uniformity and objectivity are expected (see O' Keeffe, 1994, p. 191).

In general, it has been found that, despite their usefulness in providing reliable and useful audit findings, all these specific forms of non-hierarchical cooperation between the ECA and the national audits authorities have lead to problems. The resulting cooperation is non-binding and depends upon voluntary commitment. A broad consensus amongst the parties involved is difficult to be achieved and common activities are based on the voluntary participation of some national audit authorities (see Aden, 2015, p. 320-321).

2.3. The Discharge Procedure

Perhaps one of the most indicative occasions highlighting the function and the importance of audit in the institutional system of the European Union is the discharge procedure. More specifically, Art. 287(4) TFEU stipulates that the ECA assists the European Parliament and Council in exercising their powers of control over the implementation of the budget. The most significant function of such control is the discharge procedure (see Art. 319 TFEU), during which the Parliament, based on the accounts submitted by the Commission and the Annual Report of the ECA gives a discharge to the Commission in respect of the EU budget's implementation.

The discharge procedure is one of the most characteristic instances resulting from the historical course of the budget as an institution: It has been long established, at least in the public law and budgetary law tradition of the EU Member States, that the executive must account for its budgetary mana-

gement to the national parliament. This tradition was first established especially with regard to imposing new taxes but it has been gradually expanded to other budgetary operations, throughout Europe (see for instance Trotabas & Cotteret, 1995, p. 16-19, Damarey, 2018, p. 25-36 for the cases of the United Kingdom and France).

In the EU context, the decisive involvement of the Parliament in budgetary proceedings was introduced by the so called "Budgetary Treaties" in the 1970s. At first, the introduction of the own resources system necessitated the replacement of national parliamentary accountability with parliamentary accountability at (then) Community level, as the controls exercised previously by the national parliaments over national lump-sum contributions were lost. Thus the budgetary powers of the European Parliament had to be strengthened in order to establish democratic control over the Community budget since that control could not be exercised at national level (see Freestone & Davidson, 1988, p. 118, Toth, 1990, p. 61). These amendments were seen as a democratisation scheme of the budgetary proceedings, with the Parliament being granted the power to give the Commission a discharge in respect of the implementation of the budget along with the Council, as well as to have the final say regarding the non-compulsory expenditure (see Wooldridge & Sassela, 1976, p. 13-14). However the European Parliament was not satisfied with these amendments and pressed for more, initiating an intensive political debate, which lead to a further increase of its authority, by confirming its right to reject the draft budget and ask for a resubmission and its exclusivity on granting the Commission a discharge for the implementation of the budget (see Wooldridge & Sassella, 1976, p. 15-23, Toth, 1990, p. 61-62). The

Parliament's effort in acquiring more authority over the EU budget has been always marked by a discrepancy between the rhetoric and the practice of the EU Member States on this issue: the EU Member States publicly encourage the Parliament to become more involved in all EU decision-making procedures, but privately they take steps constraining the Parliament's greater ambitions (see Wallace, 1986, p. 266). Eventually the European Parliament has been granted several powers with regard to policy-making, system-developing and controlling, the latter being defined through the Parliament's competence to call other EU institutions to account, and the most traditional of such occasions is the granting of the budgetary discharge to the Commission (see Maurer, 2007, p. 77).

Art. 319 TFEU has been gradually developed as the legal basis of the discharge procedure in the EU institutional and political system. Its first paragraph provides the Parliament with the relevant authority. But, taking this provision's wording into account, it is obvious that the discharge procedure practically begins when the ECA submits its Annual Report and its Statement of Assurance to the Parliament and the Council. In essence all the ECA's reports form part of the discharge procedure (see Laffan, 2003, p. 774). The Council must study these documents before issuing its recommendation to grant or refuse to grant a discharge to the Commission. This recommendation is prepared by a subordinate committee of budgetary experts within the framework of the Committee of Permanent Representatives/COREPER. This preparatory process is an attempt (not always successful) to reach a common position between the Member States' political points of view on the issues raised by the ECA's reports, but these reports were not always carefully examined by the committees preparing the Council's recommendation (see Harden, White & Donnelly,

1995, p. 625, O' Keeffe, 1994, p. 183, Kok,, 1989, p. 352). This was attributed to these committees' workload, and this additional task of examining the complex reports of the ECA was not "welcome". Upon the ECA's notification of discontent, the Council has sought to improve this situation (see Price, 1982, p. 242) and thus, all reports from the ECA are now carefully studied by a relevant committee of the Council or a working party from COREPER (see Harden, White & Donnelly, 1995, p. 625). Nevertheless, the Council is not obliged to take action according to the ECA's reports, and does not have to justify its choices (see O' Keeffe, 1994, p. 183).

Following the Council's recommendation, the Parliament must decide whether to discharge the Commission regarding the implementation of the budget. This competence may be seen as either an aspect of the Parliament's political control over the Commission, or a separate controlling function within the Parliament's budgetary powers. This second perspective provides a more interesting approach. The discharge procedure is included in the financial provisions of EU primary law, not the provisions regarding the institutions, thus signifying the existence of a completely separate framework, in which the Parliament plays an important role. The nature of work required in order to give a discharge to the Commission also differs substantively from the political control exercised through the parliamentary questions procedure. Before giving a discharge to the Commission, the Parliament must consider the ECA's reports and Statement of Assurance as well as the Council's recommendation. The Lisbon Treaty added to these documents the evaluation on the Union's finances, prepared by the Commission according to Article 318 TFEU. None of these documents binds the Parliament. However, in practice, the Parliament uses them all (especially the ECA's reports) in order to reach and especially justify its decision. Thus, the findings of external audit (by the ECA) are "translated", with-

in the EU's institutional system, via the Parliament's intervention, into political recommendations for action (see Hofmann, Rowe & Türk, 2011, p. 779).

The Maastricht Treaty added two paragraphs to the original version of Art. 319 TFEU (then 276 TEC) with the aim to reinforce the European Parliament's competence in the discharge procedure. Furthermore, Articles 260 to 263 of the current Financial Regulation set the exact time frame of the entire process (it must take place before the 15th of May of year N+2) as well as the obligations of the Commission to act in order to eliminate any substantive reasons of delaying the relevant decision of the Parliament.

Thus the Parliament is entitled to ask for additional information, and having read the ECA's reports, it is in a position to evaluate the additional information provided, to determine whether it is satisfactory or not and to ask for more. The Commission would be obliged to provide all relevant information. The Parliament's decision about the discharge may very well depend on such information.

The consequences of the discharge decision are very serious, in political terms. If the Parliament declines to discharge the Commission, this is politically equivalent to a motion of censure and the Commission might have to resign as a body (see Swann, 1995, p. 67, Kok, 1989, p. 350-351). In legal terms, however, there are no sanctions provided for by EU primary or secondary law against the Commission if the Parliament refuses to discharge it over the EU budget's implementation. This lack of legal impact has been deemed as a significant indication of lack of real budgetary control (see Hofmann, Rowe & Türk, 2011, p. 780). Nonetheless, even if the Commission is discharged, it must take account of the remarks put forward by the Parliament. It must take mea-

sures based on these remarks and report on the progress of those measures to the Parliament, the Council and the ECA. The follow-up measures that the Commission and the other institutions have to adopt and implement, in order to satisfy the observations and comments made by the Parliament in its discharge decision and by the Council in its recommendation for discharge, respectively (see Art. 262 of the current Financial Regulation), are a practical, yet substantive, indicator to verify the Commission's compliance. This procedure allows the Parliament to influence and control, in essence, the Commission's implementation of the budget by pointing out defects in the Commission's management and suggesting solutions. The Commission must elaborate on these points and take the appropriate action. Since this action will be reported to the Parliament, the latter can determine whether or not its remarks have been taken into consideration, and can act accordingly, by approving or disapproving the Commission's actions and exercising its other controlling competences (i.e. the motion of censure procedure), or even bringing an action before the European Court of Justice.

The decision to discharge the Commission is the only positive decisive power reserved exclusively for the Parliament. Its involvement in the legislative process or the enactment of the budget is always combined with the Council's authority. The discharge procedure should not be seen as a technicality but as a means for the Parliament to express its confidence in or criticism of the Commission's financial management (see Perron, 1983, p. 90). Granting a discharge to the Commission is not a foregone conclusion and the Parliament has delayed or denied to do so in the past as a means of censuring or expressing unhappiness with the Commission (see Baun & Marek, 2014, p. 75).

Overall, Art. 319 TFEU provides the Parliament with the power of eliminating, or at least reducing significantly, with regard to budgetary issues, the democratic deficit noted in the Union's institutional balance. The responsibility for making good use of the discharge procedure lies exclusively with the Parliament. The political impact of the discharge procedure has been demonstrated repeatedly in the institutional system of the EU, the most notable case being the discharge procedure for the 1996 budget in 1998, which culminated in the resignation of the entire Santer Commission in March 1999. As for the significance of the ECA's involvement in that case, although it was not a central player in the actual proceedings regarding the Commission's resignation, its account of financial management weaknesses in its many reports provided a justification for those who demanded improved standards in the Commission (see Laffan, 2003, pp. 774-775).

3

Audit in the service of protecting the EU's financial interests

It is not rare for the public to misunderstand the interaction between audits and combating fraud, thus leading to a significant expectation gap between what the public thinks that auditors can or should do and what they actually do. This is also fueled by the media which, unwillingly, cause an information gap by providing the public with information that frequently goes beyond what is actually stated in the auditors' reports (see James & Usher, 1995, p. 6). In the EU context, the expectation gap exists for all the institutions and bodies involved in combating fraud, corruption and all other criminal actions threatening or harming the EU's financial interests, such as the EU Anti-Fraud Office (OLAF) and the ECA (see Parts, 2019, p. 20-21). This gap is attributed to two factors: the first is the lack of substantive knowledge on what actually constitutes a threat against the EU's financial interests that must be tackled with all appropriate means (administrative, criminal, auditing, judicial) and the second is the misunderstanding of what each of the EU institutions or bodies involved in that respect can do. There is a variety of measures, usually presented in the form of an enforcement pyramid of sanctions, developed proportionally to the seriousness and the substance of the behaviour (offence) to be punished (see Ayers & Braithwhaite, 1992, pp. 35-38, Skiadas, 2017a, pp. 82-84). And the public opinion, in-

fluenced by the media, demands the imposition of the most severe sanction by all those institutions and bodies involved, regardless of their legal capacity or substantive competence to meet this public demand. When the resulting action does not meet the demand, the trust of the people to these schemes is being reduced, thus causing another problem, additional to the dangers against the EU's financial interests.

The original version of EU primary law (the Treaties of the European Communities) did not include any provision regarding the protection of the Communities' financial interests. However the increasing numbers of incidents relating to fraud and mismanagement necessitated an amendment towards including such a provision. As it had been pointed out (see House of Lords, 1989, para 205):

> *"… the huge sums which are being lost due to fraud and irregularity against the Community are losses borne by all the taxpayers and traders of Europe. This strikes at the roots of democratic societies, based as they are on the rule of law and its enforcement, and it is a public scandal".*

Protecting the financial interests of the EU is a multidimensional challenge as it involves efforts to eliminate the misallocation of EU resources, to contain the damage caused to the Union's image with regard to European public opinion, to meet the need for cooperation among the Member States in order to eliminate any fraudulent activities, to promote the incentive for an organisational restructuring of the Union (see Mendrinou, 1994), as well as using constantly increased resources (both human and monetary) in tackling the relevant offences.

Seeking the roots of the dangers for the EU's financial interests has revealed their structural dimension: these interests entail a complex system of collecting and paying out money, through national agencies that are not interested in the efficient and fair operation of the system itself, thus making it

very vulnerable to fraud or other similar offences (see Sherlock & Harding, 1991, p. 25). Furthermore, it should be pointed that the behaviours constituting the various offences against the EU's financial interests, although seemingly falling under separate classifications and typology (e.g. fraud, corruption, money laundering, tax evasion, etc), are quite often interconnected in a much broader and complex scheme of criminal activity, thus leading to the conclusion of organized crime offences being committed (see Levi, 2019, p. 9, Brown, 1998).

3.I. The legal scope of audit in protecting the EU's financial interests

The lack of any legal basis regarding the protection of the financial interests of the European Communities had caused significant limitations to their institutional system in tackling relevant behaviours. The most notable case was the so called "Yugoslavian maze" case, in which, despite the falsification of documents by the Greek authorities in order to present the Yugoslavian maize as Greek and thus to avoid the payment of an agricultural levy for importing agricultural products from a country outside the Community, the Court of Justice of the EU declined to pronounce this behaviour as fraudulent by stating that "*it is not necessary for the Court to express any view concerning the circumstances in which the official documents were drawn up or the liability of the persons responsible for doing so*" (see Case C-68/88, *Commission of the European Communities v. Greece* [1990] ECR 296, para 13). Nonetheless, this situation provided the impetus for the EU Member States to give the protection of the EU's financial interests the same weight as their own financial interests and to provide for effective proportionate and dissuasive penalties to protect the EU's financial interests. The result was the enactment of Art. 280

TEC (in the Maastricht Treaty) which was afterwards further developed in order to become what is now Art. 325 TFEU (see Inghelram, 2019, p. 70)

The original wording of this provision called the Member States to take action in order to protect the Union's financial interests like their own, and this action was to be coordinated and the Member States should seek to cooperate with the Commission in that respect. Based on this, the EU developed a two folded activity.

The first part, undertaken within the then so called "first pillar" of the Union, entailed the adoption of Regulation 2988/95 on the protection of the Communities' financial interests ([1995] OJ, L 312/1). This Regulation refers to the measures and administrative sanctions imposed for such irregularities. According to its provisions, the audits, the administrative measures and the relevant sanctions must ensure the effective protection of the Union's interests, taking to account the nature and the seriousness of the irregularity as well the advantage gained by the culprit, in accordance with the principle of proportionality. Most of the sanctions provided for therein entail fines and the recovery of the unlawfully gained advantages. No sanction can be imposed if it is not provided for by an EU legislative rule, prior to the irregularity, in accordance with the principle *nulla poena sine lege*. It is noteworthy that despite the fact that this Regulation provided a scheme based on imposing administrative sanctions, the entire philosophy of its provisions is similar to criminal law principles, which is an indication for the long-term perspective of preparing a legal framework for the criminal protection of the Union's financial interests (see Skiadas, 2007, pp. 543-544).

The second activity was developed within the so called "third pillar" of the Union, which although comprising, inter alia, combating fraud on an international scale and judicial cooperation in criminal matters, did not allow the EU to en-

act legislation in this area, and the only possibility of drawing up new legal rules was through conventions concluded by the Member States (see Manko, 2016, p. 2-3). Thus, the Member States drew up the 1995 Convention on the Protection of European Communities' financial interests (PFI Convention - Council Act of 26 July 1995, [1995] OJ, C 316/48–53). Its entry into force required ratification by all EU Member States, and despite the importance attributed to its contents, the ratification process lasted seven years, resulting to the PFI Convention entering into force only in October 2002. The PFI Convention has three Protocols which analyse in further detail some issues relating to the protection of the financial interests of the Union, such as the definition of bribery and the Member States' obligation to provide for criminal procedures against it in their respective legal orders, the Member States' obligation to enact criminal procedures against money laundering and the responsibility of those involved (see First Protocol of the Convention for the Protection of the financial interests of the European Communities, 27 September 1996, [1996] OJ C 313/2–10; Second Protocol of the Convention for the Protection of the financial interests of the European Communities, 19 June 1997, [1997] OJ C 221/12–22; Protocol for the interpretation of the Convention for the Protection of the financial interests of the European Communities by the European Court of Justice with preliminary rulings, 29 November 1996, [1997] OJ, C 151/16–28).

The PFI Convention and its accompanying Protocols provide definitions for three offences affecting EU financial interests: fraud, corruption and money laundering (see Manko, 2016, p. 3-6), include provisions on the liability of natural and legal persons, as well as on the penalties to be imposed (see Manko, 2016, p. 6-7) and on the contents and the nature of the cooperation to be developed between the EU Member States in order to provide adequate protection to the Union's finan-

cial interests (see Manko, 2016, p. 7-8).

The main objective of these legislative initiatives, at that time, was to oblige the Member States to establish administrative or criminal proceedings against those involved in activities affecting the Union's financial interests. These proceedings include administrative checks on the legality and regularity of transactions by national and Union's officials, administrative penalties such as fines, removal of advantages granted by EU law, exclusion from participation in Community schemes, etc. The PFI Convention requires the Member States to adopt legislation relating to the prosecution and the extradition of persons involved in "euro-frauds" as well as the jurisdiction of their courts for such issues. The Member States are also to cooperate during the investigation, prosecution and the carrying out of the punishment imposed by providing mutual assistance in terms of extradition, transfer of proceedings or enforcement of sentences. Of course, the *ne bis in idem* rule must be adhered to. The assimilation, cooperation and harmonisation methods described in the PFI Convention, although intended to increase the efficacy of national criminal law systems, actually created a very complex system of criminal law protection against fraud and corruption at European level.

The original wording of EU primary law on protecting the Union's financial interests (the provisions of Art. 280 TEC which later became paras 2 and 3 of Art. 325 TFEU) highlighted the necessity of cooperation between the EU Institutions and the Member States in order to establish a scheme providing for the necessary contacts, exchanges of information and joint actions towards the effective combating of offences against the EU's financial interests. The Member States, in particular, are called to treat offences affecting the financial interests of the Union in the same manner as they treat offences affecting their own financial interests. These rules are based on the concept of loyalty which derives from the principle of

sincere cooperation, enshrined in Art. 4 par. 3 TEU, according to which the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The provision of Art. 325(3) TFEU, focusing on the cooperation element, provides for the institutional and coordinative side of loyalty, while the provision of Art. 325(2) TFEU, focusing on the Member States' approach towards combating fraud, expresses the interventionist side of loyalty focusing on shaping national provisions with the aim of safeguarding the EU's financial interests (see Klamert, 2014, pp. 17-18). This interventionist aspect has an assimilating element, i.e. the national legal systems are to treat infringements of EU law pertaining to the protection of the EU's financial interests in a manner analogous to their treatment of infringements of national law referring to the protection of national financial interests. This assimilation may include the adoption, at national level, of criminal penalties for offences that in the EU legal order are punished only by civil or administrative sanctions, thus creating an "over-criminalisation" of the entire scheme, signifying an effort of behalf of the EU to formulate, through its influence on national criminal justice systems, a counterbalance element as a form of "compensation" for the limits set to the EU's competence, by Art. 83 TFEU, on adopting criminal law measures for the protection of its financial interests (see Mitsilegas, 2016, pp. 75-82).

During the 1996 Intergovernmental Conference, it was decided that further provisions were necessary at primary EU law level in order to protect the EU's financial interests more effectively. The European institutions had to be more actively involved in countering the relevant offences. It was thus considered necessary to amend the provisions of the Treaty and further provisions were added to the then Art. 280 TEC which now form the current wording of Art. 325 TFEU. This amendment was made by the Treaty of Amsterdam, and it was con-

sidered as a useful consolidation of the legal basis of all actions against fraud, contributing to the sharpening of the focus on embezzlement against EU funds. Countering fraud has been thus included in the First Pillar of the European Union (see Duff, 1997, p. 95).

The Lisbon Treaty has not amended significantly the provisions of EU primary law on protecting the Union's financial interests, but it abolished a provision stating that measures adopted by the EU institutions to combat fraud would not concern the application of national law and the national administration of justice. This clause was in line with the EU's lack of competence in the area of criminal law. Given that in Art. 83 TFEU the EU is now granted with the authority to use directives in order to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, the amendment of Art. 325 TFEU was deemed appropriate. However, the crimes mentioned in Art. 83(1) TFEU do not include fraud, thus any relevant legislative action taken by the EU in that framework may be based on the general wording of 83(2) TFEU. The new version of Art. 325(4) TFEU – being more compelling in terms of wording (by use of the verb "shall" instead of "may" which is used in Art. 83 para 2 TFEU) as well as in terms of substance (as it refers to "necessary measures" while Art. 83(2) TFEU refers merely to "minimum rules") – could provide a more solid legal basis, as a "lex specialis" provision compared to the "lex generalis" provision of Art. 83(2) TFEU (see Mitsilegas, 2016, p. 66).

In any case, the most significant provision in Article 325 TFEU is the competence given to both the Union and the Member States to counter fraud by adopting measures that will be deterrents and will afford effective protection to the Union's financial interests. The concept of deterrence through criminal law sanctions in the EU context has been seen as a crucial ele-

ment for achieving this goal. In the European Commission's view, EU criminal law measures can define which violations of the rules are to be considered as criminal offences in national laws throughout the Union, as they can also provide for effective, proportionate and dissuasive criminal sanctions, such as requiring the imposition of certain levels of monetary fines or imprisonment for an offence, thus being an important tool to deter offenders and to prevent future crimes (see European Commission, 2011). The Union has proceeded in that direction, and by using Art 83(2) TFEU as legal basis, it enacted Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ([2017] OJ, L 198/29) that includes specific definitions for offences (fraud, corruption, misappropriation, money laundering) the commission or inciting, aiding, abetting or even attempting the commission of which, are to be treated as criminal offences. The Directive also includes provisions on the liability of natural and legal persons, and on imposable sanctions to them, as well as on jurisdictional issues. The entire scheme of criminal protection of the EU's financial interests relies on the assumption that the criminalisation of certain conducts which allows for enforcement agencies to use (more intrusive detection) criminal procedure methods (e.g. surveillance, telephone tapping, searches, seizure of computer hardware etc.), will change perceptions of the likelihood of being detected, as the perceived threat of being caught as a result of criminal investigation activities (as opposed to administrative audit activities) will have a measurable impact upon the individual's propensity to act fraudulently (see GHK & Milieu Ltd, 2012, p. 79)

One relevant interesting issue refers to the concepts employed in order to describe the behaviours against which the Union seeks to protect its interests. The first relevant legislative definition was provided by Regulation 2988/95 which introduced at legislative level the concept of irregularity as follows

(Art.1(2) of Reg. 2988/95):

> *"Irregularity shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure."*

It is interesting that till that time (1995) the only "official" approach on any similar concept, had been provided by the ECA, in its first Annual Report, for the Financial Year 1977, for the concept of fraud as follows (see European Court of Auditors, 1978, p. 8):

> *"We should be very clear what it is meant by fraud. It has been defined as criminal deception, the use of false representations to gain an unjust advantage. In the Community context it is the deliberate misappropriation of money or goods, inevitably involving breaking the law or the relevant rules and instructions of the organisation concerned. It is necessary to distinguish fraud in this sense from actions designed to exploit loopholes in existing legislation. These … actions which remain within the law cannot be considered to be fraudulent."*

This definition provides the core elements of the detailed definition of fraudulent behaviour against the financial interests of the EU, as these definitions were provided subsequently by the PFI Convention and the Directive 2017/1371 and they could be summed up as follows (see Kilonis, 2019, p. 46):

> *"Fraud is any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements of documents, the non-disclosure of information (although required) and the improper use of EU funds."*

Finally there is the concept of "error" which has been defined as "*an unintentional misstatement in financial statements*" (see Kilonis, 2019, p. 46).

These three terms, i.e. error, irregularity and fraud, although referring to similar circumstances and behaviours, represent completely different concepts. While the errors and the irregularities may have similar consequences with fraud on the EU budget, they lack the criminal aspect which makes fraud stand out: intention. The notion of intentionality is pivotal in fraud, as this behaviour consists of acts designed intentionally to conceal its existence, such as collusion between the persons involved, and/or falsification of documents (see Kilonis, 2019, p. 46). More practically it has been said that irregularity is a broader concept than fraud, as the latter is an instance of the former, in which there is an element of intent which makes it a criminal offence, i.e. the malicious intent on the part of perpetrator being the differentiating element (see European Court of Auditors, 2019a, p. 8, European Commission 1998, p. 7, European Commission, 1999, p. 6). It must also be pointed out that a basic element of the concept of the offences against the financial interests of the European Union is precisely their European dimension, i.e. their impact on the EU budget, not the national budgets of the Member States, an aspect which affects their scope, their territorial aspects and the measures for tackling them (see Nikolopoulos, 2002, p. 93).

Given this conceptual context, the role of the auditors is accordingly defined. An indication of this role is provided by Art. 15(3) of Directive 2017/1371 according to which:

> *"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."

The ECA auditors do not have investigative powers and thus they are not formally entitled (even if they practically are in a position) to identify - and pronounce it legally as such - forged documentation in support of claims for grants and benefits, as only a judicial authority (court of law or public prosecutor) has the jurisdiction to determine the fraudulent nature of a particular transaction (Kilonis, 2019, p. 46). The ECA, as noted, reports such cases to OLAF and other competent authorities.

One should note that the ECA has to examine, *inter alia,* the legality and regularity of the transactions underlying the EU accounts, i.e. whether the transactions comply with the complex laws and regulations that govern the implementation of policies and programmes at both EU and national levels. The legal and bureaucratic complexities are such that administrative errors must be considered as inevitable. Although such cases are breaches of laws or regulations, they are not *a priori* fraudulent. The auditors consider all available information from all possible sources in order to undertake a risk analysis on whether the managerial system of the auditee or specific transactions are susceptible to material misstatements which may the result of fraud. Their audit methods and procedures are thus formulated accordingly, in order to mitigate fraud risks (see James & Usher, 1995, p. 6, Kilonis 2019, p. 46-47).

But, the intentionality element of fraud falls beyond the scope of the ECA audit mandate. The question of proving intent of breaching laws and regulations, with the burden of the necessary proof, is not properly a matter for the EU auditors. The audit may reveal indications that fraud has occurred. This information has then to be given to the appropriate authorities

for further investigation and possible legal action. The ECA, which operates to generally accepted auditing standards, including those concerning the nature of audit evidence, has no larger role in relation to the detection of fraud. It reports the financial consequences of actions detected in the course of its audit. It points out where systems and procedures can be improved to reduce the number of errors. It also recommends the simplification of legislation in order to reduce the likelihood of errors and the possibilities for fraud (see James & Usher, 1995, p. 6)

The ECA in exercising its auditing duties and using the approach explained above, has determined that offences against the EU's financial interests such as fraud, irregularities and corruption constitute one of the most significant risks threatening the management of the EU Budget, entailing the following elements (see European Court of Auditors, 2014b, p. 37):

- Low priority given to fraud prevention, detection and correction
- Lack of resources to fraud proof budget
- Activities involve large amounts of cash or high value goods
- Loss of assets
- Difficulty in identifying final beneficiaries

Identifying such risks is quite indicative of the ECA's overall approach. The ECA concentrates its limited resources on the prevention or discouragement of fraud by identifying weaknesses in systems and making recommendations for their improvement. It has repeatedly suggested that where systems are found to be particularly weak, the flows of funds through them should be suspended until remedial action is taken. This would oblige both the Commission and Member States' administrations to tighten up the management of EU funds and, in so doing, to reduce the opportunities for fraud. A preventative

approach may not be what the public expects from auditors, but it is the most effective way in which the ECA can help to protect their interests (see James & Usher, 1995, p. 6).

3.2. Cooperation for protecting the EU's financial interests

As noted above, the ECA notifies OLAF (the European Anti Fraud Office) as well as any other competent authority about its findings, when exercising its audit duties, and especially when it identifies instances of particular danger to the EU's financial interests. There are several actors involved in protecting the Union's financial interests (see European Court of Auditors, 2019a, p. 9-10 & 58):

- The European Anti-Fraud Office (OLAF) which is currently the EU's key anti-fraud body and it contributes to the design and implementation of the Commission's anti-fraud policy, being, at the same time, the only body with independent investigative powers at EU level.
- The Commission's Directorates-General (DGs) and Executive Agencies are responsible for setting up effective fraud risk management systems in the different areas of the EU budget.
- In shared management, Member State programme authorities are required to implement an adequate anti-fraud framework, with criminal investigation and prosecution proceedings being entirely under the responsibility of the national judicial authorities.
- The newest addition to the institutional landscape of the EU's scheme for protecting its financial interests is the European Public Prosecutor's Office ("the EPPO"), which is empowered to investigate and prosecute crimes against the EU's financial interests (its operation will start after 2020).

Over the years varying levels of cooperation have been developed between the ECA and most of these actors, the most notable being the cooperation with OLAF.

Actually the ECA played a significant role in the creation of OLAF. The European Commision, in order to set up an effective anti-fraud mechanism at European level, had established the Coordinating Unit for the Fight against Fraud (UCLAF). UCLAF had focused on three aims: prevention of fraud, cooperation with other institutions and Member States, and suppression of fraud (see Strasser, 1992, p. 251) Its operational role was to investigate complex and very serious cases of fraud, especially of international scale, in collaboration with the appropriate national authorities (see European Commission, 1996, pp. 10-11). However, in 1998, the ECA produced a Special Report with very critical (bordering to condemning) remarks on UCLAF's organisation and performance (see European Court of Auditors, 1998), which was taken into account during and after the events which lead to the Commission's resignation in 1999. One of the institutional reforms introduced following these developments was the abolition of UCLAF and the establishment of OLAF (see Decision 1999/352/EC, [1999] OJ, L 136/20, subsequently amended by Decision 2013/478/EU, [2013] OJ, L 257/19, Decision (EU) 2015/512 [2015] OJ, L 81/4, and Decision (EU) 2015/2418, [2015] OJ, L 333/148). There is an extensive series of Regulations and other instruments providing for OLAF's role and investigations, extending its authority over EU Institutions and national bodies in the Member States. OLAF is operationally independent from all institutions. Its objectives are to fight fraud, corruption and any other illegal activity affecting the financial interests of the Union, and to investigate matters relating to the discharge of professional duties and obligations on the part of EU officials. It also assists the Member States and cooperates with the competent national authorities, simultaneously developing

methods to combat fraud. The legislative provision, however, of the cooperation between OLAF and the Union's institutions, or other bodies and agencies, has not always secured its intended results. The ECB – as in the above mentioned similar case with the ECA – limited OLAF's investigative authority in favour of its own anti-fraud service, the case being brought before the Court of Justice of the EU. The Court stated that the ECB's independence does not preclude the possibility of a competent EU body, such as OLAF, to investigate all transactions affecting the Union's financial interests, including those of the European Central Bank, and it annulled the relevant decisions of the ECB (see Case C-11/2000, *Commission of the European Communities v. European Central Bank*, [2003] ECR I-7147). The operational cooperation between the ECA and OLAF has been developed as a two-way process: When an audit detects the possibility of fraud, corruption or any other illegal activity, OLAF is informed. According to the ECA Decision 35-2014, on cooperation with OLAF, OLAF provides feedback on the follow-up action it takes. OLAF also provides the ECA with any information it needs for its audit work. More specifically, the Decision provides for the written communication between ECA and OLAF, in a specific template and format, protecting the identity of possible informants (whistle-blowers), and referring to the findings as errors (refraining from any reference to fraud). The ECA avoids disrupting OLAF investigations in progress but it seeks information from OLAF in cases of auditing areas which have been or are being investing by OLAF.

Recently the ECA examined the performance of the entire EU anti-fraud mechanism, focusing, inter alia, on OLAF's pivotal role in that respect. Its findings were that under the Commission's governance model, the roles and responsibilities of the Commission departments involved in anti-fraud actions are split, with most bodies having a consultative role, while the key EU players (College of Commissioners and the competent

Directorates General) do not have a direct clear mandate for strategic fraud risk management and fraud prevention, but a vague reference to strengthening investigation of fraud against the EU budget, corruption and serious misconduct within the European institutions, and to supporting the work of OLAF, whose investigative independence must be preserved. Furthermore, neither OLAF (despite being the EU's key anti-fraud body), nor any other Commission service plays a major role in overseeing the planning and implementation of the Commission's anti-fraud actions and the reporting on outputs. Given the Commission's governance model, OLAF itself is not responsible for any decision affecting the authorised officers by delegation (AODs) or Member States, and it merely provides guidance and recommendations to those responsible for the various anti-fraud actions (see European Court of Auditors, 2019a, p. 25-26). As for OLAF's cooperation with the Member States, it has been found that its judicial recommendations, i.e. documented proposals to open criminal investigations against suspects of having committed fraud against the EU financial interests have not been properly followed up as the Member States have acted on about 57% of these recommendations, and out these, about 44.5% have lead to indictments and 55.5% were dismissed, the reasons for such dismissals being insufficient evidence, no criminal nature of the act in question under national law, time barring, etc. (see European Court of Auditors, 2019a, p. 38-42). Especially this latter finding is deemed to be directly relevant with the possibility of initiating criminal proceedings in such cases at EU level, through the European Public Prosecutor's Office.

It is true that the legal arsenal of the EU against offences threatening its financial interests is being slowly but gradually developed. At the time when OLAF became operational, in 1999, a European Public Prosecutor's Office (EPPO) was no more than an academic proposal, included in the "Corpus Ju-

ris introducing penal provisions for the purpose of the financial interests of the European Union" (see Inghelram, 2019, p. 70, and for more details on this document which provided for a full scale procedural and substantive criminal law scheme for the protection of the Union's financial interests see Skiadas, 2017b, pp. 325-10 – 325-15, House of Lords, 1999). The legislative possibility of establishing an EPPO was provided for at EU primary law level by the Treaty of Lisbon. The Commission, based on Art. 86 TFEU, put forward a proposal for a Council Regulation, as a means to improve the protection of the EU's financial interests given that the judicial action undertaken by Member States against fraud was not considered as effective, equivalent and deterrent as required under the Treaty (see European Commission, 2013). The European Parliament endorsed the Commission's proposal, making further remarks at the same time (see European Parliament, 2015). The various issues highlighted by the Member States were discussed repeatedly, the first result being the recording of the impossibility for a unanimous decision, and the subsequent stage involved the launching of an enhanced cooperation procedure (see Art. 20 TEU & Articles 326-334 TFEU – Enhanced cooperation is a procedure where a minimum of 9 EU countries are allowed to establish advanced integration or cooperation in an area within EU structures but without the other EU Member States being involved, yet they are free to join the enhanced cooperation at any time) which resulted in the enactment of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ([2017] OJ, L 283/1). This body's mandate has been set with regard to substance to cover the so called "PFI crimes" i.e. offences such as fraud, corruption, bribery, misappropriation, money laundering, damaging directly or indirectly the EU's financial interests, and with regard to territory to include 22 EU Member States, as five

Member States do not participate in this authority (see Aden, Sanchez-Barrueco, Stephenson, 2019, p. 18-21). Its structure is considered to be complex as it entails a collegial model at the central level, whereby the European Chief Prosecutor (ECP) heads up the body with the assistance of two Deputy European Chief Prosecutors (DECPs) and a college of European Prosecutors (see Articles 9, 15, 15, 16 of Regulation 2017/1939). The main added value of the EPPO is to act in a harmonizing manner with regard to prosecuting i.e. bringing criminal procedures against offences affecting the Union's financial interests, but, given that establishing an EU Criminal Court is not in the EU's agenda, this body will look to the various national judicial systems for the adjudication of the offences and the execution of penalties (see Aden, Sanchez-Barrueco, Stephenson, 2019, p. 21-22).

Given the above mentioned delimitation of an auditor's possibility to detect fraudulent activities, it has been estimated that the ECA will not be a privileged counterpart for EPPO on a daily basis but there will be occasions for bilateral cooperation, which will be more successful and mutually strengthening if adequate interinstitutional arrangements are in place. However, the current EPPO Regulation fails to establish general principles, thus building a working relationship between EPPO and ECA is left to future interinstitutional practice (see Aden, Sanchez-Barrueco, Stephenson, 2019, p. 78). This relationship will be two-fold. The first aspect will entail the normal auditor-auditee relationship between the ECA and the EPPO, the existing relevant legal arrangements being considered as satisfactory, as the ECA's power of audit and rights of access are secured (see Aden, Sanchez-Barrueco, Stephenson, 2019, p. 79). The second will refer to their operational cooperation during the investigation or trial stage of a case regarding an offence investigated and prosecuted by the EPPO. Several relevant scenarios have been indentified, as follows (see Aden,

Sanchez-Barrueco, Stephenson, 2019, p. 79-80):

i. During the investigation stage:

"***a) ECA triggers an EPPO-led investigation***. *On a general basis, ECA's audit reports will feed into EPPO's work plan. If auditors come across an instance of fraud, they must forward the case to OLAF and they will do so equally to EPPO when it is operative. To safeguard the integrity of evidence, the ECA is refrained from mentioning suspicions of fraud in the course of audits, the contradictory procedure, or in the ensuing report. Beneficiaries of EU funds implemented in direct management (grants, procurement or prices) relinquish their personal data to the Commission's IAS, ECA, OLAF, in accordance with the Financial Regulation. The Commission should verify that template agreements with recipients of EU funds of every kind integrate the EPPO to facilitate access to data and investigations whenever and wherever required. These obligations should be broadened to cover the EPPO in the future, just as is the case of funds which are managed by national bodies. Under shared management, the principle of assimilation applies to PIF protection by national authorities who are requested, additionally, to cooperate with the Commission, ECA, OLAF, and EPPO (participant Member States, obviously). In their current form, Articles 129 (1) FR (recipients in EU Member States) and 220 (5) FR (recipients in third countries) do not make reference to the right of access of EPPO. The Financial Regulation should be included to ensure that the beneficiaries are aware that they might be subjected to the EPPO's investigations in the future.*

b) ECA member or staff becomes the target of an EPPO investigation. *The general framework of immunities of EU staff would apply in such case. Immunities are granted in the sole interest of the EU and to the extent that it is necessary for the performance of Union's tasks. Following this argument, if and when the immunity of a member becomes a stumbling block*

in the protection of the (financial) interests of the Union, the College of Auditors would agree to lift it, clearing the way to national or European prosecution of the incumbent. Simple majority is sufficient to waive the immunity of a member by the college.

c) ECA is requested to second expert staff to EPPO in a given area. *As an investigating body of a technical and administrative nature, ECA might be requested by EPPO to second specific officials with targeted expertise, to join EPPO-led joint investigating teams in a certain, narrow, and highly technical area, alongside staff from police bodies or law enforcement agencies.*

d) ECA is requested by EPPO to conduct targeted audits in risk areas*. Current cooperation between ECA and Supreme Audit Institutions is built on the principle of mutual trust and respect for the mutual independence. The legal framework does not allow the ECA to impose upon SAIs, not even to pursue an allegedly higher goal of protecting the EU's financial interests from gaps and shortcomings in financial accountability at the national level. Gaps stem from diverging legislative approaches to mandates (some institutions follow the money, others follow public institutions), although conflicting work plans or schedules play a significant role as well, lack of a political will to cooperate probably remaining at the bottom of the list. The question arises whether the EPPO may request specific audits from ECA in generic risk areas, and under which conditions (e.g. sufficient evidence of fraud). It is also clear that any generic request by EPPO in the framework of an investigation should be accommodated by ECA, threading a thin line between the duty of institutional loyal cooperation and the principle of organizational autonomy. Our expectation is that the EPPO entertains close contacts with the ECA, from which suggestions for prospective audits may arise, which the ECA may or may not follow up when drafting its work programme, along similar lines to what is*

the rule with the EP committees or OLAF

e) Access to ECA's databases by EPPO. *EPPO holds powers to request access to ECA's files and databases, in the framework of specific investigations. Such a scenario should at least replicate the current status enjoyed by OLAF, which visits the ECA every now and then to consult files supporting audit reports in the framework of specific cases. Consultations are made on-site, given the absence to date of integrated databases, which EU bodies with powers in the protection of the EU's financial interests would be able to consult. An interinstitutional agreement or protocol will probably be signed in this regard, to facilitate bilateral cooperation.*"

ii) During the trial stage:

"*ECA offers judicial assistance to EPPO in the framework of a specific criminal proceeding, which may take several forms.*

a) ECA's reports are accepted as evidence *in judicial proceedings before the CJEU, and one would safely expect that the creation of EPPO leads to an increase in these calls from the national level, promoted by EDPs.*

b) ECA staff called on to provide forensic evidence*. ECA auditors may be called on by EDPs to provide forensic audit evidence in the framework of a specific criminal proceeding. They would appear as witnesses before the national court*".

These scenarios provide with an interesting scheme of the EPPO making use of the audits' findings in order to consolidate its actions within its mandate. This combination will provide the ECA with a further legitimacy basis of its actions, as these actions will be included in the overall scheme of criminal measures, and such measures are those that people most commonly associate with sanctions over harmful wrongdoing. The public opinion seems to accept the trade-off between longer investigations and less redress of harm to victims, including the EU budget itself, and the criminal punishment of the actu-

al perpetrators (see Levi, 2019, p. 11)

Furthermore, establishing a good relationship with EPPO will help the ECA to compensate for not being able (so far at least) to develop the deterring effect necessary to keep people from committing fraud. Although the ECA's audits differ from fraud investigations, it needs to address fraud and corruption in its financial, compliance and performance audits, for example through automated data analyses for financial audit. Although this will not scare many fraudsters, the possibility of the EPPO using the ECA's relevant information will enhance the Union's power to actively and effectively take on fraudsters. A useful example is provided by the ECA's Statement of Assurance. If the ECA manages to successfully develop its data analytical skills to the point where it would be able to check the entire audit population, including every individual transaction and linking all available databases, also national ones, this would provide all the competent authorities, at EU and national level, with a complete image of the scope of irregularities and a lot of information about underlying patterns (see Parts, 2019, p. 21).

Conclusion

It has been demonstrated that in a multilayered structure of governance, such as the EU, the key approach is based on cooperation and coordination between the EU and Member States, as well as between further levels of government within Member States. This is of particular significance when the arrangements of public audit and its position in the political system are discussed, as the competent audit bodies cooperate with parliamentary institutions. Such cooperation should lead to full scrutiny of public financial resources, including assurances about the accuracy of financial accounts, the assessment of compliance of transactions with applicable rules and the performance assessment of results achieved (economy, efficiency and effectiveness). The interrelation between public accountability and audit is structured upon six key elements, each of which represents a link in a chain and any weakness at any point threatens to undermine the overall effectiveness as follows (see European Court of Auditors, 2014a, p. 13):

This approach allows for a more extended scope of the concept of accountability, thus not limiting it to the provision of an account of the use of taxpayer's money through the EU general budget but also allowing for the provision of an account of (see European Court of Auditors, 2014a, p. 16):

- policy decisions taken and objectives set;
- results and outcomes of EU policies;
- the use of funds from private or international sources that are mobilised for implementing EU policies and the compliance of these projects with EU strategies; and

- the effectiveness of EU responses to systemic risks posed to the financial interests of the Union and its Member States.

In this context, the ECA, as the EU's external auditor, seeks a continuous dialogue with its stakeholders, i.e. the EU citizens, the EU Member States, the EU Institutions and bodies. In this dialogue, the ECA points out its workings, the scope and the limits of its financial and compliance audits as well as its performance audits, and its specific role in identifying the actions to be taken by the auditees in order to protect the EU's financial interests, always clarifying the respective responsibilities of the various actors involved in this endeavour (see Kilonis, 2019, p. 48)

Furthermore, the proceedings of the ECA's competences have been adjusted to the auditing nature of the tasks and the quantity of the audit required. All the relevant audit methods employed by the ECA have been elaborated in order to provide a picture of the finances of the European Union, as accurately as possible. And the fact that the auditees (institutions, organizations, bodies and individuals) have the right to reply to the ECA's remarks and findings, explaining their point of view, must not be overlooked. This "contradictory procedure" guarantees that the auditee will be heard by the ECA. One cannot avoid noticing that this procedural framework has a very strong resemblance with the proceedings followed in a court of law. Of course the ECA does not deliver any kind of judgments and does not have a competence of interpreting EU law (not even the Financial Regulation, the contents of which form exactly the ECA's object of work) as a judicial institution.

This remark allows for some de lege ferenda considerations on reinforcing the ECA's authority in the Union's institutional and political environment. It is obvious that the ECA has established itself as a significant EU institution. This, however,

has not prevented various recipients of its Reports, auditees or others, from not following up on the ECA's findings and recommendations, thus necessitating a more political reaction, usually entailing the European Parliament's involvement through questioning the Commission on the relevant issues. Therefore, the necessity of enhancing the ECA's authority in order to protect its prerogatives (audit rights) *erga omnes* in order to perform its duties more effectively becomes a significant point of interest. Such a necessity is further reinforced by the judicial finding that, even if the ECA's auditing method and behaviour is found to violate significant rights and principles, such as the right to a hearing of the auditees or third parties involved in the cases under audit, this illegality might have no impact on the results of the audit – especially when they reveal flagrant and serious failures to observe the rules of sound financial management – and the conclusions of the ECA's reports will not be affected, in terms of validity or substance (see Case C-315/99, *Ismeri Europa Srl v Court of Auditors of the European Communities,* [2001] ECR, p. I-5315 – I-5331, at p. I-5324 – I-5325).

One way of enhancing the ECA's position has been granting it the right to take action before the Court of Justice of the EU in order to protect its prerogatives (audit rights) towards the other European institutions and the Member States. The provision of Art. 263 TFEU, as it has been amended after the Treaty of Amsterdam, has resolved this issue. However it has been found that the solution provided does not cover all cases.

Even from the early years of the ECA's auditing operation, it was found that the ECA could not invoke legal sanctions against national officials who obstruct its work (see Harden, White & Donnelly, 1995, p. 626). One of the most characteristic examples has been the examination of whether the VAT own resources had been collected in 1985 and 1986. Several Member States refused to accept the audit visits planned by

the ECA for reviewing statistic data, examining documentation, carrying out compliance tests. The ECA could only point this out in its Annual Reports and inform the discharge authorities that it had not been able to fulfill its responsibilities regarding the VAT own resources (see European Court of Auditors, 1986, p. 32, European Court of Auditors, 1987, p. 39). In a similar case, several years later, another EU Member State objected to the ECA's audit visits in order to verify the correct collection of VAT resources by its national authorities. In that case the European Commission, making use of its capacity as guardian of the Treaties, "formed an alliance with the ECA" and brought infringement proceedings against this Member State before the Court of Justice of the EU, according to Art. 258 TFEU (see Aden, 2015, p. 319). The Court's judgment was in favour of the Commission, and acknowledged the ECA's authority to perform audits related to the collection of VAT, as this tax is part of the EU own resources system, as well as the national authorities obligation to cooperate in that respect (see Case C-539/09, *European Commission v. Federal Republic of Germany,* [2011] ECR, p. I-11235 at paras 59-63 and 80-82). This case could provide the basis of a suggestion for amending Art. 258 TFEU in the direction of allowing explicitly the ECA itself to take action before the Court of Justice of the European Union against a Member State in order to protect its prerogatives in relation to Art. 287(3) TFEU i.e. on the spot audits, forwarding of necessary documentation, participation of national audit institutions in the audit procedure.

Another, even more radical approach would be to grant the ECA granted special judicial authority, and the relevant jurisdiction may include all disputes created during the procedure of audit, namely disputes concerning substantial and procedural issues of audit (for instance the responsibility of the final beneficiaries or the persons responsible for the management of the European resources within the Commission, to compen-

sate the European Union in case of misuse of these resources). The ECA might as well have jurisdiction in cases involving fraud against the European Union, only with regard to the financial aspect (refund of the resources misused) and not the criminal aspect. Also a procedure, similar to that of Article 267 TFEU concerning the preliminary rulings of the ECJ, might be introduced, of course limited to issues concerning the ECA's substantive jurisdiction (see Skiadas, 2016b, pp. 287-35).

One issue to be tackled with regard to this proposal refers to the people involved in the relative judicial procedure. Since the ECA's staff is conducting the audit and most probably this staff is going to be one part of the dispute, it is at least strange to ask the members of the ECA to judge this dispute, since the staff is performing the audit under the ECA's members' guidance. The solution to that problem could be the existence of a position similar to that of the Advocate-General in the ECJ, something quite common in cases where the state audit institution has judicial authorities. The duties of such an official in the ECA institutional scheme should be to represent the European Union's general interest, according to Article 285 TFEU, by making reasoned submissions on cases before the ECA in order to assist it in reaching a decision. When a case would be brought before the ECA by an auditor against an auditee (EU Institution, Member State, organization, individual etc) or by an auditee against an auditor, this official would address the Court presenting his opinion, which of course would not be binding for the ECA. The official in question might be permanently appointed (or elected by the ECA members like the President of ECA) for this task. So, the ECA, under these circumstances can operate as a judicial institution, having all the guarantees of impartiality and independence necessary for this task. In that respect, the provisions of Article 286 TFEU on the conditions for ECA membership and its operational independence, as well as the fact that the provisions of the Protocol on

the privileges and immunities of the European Union applicable to the judges of the Court of Justice of the EU apply also to the ECA's members, reinforce these guarantees. Furthermore, granting to the ECA judicial authority, may be based on Articles 260 and 262 TFEU, as, according to these dispositions, the acts (or omissions: failures to act) of the ECA regarding audit activities are not subjected to review by the ECJ. The ECA's acts, concerning audit, are legally binding since the ECA carries out the audit and it decides whether a transaction is legal, regular and within the framework of the sound financial management principles or not. So, in the European Union's legal order, the characterization of a transaction by the ECA as legal, regular and sound, is binding for the other institutions and the Member States. Otherwise the Statement of Assurance regarding the reliability of the accounts and the legality and regularity of the underlying transactions would be meaningless. Given, finally, that the EU Court of Justice itself has accepted the ECA's power to examine the legality of expenditure with reference to the budget and the secondary legislation on which the expenditure is made, and separated from its own review which focuses on the legality of this secondary legislation (see C-294/83, *Parti ecologiste "Les Verts" v European Parliament*, [1986] ECR, p. 1339–1373 at p. 1367), sets a clear distinction between the two institutions' object of review. So, since the ECA's acts are not subjected to judicial review by the ECJ but they, in fact, form a parallel review of certain other acts (transactions), then it could be possible to contemplate upgrading the ECA to a judicial level (see Skiadas, 2016b, pp. 287-36). Considering the importance of the ECA's role for the function of the European Union, such an upgrading would reinforce the Union's audit system, since the latter would include a judicial institution.

Overall, the expansion of the EU from its original Member States to a figure of Member States covering almost the entire

European continent, has caused the Union's budget to increase and the transactions from and to the EU Member States to be multiplied accordingly. Thus a constantly growing role for the ECA is anticipated (see Laffan, 2002, p. 135). This role reflects the importance of audit within the EU budgetary governance and highlights its political as well as institutional dynamics.

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ANNEX

I. EU Primary Law

Ia) Treaty on the European Union

Title III
Provisions on the Institutions

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.
The Union's institutions shall be:
— the European Parliament,
— the European Council,
— the Council,
— the European Commission (hereinafter referred to as 'the Commission'),
— the Court of Justice of the European Union,
— the European Central Bank,
— the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 14

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties…

Ib) Treaty on the Functioning of the European Union

Part Six
Institutional and Financial Provisions

Title I
Institutional provisions

Chapter 1
The Institutions

…

Section 5
The Court of Justice of the European Union

…

Article 263

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects *vis-à-vis* third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or

the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

…

Section 7
The Court of Auditors

Article 285

The Court of Auditors shall carry out the Union's audit.

It shall consist of one national of each Member State. Its Members shall be completely independent in the performance of their duties, in the Union's general interest.

Article 286

1. The Members of the Court of Auditors shall be chosen from among persons who belong or have belonged in their respective States to external audit bodies or who are especially qualified for this office. Their independence must be beyond doubt.

2. The Members of the Court of Auditors shall be appointed for a term of six years. The Council, after consulting the European Parliament, shall adopt the list of Members drawn up in accordance with the proposals made by each Member State. The term of office of the Members of the Court of Auditors shall be renewable.

They shall elect the President of the Court of Auditors from among their number for a term of three years. The President may be re-elected.

3. In the performance of these duties, the Members of the Court of Auditors shall neither seek nor take instructions from any government or from any other body. The Members of the Court of Auditors shall refrain from any action incompatible with their duties.

4. The Members of the Court of Auditors may not, during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

5. Apart from normal replacement, or death, the duties of a Member of the Court of Auditors shall end when he resigns, or is compulsorily retired by a ruling of the Court of Justice pursuant to paragraph 6.

The vacancy thus caused shall be filled for the remainder of the Member's term of office.

Save in the case of compulsory retirement, Members of the Court of Auditors shall remain in office until they have been replaced.

6. A Member of the Court of Auditors may be deprived of his office or of his right to a pension or other benefits in its stead only if the Court of Justice, at the request of the Court of Auditors, finds that he no longer fulfils the requisite conditions or meets the obligations arising from his office.

7. The Council shall determine the conditions of employment of the President and the Members of the Court of Auditors and in particular their salaries, allowances and pensions. It shall also determine any payment to be made instead of remuneration.

8. The provisions of the Protocol on the privileges and immu-

nities of the European Union applicable to the Judges of the Court of Justice of the European Union shall also apply to the Members of the Court of Auditors.

Article 287

1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Union.

It shall also examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination.

The Court of Auditors shall provide the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions which shall be published in the *Official Journal of the European Union*. This statement may be supplemented by specific assessments for each major area of Union activity.

2. The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. In doing so, it shall report in particular on any cases of irregularity.

The audit of revenue shall be carried out on the basis both of the amounts established as due and the amounts actually paid to the Union.

The audit of expenditure shall be carried out on the basis both of commitments undertaken and payments made.

These audits may be carried out before the closure of accounts for the financial year in question.

3. The audit shall be based on records and, if necessary, performed on the spot in the other institutions of the Union, on the premises of any body, office or agency which manages re-

venue or expenditure on behalf of the Union and in the Member States, including on the premises of any natural or legal person in receipt of payments from the budget. In the Member States the audit shall be carried out in liaison with national audit bodies or, if these do not have the necessary powers, with the competent national departments. 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.

The other institutions of the Union, any bodies, offices or agencies managing revenue or expenditure on behalf of the Union, any natural or legal person in receipt of payments from the budget, and the national audit bodies or, if these do not have the necessary powers, the competent national departments, shall forward to the Court of Auditors, at its request, any document or information necessary to carry out its task.

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.

4. The Court of Auditors shall draw up an annual report after the close of each financial year. It shall be forwarded to the other institutions of the Union and shall be published, together with the replies of these institutions to the observations of the Court of Auditors, in the *Official Journal of the European Union*.

The Court of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union.

It shall adopt its annual reports, special reports or opinions by a majority of its Members. However, it may establish internal chambers in order to adopt certain categories of reports or opinions under the conditions laid down by its Rules of Procedure.

It shall assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget.

The Court of Auditors shall draw up its Rules of Procedure. Those rules shall require the approval of the Council.

Title II
Financial Provisions

Article 310

1. All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget. The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 314. The revenue and expenditure shown in the budget shall be in balance.

2. The expenditure shown in the budget shall be authorised for the annual budgetary period in accordance with the regulation referred to in Article 322.

3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.

4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable im-

plications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.

5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.

6. The Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union.

…

Chapter 4
Implementation of the Budget and Discharge

…

Article 319

1. The European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of the implementation of the budget. To this end, the Council and the European Parliament in turn shall examine the accounts, the financial statement and the evaluation report referred to in Article 318, the annual report by the Court of Auditors together with the replies of the institutions under audit to the observations of the Court of Auditors, the statement of assurance referred to in Article 287(1), second subparagraph and any relevant special reports by the Court of Auditors.

2. Before giving a discharge to the Commission, or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the European Parliament may

ask to hear the Commission give evidence with regard to the execution of expenditure or the operation of financial control systems. The Commission shall submit any necessary information to the European Parliament at the latter's request.

3. The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council.

At the request of the European Parliament or the Council, the Commission shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.

…

Chapter 5
Common Provisions

…

Article 322

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;

(b) rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting of-

ficers.

2. The Council, acting on a proposal from the Commission and after consulting the European Parliament and the Court of Auditors, shall determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources shall be made available to the Commission, and determine the measures to be applied, if need be, to meet cash requirements.

…

Chapter 6
Combatting Fraud

Article 325

1. The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

2. Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

3. Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting

the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

…

Ic) Protocol (No I) On the role of National Parliaments in the European Union

…

Title I
Information for National Parliaments

…

Article 7

The Court of Auditors shall forward its annual report to national Parliaments, for information, at the same time as to the European Parliament and to the Council.

Id) Protocol (No 4) On the statute of the European System of Central Banks and of the European Central Bank

…

Chapter VI
Financial provisions of the ESCB

…

Article 27

Auditing

27.1. The accounts of the ECB and national central banks shall be audited by independent external auditors recommended by

the Governing Council and approved by the Council. The auditors shall have full power to examine all books and accounts of the ECB and national central banks and obtain full information about their transactions.

27.2. The provisions of Article 287 of the Treaty on the Functioning of the European Union shall only apply to an examination of the operational efficiency of the management of the ECB.

II. EU Secondary Law

IIa) Regulation 2018/1046 on the financial rules applicable to the general budget of the Union, [2018] OJ, L 193/1.

(The 2018 Financial Regulation)

…

Title XIV
External audit and discharge

…

Chapter 2
Discharge

Article 260

Timetable of the discharge procedure

1. The European Parliament, upon a recommendation from the Council acting by qualified majority, shall, before 15 May of year n+2, give a discharge to the Commission in respect of the implementation of the budget for year n.

2. Where the deadline provided for in paragraph 1 cannot be

complied with, the European Parliament or the Council shall inform the Commission of the reasons therefor.

3. If the European Parliament postpones the decision giving a discharge, the Commission shall make every effort to take measures, as soon as possible, to remove or facilitate removal of the obstacles to that decision.

Article 261

The discharge procedure

1. The discharge decision shall cover the accounts of all the Union's revenue and expenditure, the resulting balance and the assets and liabilities of the Union shown in the balance sheet.

2. With a view to giving the discharge, the European Parliament shall, after the Council has done so, examine the accounts, financial statements and the evaluation report referred to in Article 318 TFEU. It shall also examine the annual report made by the Court of Auditors together with the replies of the Union institutions under audit, and any relevant special reports by the Court of Auditors in respect of the financial year concerned and the Court of Auditors' statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions.

3. The Commission shall submit to the European Parliament, at the latter's request, any information required for the smooth application of the discharge procedure for the financial year concerned, in accordance with Article 319 TFEU.

Article 262

Follow-up measures

1. In accordance with Article 319 TFEU and Article 106a of the Euratom Treaty, Union institutions and Union bodies referred to in Articles 70 and 71 of this Regulation shall take all appropriate steps to act on the observations accompany-

ing the European Parliament's discharge decision and on the comments accompanying the recommendation for discharge adopted by the Council.

2. At the request of the European Parliament or of the Council, Union institutions and Union bodies referred to in Articles 70 and 71 shall report on the measures taken in the light of those observations and comments, and, in particular, on the instructions they have given to any of their departments which are responsible for budget implementation. Member States shall cooperate with the Commission by informing it of the measures they have taken to act on those observations so that the Commission may take them into account when drawing up its own report. The reports from Union institutions and Union bodies referred to in Articles 70 and 71 shall also be transmitted to the Court of Auditors.

Article 263

Specific provisions regarding the EEAS

The EEAS shall be subject to the procedures provided for in Article 319 TFEU and in Articles 260, 261 and 262 of this Regulation. The EEAS shall fully cooperate with Union institutions involved in the discharge procedure and provide, as appropriate, any additional necessary information, including through attendance at meetings of the relevant bodies.

IIb) Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management [2013] OJ, C 373/1

THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COMMISSION,

hereinafter referred to as the 'institutions',

HAVE AGREED AS FOLLOWS:

1. The purpose of this Agreement, adopted in accordance with Article 295 of the Treaty on the Functioning of the European Union (TFEU), is to implement budgetary discipline and improve the functioning of the annual budgetary procedure and cooperation between the institutions on budgetary matters as well as to ensure sound financial management.

2. Budgetary discipline in this Agreement covers all expenditure. The Agreement is binding on all the institutions for as long as it is in force

…

4.Any amendment of this Agreement requires the common agreement of all the institutions

…

6. This Agreement enters into force on 23 December 2013 and replaces the Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management.

…

Part II
IMPROVEMENT OF INTERINSTITUTIONAL COOPERATION IN BUDGETARY MATTERS

A. Interinstitutional cooperation procedure

…

Budgetary Transparency

16. The Commission shall prepare an annual report to accompany the general budget of the Union, bringing together available and non-confidential information relating to:

-the assets and liabilities of the Union, including those arising from borrowing and lending operations carried out by the Union in accordance with its powers under the Treaties

-the revenue, expenditure, assets and liabilities of the European Development Fund (EDF), the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM), and other possible future mechanisms, including trust funds

-the expenditure incurred by Member States in the framework of enhanced cooperation, to the extent that it is not included in the general budget of the Union

…

Part III
SOUND FINANCIAL MANAGEMENT OF UNION FUNDS

A. Joint management

28. The Commission shall ensure that the European Parliament, the Council and the Court of Auditors, at their request, receive any information and documentation related to Union funds spent through international organisations, obtained under the verification agreements concluded with those organisations, which are considered necessary for the exercise of the

competences of the European Parliament, the Council or the Court of Auditors under the TFEU

Evaluation report

29. In the evaluation report provided for by Article 318 TFEU, the Commission shall distinguish between internal policies, focused on the Europe 2020 strategy, and the external policies and shall use more performance information, including performance audit results, to evaluate the finances of the Union based on the results achieved

Financial programming

30. The Commission shall submit twice a year, the first time in April or May (together with the documents accompanying the draft budget) and the second time in December or January (after the adoption of the general budget of the Union), a complete financial programming for headings 1 (except the sub-heading for 'Economic, social and territorial cohesion'), 2 (for 'environment' and 'fisheries' only), 3 and 4 of the MFF. That programming, structured by heading, policy area and budget line, should identify:

a) the legislation in force, with a distinction being drawn between multiannual programmes and annual actions

- for multiannual programmes, the Commission should indicate the procedure under which they were adopted (ordinary or special legislative procedure), their duration, the total financial envelope and the share allocated to administrative expenditure

- for annual actions (relating to pilot projects, preparatory actions and agencies) and actions financed under the prerogatives of the Commission, the Commission should provide multiannual estimates and indicate the margins left under the authorised ceilings fixed in Commission Delegated Regulation (EU) No 1268/2012

b) pending legislative proposals: ongoing Commission proposals, with the latest update

…

IIc) Rules of Procedure of the European Parliament (2019-2024)[1]

Chapter 6
BUDGETARY PROCEDURES

…

Rule 98

Implementation of the budget

1. Parliament shall monitor the implementation of the current year's budget. It shall entrust this task to the committees responsible for the budget and budgetary control and to the other committees concerned.

2. Each year, before its reading of the draft budget for the following financial year,

Parliament shall consider the problems involved in the implementation of the current budget, where appropriate on the basis of a motion for a resolution tabled by its committee responsible.

Rule 99

Discharge to the Commission in respect of implementation of the budget

The provisions governing the procedure for granting discharge

1 Available on line at https://www.europarl.europa.eu/doceo/document/RULES-9-2019-07-02_EN.pdf on 23.5.2020

to the Commission in respect of the implementation of the budget in accordance with the financial provisions of the Treaty on the Functioning of the European Union and Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council (the "Financial Regulation") are attached to these Rules as an annex.

Rule 100

Other discharge procedures

The provisions governing the procedure for granting discharge to the Commission in accordance with Article 319 of the Treaty on the Functioning of the European Union, in respect of the implementation of the budget, shall also apply to the procedure for granting discharge to:

- the President of the European Parliament in respect of the implementation of the budget of the European Parliament;

- the persons responsible for the implementation of the budgets of other institutions and bodies of the European Union such as the Council, the Court of Justice of the European Union, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;

- the Commission in respect of the implementation of the budget of the European

Development Fund;

- the bodies responsible for the budgetary management of legally independent entities which carry out Union tasks, insofar as their activities are subject to legal provisions requiring discharge by the European Parliament.

Rule 101

Interinstitutional cooperation

In accordance with Article 324 of the Treaty on the Functio-

ning of the European Union, the President shall participate in regular meetings between the Presidents of the European Parliament, the Council and the Commission convened, on the initiative of the Commission, under the budgetary procedures referred to in Title II of Part Six of the Treaty on the Functioning of the European Union. The President shall take all the necessary steps to promote consultation and the reconciliation of the positions of the institutions in order to facilitate the implementation of the procedures aforementioned.

The President of Parliament may delegate this task to a Vice-President who has experience of budgetary matters or to the Chair of the committee responsible for budgetary issues.

…

IId. Council Decision of 1 December 2009 adopting the Council's Rules of Procedure, [2009] OJ, L 325/35, as amended and valid on 31.12.2019

…

Article 19

CoRePer, committees and working parties

1. Coreper shall be responsible for preparing the work of all the meetings of the Council and for carrying out the tasks assigned to it by the Council. It shall in any case ensure consistency of the European Union's policies and actions and see to it that the following principles and rules are observed:

(a) the principles of legality, subsidiarity, proportionality and providing reasons for acts;

(b) rules establishing the powers of Union institutions, bodies, offices and agencies;

(c) budgetary provisions;

(d) rules on procedure, transparency and the quality of drafting.

2. All items on the agenda for a Council meeting shall be examined in advance by Coreper unless the latter decides otherwise. Coreper shall endeavour to reach agreement at its level to be submitted to the Council for adoption. It shall ensure adequate presentation of the dossiers to the Council and, where appropriate, shall present guidelines, options or suggested solutions. In the event of an emergency, the Council, acting unanimously, may decide to settle the matter without prior examination.

3. Committees or working parties may be set up by, or with the approval of, Coreper with a view to carrying out certain preparatory work or studies defined in advance.

The General Secretariat shall update and make public the list of preparatory bodies. Only the committees and working parties on this list may meet as Council preparatory bodies.

4. Coreper shall be chaired, depending on the items on the agenda, by the Permanent Representative or the Deputy Permanent Representative of the Member State which holds the Presidency of the General Affairs Council.

The Political and Security Committee shall be chaired by a representative of the High Representative of the Union for Foreign Affairs and Security Policy.

The preparatory bodies of the various Council configurations, with the exception of the Foreign Affairs configuration, shall be chaired by a delegate of the Member State chairing the relevant configuration, unless the Council, acting by a qualified majority, decides otherwise. The list referred to in the second subparagraph of paragraph 3 shall also identify those preparatory bodies for which the Council has made other chairing arrangements, in accordance with Article 4 of the European Council Decision on the exercise of the Presidency of the Council.

5. For the preparation of meetings of Council configurations meeting once every six months, where held during the first half of this period, the meetings of committees other than Coreper and those of working parties held during the preceding six months shall be chaired by a delegate of the Member State whose turn it is to chair the said Council meetings.

6. Except where other chairing arrangements apply, when a dossier will essentially be dealt with during a six-month period, a delegate of the Member State holding the Presidency during that six-month period may, during the preceding six-month period, chair meetings of committees, other than Coreper, and working parties when they discuss that dossier. The practical implementation of this paragraph shall be the subject of an agreement between the two Presidencies concerned.

In the specific case of the examination of the budget of the Union for a given financial year, meetings of Council preparatory bodies, other than Coreper, dealing with the preparation of Council agenda items on the examination of the budget shall be chaired by a delegate of the Member State which will hold the Council Presidency during the second six-month period of the year prior to the financial year in question. The same shall apply, with the agreement of the other Presidency, to the chairing of Council meetings at the time when the said budget items are discussed. The Presidencies concerned will consult on the practical arrangements.

7. In accordance with the relevant provisions referred to below, Coreper may adopt the following procedural decisions, provided that the items relating thereto have been included on its provisional agenda at least three working days before the meeting. Unanimity on the part of Coreper shall be required for any derogation from that period:

(a) decision to hold a Council meeting in a place other than Brussels or Luxembourg (Article 1(3));

(b) authorisation to produce a copy of or an extract from a Council document for use in legal proceedings (Article 6(2));
(c) decision to hold a public debate in the Council or not to hold in public a given Council deliberation (Article 8(1), (2) and (3));
(d) decision to make the results of votes and the statements entered in the Council minutes public in the cases laid down in Article 9(2);
(e) decision to use the written procedure (Article 12(1));
(f) approval or amendment of Council minutes (Article 13(2) and (3));
(g) decision to publish or not to publish a text or an act in the *Official Journal* (Article 17(2), (3) and (4));
(h) decision to consult an institution or body wherever such consultation is not required by the Treaties;
(i) decision setting or extending a time limit for consultation of an institution or body;
(j) decision to extend the periods laid down in Article 294(14) of the TFEU;
(k) approval of the wording of a letter to be sent to an institution or body.

IIe. Memorandum of Understanding between the European Court of Auditors and the European Central Bank regarding audits on the European Central Banks' supervisory tasks (9 October 2019)[2]

Memorandum of Understanding
Between
The ECA and the ECB
regarding audits on the ECB's supervisory tasks

Whereas:

a) The ECB, the ECA and other Union institutions are each independent in the exercise of their powers. The independence of the ECB is enshrined in Articles 130 and 282(3) of the TFEU, as well as in Article 7 of Protocol No 4 on the Statute of the European system of central banks and of the European Central Bank (hereinafter the 'Statute'). In addition, Article 19 of Council Regulation (EU) No 1024/2013 (hereinafter the 'SSM Regulation') states that when carrying out the tasks conferred on it by the SSM Regulation, the ECB (and the national competent authorities acting within the SSM) shall act independently.

b) The ECB is, under the conditions laid down by the TFEU and the Statute, subject to various kinds of Union controls, notably review by the Court of Justice and control by the Court of Auditors

c) In line with the above provisions, Article 2 7.2 of the Statute establishes the mandate of the ECA towards the ECB. Article

2 Available on line at https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=51578 and https://www.bankingsupervision.europa.eu/press/pr/date/2019/html/ssm.pr190828~549dd2c932.en.html on 29.5.2020.

20.7 of the SSM Regulation clarifies the mandate of the ECA with regard to the supervisory tasks conferred on the ECB by the SSM Regulation. In relation to these supervisory tasks, it should be noted that in accordance with Recital 55 of the SSM Regulation "[a]ny shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements."

d) Article 287 (3) TFEU states that "The other institutions of the Union .... shall forward to the Court of Auditors, at its request, any document or information necessary to carry out its task."

e) The ECB and the ECA acknowledge that the concept of "operational efficiency of the management" as referred to in Article 2 7.2 of the Statute and Article 20(7) of the SSM Regulation is not defined in Union Law. To the extent applicable, the principle of efficiency underlying Article 33 of the Financial Regulation (Regulation 2018/1046 of the European Parliament and of the Council- (hereinafter the 'Financial Regulation') may figure as a source of interpretation in the examination of the ECB's supervisory activities by the ECA in line with its mandate.

f) In order for the ECA and the ECB to cooperate closely and sincerely within the procedures, conditions and objectives set out in the TFEU, the Statute and the SSM Regulation, this Memorandum of Understanding (MoU) aims to establish practical arrangements between the two institutions. In particular, the ECB and the ECA wish to specify the modalities of document and information exchange between the two institutions with a view to ensuring the ECA's access to all information necessary for it to perform its mandate of auditing the supervisory tasks conferred on the ECB, in line with Union law.

l. This MoU shall cover solely the ECA's audit of the ECB's supervisory tasks as conferred on it by Article 20(7) of the SSM Regulation.

2. The parties consider that this MoU must be implemented diligently and in good faith, with due regard for each party's legitimate concerns and the current statutory obligations.

I. The ECA's right to access information relevant for its audits

3. The ECA is entitled to seek and obtain all documents and information necessary for its audits of the operational efficiency of the management of the ECB, in full respect of the importance of a fully informed audit and of sincere cooperation in line with its mandate as attributed to it by Union law.

4. The ECA will draw up its audit questions and request documents and information in line with its mandate. The ECB works from the general assumption that the ECA's requests for information are within this mandate. Before a decision in relation to a particular request for information, the ECB may seek an explanation from the ECA as to the relevance to the ECA's mandate of the information request concerned. However, this type of request for explanation should not be systematic in nature.

5. The ECB will make all requested documents and information necessary for the audit available to the ECA without undue delay.

6. Annex I to this MoU specifies some types of documents and information that will be made available to the ECA in accordance with sections I and II of this MoU.

II. Special treatment of highly confidential documents and information

7. The parties share the understanding that much of the supervisory data held by the ECB is particularly sensitive, requires confidentiality protection, and as such it cannot be released or given to any third party without the prior written consent of the ECB. The ECA and the ECB together will ensure that the

legal obligations and the public interest in protecting such data is also fully met in the ECA's audits, including by:

a. Ensuring that highly confidential documentation, including bank-specific information, is dealt with on-site at the ECB's premises. Access to such information may be granted in a controlled environment;
b. Restricting access to ECB documents and information to a strictly necessary number of nominated ECA staff while respecting the quality assurance processes of the ECA;
c. Ensuring that the ECA's IT systems are highly secure and at least equivalent to the standards applied by the ECB;
d. Ensuring that relevant ECA staff receives appropriate information and training in relation to data protection and applicable legal constraints;
e. Designing specific auditor profiles, where feasible, within the relevant ECB IT systems to ensure that audit related documents can be examined and stored securely;
f. Ensuring that the ECB is fully informed and consulted about any use and retention of its documents, information and data within the ECA, which must in any case be temporary and subject to the requirements of Union law;
g. If in the course of the audit or the adversarial procedure the ECB raises issues related to the protection of confidential data in line with Article 27 of the SSM Regulation in conjunction with Articles 53 to 62 of Directive 2013/36/EU of the European Parliament and of the Council (hereinafter the 'CRD IV'), the ECA will take these concerns into account.

8. The ECA and the ECB will both make sure to observe the principle of proportionality. In particular the ECA will consider proportionality when requesting confidential information, e.g. audit samplings, and will seek to limit the scope of requests

to what is necessary in line with the scope of the audit and the TFEU, the Statute and the SSM Regulation.

9. A nominated ECB Supervisory Board member will be responsible throughout an ECA audit for fulfilling the duties under this MoU - in line with relevant legal duties. Through regular dialogue between this ECB representative and the ECA reporting member, each side will strive to find smooth information sharing arrangements. In the event of a disagreement concerning the application of the MoU, such matters will be handled in a cooperative spirit.

If necessary, disagreements can be escalated to the level of a dialogue between the ECA President and the ECB President or Vice-President.

III. Public access to documents in the ECA

10. If the ECA receives an application for public access to documents received by ECA during the audit, the ECA will, in accordance with Article 5 of Decision No 12/2005 of the Court of Auditors of 10 March 2005 regarding public access to Court documents (2009/C 67/01), confirm receipt of the application and answer that the application should be addressed to the ECB.

IV. Review and amendment

11. The parties shall review the functioning and effectiveness of the cooperation and information exchange under this Mo U every three years, or earlier if deemed necessary by both parties. In the event of a change in legislation, e.g. the TFEU, the Statute or the SSM Regulation, regarding the audit remit of the ECA, this MoU shall be amended or terminated, under the conditions foreseen in Paragraph 15.

12. Any amendment to this Mo U requires the mutual consent of both parties in writing.

V. Publication of the Agreement

13. This Mo U will be published on the websites of the ECA and the ECB within one week of its entry into effect in line with section VI.

VI. Effect and termination

14. This MoU will enter into effect on the date it is signed by both parties and will remain in effect until terminated in writing by either ofthe parties.

15. Each party may terminate this Mo U by giving six months' prior written notice to the other party at any time. If the Mo U is terminated by either party, steps will be taken to ensure that the termination does not affect any prior obligation already in progress. Termination of this MoU does not affect the obligations under this MoU relating to the confidentiality of the information, which will continue to have effect, nor does it affect obligations regarding cooperation and exchange of information between the parties under the applicable laws.

Signed in Luxembourg on 9 October 2019 in two original copies each in the English language and signed by the parties' duly authorised representatives

ANNEX

Categories of documents or information

Below is a non-exhaustive list of documents or information that will be made available to the ECA if requested, in accordance with sections I and II of this MoU. They include relevant underlying documentation as well as related internal and external communication.

Bank-specific information may be requested by the ECA to support its audit work. In such cases clarification of the rele-

vance of the information to the ECA's mandate will occasionally be requested by the ECB.

Process-related information

- Information regarding ECB/SSM organisational arrangements (e.g. organisational charts, headcount organisation and functioning of Joint Supervisory Teams (JSTs) or horizontal functions, working modalities with colleges of supervisors etc.).
- MoUs with authorities from non-SSM Union member states, third countries and other authorities and institutions.
- MoUs with national competent authorities (NCAs), other competent authorities,
- international organisations and others.
- Interinstitutional agreement and MoU with the European Parliament and European Council.
- ECB annual report on supervisory activities.
- Information/manuals regarding ECB/SSM procedures and management processes.
- Information regarding tools and systems supporting ECB supervisory activities.
- Information regarding ECB costs/expenses of supervisory activities and the calculation of the supervisory fee.
- Fee notice to each fee debtor and the underlying calculations.
- Information regarding contracts with external parties/ procurement of services etc.
- Reports on time spent on task by business area and information on key performance indicators or performance metrics.
- Training material.

Policy-related information

- Information on the planning of supervisory activities.
- Reports from internal audit or ECB SSM Directorates or working groups or evaluation reports.
- ECB decisions on micro-prudential policies and regulations.
- Opinions and publications on micro-prudential and regulatory strategies.
- ECB regulations, guidelines, instructions on common methodological standards.
- ECB internal methodologies, including the SSM Supervisory Manual.
- Impact analyses.
- Asset Quality Review manual and templates.
- Supervisory review and evaluation process (SREP) decision templates.
- SREP supervisory benchmarks.
- Reports/horizontal analyses of internal models of significant institutions' (Sis).
- Templates on Sis' recovery plans.
- Benchmark reports on recovery plans.
- ECB recommendations, regulations, guidelines and general instructions on NCA supervisory practices for less significant institutions (LSIs).
- Reports on LSI supervision.
- SREP methodologies for LSIs.
- List of LSIs and information regarding the classification in three priority classes.
- Thematic reviews of LSIs.
- Risk analysis tools.
- Yearly assessment of Sis' significance.
- Stress test methodology.
- Stress test templates.
- Reports on the stress test exercises.

- Relevant reporting of information derived from Supervisory Dashboards.
- Aggregated capital reporting (COREP), financial reporting (FINREP) and short-term exercise (STE) reporting (if applicable) data

Bank specific information

- ECB decisions/notification letters, and any relevant underlying information, under the SSM regulation, Regulation (EU) No 468/2014 of the European Central Bank (hereinafter the 'SSM framework regulation'), Regulation (EU) No 575/2013 of the European Parliament and of the Council (hereinafter the 'CRR'), national legislation and related delegated acts on matters such as:
  - ✓ authorisation (approval and rejection);
  - ✓ the significance of institutions;
  - ✓ passporting of branches and services;
  - ✓ the assessment of acquisitions of qualifying holdings;
  - ✓ fit and proper (re)assessment of Sis' management members;
  - ✓ model approvals, including joint decisions with colleges of supervisors, where applicable;
  - ✓ enforcement measures/sanctions/early intervention measures and assessments;
  - ✓ own funds requirements;
  - ✓ recovery planning;
  - ✓ specific reviews;
  - ✓ banks' governance;
  - ✓ financial conglomerates;
  - ✓ investigations;
  - ✓ requirement to limit business activities, divestment or risk reduction;

  - ✓ Imposition of reporting or disclosure requirements;
  - ✓ the Sis 'failing or likely to fail';
  - ✓ solvency assessment of Sis;
- opinions on resolution plans;
- interaction with other relevant authorities (e.g. the Commission, the Single Resolution Board (SRB), the European Systemic Risk Board (ESRB));
- statistical data used in banking supervision;
- ECB measures, actions, decisions and operational acts (measures) on: (i) capital; (ii)
- liquidity; (iii) business models; (iv) internal models; (v) internal governance; and risks; (vi) reporting and requiring additional disclosure; (vii) enhanced supervision; and (viii) recovery plans;
- ECB measures as defined in Article 5(2) of the SSM Regulation;
- SREP reports;
- Sis' recovery plans;
- group risk assessment and group liquidity risk assessments reports;
- other reports regarding risks to capital (e.g. internal capital adequacy assessment
- process (ICAAP) and internal liquidity adequacy assessment process (ILAAP));
- on-site inspections (OSI): mission files including requests for information, pre-inspection notes, letters of recommendations;
- OSI reports and their findings;
- resolution planning and assessment of the resolvability of an SI;
- opinions on minimum requirements for own funds and eligible liabilities (MREL);
- institutional reports for (high priority) LSI

IIf. Decision No 35-2014 laying down internal procedures for cooperation between the European Anti-Fraud Office and the European Court of Auditors (the Court) concerning audit related matters and information received from third parties (denunciations) forwarded by the Court[3]

THE EUROPEAN COURT OF AUDITORS

HAVING REGARD TO the Treaty of the European Union, and in particular Article 4 §3 and having regard to the Treaty on the Functioning of the European Union, and in particular Articles 287 and 325 thereof,

WHEREAS by its Decision of 28 April 1999\ the Commission established within its own departments a European Anti Fraud Office ("OLAF");

WHEREAS OLAF's responsibilities were set out in greater detail in Regulation (EU, EURATOM) No 883/20132 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

HAS DECIDED:

Article 1 - Field of application

This Decision shall apply to:

- Any case of suspicion of fraud, corruption or any other illegal activity arising from the Court's audit work affecting the financial interests of the Union and;
- Any information received from third parties (denuncia-

3 Available online at https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/decision_35_2014_en.pdf, on 31.5.2020

tion) affecting the financial interests of the Union concerning allegations of fraud, corruption or any other illegal activity and;
- Any requests for information or documentation from OLAF relating to the Court's audit work.

It shall apply without prejudice to the provisions of Articles 22a and 22b of the Staff Regulations.

Article 2 - Suspicions of fraud. corruption or any other illegal activity arising from the Court's audit work

Article 2.a): Communication with OLAF on cases arising from the Court's audit work

When, in the course of an audit, a suspicion of fraud, corruption or any other illegal activity arises, the Member in charge of relations with OLAF shall (in cooperation with the reporting Member), without undue delay, have a standard letter drawn up - a template for which can be found in the Court's audit guideline on fraud - and communicate this to the Director General of OLAF.

The letter shall contain a request that OLAF:
- Acknowledges receipt of the information transmitted by the Court.
- Informs the Court as soon as possible if it has opened an investigation.
- Informs the Court of any further changes made to the investigative status of the case forwarded by the Court.

Where the information forwarded by the Court has, in the course of an audit, been obtained from an informant, the Court should protect his/her identity. This is in particular important for whistle-blowers. Hence, in relevant cases, the Court should specifically inform OLAF whether the information forwarded originates from an informant who has requested that his/her

identity is not disclosed by the Court, so that OLAF can take this into account.

Once initial contact has been formally made with OLAF, operational contacts shall, if necessary, continue at the level of the Court/OLAF services. These contacts shall focus on potential clarification to the information provided.

In addition, the Member in charge of relations with OLAF shall request from OLAF an annual updating of the status of open cases sent to OLAF, including available information on the outcome of cases closed within the year in question.

Article 2.b): Confidentiality of information forwarded to OLAF pertaining to cases having arisen from the Court's audit work

The information forwarded to OLAF pursuant to Article 2a above shall not be communicated by the Court to the Union institution, body, office or agency concerned but be treated as normal errors (without any reference to fraud) in the relevant statements of preliminary findings, unless exceptional circumstances dictate otherwise.

Article 2.c): Informing EU SAI's about suspicions of fraud in the Member States

When, as a result of audit work in the Member States, information concerning a suspicion of fraud, corruption or any other illegal activity is submitted to OLAF, a standard letter based on the specimen contained in Appendix 1 shall be sent by the Member in charge of relations with OLAF to the Head of the National Audit Institution concerned (with a copy to the Court's Member of the Member State concerned).

Article 3 - Suspicions of fraud. corruption or any other illegal activity received from third parties (denunciations)

Where third parties send unsolicited information to the Court containing allegations of fraud, corruption or any other ille-

gal activity affecting the financial interests of the Union, the Member in charge of relations with OLAF (if necessary in consultation with the Director of the chamber responsible for the audit area in question) shall, when relevant and without undue delay, forward the information, accompanied by a standard letter - a template for which can be found in the Court's audit guideline on fraud - to the Director General of OLAF.

The letter shall contain a request that OLAF:

- Acknowledges receipt of the information transmitted by the Court.
- Informs the Court as soon as possible if it has opened an investigation.
- Informs the Court of any further changes made to the investigative status of the case forwarded by the Court.

By default, the Court should protect the identity of all informants. This is in particular important for whistle-blowers.

Hence, in relevant cases, the Court should specifically inform OLAF whether the information forwarded originates from an informant who has requested that his/her identity is not disclosed by the Court, so that OLAF can take this into account.

In addition, the Member in charge of relations with OLAF shall request from OLAF an annual updating of the status of open cases sent to OLAF, including available information on the outcome of cases closed within the year in question.

Article 4 - Requests by OLAF for information

Whenever OLAF addresses to the Court requests for information or documentation relating to the Court's audit work, but outside the information transmitted by the Court in accordance with Article 2 and 3, the Member in charge of relations with OLAF shall ensure that any relevant material available at the Court is sent to the Director General of OLAF without

undue delay. Any available information will be identified in consultation with the Director of the chamber responsible for the audit area related to OLAF's request.

Article 5 - Avoidance of disruption of any OLAF investigation

The Court should avoid disrupting any OLAF investigation in progress. Therefore:

- After a case arising from the Court's audit work has been notified to OLAF, the Court shall continue its audit in accordance with its responsibilities and on condition that it does not disrupt any investigation that may be in progress.
- If the Court is aware, through a prior denunciation or information received from the managing authorities, of a possible OLAF investigation concerning an area to be audited, the Member in charge of relations with OLAF l)1ay request information from OLAF in order to take this into account.

Notwithstanding the information received from OLAF regarding the existence of ongoing investigations, the Court remains solely responsible for deciding on the subsequent actions required in the context of the Court's audit.

Article 6 -Annual reporting to the Court

The Member in charge of relations with OLAF shall every year report to the Court on the cooperation with OLAF during the previous year3.

Article 7 - Assistance to the Member in charge of relations with OLAF

In carrying out the tasks described in Articles 2 to 6, the Member in charge of relations with OLAF will be assisted by the CEAD-A Directorate which shall act as the point of contact for the other services of the Court.

Article 8 - Entry into force

This Decision cancels and replaces Decision 97-2004 of 16 December 2004. It shall enter into force on 1st December 2014.

Detailed Court guidelines will be issued to supplement the present Decision within the Court and ensure full compliance with International Standards of Supreme Audit Institutions.

Luxembourg, 20 November 2014

The book aims to be a point of reference with regard to the national and international bibliography on EU Budgetary Governance and Audit. It will entail a thorough analysis of the entire institutional and legal framework of the audit function, within the overall system of EU Budgetary Governance. The 1999 developments and their subsequent political and institutional options on EU governance, as well as the Lisbon Treaty have established several schemes pertaining the management of EU funds, and the corresponding audit schemes. Furthermore, the EU£s response to the financial crisis lead to new schemes of providing financial support to Member States, establishing new lending mechanisms and using the EU budget as collateral. These new arrangements form significant challenges for the EU£s Audit institutions at all levels. The books will seek to establish that all these activities and the relevant transactions are being audited in an appropriate and efficient manner, and to examine whether these audit schemes are actually in a position to provide a substantive assurance on the soundness of the EU Budgetary Governance. The entire analysis will seek to establish the legitimacy of EU Budgetary Governance in the weberian perspective (traditional, charismatic and rational-legal legitimacy).

Given the extent of the EU£s audit schemes, the book will comprise three volumes.

The second volume will examine the political element of the audit schemes included in EU Budgetary Governance. The increased role of the European Parliament, as well as the involvement of national parliaments, on issues relevant to the management of EU funds, has pointed out, quite emphatically, that it is necessary for all budgetary activity to be explained and justified as the parliamentary institutions are becoming more and more demanding with regard to being well informed on such issues before approving or discharging the executive£s actions with regard to the EU budget£s implementation at EU and national levels.

ΕΚΔΟΣΕΙΣ
ΠΑΝΕΠΙΣΤΗΜΙΟΥ
ΜΑΚΕΔΟΝΙΑΣ

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