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# The independence of the European Court of Auditors

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*This article considers the independence of the European Court of Auditors (ECA) from a formal, legal perspective. It argues that the primary constitutional justification behind such independence is the ECA's need to act on behalf of and defend the EU interest. The paper discusses several dimensions of independence, including the appointment process, the number of ECA Members, the independence in the ECA's functions (both from the member states and the EU institutions). Proposals for amendment of the existing legal framework are also explored, the most important of which is to put the European Parliament on an equal footing with the Council in the appointment process. Underlining that independence should not be conflated with accessibility, though, toward the end of the article the ECA is invited to further improve its communication policy and translate its findings in a more effective way.*

## 1. Introduction: The role of the European Court of Auditors and why its independence matters

The European Court of Auditors (hereinafter ECA, Court of Auditors) is the EU institution responsible for carrying out the EU's external audit, under Articles 285 and 287 TFEU. The ECA gained its status as an institution (featuring now in Article 13(1) TEU) under the Maastricht Treaty, evidence of 'clear recognition of the need to enhance the authority of the Court and to elevate it to a status equivalent to those institutions over which it had auditing power'.[1] The ECA commenced its work in 1977, effectively replacing the weaker Audit Board of the European Communities.[2] Particularly influential in its establishment was the European

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[1] Brigid Laffan, 'Becoming a "Living Institution": The Evolution of the European Court of Auditors' (1999) 37 *Journal of Common Market Studies* 251, at 263. The ECA itself welcomed this development. See, for example, 'Echanges de vues sur les modifications éventuelles à apporter aux Traites pour tenir compte des desiderata de la Cour', CCE DEC. 1990 42/90. The ECA documents cited in this article follow the HAEU reference.

[2] The Audit Board operated from 1959-1977. See, for example, Paul Stephenson, 'Sixty-Five Years of Auditing Europe' (2016) 12 *Journal of Contemporary European Research* 467.

Parliament, and notably Heinrich Aigner (later on chair of the Budgetary Control Committee), pushing for the urgent need to strengthen the external control over the EU budget.[3]

The ECA's audit functions can principally be divided into two categories: *compliance* and *performance* audit.[4] In the first case, the ECA checks the legality and regularity of transactions. The Treaty of Maastricht required the ECA to issue a Statement of Assurance (SoA)[5] 'as to the reliability of the accounts and the legality and regularity of the underlying transactions'.[6] The SoA is included in the Annual Report of the Court of Auditors and, as the Treaty specifies, it is taken into consideration by the European Parliament and the Council in the context of the discharge to the Commission in respect of the implementation of the EU budget.[7] Moreover, the ECA produces special reports which are generally associated with its other key mission, namely performance or value-for-money audit.[8] Such audit is underpinned by the 'three Es', i.e. economy, efficiency and effectiveness.[9] In addition, the Treaty states that the ECA provides an opinion on legislation pertaining to financial rules concerning the implementation of the EU budget and the prevention and fight against fraud.[10] Despite its name, the ECA is not a judicial institution: its reports contain recommendations and it does not have legally enforceable powers. Even its findings in the SoA are not compulsory upon Parliament in its discharge decision (albeit, naturally, the SoA is being taken into due consideration by Parliament and the Council). And yet, mirroring the CJEU, its Members are assigned to five chambers,[11] focusing

[3] Aigner's contribution is chiefly documented in Laura Christine Ulrich, *Roads to Europe: Heinrich Aigner and the genesis of the European Court of Auditors* (Publications Office of the European Union 2016). See, relatedly, European Parliament, *The case for a European Audit Office* (Official Publications of the European Communities 1973).

[4] See further, among others, Paul Stephenson, 'Reconciling audit and evaluation? The shift to performance and effectiveness at the European Court of Auditors' (2015) 6 *European Journal of Risk Regulation* 79.

[5] Most frequently referred to as DAS, from the French version *Déclaration d' Assurance*.

[6] Art. 287(1) TFEU.

[7] Art. 319(1) TFEU.

[8] See, for example, Roger Levy, 'Managing value-for-money audit in the European Union: The challenge of diversity' (1996) 34 *Journal of Common Market Studies* 509.

[9] See Article 30 of the EU's Financial Regulation (Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union [2012] OJ L 298).

[10] See Arts 287(4), 322, and 325(4) TFEU.

[11] These are: sustainable use of natural resources; investment for cohesion, growth and inclusion; external action, security and justice; regulation of markets and competitive economy; financing and administering the Union. See the ECA's organisation chart at: www.eca.europa.eu/en/Pages/OrganisationChart.aspx.

on different fields of audit, as well as to the horizontal Audit Quality Control Committee.[12] This is but a brief summary of the ECA's main functions.[13]

Such is the nature of the Court of Auditors' work that a crucial, arguably the most important, precondition for success is independence. Independence is a broad notion effectively entailing that an institution should operate autonomously, without external influence and pressure. It is well known that non-majoritarian institutions 'are not directly subject to political oversight or the popular vote' and therefore the 'key to their legitimacy lies in their independence and the importance of their role in fostering good government'.[14] Different dimensions of independence have been presented in the ECJ's case-law (including Advocate-General Jacobs' distinction between institutional, personal and financial independence[15]) and in the literature.[16]

The ECA has been described *inter alia* as the 'financial conscience' of the Union[17] or as the 'guardian of the EU finances'.[18] Thus, independence enables or should enable the ECA to work without political pressure, maximising its (expert) output. In addition, it is only natural that at times of financial instability EU citizens expect of the ECA to observe the highest standards of integrity and impartiality, while delivering products that will enable them to hold the EU institutions (and, in particular, the Commission, which has the overall responsibility for the implementation of the budget under Article 317 TFEU) and their member states to account. Relatedly, the EU budget is one of the key policy pillars underlined by the Commission's White

[12] That Committee 'deals with the ECA's audit policies, standards and methodology, audit support and development and audit quality control'; see: www.eca.europa.eu/en/Pages/Structure.aspx.
[13] See further Maria Luisa Sanchez Barrueco, *El Tribunal de Cuentas Europeo: La superación de sus limitaciones mediante la colaboración institucional* (Editorial Dykinson 2008).
[14] Brigid Laffan, 'Auditing and accountability in the European Union' (2003) 10 *Journal of European Public Policy* 762, at 762-763. See, more generally, Giandomenico Majone, 'The regulatory state and its legitimacy problems' (1999) 22 *West European Politics* 1; Fabrizio Gilardi, 'Policy credibility and delegation to independent regulatory agencies: A comparative empirical analysis' (2002) 9 *Journal of European Public Policy* 873; Madalina Busuioc, 'Accountability, Control and Independence: The Case of European Agencies' 15 *European Law Journal* 599 – among others.
[15] Opinion of Advocate General Jacobs in C-11/00, *Commission* v *European Central Bank*, EU:C:2002:556, paras 151-154.
[16] See, for example, Paul Magnette, 'Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model' (2000) 6 *European Law Journal* 326; Miroslava Scholten, 'Independence vs. accountability: Proving the negative correlation' (2014) 21 *Maastricht Journal of European and Comparative Law* 197; Gilardi (n 14) 880; Koen Verhoest et al., 'The study of organisational autonomy: A conceptual review' (2004) 24 *Public Administration and Development* 101.
[17] Laffan (n 14) 765.
[18] Colin Scott and Imelda Maher, 'Four meta-doctrines of regulatory accountability in the European Union' in Carol Harlow, Paivi Leino and Giacinto della Cananea (eds) *Research Handbook on EU Administrative Law* (Edward Elgar 2017) 263, at 280.

Paper on the Future of Europe.[19] Shortly after the publication of that Paper, the Commission published a specific reflection paper on the future of EU Finances,[20] to which the ECA responded in February 2018.[21] The Commission's paper rightly points out that the EU value added should be at the core of the discussion on the future of the budget, and that 'concerns and expectations of European citizens should be a major factor in shaping' it.[22] If the ECA is the 'guardian of EU Finances', it becomes clear why the question of its independence should be at the centre of the ongoing discussions on the future of the EU.

In this context, the purpose of this article is to assess different aspects of the ECA's *formal independence*. This notion should be clarified: a critical distinction relied upon in this contribution is the one between *formal* (or legal[23]) and *de facto* independence. The former refers to 'the degree of independence from politics inherent in those legal instruments which constitute and govern' the ECA, while the latter to actual, real life independence.[24] Thus, while this article is not an empirical study on what actually happens on the ground (for example, the degree of independence of ECA staff when performing on the spot visits across member states), formal independence is indispensable for auditors. According to the Lima Declaration of the International Organization of Supreme Audit Institutions (INTOSAI), which contains principles to which the ECA naturally subscribes, 'the degree of … independence [of Supreme Audit Institutions] shall be laid down in the Constitution; details may be set out in legislation'.[25] This principle accentuates, therefore, the importance of formal independence. Related to this is the observation that if 'these conditions of independence are defined in the treaty itself [then this] is a major guarantee of their respect'.[26] In other words, member states and EU institutions are well aware that no less than treaty revision is required in order to reduce the scope of the ECA's independence. Overall, therefore, it is recognised internationally that formal

[19] European Commission, 'White Paper on the future of Europe: Reflections and scenarios for the EU27 by 2025', COM(2017)2025. The five scenarios presented for the future development of the EU correspond to different implications for the budget; see an overview on p. 29.
[20] European Commission, 'Reflection paper on the future of EU Finances', COM(2017) 358.
[21] European Court of Auditors, 'Future of EU finances: Reforming how the EU budget operates' (2018).
[22] European Commission (n 20) p. 11.
[23] Busuioc (n 14) 602. The terms are used interchangeably, but the article will refer to 'formal independence' hereinafter.
[24] Chris Hanretty and Christel Koop, 'Measuring the formal independence of regulatory agencies' (2012) 19 *Journal of European Public Policy* 198, at 199 (referring to agencies more generally).
[25] See INTOSAI Lima Declaration, Section 5, paragraph 3, available at: http://www.issai.org/en_us/site-issai/issai-framework. According to the same provision, and in addition, 'adequate legal protection by a supreme court against any interference with a Supreme Audit Institution's independence and audit mandate shall be guaranteed'.
[26] Magnette (n 16) 330 (referring to the ECB).

independence is a prerequisite in order to insulate the auditors from external interference, without necessarily guaranteeing, of course, real-life independence.

Although the present contribution focuses on the Court of Auditors, it seeks to contribute to the broader debate on the independence of supranational institutions in the EU, and in particular that of the Commission, the European Central Bank (ECB) and the Court of Justice. Many of the questions surrounding the ECA's independence can be of relevance to the abovementioned institutions, which have, of course, different mandates and functions. That being said, the article generally does not seek to answer the question of the ECA's accountability, which can indeed be seen as the other side of independence.[27] However, the penultimate section will provide some remarks that pertain (also) to the ECA's accountability.

The article is structured as follows. The next section poses a pivotal question that informs the analysis throughout the piece: what is the key purpose of the ECA's independence? The answer is that the primary constitutional justification behind such independence is the need to act on behalf of, and safeguard, the EU interest. The subsequent sections explore different aspects of the existing legal framework, namely the appointment and number of ECA Members, and the ECA's independence in its functions (with separate sections focusing on the member states and the EU institutions). The penultimate section clarifies that independence should not be conflated with lack of accessibility. The concluding remarks summarise the discussion.

## 2. Why should the ECA be independent?

On this point, two potentially conflicting views exist, also within the Court of Auditors. On the one hand, some suggest that the ECA should be independent merely because it is an audit institution. Simply put: 'since we are auditors, we are/ have to be independent'. On the other, it can equally be argued that the ECA should be independent because it should act on behalf of, and defend, the Union interest. This account submits that the Treaty and several further rules and sources confirm that the primary rationale behind independence is the need to act on behalf of the EU interest. Both positions will be examined in turn. It is noteworthy, in this respect, that personal (i.e. of the members) and institutional independence are interconnected

[27] For an account exploring *inter alia* the 'precarious balancing act' between independence and accountability (with regard to the ECB and its position under the Single Supervisory Mechanism Regulation) see Gijsbert ter Kuile, Laura Wissink and Willem Bovenschen, 'Tailor-made accountability within the Single Supervisory Mechanism' (2015) 52 *Common Market Law Review* 155, at 164 *et seq*.

issues as the 'independence of Supreme Audit Institutions is inseparably linked to the independence of its members'.[28]

According to the first position, and further to entrenched views within the auditing profession, auditors' independence is a *state of mind*, 'characterised by integrity and an objective approach to professional work'.[29] A key principle within the profession is the duty of 'professional skepticism', i.e. 'an attitude that includes a questioning mind, being alert to conditions which may indicate possible misstatement due to error or fraud, and a critical assessment of audit evidence'.[30] The above applies to the ECA as well: it is clearly an external audit institution, and its methodology, policies and standards do refer to internationally developed norms within the profession. Besides, through international cooperation, the ECA *contributes* to the development of these standards.[31] However, it is essential to pose the question as to whether in the existing EU constitutional framework, the *primary* justification of granting the ECA the degree of independence it enjoys (examined in further detail below) is the function itself, i.e. auditing. A careful examination of provisions of primary law and other sources points in a different direction: the ECA's independence should be viewed in the context of acting on behalf of, and defending, the EU interest.

To begin with, Article 285 TFEU provides that the ECA's Members 'shall be completely independent in the performance of their duties, *in the Union's general interest*'. A similar formulation is found in the Preamble to the ECA's Code of Conduct.[32] Importantly, the treaty can be interpreted to mean that the Members do not necessarily need to have a background in auditing. Thus, Article 286(1) TFEU stipulates that 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'. As will be seen below, an ongoing debate takes place within the European Parliament (but also within the Court of Auditors itself) as to whether this provision was wisely

[28] Lima Declaration (n 25) Section 6, paragraph 1.
[29] See, for example, Laura Macgregor and Charlotte Villiers, 'Independence of auditors' (1998) 9 *European Business Law Review* 318.
[30] International Federation of Accountants, 'Handbook of international standards on auditing and quality control' (2009), p. 91.
[31] See, for example, European Court of Auditors, 'Audit methodology', available at: www.eca.europa.eu/en/Pages/AuditMethodology.aspx. See further Paul Stephenson, 'Norms, legitimacy and institutional independence: the active role of the European Court of Auditors in setting international standards' (2017) 13 *Journal of Contemporary European Research* 1144.
[32] Code of Conduct for the Members of the Court, available at: www.eca.europa.eu/Lists/ECADocuments/CODEOFCONDUCT_MEMBERS/CODEOFCONDUCT_MEMBERS_EN.PDF.

drafted. A comparison with the respective provision concerning the judges of the Court is revealing: according to Article 253 TFEU, a juridical background is essential.[33]

Some historical background is also useful here. When the first Members of the ECA undertook their solemn oath in 1977, the then President of the ECJ opined that the work of the Court of Auditors should be placed in the same framework surrounding the work of the ECJ and the Commission, and it is in this context that its independence should be viewed.[34] Thus, although some might consider that such independence is 'self-evident', the respective provisions underlie that 'above the member states there exists a European Community which is authorized and called upon to act independently … Accordingly, the Treaties refer to the "general interest *of the Community*" which we are bound to serve in the performance of our duties'.[35]

To be sure, both notions (independence stemming from the auditing profession, and independence to defend the Union interest) are contested. On the one hand, it cannot be claimed that the regulation of the auditing profession is harmonised across Europe, nor that it has developed a concrete set of professional standards (including procedures and methodologies) to which all auditors subscribe. This is partly due to the divergent auditing traditions across member states, as will be shown below. True, the Supreme Audit Institutions (SAIs) subscribe to declarations drafted by international bodies (such as the Lima Declaration) but these documents use, understandably, vaguely drafted formulations and principles which are not legally enforceable. On the other, the notion of EU interest, albeit not having received the deserved scholarly attention, cannot be taken for granted either. The notion is frequently examined with regard to the Commission's role to 'promote the general interest of the Union'.[36] On this point, commentators have queried, for example, whether the Commission always represents the Union interest when initiating legislation,[37] the extent to which the socialisation within the Commission leads to support for international norms,[38] or the possible impact of

[33] According to Article 253 TFEU, the Judges and Advocates-General 'shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence'. See also Article 254 TFEU for the General Court: its judges 'shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office'.
[34] Address by President Kutscher delivered on 25 October 1977 (Solemn Declaration by the Members of the Court of Auditors), p. 1.
[35] Ibid, p. 2.
[36] Art. 17(1) TEU.
[37] Nikos Vogiatzis, 'Between discretion and control: Reflections on the institutional position of the Commission within the European citizens' initiative process' (2017) 23 *European Law Journal* 250.
[38] Liesbet Hooghe, 'Several Roads Lead to International Norms, but Few Via International Socialization: A Case Study of the European Commission' (2005) 59 *International Organization* 861. On the tensions between

comitology[39] – among others. Accordingly, it is not a foregone conclusion that the EU interest as a term can be conceptualised homogeneously or has the same implications for all the supranational institutions. The aforementioned degree of uncertainty about the precise contours of the notions suggests that these choices are neither one-dimensional nor mutually exclusive. Consequently, the article submits that the *primary* justification regarding the ECA's independence is the need to defend the EU interest. Moreover, it is remembered that the present article is concerned with the ECA's *formal* independence, i.e. the *applicable legal framework*; and the above analysis has shown in which direction that framework mainly points.

Framing the ECA's independence in the context of the need to safeguard the EU interest is not a purely theoretical issue but has a number of implications: subsequent sections will examine the criteria and process of appointment for the ECA Members, as well as the overall number of Members as such, through the prism of this dichotomy. The prioritisation of the EU interest over the status of auditor as such also pertains to certain aspects of the ECA's relations with member states and EU institutions. Significant choices of constitutional and institutional design, therefore, depend on where precisely the emphasis should be placed. More generally, the supranational character of the institution effectively entails refraining from defending the interests of member states, and especially that of the respective country of the Member. Moreover, and with the necessary reminder that the earlier remarks should not be viewed as inviting the ECA to depart from widely recognised standards and principles within the auditing profession, the possibility that the latter might one day be faced with developments in the profession which, if followed, cannot automatically be deemed to serve the EU interest, cannot be ruled out. Obviously, the ECA would have to resist subscribing to such developments, and an appropriate constitutional justification is its mission to safeguard the EU interest.

Even though one might be excused for thinking that Article 286 TFEU may result in losses in expertise (or, indeed, independence), there are benefits, too: the 'presence of politicians, which at times created problems with those who came from a professional auditing background, has actually assisted the Court to chart the difficult waters of interinstitutional relations'.[40] Thus, to return to Article 286(1) TFEU, an appropriate constitutional justification behind this diversity (in terms of Members' background) is the need to safeguard the EU interest, and it is

European and national identity see also Irène Bellier, 'A Europeanized elite? An anthropology of European Commission officials' (2000) 14 *Yearbook of European Studies* 135.

[39] Thomas Christiansen, 'Tensions of European governance: Politicized bureaucracy and multiple accountability in the European Commission' (1997) 4 *Journal of European Public Policy* 73, at 84.

[40] Laffan (n 1) 255.

through this lens that the term *especially qualified* may be understood. To be sure, the authoritative interpretation of this rather ambiguous term can only be provided by the ECJ, if such opportunity arises; yet in the author's view, as currently drafted, and if contrasted with Article 253 TFEU, this provision may not be interpreted to mean that the ECA Members should *stem exclusively* from the auditing profession. This is not, of course, to suggest that the ECA should be interfering with political decision-making as this would, indeed, undermine its independence. Ultimately, this question is inextricably linked, in the first instance, with the criteria and procedure behind the appointment of the ECA Members, which is examined below.

### 3. The appointment of the ECA Members

The appointment of the ECA Members is regulated by the Treaty, while the process has remained unchanged since 1977, despite several legitimate calls by the European Parliament (and especially the Budgetary Control Committee) to undertake a more substantial role therein. In this context, Article 286(2) TFEU provides, firstly, that the Members are appointed for a renewable term of six years and, secondly, that 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'. From this it follows that the European Parliament does not have a right of consent, either for individual Members or for the ECA College as a whole (as is the case with the Commission under Article 17(7) TEU).[41] It is well known that the European Parliament has relied on this particular power to scrutinise and effectively replace unsuitable candidates for the Commission that were nominated by member states. The procedure under Article 286(2) TFEU also entails the absence of a panel similar to the one under Article 255 TFEU for the judges of the Court - a panel which, on balance, is perceived to have contributed towards limiting the arbitrariness of certain national selection processes.[42]

Since the establishment of the ECA in 1977, the European Parliament has consistently reported instances of delayed submissions of candidacies, or even appointments despite a clear negative opinion by the Budgetary Committee and/ or the plenary. In 1983, for example, and in the context of nominations which were approved by Parliament, the Budgetary Committee

[41] That Article states *inter alia* that the 'President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.'

[42] See further Tomáš Dumbrovský, Bilyana Petkova and Marijn van der Sluis, 'Judicial appointments: The Article 255 TFEU advisory panel and selection procedures in the member states' (2014) 51 *Common Market Law Review* 455.

'deplore[d] the fact that Parliament had relatively little time to deliberate'.[43] In 1989, because of the belated submission of the dossiers, Parliament declared itself incompetent to provide an opinion before the expiration of the Members' respective mandates.[44] After the Treaty of Maastricht, which elevated the ECA to an institution, Parliament seized the opportunity to contextualise the nomination process, and pose *inter alia* the following question: should the ECA Members be considered as public auditors or politicians?[45]

> 'If they are to be considered as politicians then their nomination by their national governments is the proper procedure; in which case, however, the Court of Auditors cannot be considered as the Community's public auditor but as the forum where national governments discuss and settle the problems of the Community's finances in a political way. This is clearly not what the Treaties provide.'[46]

The ideal way forward, according to Parliament, was to change the unanimity rule in the Council and to grant Parliament a right of assent. The Treaty of Nice changed the unanimity rule to qualified majority.[47] In practice, member states within the Council generally do not object to the nominee proposed by the respective government.

Perhaps the most substantial contribution by Parliament to the appointment method was provided in a 2014 resolution on the future role of the Court of Auditors.[48] Therein, Parliament (relying also on earlier resolutions adopted in the nineties) reiterated that 'some appointments have given rise to differences of opinion between Parliament and the Council, the persistence of which risks harming the good working relations of the Court with the aforementioned institutions and, possibly, having serious negative consequences for the credibility, and hence the effectiveness, of the Court'.[49] Parliament effectively suggested that when a candidate's weaknesses during the hearing are exposed, yet this is ultimately ignored by the Council (given that the Parliament does not have the power to block the appointment), the credibility of this

[43] Report drawn up on behalf of the Committee on Budgetary Control embodying the opinion of the European Parliament on the appointment of six members of the Court of Auditors of the European Communities, PE 86.453/fin, point 2.
[44] 'Consultation du Parlement européen sur la nomination de 6 membres de la Cour des comptes', CCE INF. 1989 91/89.
[45] Explanatory Statement of the Report of the Committee on Institutional Affairs on the independence of members of the Community institutions (1994) PE 201.997/fin, point 28.
[46] Ibid.
[47] See now Art 286(2) TFEU, in conjunction with Art 16(3) TEU.
[48] European Parliament resolution of 4 February 2014 on the future role of the Court of Auditors. The procedure on the appointment of Court of Auditors' Members: European Parliament consultation (2012/2064(INI)).
[49] Ibid, recital I.

particular Member, once assuming office, is obviously undermined. Moreover, when the Council appoints Members in the simultaneous 'unfavourable' opinion by Parliament, this is 'incomprehensible and shows a lack of respect for Parliament'.[50] Drawing a comparison with the nominees for the Court of Justice, Parliament criticised the Council effectively for applying double standards, since it has always followed (and without an explicit Treaty obligation) the recommendations of the Article 255 TFEU panel.[51]

Parliament then went on to outline its vision and criteria for the selection of suitable candidates for the Court of Auditors. It proposed a number of criteria, including the following: high level professional experience in public finance, auditing and management; good auditing record and command of at least one of the working languages of the EU; on the date of appointment, the absence of holding any political office; the age of candidates with an expectation that on the date of appointment candidates may not be over 67; high standards of integrity and morality; the need to respect gender balance should be taken very seriously, in that the Council should propose at least two candidates from each member state, one being a woman and one being a man.[52] Moreover, the Council should provide all the necessary details concerning the career background of nominees and proactively cooperate with the respective national authority with a view to communicating Parliament's criteria.[53]

Parliament's criteria are a more elaborate version of earlier resolutions alerting the Council to similar issues.[54] On this basis, it emerges that Parliament's preference is for candidates (and therefore Members) to have a background in auditing. This is not a stance to be criticised as Parliament's aim is to ensure expertise in light of the nature of the tasks involved and, equally important, insulation from the respective domestic political arena. On the other hand, the appointment process cannot be dissociated from the main constitutional platform upon which independence should be based, namely the need to act on behalf of the EU interest. Seen through this lens, it cannot be excluded that Members who might not necessarily have a background in auditing could contribute to the fulfilment of the ECA's core mission.

[50] Ibid, recital J. The most recent incident concerned the Polish nominee (now Member) of the ECA; see: www.europarl.europa.eu/news/en/press-room/20160407IPR21780/parliament-backs-four-out-of-five-nominees-to-the-european-court-of-auditors.
[51] Ibid, recital P.
[52] Ibid, points 43-44.
[53] Ibid, point 43.
[54] See, for example, European Parliament resolution of 17 November 1992 on the procedure for consulting the European Parliament on the appointment of Members of the Court of Auditors, OJ C 337/ 51; European Parliament resolution of 19 January 1995 on procedures to follow when Parliament is consulted in connection with appointment of Members of the Court of Auditors, OJ C 43/ 75.

Conversely, it is not automatically certain that an excellent auditor in one specific member state will adapt themselves to the collegiate, EU-wide nature of the ECA's role. And indeed, the ECA has been a diverse college which has included, among others, politicians,[55] academics or lawyers.[56]

In any event, in order for the European Parliament to have a meaningful role in the process, a revision of Article 286(2) TFEU is required in order to grant the European Parliament a *right of consent*. This has been an ongoing request by Parliament effectively since the establishment of the ECA, and it is only through this revision that the aforementioned delays, miscommunication and, in remote cases, failure to comply with Parliament's negative opinion, can be dealt with. The experience with the hearings of the nominated Commissioners confirms as much. If such amendment takes place, it will then be left to the European Parliament and, in particular, the Budgetary Control Committee, to determine the suitability of the proposed candidates by the Council, taking into account the supranational character of this EU institution and the corresponding mission to protect the EU interest. If the Committee concluded that only esteemed auditors would pass this threshold, then so be it. It is only through meticulous scrutiny by Parliament and application of specific criteria (such as the ones that have already been prepared) in the selection that the possibilities of complete independence from member states can be maximised.

It may be asked whether there is scope to replace the existing appointment scheme with a panel inspired by Article 255 TFEU; if such panel were to be established, this would probably move the ECA towards a clearer technocratic direction. Yet that option would raise several challenges: Parliament is central to the discharge procedure, and therefore it has legitimate interests to be involved in the ECA's appointment procedure. In addition, and relatedly, an expert panel similar to the one for the CJEU would nullify the persistent 'fight' (for several decades) of the European Parliament to have a more meaningful role in that process; lastly, such proposal would probably find very limited support by both Parliament and the Council.

## 4. The number of ECA Members

[55] Who have worked on establishing inter-institutional relations; see Laffan (n 1) 255.
[56] Whose expertise may be employed for strategic decisions concerning legal powers entrusted upon the ECA under the Treaty, and most notably the faculty of the ECA to bring an action for annulment under Article 263(3) TFEU in order to protect its prerogatives.

The number of ECA Members also pertains to formal independence as this is, of course, a matter regulated directly by the Treaty, which provides that the ECA should be composed of one national per member state.[57] However, and especially post-Maastricht, several claims have been advanced that the number of the ECA Members should be reduced. The main argument is the need to increase the ECA's effectiveness in audit, to attribute a more technocratic character to its work, and therefore to insulate it from any political pressure. Effectiveness was the key argument in Parliament's 1994 report on the independence of the Community institutions.[58] In the earlier Intergovernmental Conference on Political Union the UK delegation had submitted a proposal to redesign an ECA of twelve Members, assisted by a Board of Management.[59] The UK continued to push for a more flexible ECA via a report published in 2001 by the House of Lords European Union Committee. Therein, the House of Lords concluded that in light of the enlargement, an ECA of 'over 20 full-time executive members would be unwieldy, sluggish and ineffective'.[60] This time, that Committee proposed 'the impartial appointment of a highly-qualified chief executive, supported by a large team of audit staff, reporting to a part-time, non-executive board of representatives from each of the Member States' (in order to maintain national representation as well).[61] Claims advancing the ECA's professionalisation with a clear focus on the auditing profession, replacing the principle of geographical representation, have also been advanced more recently.[62] Such proposals bring to the fore the aforementioned potential tensions between (partly) divergent visions of independence: that one rooted in the auditing profession, and the defence of the EU interest.

While there is certainly merit to these arguments (after all, some of these proposals have been advanced by former Members of the ECA), this does not necessary mean that the ECA itself as an institution has endorsed this amendment of the legal framework. In 1991, in a letter addressed to the remaining Members of the ECA, the (then) President opined that a pyramid

[57] See Art. 285 TFEU.
[58] Explanatory statement (n 45) point 28.
[59] 'Note from the United Kingdom delegation to the Intergovernmental Conference on Political Union, CONF-UP 1737/91' (1991) pp. 7-8.
[60] House of Lords Select Committee on European Union, 12th report, 'The European Court of Auditors: The Case for Reform' (2001) Summary of conclusions, point 6.
[61] Ibid.
[62] See, for example, Jules Muis, 'The mandate of the European Court of Auditors re-examined' in Committee on Budgetary Control, *Public Hearing: Future role of the European Court of Auditors: Challenges ahead and possible reform* (2012) p. 68. Muis is a former Internal Auditor of the Commission, and proposed a scheme with a Chair or President and a number of Directors. See also Jan Karlsson, 'Interview: Towards a European Council of Audit?' Journal Cour des comptes européen 7/2012, p. 5-6. Karlsson is a former ECA President, and proposed an Auditor General, assisted by two deputies, working alongside a European Council of Audit with one Member per country.

structure with an executive director would conflate the responsibilities and could lead to exactly opposite results (than the intended efficacy).[63] Moreover, in 2000 the ECA firmly objected to a reduction in the number of Members, and this despite the forthcoming enlargement of the Union.[64] The arguments that were advanced merit particular attention: 'any change to this rule might trigger negative reactions among Member States afraid of ceasing to be "represented" at Court level and, inevitably, could trigger political negotiations seeking to compensate for this in other institutions or, even, within the institution itself'. Furthermore, and drawing an analogy with the CJEU, the ECA submitted that the representation of each 'national financial framework' enables the auditing of Community finances to benefit from each audit and financial tradition, lends legitimacy to the ECA's work, and augments the commitment of national audit institutions to the 'objectives and application of Community controls'.[65] That would be even more necessary in light of the forthcoming enlargement of the Union. These arguments found support at the time within the European Parliament.[66] In fact, it appears that the chamber structure, inspired by the Court of Justice and eventually implemented in 2004 (previously the ECA worked under 'audit groups'), was a creative way to propose gains in efficiency while maintaining the 'one Member per state' rule.[67]

In this context, the aforementioned arguments advanced by the ECA cannot be rejected outright, and perhaps most importantly the point about the varying auditing traditions across Europe, particularly because the ECA (and therefore its Members, too) need to coordinate visits at the member states and be in contact with domestic Supreme Audit Institutions (SAIs). More fundamentally, in the author's view the case has not been made as to why the ECA should be 'more independent' than other *supranational institutions*, and primarily the Court of Justice,[68] which is also composed of one judge per member state[69] (although a comparison with the Commission[70] may not be entirely inappropriate, too). To return to the Court of Auditors, such

[63] See 'Révision des traités', CCE INF. 1991 47/91.
[64] See 'Draft contribution from the European Court of Auditors to the Intergovernmental Conference, Annex I' (2000)
[65] Ibid, point 1.1.
[66] Ibid, Annex III.
[67] Ibid, and also Draft contribution, Annex I (above n 64).
[68] It is noted, in this respect, that the latest reform of the Court as an institution eventually led to a solution that the General Court will still be composed of two nationals per member state by September 2019. See Article 1 of Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union. For a critical discussion see Alberto Alemanno and Laurent Pech, 'Thinking justice outside the docket: A critical assessment of the reform of the EU's court system' (2017) 54 *Common Market Law Review* 129.
[69] Art. 19(2) TEU.
[70] Despite the wording of Article 17(5) TEU, the idea to reduce the size of the College of Commissioners has not materialised to date. See European Council Decision of 22 May 2013 concerning the number of members of the

proposals essentially seek to attribute the technocratic character and degree of independence of the ECB. Contrary to the ECB however, which has a clear mandate to prioritise price stability, the Treaty is silent as to how the ECA will perform its audit functions (this point is returned to below). One could also argue that, while the Treaty guarantees the independence of national central banks,[71] there is no reference to the independence of SAIs. One cannot therefore draw direct comparisons between monetary policy in the EU and external audit.

Thus, it is submitted that other proposals should be explored (and exhausted) first before resorting to a more radical amendment of the ECA's formal independence with regard to the number of Members, which, in any event, is unlikely to find support in light of the almost certain reactions by member states. Again, the focus should be on the appointment process, rather than the number of Members. By granting a stronger role to the European Parliament (as the earlier section argued), it may simultaneously be possible to achieve most of the aims advanced by the proponents of a smaller ECA.

## 5. Independence in the ECA's functions: General remarks

The legal framework concerning the ECA's independence in its functions is rather robust. To begin with the Treaty text, Article 286(3) TFEU stipulates that the ECA Members in 'the performance of [their] duties … shall neither seek nor take instructions from any government or from any other body' and 'refrain from any action incompatible with their duties'. The subsequent paragraph adds that during their term of office, the Members should not 'engage in any other occupation, whether gainful or not', and that when assuming office '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'.[72] Only the Court of Justice can remove an ECA Member from office when finding that she or he no longer fulfils the requirements; otherwise, the security of the post is guaranteed by the Treaty, which provides that the term ends only by death, resignation and normal

European Commission [2013] OJ L 165/98. As is known, that decision was adopted to accommodate Irish concerns with respect to the Lisbon Treaty.

[71] Art. 130 TFEU.

[72] See Art. 286(4) TFEU.

replacement.[73] The privileges and immunities applicable to the CJEU judges also apply to the ECA Members.[74]

The ECA's Rules of Procedure, which require the *approval of the Council* under Article 287(4) TFEU, are silent on the concept of independence, merely referring to the aforementioned Treaty provisions.[75] By contrast, the ECA's Implementing rules,[76] which are adopted by *the ECA alone*, elaborate on what independence means in the performance of the Members' duties. The first Implementing rules were adopted by the Court of Auditors in 2004, and were followed by several amendments. Criteria have been established therein to facilitate the assessment as to whether the independence standards are met.[77] Importantly, reporting obligations have been imposed upon the Members to notify outside activities to the President of the Court of Auditors; these are assessed by an Ethics Committee established for this purpose.[78] Similar obligations apply to former Members within the first year after leaving the office.[79]

Implementing a recommendation by the first international peer review of the ECA's work,[80] and mirroring international developments in audit,[81] the ECA adopted a Code of Conduct for its Members,[82] which contains additional ethical rules with a view to insulating them from potential conflict of interest. The Code elaborates on the principles of independence (the first article in the Code),[83] impartiality (in particular avoiding conflict of interest),[84] integrity,[85] and

[73] Arts 286(5) and 286(6) TFEU.
[74] Art. 286(8) TFEU.
[75] See Article 3 of Rules of Procedure of the Court of Auditors of the European Union [2010] OJ L 103/1 (hereinafter 'Rules of Procedure').
[76] Decision No 38/2016 laying down the rules for implementing the Rules of Procedure of the Court of Auditors, available at: www.eca.europa.eu/Lists/ECADocuments/IMPLEMENTING_RULES_2016/IMPLEMENTING_RULES_2016_EN.pdf (hereinafter 'Implementing rules').
[77] These are: the activity does not undermine the Court's impartiality; there is no conflict of interest; the activity does not take up an excessive amount of time; and does not bring any pecuniary gain. See Article 5(2) of the Implementing rules.
[78] The composition and duties of the Ethics Committee are described in Articles 33 and 34 of the Implementing rules. Under Article 33(1), the 'Committee shall comprise three permanent Members and three alternate Members. Both groups of Members shall include two Members of the Court and a person from outside the Court [of Auditors]'.
[79] Art. 6(2) of the Implementing rules.
[80] See 'International peer review of the European Court of Auditors' (2008), available at: www.eca.europa.eu/Lists/ECADocuments/PEERREVIEW2008/PEERREVIEW2008_EN.PDF, point 43.
[81] See, for example, INTOSAI Code of Ethics, available at: www.intosai.org/issai-executive-summaries/view/article/issai-30-code-of-ethics.html.
[82] See above n 32 (hereinafter the 'Code').
[83] That article adds that 'independence is incompatible with applying for, receiving or accepting from any source external to the Court any benefit, reward or remuneration which may be linked in any way 'with the duties of a Member of the Court'.
[84] See Art. 2 of the Code.
[85] Art. 3 of the Code.

commitment.[86] The publication of the Members' declarations of interest is an important step in this direction.[87] The Code assigns monitoring tasks to the President and, further to the corresponding Implementing rules, decision-making and interpretative responsibilities regarding outside activities and (more generally) any other ethical considerations to the Ethics Committee.[88] Contrary to the INTOSAI Code, the ECA Code does not refer to competence, despite the recognised need for auditors to be not only independent, but also 'competent'.[89] Here again, the possibility of divergent professional backgrounds of Members in the Treaties is of relevance – a matter linked with the dual rationale (auditing profession and EU interest) for independence that was discussed above.

Overall, therefore, the legal framework concerning the degree of ECA's independence in the performance of its duties is robust. The Treaty contains sufficient guarantees, which are crystallised in the Implementing rules and the Code of Conduct. The presence of an Ethics Committee is certainly a step towards further transparency and ethical governance. It should be noted that the more elaborate conditions for independence were drafted by the Court of Auditors itself, either via the Implementing rules or the Code, without the participation of the Council. In other words, the fact that the Rules of Procedure (requiring the Council's approval) are effectively silent on this question gives latitude to the Court of Auditors to adjust these standards and respond to challenges and recommendations from the public auditing world. Differently put, it is further confirmation in itself of the ECA's independence. After all, this practice corresponds to international standards pointing to the discretion of SAIs in the performance of their work: and in any event, the ECA itself is in a better position to identify what could possibly be a threat for its smooth operation. On the other hand, it should equally be acknowledged that the latitude the ECA (plausibly) enjoys to draft the more precise

[86] Art. 4 of the Code. This principle mainly refers to absence of engagement with a political office or outside activity incompatible with their duties for the duration of the mandate.
[87] Art. 2(4) of the Code. This amendment to an earlier version of the Code stemmed from persistent calls by the European Parliament (pushing the ECA to force its Members to publish particularly their financial declarations), and also from similar developments in other EU institutions, and notably the Commission and the European Parliament. See Vitor Caldeira, 'Revised Code of conduct for the Members of the Court' DEC 6/12, Explanatory note, point 5.
[88] Art. 4(5) of the Codes and Arts. 5 and 6 of the Implementing rules. Under Article 34(1) of the Implementing rules, the Committee is responsible for the interpretation of the Code.
[89] Christopher Humphrey, Peter Moizer and Stuart Turley, 'Independence and Competence? A Critical Questioning of Auditing' in Cheryl Lehman (ed.) *Independent Accounts (Advances in Public Interest Accounting, Volume 12)* (Emerald Group Publishing 2006) 149. Competence 'relates to the ability to execute the basic audit task of discovering errors and omissions. The difficulty for auditors is that there is no guaranteed process that will allow them to find all material errors and omissions, and so there will always be a residual risk that they have failed to find something' (ibid, at 158).

conditions for independence brings to the fore the tension between independence and other interests, and notably accountability and scrutiny.

Having discussed the legal framework concerning the ECA's functions in more general terms, it is now appropriate to examine separately the ECA's independence from the member states, before moving on to the EU institutions.

**6. Independence from member states**

The earlier discussion on the appointment procedure is of direct relevance to the ECA's independence from member states. Leaving this issue aside, this section will inquire into the independence from member states once the Members have assumed office. It will be seen, however, that this question cannot be insulated from the broader budgetary arrangements in the EU. Even though the Commission formally assumes responsibility for the implementation of the EU budget under Article 317 TFEU,[90] approximately 80% of the EU budget falls under shared management, whereby the Commission assumes a monitoring role but effectively funds are distributed and expenditure is managed by the member states. And it falls upon the ECA to provide an opinion *also* regarding the implementation of the budget at the domestic level: this is the ECA's most challenging task.

The ECA cannot but work with the national authorities and/or the SAIs of the member states. To that end, the Treaty grants the ECA significant powers which pertain to the domestic level. The Members perform on the spot checks in the member states, 'including on the premises of any natural or legal person in receipt of payments from the budget'.[91] The ECJ's case-law has clarified that member states are normally not expected to object to such audit visits.[92] Further, the Treaty provides that 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*.'[93] According to the same provision, '[t]hese bodies or departments shall inform the Court of Auditors whether they

[90] Note, however, that Article 317 TFEU states that the Commission 'shall implement the budget *in cooperation with the Member States*'.
[91] Art. 287(3) TFEU.
[92] Case C-539/09, *Commission* v *Germany*, EU:C:2011:733. The ECJ examined whether the German Federal Ministry of Finance's refusal to a planned audit by the Court of Auditors was incompatible with the Treaties. It found that the audit in question was directly linked to the ECA's powers under the Treaties and that Germany had failed to fulfil its obligations.
[93] Art. 287(3) TFEU (emphasis added).

intend to take part in the audit'. The fact that the domestic authority is notified, but not obliged, to take part in the audit 'confirms the autonomous nature of the Court [of Auditors]'s audit rights in the member states'[94] as the audit will be carried out regardless of the presence or even consent of the national audit office. Any document or information 'necessary to carry out its task' shall be forwarded to the ECA by other EU institutions, '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'.[95]

The clause referring to a 'spirit of trust' between the ECA and the national authorities did not feature in the Budgetary Treaty of 1975 (establishing the Court of Auditors) but was only added in the Amsterdam Treaty. A historical examination of the initial tensions between the ECA and certain SAIs or other domestic authorities can explain the rationale behind this welcome addition. In 1978, for example, the ECA had to underline its 'very extensive' investigatory powers under the Treaty, which 'should be given wide interpretation'.[96] The ECA added that the meaning of the term 'liaison' in what is now Article 287(3) TFEU 'is to enable the national audit bodies to take part in the audits, and cannot be interpreted as *the gateway* to the [ECA's] operation in the member states'.[97] In 1981, the French Court of Auditors required clarifications as to how on-the-spot visits would be conducted, insisting that a member of the French Court or another official be present (something that the Treaty clearly permits). However, the proposal to include in the ECA's reports replies and observations by national SAIs was found impractical.[98] Similar exchanges took place at the time with the UK Parliamentary Committee on Public Accounts.[99] Realising that it would come across different types of national bodies in receipt of funds from the EU budget, as well as different kinds of questions unravelled during the audit,[100] the ECA was quick to arrange several meetings with national liaison officers,

[94] Jan Inghelram, 'The European Court of Auditors: Current legal issues' (2000) 37 *Common Market Law Review* 129, at 139.
[95] As Inghelram (n 94) notes, the reference to 'any competence department' is evidence of 'non-interference by [EU] law in the structures of the member states'.
[96] See 'Rapport de contrôle: produits hors annexe II' CCE DEC. 1979 98/79, 'Annexe IV: Visit to private undertaking in the Federal Republic of Germany', in particular p. 6. The representatives of the Federal Ministry of Finance in Germany objected to a visit to private undertakings by the Court of Auditors, questioning its powers.
[97] Ibid, p. 9 (emphasis added).
[98] See 'Lettre du 5 février 1981 au Premier Président de la Cour des comptes française', CCE DEC. 1981 21/81.
[99] See 'Enquiry of Committee on Public Accounts of United Kingdom Parliament into the work of the Court' CCE DEC. 1981 33/81.
[100] See: 'Audits in member states' CCE DEC. 1978 283/78. Such questions/ issues pertained to – among others - arithmetical errors, varying degrees of tightness of control or even sincere efforts to apply the spirit of the applicable regulations in the simultaneous lack of sufficient administrative resources.

which included fruitful discussions as to how the ECA should coordinate in a more effective way its approach regarding member states visits.[101]

More generally, the ECA is a member of the Contact Committee of the Supreme Audit Institutions of the European Union, an 'informal' and 'non-hierarchical' form of governance[102] whose aim is to foster collaboration between the national and the European external audit institutions.[103] The ECA took advantage of this informal setting to exchange views on several items of mutual concern, such as the supply of information, the contradictory procedure, access to private recipients of grants, among others.[104] However fruitful the relations with most SAIs might have become, the fact that the ECA does need to provide an assessment of the implementation of the budget at the domestic level prompts a number of difficult questions.

To begin with, should the ECA be 'naming and shaming' member states if they underperform, or given that the Commission is the main auditee, criticisms vis-à-vis the member states must be limited? In the absence of any guidance from the Treaties as to how its reports should be presented, the ECA has generally decided to do the latter. An empirical study for the years 1996-2001 found that the ECA preferred to refer to the member states as a whole, and even more so in the SoA part of the Annual Report, where references to individual member states were very infrequent.[105] Besides, and faced with the impossibility to trace every transaction at the domestic level, the ECA opted for a 'systems-based approach' to auditing. This assumes is 'that every organization must create its own internal control mechanism, and that external auditors can – to a certain extent – rely on these internal controls'.[106] The ECA tests this model via a sample of transactions[107] with a view to 'presenting to the discharge authority observations on significant shortcomings and thus giving a "true and fair" view of the use' of

[101] See, for example, 'Compte rendu de la deuxième réunion des agents de liaison des autorités supérieures de contrôle des Etats membres et de la Cour des comptes des Communautés européennes' CCE DEC. 1980 5/80.
[102] Hartmut Aden, 'The European Court of Auditors and its relationship with National Independent Audit Institutions: The evolving audit function in the EU multilevel system' in Michael Bauer and Jarle Trondal (eds) *The Palgrave Handbook of the European Administrative System* (Palgrave Macmillan 2015) 313, at 320-321.
[103] See: www.eca.europa.eu/sites/cc/en/Pages/About.aspx.
[104] See 'Note au President et aux membres de la Cour des comptes' CCE DEC. 1980 108/80.
[105] Nico Groenendijk, 'Assessing member states' management of EU finances: An empirical analysis of the Annual Reports of the European Court of Auditors, 1996-2001' (2004) 82 *Public Administration* 701, at 713-714.
[106] Ibid, 706. It is an approach widely used in public audit, concentrating on 'whether and to what extent the established systems to implement the law achieve their objectives, while "controlling" themselves for legality, regularity, and sound financial management'; see Chris Kok, 'The Court of Auditors of the European Communities: "The other European Court in Luxembourg"' (1989) 26 *Common Market Law Review* 345, at 354.
[107] Aden (n 102) 316-317.

EU funds.[108] Accordingly, the ECA has pushed for and developed principles for a 'single audit' model, with the Commission situated on the top of the pyramid.[109]

Thus, much of the discussion concerning the implementation of the budget and, consequently, the ECA's supervision of such implementation, has centred on the member states. It has been argued that the Commission's view is that its budgetary responsibilities exceed its executive powers, in that they 'leave off where those of the member states start'.[110] And in reality, it is indeed difficult to impose guidelines of best practice 'from Brussels' to thousands of national entities which are not 'subordinated to the Commission'.[111] This renders the ECA's work somewhat challenging, and the same applies to the European Parliament's discharge decision as the latter cannot question and hold to account national administrations.[112]

In light of these challenges, the way forward for some[113] (and even more so for the European Parliament[114]) is for SAIs to adopt a national declaration for EU funds, along the lines of the SoA model. This proposal does not, however, come without difficulties. The ECA itself has acknowledged that the scheme represents a 'voluntary initiative'[115] by member states, unless a Treaty modification occurs whereby the existing loose form of cooperation would be revisited (except for the ECA's significant investigatory powers at the national level, as already noted). Importantly, they are addressed to national parliaments and whether they 'provide useful additional information will depend on the *scope and quality* of the work that underlies them'.[116] Simply put, the ECA's Opinion underlined the divergent mandates, as well as the varying

[108] Kok (n 106) 354.
[109] European Court of Auditors, Opinion No 2/2004 on the 'single audit' model (and a proposal for a Community internal control framework) [2004] OJ C 107/1. More recently, the ECA observed: '[T]he term "single audit" refers to a system of internal control and audit which is based on the idea that each level of control builds on the preceding one.' See European Court of Auditors, Special report 16/2013, 'Taking stock of 'single audit' and the Commission's reliance on the work of national audit authorities in cohesion', p. 16.
[110] Gabriele Cipriani, 'The responsibility for implementing the Community budget' CEPS Working document 247/2006, p. 10.
[111] Ibid, 18.
[112] Ibid, 17-18.
[113] See, for example, Maarten Engwirda, 'Without the obligation of National Declarations there will never be a clean Opinion of the Court' in European Court of Auditors, '35th Anniversary: Reflections' (2014) available at: https://www.eca.europa.eu/Lists/ECADocuments/REFLECTIONS_35TH_ANNIVERSARY/Reflections_35anniversary.pdf, p. 28. See also House of Lords European Union Committee, 50th Report of Session 2005-06, 'Financial management and fraud in the European Union: Perceptions, facts and proposals', pp. 35-36.
[114] This point was emphasised by Parliament in several discharge resolutions. See, for example, European Parliament resolution of 24 April 2007 with comments forming an integral part of the decision on the discharge for implementation of the European Union general budget for the financial year 2005, Section III – Commission, points 19-30.
[115] European Court of Auditors, Opinion No 6/2007 on the annual summaries of Member States; 'national declarations' of Member States; and audit work on EU funds of national audit bodies, p. 4. Four countries have so far responded positively to this initiative: the Netherlands, the UK, Denmark, and Sweden.
[116] Ibid (emphasis added).

quality of work of domestic SAIs, and called for a harmonisation of standards (at the very least) in order for this proposal to be further discussed. Albeit not featuring prominently in the Opinion, another methodological concern was that '[t]he "national" nature of the national declarations and national audit work contrasts with the current horizontal nature of the Court's work where conclusions are generally provided by budgetary area rather than individual member state'.[117] This point is also linked to the aforementioned tendency of the ECA to generally avoid 'naming and shaming' member states.

Others believe that far-reaching solutions are necessary in order to deal with this difficult equation, i.e. the conditions surrounding the implementation and audit of the budget: the formal responsibility of the Commission, the ECA's broad mandate in the absence of limitless resources, and the fact that at least 80% of the EU budget is effectively managed by member states. Thus, Cipriani argues that the Commission should take full responsibility for the implementation of the budget, by delegating specific executive tasks to national authorities. Funds should be allocated further to an 'accreditation process', which would entail a shift from the current *ex post* to an *ex ante* logic in the implementation.[118] He effectively argues for an allocation based on good performance and measurable outputs of *EU added-value* that would replace the present system of 'eligible spending'.[119] This is a matter echoed in the ECA's 2018 paper on the future of EU finances as well, where it is suggested *inter alia* that a common, inter-institutionally agreed, definition of 'EU added value' is needed.[120] Groenendijk argues for a more meaningful 'integration of internal and external budgetary control'.[121]

While a complete re-design of the EU system of implementation of the budget is a matter that goes beyond the ECA's influence, the latter can improve, to a certain extent, the legal framework pertaining to Members' independence from member states in the performance of their functions. More specifically, as Desmoulin observed, Articles 2 and 3 of the Implementing rules grant information rights to Members concerning audits related to their

[117] Ibid, p. 5.
[118] Gabriele Cipriani, *The EU budget: Responsibility without accountability?* (CEPS 2010).
[119] Ibid, in particular 73 *et seq*.
[120] European Court of Auditors (n 21) p. 7.
[121] Groenendijk (n 105) 723. This 'system would encompass the integration of the audit activities of the ECA, the Commission … and the member states'. The challenges are acknowledged by the author: among others, this would entail 'expansion of the authority of national audit offices regarding EU finances, and these would have to receive the same mandate as the ECA. It would also mean harmonization of audit procedures, to be initiated and managed by the ECA'.

countries.[122] Thus, Article 2 of the Implementing rules states that '[t]he Member acting as Reporting Member shall forward a copy, which may be in electronic form, of all correspondence with the national authorities being audited and the national audit institution concerned to the Member of the Court who has the same nationality as those bodies'. Accordingly, Article 3 stipulates that '[i]f Members agree to be interviewed by the media of any State other than their own, they may first consult the Member who has the nationality of the State concerned'.[123] These provisions sit uncomfortably with the duty of ECA Members to *act on behalf of the EU interest* once they assume office. Since the Implementing rules are the sole responsibility of the ECA, it is submitted that the usefulness of maintaining these provisions should be reflected upon.

## 7. Independence from the EU institutions

As the external auditor in the EU, the ECA must, of course, remain independent also from the EU institutions. Simultaneously, it needs to develop good working relations, particularly with the Commission, which is the main auditee, but also with other EU institutions and bodies, and notably the European Parliament and the Council, which are responsible for the discharge of the Commission.[124] Considering the ECA's early years of operation, Laffan observed that it 'had extremely conflictual relations with the Commission[125] and the European Investment Bank, was largely ignored by the Council of Ministers[126] and the European Council, and was

[122] Gil Desmoulin, 'La Cour et les Etats: Qui contrôle qui? Indépendance de la Cour des comptes européenne et souveraineté des Etats membres' (2005) *Revue du marché commun et de l'Union européenne*, No 491, 515, at 518.

[123] This is an improved version; an earlier version of Article 3 stated that the Member in question 'shall' consult the Member who has the nationality of the country where the interview will be given.

[124] See Art. 319 TFEU. This was immediately understood by the first ECA President, who assigned to one of the Members beyond vertical tasks, the horizontal task of the relations with other Community institutions (another Member was tasked with the relations with national audit bodies); see 'Allocation of vertical and horizontal tasks' CCE DEC. 1977 52/77.

[125] This is also evidenced in several documents from the ECA's early years. See, for example, the exchanges between the ECA and the DG responsible for budget and financial supervision: 'Document concernant les relations avec la Commission' CCE DEC. 1978 83/78; 'Note circulaire de M. Tugendhat concernant les nouvelles instructions à suivre pour les contacts avec la Court et Annexe' CCE DEC. 1979 215/79, among others. The issues under discussion included *inter alia* the scope of the ECA's mandate, the method of notifications to the Commission and more generally issues surrounding the inspections at the Commission's premises, and the right of the Commission to reply to the ECA's critical observations and the ECA's right to respond to these replies. This latter issue was also mentioned in the ECA's first Annual Report for the 1977 financial year. Therein, on p. 4 the ECA rejected the Commission's view that the legal framework did not permit counter-replies by the Court of Auditors. One of the points advanced by the Commission was that this was against established practices by the Audit Board. The ECA responded that under the Treaty the ECA was granted greater powers, was not bound by its predecessor, and it was only natural that it would provide 'fresh views' on a number of issues.

[126] In 1980, in a meeting with COREPER, the ECA invited the Council to attach greater weight to the Annual Report. Likewise, it proposed that the Council take into serious consideration the special reports, with a view to addressing recommendations to the Commission. See 'Rencontre avec le COREPER le 14 novembre 1980' CCE DEC. 1980 166/80, p. 2.

welcomed as a supporter by the European Parliament'.[127] With regard to the Commission, the institution formally responsible for the implementation of the EU budget unsurprisingly felt discomfort when subjected to a newly established mechanism of administrative, financial accountability.[128] Concerning the Council, and leaving aside the appointment procedure, the Council's continued indifference vis-à-vis the ECA after the successful appointment of nominees[129] is certainly unfortunate from the point of view of thorough monitoring of the Commission's implementation of the budget. Nonetheless, it is a matter that does not require any further discussion from the point of view of the ECA's formal independence.

Yet, it is worth considering the inter-institutional relations between the ECA and the European Parliament. The Treaty provides that the ECA 'shall assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget'.[130] Post-Maastricht, the most important dimension of such assistance is Parliament's consideration of the SoA which, according to Article 319(1) TFEU, should be taken into account by Parliament (and the Council, which provides a recommendation) before deciding on the discharge. The same applies to the ECA's Annual Report (which does include the SoA for the respective financial year) and any relevant special reports. The SoA enabled Parliament to form a 'global judgement' of the Commission's work, but also pushed the ECA to adopt a more coherent and professional audit approach, while increasing the ECA's visibility and generating fresh attention to its outputs.[131]

In the early years of the ECA's operation (and therefore before the introduction of the SoA), Parliament would commend the ECA on the high standards of the – 'indispensable' for the discharge process - Annual Reports and, more generally, on 'match[ing] very closely the expectations and concerns of parliamentary control'.[132] However, Parliament later on raised its

[127] Laffan (n 1) 256.
[128] A similar pattern may be observed with regard to the Commission's stance during the European Ombudsman's early years of operation; the first Annual Reports by the European Ombudsman document the underlying tensions. See Nikos Vogiatzis, 'Communicating the European Ombudsman's mandate: An overview of the Annual Reports' (2014) 10 *Journal of Contemporary European Research* 105.
[129] House of Lords (n 60) point 12 (emphasis original). The Committee added: 'Notwithstanding President Karlsson's assurance that the dialogue between the Court and Council officials had "increased enormously", we remain deeply unhappy with the seeming indifference displayed at the Council's highest level to the auditing functions and findings of the ECA.'
[130] Art. 287(4) TFEU.
[131] Gilberto Moggia, 'The origin of the Statement of Assurance – the European Court of Auditors after Maastricht' (paper in preparation, on file with the author).
[132] Report drawn up on behalf of the Committee on Budgetary Control concerning the consultation of Parliament for the appointment of four Members of the Court of Auditors of the European Communities, PE 74.384/fin, Explanatory Statement, point 5. The report referred to the ECA's first four years of operation.

expectations vis-à-vis the ECA. Thus, in its 1994 report on the independence of the Community institutions, Parliament observed, among others, that the ECA had 'not always been successful in the fulfilment of [its] obligations'. Reflecting on the ECA's record, it noted that in 1985 and 1986 and concerning the Community revenue the ECA 'was "unable to discharge its responsibilities in full" to audit the exact Community revenue' in light of certain member states' resistance to provide statistics or refusal to audit checks; the ECA had to assume a 'small part of the blame', Parliament observed, since it proved unable to 'press the issue' because of 'internal problems and political considerations'.[133] Accordingly, concerning the Community expenditure, the ECA also demonstrated 'serious weaknesses' as 'in certain areas its reports [were] rather superficial containing both good and bad quality auditing', whereas it was criticised for being 'less diligent' vis-à-vis the European Parliament.[134] That being said, the report acknowledged that, to the ECA's credit, 'in many cases the reports clearly pointed out the irregularities and responsibilities both of the Commission and the member states'.[135] It was also added that the ECA had faced 'a series of internal problems concerning its staff and allegations of over-spending' which damaged its 'outside image and credibility'.[136]

Such considerably more critical approach was reiterated in the more recent resolution on the future role of the ECA, including the appointment process (a matter discussed above). Therein, Parliament firstly underlined that it was regrettable that the ECA's results did not permit it to provide in the SoA a positive assessment of the legality and regularity of transactions for eighteen consecutive years, and added that since the SoA is 'an annual indicator of a multiannual spending scheme', it would have been preferable if the ECA could provide Parliament 'with a midterm review and a summary report in addition to the annual' SoA.[137] Importantly, the ECA was invited to pay more attention (and improve the quality) of performance, value-for-money audit, which falls outside the SoA exercise, but within

[133] Explanatory Statement (n 45) point 26.
[134] Ibid.
[135] Ibid.
[136] Ibid, point 29. According to the report, whereas all of the EU institutions had faced legal action from members of staff, the volume of such cases vis-à-vis the ECA was 'alarmingly high, and some of the rulings of the Court of Justice [had] proved that the personnel policies were not, in some cases, impartially and soundly managed'. Even though a young organisation can certainly be expected to be less experienced in management, part of the blame had to be attributed to certain Members, according to Parliament.
[137] European Parliament resolution (n 48) points 5, 7.

Parliament's responsibility to provide a global assessment of the Commission's implementation of the budget via the discharge process.[138]

Some of the claims in the resolution merit closer examination. First, Parliament proposed for itself a follow-up process on earlier recommendations of the Court of Auditors, in order to motivate the Commission and the member states; simultaneously, 'Parliament should also indicate to which major follow-up actions the Court can pay special attention in its annual report, *without prejudice to its independence*'.[139] Second, it criticised the ECA for not 'collect[ing] in a structured way nor fully treat[ing] as preferential' audit requests, and in particular those stemming from the European Parliament. Parliament 'consider[ed] this to be detrimental to the relevance and impact of the Court's audit results' and 'note[d] … that the added value of the Court is directly linked to the use made of its work by Parliament and other stakeholders in the accountability process'.[140] This stance may partly be explained with reference to the historical background behind the ECA's establishment. As already mentioned, while Aigner (later on the chair of Parliament's Committee on Budgetary Control) was influential in convincing the EU institutions and the member states to create an external audit body with important powers, his vision was that the ECA could be 'a sort of budgetary control arm of the Parliament'.[141] Others have even suggested that Parliament developed a 'proprietorial', 'subordinate attitude' vis-à-vis the ECA.[142] For Sanchez Barrueco, the Budgetary Control Committee does not act as the liaison between Parliament and the Court of Auditors, but rather as 'a kind of firewall' between the two institutions, preventing the ECA from cooperating with committees whose field is more closely associated with particular audit tasks or products.[143] Moreover, it has been observed that Parliament has used the notion of the ECA's independence, as manifested in objective, expert opinions, to strengthen its position vis-

[138] Ibid, points 8-10 and 24-27. Similar views have also been expressed in the literature. See, for example, Ian Harden, Fidelma White and Katy Donnelly, 'The Court of Auditors and financial control and accountability in the European Community' (1995) 1 *European Public Law* 599. As the authors pointed out, however, value-for-money audit can be 'unpopular' for the administration as it involves questions such as whether policy objectives have been achieved or even whether such objectives were clearly outlined. Relatedly, public sector auditors may be accused of 'trespass into politics' (ibid, at 615).
[139] European Parliament resolution (n 48), point 13 (emphasis added).
[140] Ibid, point 16.
[141] See Ulrich (n 3) 81. As Ulrich observes, a close cooperation was initiated, complemented with frequent references that the ECA's work 'would be in vain if its reports could not then be acted upon by a politically active institution'.
[142] Martin Westlake, 'The European Parliament's emerging powers of appointment' (1998) 36 *Journal of Common Market Studies* 431, at 432.
[143] Maria Luisa Sanchez Barrueco, 'The Contribution of the European Court of Auditors to EU Financial Accountability in Times of Crisis' (2015) 15 *Romanian Journal of European Affairs* 70, at 82.

à-vis the Council and the Commission.[144] Yet simultaneously, Parliament 'does not advocate the independence of the ECA at the expense of its control over the ECA'.[145]

Against this background, it is submitted that the Treaty reasonably expects the Court of Auditors to *assist* the two institutions responsible for the discharge of the Commission and, in particular, the European Parliament, which has the final say in the process. The higher standards imposed upon the Court of Auditors after Maastricht, and in light of the SoA, have certainly enabled the ECA to improve its methodology and align its standards with international developments. However, the existing legal framework suggests that the ECA should also be independent from Parliament. Thus, it is not entirely clear why the ECA should be prioritising audit requests by Parliament or be fully responsive to its priorities via a follow-up process. There is a fine line between fruitful and mutually beneficial cooperation and loss of independence. In addition, the more the ECA aligns itself with the views of the European Parliament, the easier it becomes for it to be accused of interference with political decision-making (and hence lack of autonomy in the performance of its functions). It is therefore submitted that the ECA has reasonably resisted so far to accommodate certain of the parliamentary requests, to the extent that those would effectively result in the ECA becoming an *organ of the European Parliament*. Of course, continuous collaboration with the institution responsible for political accountability, insofar as it does not amount to preferential treatment, can only be beneficial for EU citizens and ultimately maximise the usability of the ECA's outputs. And it is *that* – no doubt – delicate balance that arguably corresponds to a combined reading of, on the one hand, Article 286 and, on the other, Articles 287(4) and 319(1) TFEU.

## 8. On independence and accessibility

The penultimate section will pose the question as of whether the ECA is (or has been) open regarding its methodology and procedures, and to what extent its findings are communicated to the public in an effective and understandable way. On this latter point, a key priority in the auditing world is 'the need for auditors … to open up their world as much as possible and enable more insight to be provided of auditors' day-to-day working environments'.[146]

[144] Hae-Won Jun, 'Using one agent to control another? The European Parliament and the Court of Auditors' (2003) Archive of European Integration paper, available at: aei.pitt.edu/6512/1/001334_1.PDF, p. 19.
[145] Ibid.
[146] Humphrey and Moizer (n 89) 166.

Accordingly, in financial regulation public engagement is one of the key strategies to 'mediate the tension between independence and accountability while maintaining a focus on efficacy'.[147]

The above remarks are clearly relevant to the work of the Court of Auditors. As is known, the financial crisis has brought to the fore questions of financial accountability and sound management of the EU budget. In addition, the ECA must be aware that its findings have been used by various Eurosceptic fora in order to criticise or even attack the EU and accuse it of various wrongdoings. The debate prior to the referendum concerning the UK's membership of the EU is a suitable example. Undeniably, therefore, there is a need to evaluate the ECA's communication of its methodology to the public.

Before proceeding, a few disclaimers are necessary. First, it is beyond the present purposes to provide a *technical assessment* of the ECA's methodology. Second, by no means the earlier remarks imply that the ECA should be adjusting its methodology to please the Eurosceptic audience in the EU; if anything, this would seriously and irreversibly harm its independence.[148] Nonetheless, third, the methodology is one thing, and the translation of these findings into clear messages another. Regardless of whether or not the ECA wishes (or had wished) to maintain a low or strictly technocratic profile,[149] its outputs are evidently significant for citizens and stakeholders seeking to find out more about how the EU budget is spent.[150]

The Treaties are silent on the ECA's methodology: that is left to the institution to determine. A choice of this sort evidently protects the independence of the Court of Auditors in the performance of its functions. It cannot be said that the ECA selected its methodology arbitrarily and without substantial internal reflection, taking into consideration international standards.[151]

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[147] Michael Barr, 'Accountability and independence in financial regulation: Checks and balances, public engagement, and other innovations' (2015) 78 *Law & Contemporary Problems* 119, at 126.

[148] It is noted that, according to the Mexico Declaration, a 'sufficiently broad mandate and full discretion, in the discharge of SAI functions' is one of key the principles of independence; See INTOSAI Mexico Declaration on SAI Independence, principle 3, available at: www.intosai.org/issai-executive-summaries/view/article/issai-10-the-mexico-declaration-on-sai-independence.html.

[149] It is unclear whether the inaugural Members of the Court of Auditors understood the significance of the Annual Report. In one of their first meetings, they expressed the view that the ECA 'should avoid attaching undue attention to its Annual Report', despite the 'temptation' in the press or some EU institutions to 'fix their major attention on this Report'. The reason was that the ECA Members wished the Report to be seen as 'a step in a continuing process of audit' and 'not put other work in jeopardy'. See 'Discussion at meeting of the Court of Auditors 26/28.10.77', CCE DEC. 1977 14/77, p. 10.

[150] See also, in this respect, the Commission's remarks (n 20, p. 11) on the future of EU finances, and notably that 'European taxpayers expect a transparent EU budget that is easy to understand and gets the most back from every euro spent. The results achieved must be visible and measurable'.

[151] See further Stephenson (n 31).

Let us now focus on the reliability, legality and regularity of the accounts. Concerning the results of the SoA exercise,[152] the ECA has been able to deliver a positive opinion on the *reliability* of the accounts (of all the revenue and expenditure of the European Union) only since 2007, and has been unable (to date) to deliver a positive opinion on the *legality and regularity* of the transactions underlying the EU accounts – albeit noting improvements in the latest Annual Reports for the 2016 and 2017 budgets, which resulted for the first time in a 'qualified (rather than an adverse)' opinion.[153] A pivotal question in this exercise is what should be the acceptable error rate in payments from the EU budget. The ECA has fixed the 'quantitative materiality' threshold at 2%; this is explained in the SoA methodology brochure,[154] as well as in the more detailed financial and compliance audit manual.[155] Both documents are available online. The notions of legality and regularity are also explained in the latter publication; in practice the ECA does not distinguish between the two concepts.[156] The ECA claims that it follows international standards in its methodology,[157] and commentators have also confirmed this[158] or opined that the ECA's negative opinions are partly explainable due to the 'small sample size (which in its turn is due to lack of staff)'.[159] The first international peer review also found that the ECA adheres to international standards regarding its SoA methodology.[160] It is also noteworthy that the ECA acknowledged in the 2016 annual report that the 'Commission's estimates of levels of error are, in most cases, broadly in line with our

[152] This is described by the Court of Auditors itself as the 'central part' of the Annual Report; see ECA Annual Report for 2017, p. 7.
[153] See 'EU audit in brief: Introducing the 2016 annual reports of the European Court of Auditors', pp. 3-4; 'EU audit in brief: Introducing the 2017 annual reports of the European Court of Auditors', pp. 3-5.
[154] See European Court of Auditors, 'DAS methodology' available at: www.eca.europa.eu/Lists/ECADocuments/DAS_BROCHURE/DAS_BROCHURE_EN.PDF, p. 11.
[155] See European Court of Auditors, 'Financial and Compliance Audit Manual' (2012) available at: www.eca.europa.eu/Lists/ECADocuments/FCAM_2012/FCAM_2012_EN.PDF, pp. 218-220.
[156] Ibid, in particular p. 211.
[157] See European Court of Auditors, 'Audit methodology', available at: www.eca.europa.eu/en/Pages/AuditMethodology.aspx.
[158] Groenendijk (n 105) 710: 'To be fair to the ECA it must be mentioned that it has extensively codified its auditing policies and standards, especially over the last five years, resulting in detailed procedures and practices which are laid down in … Audit Manual[s]'.
[159] Groenendijk (n 105) 711. See also Aden (n 102) 316-318.
[160] International peer review 2008 (n 80) p. 5: 'The Court [of Auditors] uses many of its resources to complete the annual audit work for the DAS. It has developed a well-documented methodology in accordance with international auditing standards and in compliance with the Court's audit policies. The ongoing progress of the audit for the DAS is monitored closely by various Members of the Court to ensure the approach is accurately applied'. A similarly positive assessment was also provided as regards the ECA's audit planning and manuals (ibid, p. 6).

own findings'.[161] Despite the above, it should also be underlined that additional views have been expressed as to how the ECA should be carrying out its compliance audit.[162]

As already stated, a technical evaluation of the ECA's methodology cannot be undertaken here. However, there is no sufficient evidence to conclude that the ECA has been 'too independent' in the selection of its methodology. By contrast, sufficient evidence exists that is has been at least fairly diligent, especially further to the pressure exercised upon it after the introduction of the SoA – it is remembered that the SoA was an external constraint imposed on the ECA to professionalise its work.[163] Nor can it be inferred from the above that the ECA is not prepared to accommodate recommendations, especially by the European Parliament and the international peer reviews. Simultaneously, and understandably, its methodology is not universally accepted: different opinions have been expressed, which should and are being considered and evaluated by the ECA. Quite naturally, the most challenging aspect of the SoA is the review of the implementation of the budget by the member states.[164]

This article will be slightly more critical, nonetheless, of the ECA's communication of its findings to the public. In this respect, a key question that has to be answered is who are, indeed, the 'key external stakeholders' interested in the ECA's outputs, and in particular in the Annual Report, which incorporates the SoA. For instance, the 2008 international peer review noted that these included 'members of the Committee on Budgetary Control of the European Parliament, Commissioners, the Budget Committee of the Council, and Directors General of the European Commission'.[165] These stakeholders gave a positive assessment of the ECA's reports: they were presented in a neutral and objective tone, supported with sufficient auditing evidence and included the responses of the EU institutions.[166] They added that they 'place[d] a high level of confidence in the Court's reports and in the professionalism of its audit staff'; moreover, the stakeholders *and* reviewers found the reports (and especially the Annual Report) to be 'usually

[161] ECA Annual Report for 2016, pp. 26-28. This observation follows comments in earlier annual reports whereby the Commission's efforts to improve its calculations were noted.
[162] See, for example, House of Lords (n 113) pp. 16-17, arguing that it 'would be preferable for the Court to issue statements on each of the spending areas'. To return to an earlier remark, others believe that only through the uniform application of national declarations will the Court of Auditors be able to provide a fully clean Opinion; see Engwirda (n 113).
[163] Moggia (n 131).
[164] Of interest here is the ECA's decision in 2017 to amend its approach to the SoA audits in cohesion policy, which constitutes approximately 35% of the EU budget. The ECA is now prepared to rely more extensively on the internal control systems in place, both at Commission and Member State level. The impact of this new approach remains to be seen. See Background paper: The ECA's modified approach to the Statement of Assurance audits in cohesion (2017) available at: www.eca.europa.eu/en/Pages/DocItem.aspx?did=44524, p. 4.
[165] International peer review 2008 (n 80) p. 3.
[166] Ibid, p. 10.

clear, unambiguous, understandable, concise, and well organized'.[167] Such positive assessment evidences the substantial work undertaken by members of staff at the ECA in the preparation and verification of the report.

Simultaneously, albeit a *peer review* understandably focused on the EU institutions (and notably the DGs and committees responsible for the budget), the main audience of the ECA is, in fact, EU citizens. On this basis, it is no hyperbole to claim that the Annual Report (even in its present, improved form) is not effectively addressed to citizens, by rather to auditors. That being said, the ECA's summary publication which introduces the annual report is significantly more accessible and clear in its messages.[168] By this it is not suggested that the ECA should be sacrificing the quality of its reports, but rather that it should go to great lengths to actually translate these findings to an EU-wide audience, so that the performance of the EU and national administrations be more easily understood and evaluated. The ECA's summary publication can serve as a useful guide in this direction. The author is not alone, unfortunately, in opining that the presentation of the Annual Report (and the SoA) requires careful re-examination: the former ECA President expressed similar views in late 2016, namely that the ECA should 'foster closer links with European citizens' in order to 'help build trust in the EU institutions', and improve the reports so that they become 'attractive, user-friendly and accessible'.[169] There are indirect ways to build trust, too, especially via the collaboration with the European Parliament and national parliaments.[170]

To that end, the ECA could draw on practices adopted by other EU institutions and bodies, which have significantly invested in their communication policy, either via an improvement of the user-friendliness of the annual report[171] or increased social media presence, proactive engagement with media and stakeholders – among others.[172] In addition, there is also scope for the ECA to be more positive in its reports, where appropriate. In its 2016 Annual Report, for example, the ECA observed that '[o]ur overall estimated level of error improved compared to that of recent years but it continues to exceed our benchmark for materiality of 2%. Nevertheless, around half of 2016 expenditure was free from material error'.[173] A related press

[167] Ibid.
[168] 'EU audit in brief' (n 153).
[169] Vitor Caldeira, 'Interview: The most challenging aspect was to move the institution forward' (2016) European Court of Auditors Journal, No 10, p. 3.
[170] Ibid.
[171] The European Ombudsman's annual reports are a suitable example here; see Vogiatzis (n 128).
[172] See further Nikos Vogiatzis, *The European Ombudsman and good administration in the European Union* (Palgrave Macmillan 2017) 278-279.
[173] ECA Annual Report for 2016, p. 20 (under the heading 'Our 2016 audit results show an improvement').

release also echoed a more positive tone.[174] But there is clearly scope for more explicit acknowledgment of good financial performance. Again, interesting ideas can be borrowed from other EU institutions and bodies.[175] The aforementioned positive remarks should be placed in the context of the ECA's present aim to address this perceived gap. Indeed, one of the principles upon which the ECA's reform[176] is based is to better communicate the ECA's role and work.[177]

## 9. Conclusion

This article assessed the legal framework surrounding the independence of the Court of Auditors. The debate on the budgetary reform in the EU brings to the fore, inevitably perhaps, the role of the ECA. If the future EU budget should be revisited in order to increase the EU added value and meet the taxpayers' expectations, so too the levels of control over the implementation of the EU budget will have to be re-examined. In this context, the article argued that the primary constitutional justification behind the ECA's independence is its mission to act on behalf of and defend the EU interest. This was used as a basis upon which the various dimensions of independence were assessed.

Thus, and excluding the appointment process, the existing legal framework can generally be deemed sufficient to ensure an appropriate level of independence. There are areas where such independence is manifested more effectively; elsewhere, adjustments are needed. More specifically, Article 286 TFEU stipulates that any other occupation is incompatible with the office, and that Members should behave with integrity once they assume their post. The ECA's extensive Code of Conduct, monitored by the President and the Ethics Committee, imposes further obligations regarding the declaration and publication of financial and other interests. Importantly, the Code, as well as the Implementing rules, were drafted by the ECA itself; this

[174] Press release, 'EU accounts true and fair and share of irregular spending further reduced in 2016, say EU auditors' September 2017, available at: www.eca.europa.eu/en/Pages/AR2016.aspx.

[175] Strategies used by the European Ombudsman's office deserve to be mentioned here. The former office holder, Nikiforos Diamandouros, introduced in the reports 'star cases exemplifying best practice' as a means to award the respective EU institutions, while the current Ombudsman, Emily O'Reilly, introduced the 'award for good administration'.

[176] The reform concerns mainly the ECA's *internal organisation* and the need to respond to the second international peer review conducted in 2013, as well as to Parliament's recommendations in the aforementioned resolution (n 48). See: www.eca.europa.eu/en/Pages/Structure.aspx, as well as 'Understanding the reform of the ECA', available at: www.eca.europa.eu/Lists/ECADocuments/ECA_REFORM/ECA_REFORM_EN.pdf.

[177] See also an interview with the ECA's current President who, before assuming office, opined, among others, that 'there is still room to improve public perception. The problem lies with the impact of our work'. Interview with Klaus-Heiner Lehne, 'As I see it, I have three key tasks: to implement the reform of the ECA, to reform our products, and to boost the ECA's external impact' (2016) European Court of Auditors Journal, No 10, p. 6. See also the ECA Strategy for 2018-2020 (available at: www.eca.europa.eu/en/Pages/Strategy.aspx); one of the key goals is 'to get clear messages across to our audiences'.

obviously entails significant discretion and autonomy. The independence from member states is mainly guaranteed via the extensive information and audit rights granted to the ECA under Article 287(3) TFEU. Simultaneously, pragmatic limitations exist as to the overall possible impact of the ECA's control at the domestic level, owing to the existing budgetary arrangements in the EU and the fact that most of the EU budget is, in essence, managed by domestic authorities. In this context, loose, non-hierarchical forms of cooperation with SAIs may provide partly satisfying solutions. Nonetheless, the ECA's independence can be augmented by reducing the scope of information rights that the Members presently enjoy under the Implementing rules, regarding activities carried out and interviews given by colleagues in their own country. Regarding the EU institutions, the author finds that the Court of Auditors has rightly resisted to accommodate certain of the recommendations of the Budgetary Control Committee, insofar as those would turn the ECA into an organ of the European Parliament.

On the appointment process, the European Parliament's Budgetary Committee has developed a detailed list of criteria which clearly are not always taken into consideration by the Council. This contribution argued that granting the European Parliament a right of consent is indispensable as it would enable thorough scrutiny of the proposed candidates as to both their independence (primarily – but not exclusively – from their member state), as well as their suitability for the office. Moreover, the EU interest should be prioritised in Parliament's considerations: to take a hypothetical example, it is not a foregone conclusion that a candidate with an excellent résumé in auditing will necessarily act on behalf of the EU interest when assuming office. If anything, examples exist where past Members pushed an agenda that would turn the ECA into the SAI of their respective member state, despite the divergence in auditing traditions and mandates across Europe. Precisely in light of these traditions, as well as the ECA's inescapable need to cooperate with or even rely on national authorities, a fully convincing case has not been made as to why the number of ECA Members should be drastically reduced and why, consequently, the ECA should diverge, in terms of composition, from the Commission and the CJEU. If anything, the suitability of candidates for the post should matter more than their overall number: this is why priority should be given to changing the rules in the appointment process, and evaluating the impact of such amendment in due course.[178]

[178] While this is not the main reason why the prioritisation of a different appointment process is advanced in this contribution, it should be noted that pragmatically, it can only be anticipated that member states will be more likely to accept a more meaningful role for the European Parliament than losing their Member.

Moreover, the paper considered the ECA's openness as regards its methodology and the clarity of its findings (without, however, providing a technical assessment of the former). Especially post-Maastricht and in light of the greater responsibilities entrusted upon the ECA via the SoA, there is no sufficient evidence to conclude that the ECA's methodology is not recognised internationally. What is more, several stakeholders in the 2008 peer review evaluated positively the accuracy and coherence of the ECA's reports. However, the last part of the paper provided a rather critical assessment of the ECA's communication policy and the clarity of its findings in the Annual Report and the SoA more specifically. On this point, one may be excused for thinking that in the past, the ECA perhaps conflated the concept of independence with absence of engagement with the EU public. The technocratic functions of an institution cannot amount to lack of openness and accessibility. Over the last years, the ECA has taken steps to shorten this distance. Underlining that EU citizens are, in fact, the ECA's main audience, the article invited the Court of Auditors to continue taking steps with a view to becoming even more accessible and understandable in its outputs.