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Trapped between subsidiarity and loyal cooperation? A legal perspective into the European Court of Auditors' audit powers in Member States.

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This document summarizes informally the main reflections that were put forward at the UACES Annual Conference on 4 September 2012.

Being an early draft paper, its use or quote is strongly discouraged.

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I Introduction

The Court of Auditors has seldom gathered much attention outside Luxembourg, and beyond the initial vague after its creation in 1975.[2]

Therefore, the primary aim of this paper is to provide further analysis on the institutional features of this European institution and the way in which they have evolved throughout time.

A second goal of this paper stemmed from an infringement procedure against Germany that was decided in november last year. I decided then that reflection on how the ECA is affected by the interplay between two core constitutional principles in the EU (subsidiarity and sincere cooperation) was lacking in the scarce litterature body on the European auditing institution.

During the infringement procedure, I embraced the initial hypothesis that the Court might be comforted by the principle of sincere cooperation in the conduct of its tasks but was in turn trapped somehow by the need to respect subsidiarity in its relations with national audit bodies. Hence the title of my paper. The Court would be trapped on the need to rely on the audit results of supreme audit institutions on EU funds implemented at the national level. Following the judgement issued in November 2011, some readjustment had to be made on the approach; nevertheless, the eventual conclusion of my paper remains mostly unchanged. A trap in-between subsidiarity and sincere cooperation exists as regards the ECA, but its nature is different than expected.

Throughout this contribution, I take for granted that the quest for EU legitimacy cannot be completed without greater financial accountability in the EU, and that financial accountability demands a fully-fledged Court of Auditors within the Union's institutional framework.

[2] The European Court of Auditors was created under the Treaty amending certain financial provisions, signed in Brussels on 22 July 1975 (OJ L 359 of 31 December 1977). It started its functions on 18 October 1977 with its seat in Luxembourg.

However, there is room for challenging that the existing ECA really suits such role. The ECA's shortcomings as regards independence and effectiveness should be highlighted up-front, despite official statements claiming that the ECA ensures an accountable management of EU finances to the European taxpayer. Although the main focus of this paper is a precise aspect of effectiveness: the ability of the ECA to carry out efficient auditing of EU budgetary management in Member States, attention should also be paid to structural concerns linked to the independence of the institution.

II Challenges as regards the independence of the Court of Auditors.

The independence of the European auditors must be ‘beyond doubt’ according to the Treaty. However, we consider that no sufficient constitutional guarantee has been foreseen in the Treaty to ensure such independence, neither at the moment of the designation of the members of the European Court of Auditors nor during their period in office.

As regards the appointment procedure, under the Treaty, the Court of Auditors is the only institution in the institutional framework to be designated by another institution (the Council). This seems all the most inappropriate given the involvement of Member States in budgetary management, which accounts for roughly three quarters of the EU budget. From a theoretical perspective, the designation of the auditor by one of the auditees entails an actual risk of undermining the necessary independence of the ECA, specially when the auditee is also the most important from a quantitative perspective.

The Treaty does not safeguard independence of the members of the Court and, in practice, national governments designate the candidate of their choice without any further opposition from the rest of Member States. Independence is rarely on top of the national agenda in national capitals when it comes to the appointment of the European auditors. In stark contrast with the Council, the European Parliament has become the advocate of the competence and independence of the auditors. The European Parliament submits the candidates to a thorough scrutiny prior to their appointment by the Council. The conclusions of the hearing of the candidates are made public by means of a report, alas, this document lacks binding force over the Council. All in all, the EP has failed to prevent contested candidates from becoming members of the

ECA in recent times, if it has not provided the stage for political negotiation alongside that of Member States3.

The Treaty seems to attach similar importance to the independence of the Members of the Court of Auditors during their mandate. Following article 285 TFEU, second paragraph in fine, members of the European Court of Auditors must act in the general interest of the EU finances while in office. Likewise, article 286 TFEU, paragraph 3, states that "[i]n the performance of these duties, the Members of the Court of Auditors shall neither seek nor take instructions from any government or from any other body. The Members of the Court of Auditors shall refrain from any action incompatible with their duties." Additionally, they cannot engage in any other "occupation, whether gainful or not" (art. 286.4 TFEU).

Should a breach of due independence be proved, a member of the Court of Auditors might be removed by the Court of Justice upon request of the Court of Auditors itself, under paragraph 6 of article 286 TFEU. This procedure has never been applied in practice, although voices have raised concerns every now and then, in and out of the institution, linked to alleged attempts of members of the Court of Auditors to water down the statements contained in specific reports addressing management of EU funds in individual Member States. Although evidences of such allegations are obviously difficult to gather, and however occasional such cases might be, they stain the Court's reputation and authority.

[3] We refer here to the appointments of the Spanish and Irish members of the Court.

III Challenges affecting the effectiveness of ECA's audit missions in Member States

The effectiveness of the ECA in the fulfilment of its tasks may be appraised from various perspectives, among which this contribution chooses the extent to which the principles of subsidiarity and sincere cooperation affect the effectiveness of missions conducted by the ECA in Member States.

The starting point is the large scope and extent of the audit powers of the ECA under article 287 TFEU. The mere existence of a link to the general budget (either in the expenditure or in the revenue side), expressed in very broad terms, suffices to grant the ECA the power to follow the money until the last recipient. Moreover, budgetary management may be assessed according to review criteria defined in equally broad terms: legality, regularity and value for money. The latter allows the ECA to foster analysis on the economy and efficiency of a given action or programme launched by the EU institutions and bodies, political control representing the only boundary for the ECA appraisal. In fact, political control belongs in the European Parliament's competence.

Nevertheless, such wide scope of the ECA's audit powers faces obstacles when it comes to practical implementation. The European Union is obliged to comply with the principles of subsidiarity and procedural autonomy in implementing its policies; accordingly, the lion's share of the EU budget is either collected or spent at the national level. The ECA thus finds itself at a crossroads: it can hardly review whether MS collect and spend EU moneys in an efficient, effective and economic way without examining collateral factors that belong in the MS' competence and yet affect EU budgetary management.

In this regard, our hypothesis is that the interplay between two constitutional principles governing the implementation of EU powers (sincere cooperation and subsidiarity) leads in practice to watering the extensive competence

accorded by the Treaty down, therefore reducing the Court's ability to fulfil its tasks.

Starting with the principle of sincere cooperation, this principle is enshrined in a general way in article 4 TEU paragraph 3, under which Member States are requested to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.' Its second paragraph states that '[t]he Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

Beyond this general provision, Member States are bound by a specific duty to cooperate with the ECA under article 287 TFEU. Nevertheless, under this provision national authorities are treated differently according to their role in the budgetary management procedure, giving rise to two distinct groups: national audit bodies and implementing authorities. While national audit bodies are softly requested to 'cooperate in a spirit of trust while maintaining their independence'; cooperation duties are expressed in tighter terms when it comes to government departments which are entitled to collect or spend EU funds. Those bodies must 'forward to the Court any document or information necessary to fulfil its task upon request.'

It stems from the abovementioned provisions that both government departments and national audit bodies are requested to cooperate with the Court of Auditors. Nevertheless, any prospect for a legally binding obligation for national audit bodies to carry out audits on EU budgetary management on behalf of the ECA was clearly ruled out by the treaty framers. Sincere cooperation is interpreted here as a governing principle close to either procedural autonomy or subsidiarity. Mutual trust and respect thus prevail in the relationship between the ECA and national audit institutions, without any

clear distribution of tasks between the supranational and national levels, though. The way things stand, the Court of Auditors cannot expect a consistent support from the supreme audit bodies and will be inclined instead to rely on its own audit missions on the territory of Member States to ensure an adequate follow-up of management of EU funds.

Conversely, the Treaty seems to favour a watertight interpretation of sincere cooperation as regards national authorities implementing EU funds, which must forward to the ECA any relevant document or information that the institution considers necessary to carry out the external financial control over the management of EU funds at the national level. The question of how far the ECA can go in the request for national documents arose during the drafting of a Special Report on administrative cooperation in the field of value added tax in 2006. The German Ministry of Finances refused the ECA access to the requested documents on grounds that the revenue perceived under the VAT was not subject to control by the ECA because this might imply questioning political decisions of Member States that fell within their exclusive competences. The Commission eventually decided to back up the ECA in the defence of its prerrogatives and brought an infringement procedure against Germany before the European Court of Justice (ECJ).[4] The ruling provided useful insight on the scope and limits of the audit powers of the ECA, although important issues were not tackled by the ECJ regarding subsidiarity as applied to the ECA.

Under the subsidiarity principle (ensrined in article 5.3 TEU), the Union's action in fields of shared competence is legal in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and are better achieved at Union level. Additionally, reference must be made to Protocol No. 2, annexed to the Treaty and equally binding under articles 5 (3)

[4] Case C-539/09, *Commission v Germany*, Judgment of the Court (Grand Chamber) of 15 November 2011

and 51 TEU. This Protocol binds the ECA, as part of the EU institutional framework, to comply with subsidiarity in the conduct of its tasks. However, the precise limits of this obligation are not so obvious.

Notwithstanding the German argument that the ECA had trespassed the 'red line' of subsidiarity in the conduct of the contested audit mission, the ECJ refused to take that path and proposed instead an alternative approach that laid stress on a wide interpretation of the ECA's powers and the tight obligations stemming thereof for Member States, following the principle of sincere cooperation. The ECJ reached the conclusion that any national refusal of information to the ECA represents a failure to fulfil the obligations under the Treaty.

Member States would however not be obliged to answer the ECA's request in the event of a request *ultra vires*, that is, one that fell outside the scope of the ECA's powers. However, so broad thresholds were proposed in the ECJ ruling to define the extent of the audit powers that it is hardly conceivable a reasonable demand made by the ECA that would not fit into those limits. The thresholds were two: the existance of a link between the audited revenue or expenditure and the EU budget, and the cross-border nature of the programmed audit mission.

As regards the link between the audit and the EU budget, a sufficiently direct connection suffices between them, the power to carry out the audit is unchallenged. And since the stress is put on the potential effect on the EU revenue or expenditure, any field of national policy affecting the EU budget might fall within the competence of the ECA, if it so decides.

The second threshold refers to the cross-border dimension of the audit. The European Court of Justice affirmed that subsidiarity is respected whenever the

audit involves more than one state, because unlike the national audit bodies, the ECA's power covers all MS.

The approach followed by the European Court of Justice focuses on the territorial scope of the audit mission, that is, deploying an audit mission in more than one MS; nonetheless, we argue that subsidiarity breaches essentially stem from the nature of the goals pursued and the material scope of the on-the spot mission envisioned by the European Court of Auditors. It is important to recall that the boundaries between value-for-money audit and political control of a given action are, more often than not, vague. The assessment of the economy, effectiveness and efficiency of a given action may clearly open the door to the political appraisal of member states' activities involving EU funds.

Additionally, the Court seemingly overlooked the capacity of national audit bodies to carry out joint audits, taking for granted that on-the-spot missions conducted by the Court of Auditors are more effective than those jointly performed by Member States' audit institutions. However true it is that a number of elements hinder consistency of joint audit missions accross Member States, the need arises to ascertain what the treaty framers exactly implied by 'cooperation in a spirit of mutual trust while keeping their own independence' and whether the scope of this expression is limited to their exclusive involvement in ECA's audits or it might encompass a division of labour between the European and national audit institutions as well.

IV Conclusion

The hypothesis at the origin of this paper was that the interplay between sincere cooperation and subsidiarity was likely to hinder efficient control on national management of EU funds by the European Court of Auditors. The trap would naturally stem from the distinct features of multilevel management of

EU funds, as well as the asymmetries between responsibilities imposed on Member States and the Commission in this regard. The European Court of Justice's reasoning in Case C-539/09, however, proved that the actual scope of subsidiarity as a restraint to ECA's activities at the national stage is more than limited. In providing such generous thresholds for compliance of ECA's requests for information with constitutional requirements, the ECJ established in fact a presumption of legality for ECA's requests for information. The burden of the proof would thus lie in national authorities desiring to challenge a specific audit mission, for they would have to justify that such request goes beyond the limits set by either the scope of ECA's powers (the existance of a link with EU revenues or expenses, expressed in terms of their potential affectation) or proportionality. The broad interpretation of ECA's powers should theoretically refrain national authorities from objecting to on-the-spot missions on their territory.

Besides, Case C-539/09 offered an opportunity for the ECA to feel comforted as an institution within the EU institutional framework, receiving the support of other EU institutions: the Commission defended its prerogatives, the European Parliament broke its long-lasting trend of not intervening in an infringement procedure against a Member State, and the ECJ interpreted them as widely as could be.

Beyond such apparent benefits, however, lie some challenges as regards the effectiveness of the European Court of Auditors. By the time the ECJ declared the German infringement, 5 years had ellapsed after the facts. Meanwhile, the Special Report compiling the results from the contested mission had been published, not saving Germany from criticisms that could be inferred from audits in other Member States. All in all, Case C-539/09 mirrors the shortcomings of the European Court of Auditors' legal standing before the European Court of Justice. The ECA is not the only institution which was created after legal remedies were conceptualised in the founding treaties, but is

the only one with substantial powers to have been left behind. It is worth noting that both the European Central Bank and the European Investment Bank, created much later than the European Court of Auditors, are currently granted autonomous infringement action by the Treaty, against whichever State that does not fulfil their obligations under the treaties or the respective statutes of these bodies. The treaty framers should take into due consideration that current legal remedies at the EU level are ill-adapted to the ECA's needs and deserve reflection. One possible solution could be to accord it the privilege to autonomously sue reluctant Member States before the European Court of Justice.

The ECJ's judgement adds to previous case-law that convey national concerns (specifically in Germany) over the constitutional limits to the level of EU involvement in internal affairs. Further reflection is needed on whether Case 539/09 adds to the dialogue (or argument, for that matter) between the ECJ and national Supreme Courts. It should be noted that the German Constitutional Court stated explicitly, in its so-called 'Lisbon ruling' that it retained the power to disregard EU primacy should the EU act beyond its competences. National authorities could well draw on the insufficiencies of existing legal remedies to raise obstacles to ECA's missions.

Finally, the fact that the ECA will probably not breach subsidiarity, according to the generous thresholds set by the European Court of Justice, shifts the focus towards a more practical question, whether the European Court of Auditors has sufficient means at its disposal to guarantee an effective control in Member States. And yet, the issue of national audit bodies' responsibilities as regards accountable management of EU funds remains unanswered.