

# Appointing the members of the European Court of Auditors: towards better-qualified management and more efficient and timely decision-making?\*

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**Abstract:** This article draws on the on-going debate at the European Parliament on the future role of the European Court of Auditors and the impact that its appointment procedure may have on the interinstitutional relations and credibility of this European institution. First, it analyses the context and challenges of reforming the Court, with a view to its collegial nature and the desired qualifications of its members. Second, it looks historically at collegiality as a crucial aspect of the Court's organisational structure, and as a value/norm, addressing the debates on the way in which members are appointed. Third, it provides an overview of recent developments in the push for reform. Fourth, it considers future scenarios for new governance arrangements, acknowledging that effective and efficient management and decision-making is crucial for the Court's legitimacy within the institutional framework of the European Union, but also essential to ensure financial accountability of the EU budget.

**Keywords:** European Court of Auditors, collegiality, financial management, EU budget, administrative reform.

**Resumen:** *Partiendo del actual debate en el Parlamento Europeo sobre el futuro rol del Tribunal de Cuentas Europeo y el impacto que el procedimiento de designación de sus miembros puede tener en las relaciones interinstitucionales y la credibilidad de esta institución europea, este artículo analiza el contexto y desafíos de la reforma del Tribunal desde la perspectiva de su naturaleza colegial y la necesaria competencia profesional de sus miembros. Seguidamente, se examina la colegialidad en perspectiva histórica como un aspecto crucial de la estructura organizativa del Tribunal y como un valor/norma, abordando los debates sobre la forma*

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*de designación de los auditores europeos. En tercer lugar, se ofrece una panorámica de los desarrollos recientes en favor de una reforma. En cuarto lugar, toma en consideración las alternativas para futuros acuerdos de gobernanza, reconociendo que la gestión eficaz y eficiente es crucial para la legitimidad del Tribunal de Cuentas dentro del marco institucional europeo, pero también esencial para asegurar el control financiero del presupuesto de la Unión Europea.*

**Palabras clave:** Tribunal de Cuentas Europeo, colegialidad, gestión financiera, presupuesto europeo, reforma administrativa.

## I. Introduction

On 2 December 2013 the European Parliament’s Budgetary Control Committee (CONT) voted on the appointment of five new members to the European Court of Auditors (ECA), hereafter ‘the Court’. Germany’s nomination of centre-right MEP Lehne (EPP) as the replacement of Noack caused quite some controversy. According to Tim King, editor of the Brussels weekly newspaper, *European Voice*, Lehne had been an MEP for 22 years, during which time he had established a ‘reputation as an effective operator’ but not supposedly a ‘reputation for independence’; King goes on to claim that he had carved a reputation ‘not to say notoriety, for representing the interests of others’<sup>1</sup>. Supposedly, he had fought to defeat a proposal for a EU takeover Directive, a software patents directive, and areas of tobacco regulation—all in areas where he is argued to have business interests. Thereafter, on 17 December 2013, the Council appointed four new members of the Court and renewed the mandate of one other<sup>2</sup>, but the German’s nomination remained up in the air. Finally, on 23 January 2014 the EP’s CONT Committee questioned Lehne, who refused any suggestion of conflict of interest, subsequently endorsing his nomination by 17 votes to four, with two abstentions. King claimed that the German government had “erred in its choice of who should join the European Court of Auditors” and that the appointment was “a mistake”—the fact that “this mistake will not be rectified tells voters (if they care to look) plenty about the current state of the institutions”<sup>3</sup>:

So why do I baulk at Lehne’s nomination to the ECA? It is because, while I respect his effectiveness as an MEP and while I recognise that people should represent the interests of business, I do not think that his

<sup>1</sup> KING, T., “The wrong man”, *European Voice*, 30 January 2014.

<sup>2</sup> The appointments concerned the Greek, Dutch, French and British members of the European Court of Auditors, while the member from Luxembourg saw its mandate renewed.

<sup>3</sup> See fn 1.

track-record over the last two decades fits the pattern of independence—whether from party, government or business—that citizens should expect from the EU’s external auditor.

This story nicely highlights the contention surrounding the appointment of members to the European Court of Auditors, not only surrounding issues of independence, but also expertise, experience, and political impartiality. Moreover, in the broader context of the College of members of the European Court of Auditors, who effectively act as its managers and principal decision-makers, the recent round of appointments once more raises questions over the ideal size and profile of the College, and how it can operate effectively in a European Union of 28 member states. For more than 15 years scholars and practitioners alike have been debating how to adapt the top-heavy management of the Court to the needs of a large, modern-day European Audit Office, and the pressure for reform has increased since the ‘Big Bang’ enlargement in 2004. Indeed, Tim King also asserted:

Where Lehne is right is that the ECA needs reform. This is one of those institutions that suffers from each EU state having the right to nominate one member. The court is too big at 28. A smaller court, with countries filling places by rotation, would make sense. Perhaps it will be argued that because the court is too big at 28, the appointment of Lehne does not matter. But what his appointment reminds us of is that no member state will block the appointment of another state’s nominee. The Council of Ministers has its own pact of mutual non-interference.<sup>4</sup>

Indeed, on 30 May 2012, a public hearing was held by the European Parliament’s CONT Committee on the ‘Future Role of the European Court of Auditors: Challenges Ahead and Possible Reform’<sup>5</sup>. The event brought together the current President of the Court (Victor Caldeira), a former President (Jan Karlsson), a current Member (Kersti Kaljulaid), and a former Member (Irena Petruškevičienė), alongside a former Internal Auditor of the European Commission (Jules Muis), and an academic (Stéphanie Flizot), as well as regular members of the CONT committee and MEPs who wished to attend. Many of the issues raised in this meeting will be drawn upon in this article, as well as recourse to previous debates in 2002 in the House of Lords.

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<sup>4</sup> Ibid.

<sup>5</sup> EUROPEAN PARLIAMENT, *Future Role of the European Court of Auditors: Challenges ahead and possible reform, Public hearing at the Committee for budgetary control*, <http://www.europarl.europa.eu/committees/en/cont/events.html?action=1&id=hearings#menuzone>

The period that followed, from October 2012 to 2013, marked the 35<sup>th</sup> anniversary celebrations of the European Court of Auditors, an opportunity for the institution to interview current and former staff members and gauge their opinions on the evolution and future direction of the Court<sup>6</sup>. What should the Court look like? And how might decision-making be improved? In January 2014, the German, French and Swedish national audit office representatives delivered their international peer review of the operations of the Court—the second such review in recent years—highlighting the need for ‘efficiency’, ‘timeliness’, risk-responsiveness’ and better ‘overview’<sup>7</sup>. In short, there is now ample scholarly, political and technocratic awareness of the need for reform to improve the value-added of the Court and increase its impact in audit and evaluation. To bring in Tim King once more:

The ECA could, at its best, be a force for constructive reform of the EU institutions and better use of EU money. Sadly, it is not living up to its potential. Part of the reason is that individual member states are using jobs in EU institutions as a form of political patronage, instead of appointing those best qualified for the tasks. In the long-term, as any decent auditor would tell you, the EU suffers.

This article, thus addresses the management and administration of the Court, with a very timely focus on the issue of collegiality. Collegiality is at the very heart of the organisational structure, rules and processes of the Court. From a sociological institutionalist perspective, one might consider it a *value* or *norm*—a rule, pattern or understanding that shapes (expectations of) behaviour. The proper functioning of the collegial system is intrinsically linked to the *systemic legitimacy*<sup>8</sup> of the Court, and the financial accountability of the EU budget, even if the Court is only one institutional player in the ‘chain of accountability’ within a multi-level system of audit. Collegiality is essentially, not only about the social relationship between an actor and a forum<sup>9</sup>, but the

<sup>6</sup> EUROPEAN COURT OF AUDITORS, *Reflections of the 35<sup>th</sup> Anniversary of the Court*, 2014, Luxembourg.

<sup>7</sup> EUROPEAN COURT OF AUDITORS, *International Peer Review Report of the European Court of Auditors (carried out by the Bundesrechnungshof, Cour des comptes de France and Riksrevisionen)*, Luxembourg, 2014, DOI 10.2865/56810 (available at [http://www.eca.europa.eu/Lists/ECADocuments/2013\\_PEER\\_REVIEW/2013\\_PEER\\_REVIEW\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/2013_PEER_REVIEW/2013_PEER_REVIEW_EN.pdf)).

<sup>8</sup> LAFFAN, B., “Auditing and accountability in the European Union”, *Journal of European Public Policy*, 10(5), 2003, p. 763; SÁNCHEZ BARRUECO, M. L., “The post-Lisbon European Court of Auditors: little prospects for better enhancing EU legitimacy through better accountability in harsh times”, Conference paper presented at the European Union Studies Association (EUSA) 12<sup>th</sup> Biennial Conference, 3-5 March 2011, Boston, p. 3.

<sup>9</sup> BOVENS, M., “Analysing and assessing public accountability. A conceptual framework”, *European Law Journal*, n.º 13, vol.4, 2007, pp. 447-468.

social relationship between multiple *actors* in multiple *fora*. In the Court there are many constellations of actors: the Court members in the College, the Court members and their staff in their private cabinet, the five Chambers of Members and senior audit staff, not to mention other bodies such as the Presidency, the Administrative Committee and the Court' Secretariat. The College, itself is an exclusive forum operating inside the broader forum of the whole Court.

The article begins by contextualising the issue of audit and financial control in the EU and examining the ideal qualities of members of the Court, if one is to enable the College to act as a mechanism for financial accountability. Thereafter, it addresses the historical evolution of management and decision-making structures in the Court. Why does the College operate the way it does today? How did 'collegiality' come about within the Court? The final section of the article then looks at the pressures for internal reform, in light of the changing nature of audit, the challenges that new financial instruments bring to the task of financial control, and the changing institutional architecture of the EU. Therein, what might the future College of members look like? And what would need to happen for reform to occur?

## II. The Context and Challenges of Reforming the Court

### 1. *The College and the Chambers*

As outlined in the recent report of the second international peer review exercise<sup>10</sup>, just completed, the Court operates as a collegiate body that consists of members with one Member being drawn from each Member State. Members are required to perform their duties "in full independence" and "in the general interest of the European Union". Pursuant to Article 286 (1) of the TFEU, the EU Member States shall choose the members of the Court of Auditors 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. Members are appointed by the Council following consultation with the EP<sup>11</sup>.

The Court is composed of four vertical audit Chambers and one Chamber for Coordination, Evaluation, Assurance and Development (CEAD). The four vertical audit Chambers are respectively in charge of: Chamber I – preservation and management of natural resources; Chamber II – structural policies,

<sup>10</sup> See fn 7.

<sup>11</sup> *Ibid.*, p. 4.



transport and energy; Chamber III – external actions; Chamber IV – revenue, research and internal policies, and EU institutions and bodies. Within their respective remits, the vertical Chambers adopt the special reports, decide on key procedural aspects and perform important steering functions. A Chamber is composed of a minimum of five members. These obtain support and advice from their private offices. In each Chamber, a Director is responsible for coordinating audit work and managing resources. The Directors supposedly have ‘long professional track records within the ECA.’ They attend the meetings of the Chambers and may be consulted. Audits are carried out by the audit staff of the Court—in 2010, they accounted for 557 of 889 total staff<sup>12</sup>—theoretically with the ‘close cooperation’, where needed, of the national audit institutions (SAIs), though this relationship has not historically been as close as it might have been. The auditors come from all EU Member States; not all performance auditors had experience in performance auditing before taking part in performance audits<sup>13</sup>.

All 28 Members meets around twice a month to discuss and adopt documents, such as the Court’s main annual publications—the annual reports on the general budget of the EU and the European Development Funds. The European Court of Auditors is headed by a president who is elected for a renewable term of three years by the members of the Court themselves. His or her role is that of *primus inter pares*—first amongst equals. On 16 January 2008, Mr Vítor Manuel da Silva Caldeira, the Portuguese Member, was elected as the Court’s 10th President. His mandate was renewed on 12 January 2011 for a second term<sup>14</sup>. As Karakatsanis and Laffan assert, ‘regardless of the personality of the President, the Court is a collegiate body characterized by a vertical hierarchy between the auditing staff and the college of members, and a horizontal division between the sectoral auditing areas’<sup>15</sup>. Former President of the Court, Bernhard Friedmann, on the work of the members said, ‘What we have to say is not always to be found in the official reports and special reports. Discussion in a spirit of partnership is often much more important since much can really be achieved in such discussions where opinions and counter-opinions are exchanged’<sup>16</sup>.

<sup>12</sup> KARAKATSANIS, G. and LAFFAN, B., “Financial Control: the Court of Auditors and OLAF”, chapter 11 in PETERSON, J. and SHACKLETON, M., *The Institutions of the European Union*, OUP, Oxford, p. 245.

<sup>13</sup> *Ibid.*, pp. 5-6.

<sup>14</sup> ECA website 2014.

<sup>15</sup> KARAKATSANIS, G. and LAFFAN, B., “Financial Control: the Court of Auditors and OLAF”, chapter 11 in Peterson, J. and Shackleton, M., *The Institutions of the European Union*, OUP, Oxford, p. 246.

<sup>16</sup> EUROPEAN COURT OF AUDITORS, *The European Court of Auditors 1977-1997*, brochure commemorating first 20 years of existence, 1998, Luxembourg, p. 29.

## 2. *The Skills and Qualities of Members*

Central to long-running debates on reforming the Court has been the status of its appointed members. The EU member states have the right to propose members. The European Parliament is consulted but has not right of veto. The Council ultimately decides. Therein, has been the controversy—namely, that often those proposed, and ultimately appointed, are not those best suited to the job<sup>17</sup>. At present the members of the College are mixed in terms of their professional background and familiarity with the audit function. There is a clear tension between the supposed values/norms of the Court, and the qualities of those appointed. These concerns have long been known, as clear from examining scrutiny of the Court's functioning, such as in debate on the Court of Auditors in the House of Lords (2002) well over a decade ago eve, on the 25<sup>th</sup> anniversary of the Court<sup>18</sup>. The debate came in the wake of the Select Committee report making a case for reform<sup>19</sup>. First, it drew attention to the question of efficiency.

National representation is a *sine qua non* for any EU institution, but to improve the court's efficiency that representation ought [...] to be at the level of a part-time non-executive board to which a highly qualified chief executive, supported by a large audit staff, would report [...] The time was ripe for an external management audit of the court to help determine how appropriate its structures are as it enters its second quarter-century (Lord Grenfell<sup>20</sup>).

Second, the crucial need for a professional management and staff was flagged up. Given the growth in the court's task, it was deemed appropriate for the top management structure to be thoroughly reviewed.

It needs an entirely professional and truly independent chief executive with a qualified auditing staff working under him, reporting to a part-time non-executive board (Lord Renton of Mount Harry<sup>21</sup>).

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<sup>17</sup> SANCHEZ-BARRUECO, M.-L., *El Tribunal de Cuentas Europeo. La superación de sus limitaciones mediante la colaboración institucional*, Madrid, Dykinson, 2008, pp. 36-37.

<sup>18</sup> HOUSE OF LORDS, Debate of 8 January 2002 after "Court of Auditors EUC Report", retrieved at <http://www.theyworkforyou.com/lords/?id=2002-01-08a.518.0&m=100585> on 31 March 2014.

<sup>19</sup> HOUSE OF LORDS, "The European Court of Auditors: The Case for Reform", 12<sup>th</sup> report, 3 April 2001, London.

<sup>20</sup> See fn 18.

<sup>21</sup> *Ibid.*

Third, an emphasis was placed on the importance of possessing suitable and appropriate qualifications in audit. The Committee found it strange that members of the Court of Auditors did not have to have either a professional qualification or recognized experience in government auditing in one of the SAIs [supreme audit institutions].

I find it even more odd that professional qualifications are not de rigueur among the court staff. But most odd is the Government's response, which seems to say that the qualifications in audit and/or accountancy are important but in a par with knowledge of the European Community and institutions. That is a response generated from a Civil Service dominated by the cult of the generalist. I am disappointed in the Government for showing so little appreciation of the ethos and skills of professionally qualified auditors (Baroness Noakes<sup>22</sup>).

However, the Committee also recognized the importance of experience and the ability, beyond auditing, to navigate among the other EU institutions.

The high qualification need not stop at audit or accountancy. The head of this organisation will need the qualities and experience to enable him or her to stand up to the other "big shots" in the European Union and to be impressive and convincing to both them and the European Parliament. So the qualifications will need to be more than simply those of good audit (House of Lords, 8 January 2002, Lord Armstrong of Ilminster).

Fifth, the issue of independence was seen as far more important than equal representation. Apart from the notion of jobs for all, what lay at the heart of the issue was the question of independence versus representation.

I submit that we cannot have a truly independent body when it has a representative from every member state. It is fatuous to believe that member state representatives will not take some heed of what is happening back home. After all, some of them will need jobs when they return to their home country (House of Lords, 8 January 2002, Lord Sharman).

Sixth, it was seen as key that the organisation was beyond politics and organised in such a way that there were sufficient auditors as opposed to an inflated management.

A body which at the top is too politicised and in many ways under-qualified, skews the distribution of scarce resources [...] consequences flow from having only one qualified auditor—the size of each member's

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<sup>22</sup> Ibid.



cabinet; the size of the number of qualified staff they have to have directly working for them takes such a large slice from the small establishment of the Court of Auditors that it substantially skews the distribution (Lord Tomlinson<sup>23</sup>).

In short, the need for members to possess financial expertise in accountancy was clear given the sheer numbers of transactions and the massive increase in EU budgetary expenditure.

[...] there is nothing for the ECA to be ashamed of. The court has been in existence for 24 [sic] years and has done a valuable job. It has taught a lot of lessons to the Commission, which would acknowledge that the ECA has led it a long way on the path of competent modern accountancy. It is worth remembering that the amount of expenditure that the ECA has to audit has increased tenfold, from 10 billion euros a year when it was founded to 100 billion a year now (Lord Renton of Mount Harry<sup>24</sup>).

### III. Collegiality and the Process of Appointing Members

The way in which the 28 members of the Court are organised (as opposed to the staff) goes back to the establishment of the Court in 1977, when it had just 12 members. Arguably, however, we can trace the origins of today's large collegial system back to 1959, and the setting up of the Audit Board of the European Communities. The Audit Board operated for 18.5 years until its dissolution, with its last meeting in December 1977 (The Court of Auditors began operating on October 25<sup>th</sup> 1977). Though it has 12 members by 1977, it started out with just six part-time members—one from each of the founding member states—who each travelled on average once a month to Brussels. At the outset of the Communities (EEC, Euratom—the ECSC had its own auditor), these senior officials, most emanating from national audit offices or finance ministries, came together, at first with no staff, to consider how to go about the task of auditing expenditure carried out by the new Community institutions. The Audit Board worked on behalf of the Council, with no resources or premises of its own, its members with temporary mandates, renewed every five years. Article 206 of the EEC Treaty stated that: 'The account of all revenue and expenditure shown in the budget shall be examined by an Audit Board consisting of auditors whose independence is beyond doubt, one of whom shall be

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

Chairman'. The subsequent decision of 15 May 1959 establishing the Rules of the Audit Board referred to “full autonomy” and “own responsibility” (Article 1). As regards the appointment procedure of the Audit Board, article 2 of its Rules establishes that “[t]he Audit Board shall consist of six auditors who shall be chosen as a rule from among persons having the status of an official or servant or a legal person governed by national or international public law. Their independence must be beyond doubt and they must possess recognized qualifications and ability in the field of accountancy, economics and finance or the auditing of public accounts”<sup>25</sup>.

In 1972, the European Parliament, following the Commission, suggested its own amendments to the Council’s 15 December 1969 financial regulations<sup>26</sup>, one of which was to explicitly state that “[t]he Audit Board shall act and take decisions on the collegial principle”<sup>27</sup>. Therein, the members of the Court must act through unanimously, the principle of collegiality being respect at all stages of the control process: preparation, audit and decision-making<sup>28</sup>. With new budgetary powers following the Treaty of Brussels in 1975, the European Parliament pushed for an independent Court of Auditors<sup>29</sup>. Heinrich Aigner, head of the Budgetary Committee supposed that the EP would choose members based on lists, each member state putting forward three candidates, as was the system at the national level for the SAIs<sup>30</sup>. Several delegations of the Council sought to create a smaller College of members ‘limited to 7, 5 or 3 members’, however, this was not possible—it was inconceivable to think that the member states would accept a situation where they were represented by a person not from their country<sup>31</sup>.

The insistence on “belonging to or having belonged to an external control body or possessing a qualification to carry out this function’ was dropped, in favour of ‘possessing a special qualification”, which opened the doors for all members of government or experienced parliamentarians<sup>32</sup>. At

<sup>25</sup> COUNCIL OF THE EUROPEAN COMMUNITIES, Decision of 15 May 1959 establishing the Rules of the Audit Board 1959, Brussels. Reproduced in Aigner 1973, pp. 118-120.

<sup>26</sup> COUNCIL OF THE EUROPEAN COMMUNITIES, Regulation 15 December 1969 establishing the procedure to be adopted for presenting and auditing accounts (69/492/Euratom, CECA, CEE), Brussels.

<sup>27</sup> Article 85, Financial Regulation 25 April 1973.

<sup>28</sup> LEYGUES, J.-Ch., “La Commission de contrôle des Communautés européennes”, *Revue du Marché Commun*, n.º 172, 1974, p. 60.

<sup>29</sup> AIGNER, H., *The Case for a European Audit Office*, Brussels, European Parliament, 1973.

<sup>30</sup> FLIZOT, S., “The court’s organisational set-up”. Paper given during CONT hearing of 30 May 2012, Brussels.

<sup>31</sup> EHLERMANN, C-D., *Der Europäische Rechnungshof, Haushaltskontrolle in der Gemeinschaft*, Nomos Verlagsgesellschaft, Baden-Baden, 1976, p. 17.

<sup>32</sup> *Ibid.*, p. 18.

the time, the role of a member of the Court, based on the experience of the Audit Board, was recognised as very demanding, given the need to be able to travel regularly to conduct audits in the member states—members had to be physically fit and why serious consideration was given to set an upper age limit. This contrasts quite dramatically with the opinion given 25 years later of the court as a body “run by, what shall I say, 15 over-paid, under-worked senior executives”<sup>33</sup>.

As a new body in Luxembourg, the Court of Auditors found establishing an *esprit de corps* difficult. ‘Members were drawn from diverse backgrounds such as politics, national audit institutions and the legal profession’<sup>34</sup>. Laffan claims, however, that “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”. Early on each member was put in charge of a section of the EC budget (and its corresponding part in the annual report), as well as horizontal tasks. This led to conflict over how staff were allocated to audit areas and seemed incoherent. The system led to “overlapping responsibilities, friction between members of the Court, and endless debates about rather trivial administrative problems”. It also saw the rise of “fiefdoms”<sup>35</sup>. The Court ended up establishing audit groups—three vertical and two horizontal—each of two to three members, to create small groups and avoid specific areas of audit being in the hands of one member<sup>36</sup>.

From 12 members in 1977, the College of the Court grew following successive enlargements to 15 members in 1995 and “it became apparent that a college of 15 members aiming at consensus would not function smoothly. And a much greater enlargement was waiting just around the corner”<sup>37</sup>. Reform would have to come from the outside, with the Convention establishing a new constitution ‘a golden opportunity’. Governments committed proposals for reform, but the main EU issues found to be ‘so overwhelming’ that other matters were pushed aside and ‘the Court itself did not seek to raise the issue’<sup>38</sup>.

<sup>33</sup> Lord Williamson of Horton on Mr. Carey, British member of the ECA. See fn 18.

<sup>34</sup> LAFFAN, B., “Becoming a ‘Living Institution’: The Evolution of the European Court of Auditors”, *Journal of Common Market Studies*, n.º 37, vol. 2, 1999, p. 255.

<sup>35</sup> House of Lords 1987, p. 64, cited in LAFFAN, B., “Becoming a ‘Living Institution’: The Evolution of the European Court of Auditors”, *Journal of Common Market Studies*, 37(2), 1999, p. 255.

<sup>36</sup> *Ibid.*, p. 256.

<sup>37</sup> KARLSSON, J.O. and TOBISSON, L., “‘Much talk, little action’ at the European Court of Auditors”. *European Voice*, 7 June 2007. Article and related speech given during CONT hearing of May 2012, Brussels.

<sup>38</sup> *Ibid.*

The resignation of the Santer Commission in March 1999 had paved the way for the Kinnock reforms, and the introduction of codes of conduct, as well as the creation of the Anti-Fraud Office (OLAF). It is against this background that rules for implementing the Rules of Procedure of the Court of Auditors were adopted<sup>39</sup>. The collegial nature of the Court was established in the first of 32 articles. They established the right of members to be fully informed and their duty to share all information (Article 1), to consult other members regarding his/her media interviews (Article 3) and for all official post received to be officially registered (Article 4). Members should refrain from any professional activity outside the Court ‘incompatible with the principles of independence and readiness with regard to the performance of their duties’—outside activities should not undermine the Court’s impartiality; should have no conflict of interest; should not take up an excessive amount of time; and should not bring any pecuniary gain (Article 5). That same month, a ‘Code of Conduct for Members of the Court’<sup>40</sup> recognised seven values that should guide the conduct of its members: independence, impartiality, integrity, commitment, collegiality, confidentiality, cooperation (with OLAF) and responsibility. Article 5 on ‘Collegiality’ contains three parts:

Members shall under all circumstance respect the collegiate nature of the Court’s organisation and adhere to decisions adopted by the Court. However, Members may have recourse to the judicial instruments provided for in Community law if they consider that those decisions have caused them personal prejudice (Article 5.1).

Without prejudice to the President’s responsibility for external relations, Members shall have authority outside the Court to communicate and comment upon any reports, opinions or information which the Court has decided to make public (Article 5.2).

Members shall refrain from making any comment outside the Court that could damage the Court’s reputation or be interpreted as a statement of the Court’s position on matters that do not fall within its institutional remit. They shall refrain from making in public any comment that might involve the Court in any controversy (Article 5.3).

The Treaty of Amsterdam emphasised the Court’s role in fighting fraud and extended the possibilities for it to have recourse to the Court of Justice to protect its prerogatives regarding the other institutions. Moreover, it gave

<sup>39</sup> EUROPEAN COURT OF AUDITORS, Decision 92-2004 Laying down Rules for Implementing the Rules of Procedure, 8 December 2004, Luxembourg.

<sup>40</sup> EUROPEAN COURT OF AUDITORS, Code of Conduct for Members of the Court, 16 December 2004, Luxembourg.

it the right to audit the European Investment Bank's activity in managing funds<sup>41</sup>. However, the Treaties of Amsterdam and Nice failed to address the implications for the Court of the 2004 enlargement: "These differences of approach have not been wholly resolved, despite the long discussions in the preparation of the Treaty of Amsterdam and the conclusions of the Treaty of Nice"<sup>42</sup>.

In my book, it is simply that the constitution at the top of the ECA is wrong. A top management structure with 15 members, one drawn from each state, each acting as executive directors with their own cabinet and their own special interest but with no requirement for any professional accountancy or auditor qualifications, is not capable of delivering results. [...] it is bad enough with 15 members of the Community, but when that figure increases to 25—perhaps by 2005, which is only three years away—the accession of another 10 will make that top management structure even more incapable of dealing with the complex accountancy of the European Union and doing so bravely and independently<sup>43</sup>.

Even if the enlargement of the European Union was not imminent, the present structure of the court needs an overhaul. One court member per member state is an unsatisfactory arrangement in a union of 15 states. With 20 states or more it will prove hopelessly unwieldy<sup>44</sup>.

In fact, Article 247(1) of the Nice Treaty explicitly stated that the Court would consist of one Member from each member state, appointed by qualified majority voting (now the ordinary voting procedure, after consulting the European Parliament<sup>45</sup>). The impact of enlargement was dramatic. The move from 15 to 27 members paralyzed the College, making it much more formalized, with fewer staff allowed to be present alongside the members, and requiring that pre-decisions were made before the meetings. These new arrangements led to a reduction in productivity and output, with fewer special reports being produced, despite the staff growing in size by over 200 persons. As a consequence, the Court set up 'Chambers'—its previous 'audit groups' being upgraded to chambers, each with at least five members of the Court, and each with decision-making powers.

<sup>41</sup> EUROPEAN COURT OF AUDITORS, *Reflections of the 35<sup>th</sup> Anniversary of the Court*, 2014, Luxembourg, p. 73.

<sup>42</sup> Lord Williamson of Horton, in HOUSE OF LORDS, Debate of 8 January 2002 after "Court of Auditors EUC Report", retrieved at <http://www.theyworkforyou.com/lords/?id=2002-01-08a.518.0&m=100585> on 31 March 2014.

<sup>43</sup> Lord Renton of Mount Harry, in *Ibid.*

<sup>44</sup> Lord Grenfell, in *Ibid.*

<sup>45</sup> EUROPEAN COURT OF AUDITORS, *Reflections of the 35<sup>th</sup> Anniversary of the Court*, 2014, Luxembourg, p. 74.



## IV. The Reform Process

Although the ECA claims to have EU taxpayers as its stakeholders, the truth is that it was conceived as an auxiliary body to the EP and the Council. Today it even refers explicitly to these institutions at times as its ‘clients’, and to its reports as ‘products’. The reform process has involved many political, administrative and professional stakeholders over the last decade, including audit bodies from outside the EU. While some internal reforms have been made and continue to be implemented, larger questions about the position of the Court in the EU’s institutional architecture and its role in a fast-changing policy-making environment remain highly political and thus hotly debated.

### 1. *International Peer Review Exercises in 2008 and 2014*

The 2008 peer review report, after work carried out by members of the national audit offices (SAIs) of Austria, Canada, Norway and Portugal, contained the recommendation (item 43) that the Court’s audit management framework could be strengthened by requiring members and staff to update their declaration of independence on an annual basis and to attest to any threat to their independence as soon as it arises. For this purpose, the Court put into place procedures for annual declarations in 2011, developed a training course and revised its ‘Code of Conduct for Members of the Court’<sup>46</sup>. In addition, it adopted ‘Ethical Guidelines’<sup>47</sup> which replaced the ‘Code of Good Administrative Conduct’<sup>48</sup>. Second, the 2008 peer review also recommended (item 45) that the Court should establish a policy for the mandatory rotation of staff. Subsequently, in 2010, the Court implemented a regulation on staff rotation that lays down the intended minimum and maximum terms of office for each category of staff. Third, reviewers (item 92) recommended that management provide ‘clear direction and leadership that would support the importance of training as a means to achieve the Court’s audit and staff development priorities’.

As a result, the Court took action, by introducing a medium-term training plan that ‘comprises an analysis of the current state and defines training objectives in accordance with the overall strategy, as well as measures,

<sup>46</sup> EUROPEAN COURT OF AUDITORS, Code of Conduct for Members of the Court, 8 February 2012, Luxembourg.

<sup>47</sup> EUROPEAN COURT OF AUDITORS, Ethical Guidelines, 20 October 2011, Luxembourg.

<sup>48</sup> EUROPEAN COURT OF AUDITORS, Code of Administrative Good Conduct, 19 June 2000, Luxembourg.

resources and people in charge of their implementation’. The reviewers recognised the need to provide tailored solutions to satisfy the continually high training needs of both senior executives and staff. They made a point of stressing the need for continued and additional professional education/training in performance auditing for the auditors and members—auditors traditionally have training or experience in the public/private sector in financial and compliance auditing but be unaware of appropriate methodologies for performance/value-for-money auditing; in fact they have been using the approaches they know for performance audit when there may be better approaches to audit, particularly given that performance audit touches upon political evaluation. They encouraged close cooperation with the SAIs at national level in this matter<sup>49</sup>.

The second peer review exercise conducted by the German, French and Swedish national audit offices (SAIs) “identified areas offering scope for improvement which may need the Court’s special attention to further enhance efficiency and effectiveness”<sup>50</sup>. The report was published in January 2014. On the issue of expertise it found that:

In practice, some Members gained their professional experience in SAIs while others did so in government departments and public sector bodies, private sector companies, universities or as Members of Parliament. Although not the subject of the peer review it is noted that, unlike the Court of Justice, there is no procedure in place ensuring that Members proposed by the Member State possess adequate knowledge and experience in the audit area, the required independence and the skills to fulfil their duties. The Members contribute the experience gathered in their respective national environment and a variety of professional backgrounds. The ECA Members are appointed for a six-year renewable period (cf. Article 286(2) TFEU).

As a result of these provisions, Members retire from the ECA frequently and new Members take office. Due to the EU’s enlargement, the number of ECA Members has continually been on the rise. Each Member can draw on the support of an own private office (cabinet) with several staff<sup>51</sup>.

The 2014 international peer review also reported on the negative consequences of the introduction of the chamber system, and the need to rectify the loss of oversight that the College was experiencing

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<sup>49</sup> EUROPEAN COURT OF AUDITORS, *International Peer Review of the European Court of Auditors (carried out by the Bundesrechnungshof, Cour des comptes de France and Riksrevisionen)*, Luxembourg, 2014, DOI 10.2865/56810 (available at [http://www.eca.europa.eu/Lists/ECADocuments/2013\\_PEER\\_REVIEW/2013\\_PEER\\_REVIEW\\_EN.pdf](http://www.eca.europa.eu/Lists/ECADocuments/2013_PEER_REVIEW/2013_PEER_REVIEW_EN.pdf)).

<sup>50</sup> See fn 7 p.ii.

<sup>51</sup> *Ibid.*, p. 5.

The ECA has become aware that its current programming system is determined essentially by the four Audit Chambers' setting of priorities and identification of themes, making it difficult to take Court-wide priorities into account, to make significant changes in Chamber's AWP's [Annual Work Programmes] during the current audit year and to respond appropriately to priorities emerging at short notice<sup>52</sup>

Therefore the ECA intends to modify its programming procedure by applying a top-down approach at Court level to complement the bottom-up approach of compiling the first drafts of the portfolio of potential audit tasks [...] As an initial step, the procedure calls for a cross-Chamber policy and risk review on the basis of which the ECA will determine priorities, including proposals for assignments to Chambers and estimated resources needed<sup>53</sup>.

Indeed, these findings seem to indicate that the creation of the chambers was 'one step forward, two steps back' in terms of the impact on decision-making. On the one hand, the delegation of decision-making to the chambers allowed for more rapid decision-making, to get over the gridlock brought about by enlargement. In so doing, however, the Court as a whole saw its managerial capacity reduced in terms of the coordination and prioritisation of tasks.

## 2. *Budgetary Control Committee Public Hearing 2012*

In 2011 the Court published a position paper on entitled 'Consequences for Public Accountability and Public Audit in the EU and the Role of the ECA in the Light of the Current Financial and Economic Crisis'<sup>54</sup>. It recognised that the EU had taken measures in response to the crisis, establishing new structures and processes (the temporary European Financial Stability Facility (EFSF) and permanent European Stability Mechanism (ESM)). This had implications for the use of public funds—taxes paid by citizens—in the EU, bringing challenges for accountability, transparency and public audit, with implications for the role of the Court. It is against this background that the CONT committee meeting in May 2012 (six months later than first envisaged), sought to examine both internal intra-institutional and external inter-institutional aspects of reform. President

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<sup>52</sup> Ibid., para. 31, p. 18.

<sup>53</sup> Ibid., para. 32, p. 18.

<sup>54</sup> EUROPEAN COURT OF AUDITORS, *Position Paper*, Luxemburg, ECA, 2011, [http://www.eca.europa.eu/Lists/ECADocuments/POSITIONPAPER\\_2011/POSITIONPAPER\\_2011\\_HU.PDF](http://www.eca.europa.eu/Lists/ECADocuments/POSITIONPAPER_2011/POSITIONPAPER_2011_HU.PDF).

Caldeira outlined the Court's values—*independence, integrity, impartiality and professionalism*—while emphasising the need to improve public accountability. In terms of internal reform, however, he reiterated that “[t]he composition, appointment procedure, and collegial nature of the Court are fixed in the Treaty. It is not for an external auditor to question these decisions by the EU's political authorities. However, we are ready to provide input or to comment on the implications of other proposals—as indeed we did in the run up to previous changes to the Treaty”<sup>55</sup>.

Referring back to the 2008 peer review, he claimed, first, that the Court's “current arrangements are sufficient and appropriate for it to fulfil its mission under the Treaty as an SAI” and that “effectiveness in the respect of the current arrangement should provide a benchmark for assessing the benefits of any proposed alternatives”. Second, he raised the issue of potential cost-savings of new arrangements but highlighted the extensive communications role played by members: “Members are responsible for carrying out and reporting on individual tasks. They are also responsible for communicating with members of other EU institutions, national authorities, national parliaments, the media and citizens. In addition, they facilitate cooperation with Member States SAIs at the highest level”<sup>56</sup>.

Third, ‘and arguably most importantly’, he returned to the position and role of the Court in the wider institutional and European context, asserting that developments in EU governance has created the need for a “broad reflection on the public accountability and the audit structure of the EU as a whole”. That said, its own scope for action had been improved by adopting new rules of procedure in 2010.

The new rules have already enabled the Court to streamline its decision-making so that the audit reports and opinions are now adopted by Chambers of 5 or 6 members rather than the full college. The new rules also provide a flexible framework for managing the Court's resources and for implementing our next strategy for 2013 to 2017, which we are currently in the process of establishing. Our key concern is to find ways to increase our added value over that period while respecting budgetary constraints. To achieve that goal, we must develop our products and services, work closely with our partners, and organise ourselves efficiently<sup>57</sup>.

He also established that the Court's depended on the trust of its stakeholders—‘the value of our work depends on the confidence of our partners

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<sup>55</sup> CALDEIRA, V., “The Future Role of the ECA: Challenges and Possible Reforms”. Speech given during CONT hearing of 30 May 2012, Brussels, p. 6.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, p. 7.

in our professionalism’ — and how it needed to continue working to improve efficiency, arguably by reducing the size of top-heavy management— ‘Since 2009 we have made considerable efficiency gains in our administration that have led to posts being transferred to audit services’. He alluded to the importance of its expertise— ‘The Court adds value by transferring knowledge it acquires through audit to our partners. To become a more efficient knowledge-based organisation, we will need to see how we can streamline the key processes’<sup>58</sup>.

Former member of the Court, Irena Petruškevičienė, asserted that the challenge of enlargement was “successfully addressed” by the Court itself using the possibility provided in the Treaty to re-organise itself internally. However, she felt that this new design “implies greater pressure on, and a more demanding role for each Member as the knowledge and expertise of other more experienced members from other Chambers becomes less available”. As such, she told the EP that “it is very relevant to discuss and reconsider the profile of candidates to be appointed as members of the Court”<sup>59</sup>. This internal reform had aimed at making the work of the Court more efficient and timely, but resulted in ‘siloeing’, some observers claiming that the chambers had become insulated, each competing with the other in terms of timely output and the quality of reports.

Former Director-General and Internal Auditor of the European Commission, Jules Muis, referred to the ‘status quo drag that goes with the treaty [which] imposed geographic representation’ and that consensus driven management had ‘far outlived its usefulness and credibility’. He claimed the current organisation of the Court was

[...] not conducive to expecting timely change initiatives, bold self-reform proposals, emanating from within the Court itself. Hence it takes external pressure, such as from other institutions, in particular Parliament, ECA’s principal client, to instigate any fundamental revamp of ECA’s priorities or proposals that affect its top governance dynamics. Because it touches the immediate personal position of its 27 members, whatever their professional poise<sup>60</sup>.

Moreover, it claimed that the current ‘independence in appearance’ was the result of ‘historically well-intended “positive discrimination”’, which limited optimal choices in terms of skills and competences’. In so doing,

<sup>58</sup> Ibid., p. 8.

<sup>59</sup> EUROPEAN PARLIAMENT, CONT meeting, 30 May 2012.

<sup>60</sup> MUIS, J., “The mandate of the European Court of Auditors re-examined – thinking aloud”, Speech given during CONT hearing of May 2012, Brussels.



‘it unnecessarily shrinks the pool of talent from which to choose the best senior management composition’.

Would any EU citizen want to go to a hospital, or garage for that matter, that requires its top management to be reflective of the composition of EU member states? Would the American GAO [General Accounting Office] want to recruit 51 top management members based on one per US State? Or any country stipulating one SAI representative per province, before we start looking at the best talent available?<sup>61</sup>.

Following the public hearing at the European Parliament on 30 May 2012, and the Committee on Budgetary Control’s report of 8 January 2014<sup>62</sup>—adopted by unanimity—on 4 February 2014 the European Parliament (EP) endorsed the need for a Treaty change that would put the Council and Parliament on an equal footing when appointing members of the Court, in order to ensure the democratic legitimacy, transparency and complete independence of the members. It asserted that “the Council should, in the spirit of good cooperation among the European Institutions, respect decisions taken by Parliament subsequent to its hearing”<sup>63</sup>. It called for the EP, under the next review of the EU Treaty, to be made responsible for the selection of Court members on a proposal from the Council. It took the view that

the present geographic representation rule relating to high-level management, according to which there may be one member per member state, has by far outlived its initial usefulness and credibility, and that it could be replaced by a light management structure. Members should have, at the least, professional experience of auditing and management and be especially qualified for their function, and their independence must be beyond doubt.

In parallel, the EP proposed a new appointment method regarding the candidates for membership of the Court of Auditors, based on the following principles, selection criteria and procedures: hearings will be public and the discussions will be relayed via video; the EP will take its decisions

<sup>61</sup> Ibid.

<sup>62</sup> Report of the Committee on Budgetary Control on the future role of the Court of Auditors. The procedure on the appointment of Court of Auditors’ Members (Rapporteur: Inés Ayala Sender), A7-0014/2014, 8 January 2014, <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0014&language=EN>.

<sup>63</sup> 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))*, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0060&language=EN&ring=A7-2014-0014>.

on the basis of the majority of the votes cast at the plenary sitting, and its opinion must be respected by the Council (in the case of a negative vote, the candidate should withdraw their candidacy); high-level professional experience acquired and high standards of integrity and morality of the candidate (members should not be over 67 years of age at the time of their appointment); they should not serve more than two terms of office.

Lastly, the EP called on the Council to undertake to: present the EP with at least two candidates from each Member State, one being a woman and one being a man; frame its proposals in such a way as to comply fully with the criteria set out in the EP's resolutions; pass on any information concerning nominations which it has received from Member States on the understanding that if it were to withhold information. The EP would be obliged to conduct its own inquiries; avoid withdrawing nominations and submitting new ones, which take account of new proposals made by Member States that are motivated exclusively by political criteria and respect, if such a case arises, Parliaments unfavourable opinion of the situation, and propose a new candidate<sup>64</sup>.

## V. Future Scenarios

The notion of one member per member state goes way back to the Audit Board of the European Communities (1959-1977). The fact that his formula was carried over into the new Court would seem to be a clear case of what historical institutionalists<sup>65</sup> would term path dependence<sup>66</sup>, though the Court may have also been looking to the Commission. If many of the 28 members have not worked in a multicultural environment, are not familiar with EU policy-making and how little knowledge of audit, then there is potentially a problem. In reality, the composition of the Court is mixed. In intervention at the CONT meeting of 30 May 2012, French scholar, Stéphanie Flizot, and former Commission Internal Auditor, Jules Muis, put forward a number of scenarios.

First, the default is to stick with the present arrangement, potentially adding new Serbian and Montenegro members as the EU continues to enlarge, i.e. a College of 30 members and more. This will do little to improve

<sup>64</sup> Ibid.

<sup>65</sup> PIERSON, P., *The Path to European Integration: A Historical Institutional Perspective*, Program for the Study of Germany and Working Paper 5.2., Harvard, October 1994.

<sup>66</sup> STEPHENSON, p. 60 *Years of Auditing Europe: a Historical Institutional Analysis*, conference paper presented at the biannual conference of the European Union Studies Association (EUSA), May 2013, Baltimore.

efficiency. Second, to bring about Treaty change to reduce the number of members to between five and nine, looking to the European Court of Justice, the other Luxembourg-based institution as a model. Since the Lisbon Treaty, the judges and advocates-general are appointed by way of intergovernmental agreement, after consultation with a committee that delivers its informed opinions to decision-makers—this committee is made up of former ECJ judges as well as magistrates from the national level. Even at the ECB, the executive college is small, though it has a Council of governors, with officials from each member states<sup>67</sup>. Third, one might envisage the President becoming an Auditor-General who reports to a small board of members, but with the principle of national representation being applied instead to a more prominent Administrative Committee (which has indeed taken on a greater role in recent years). Only when management has been shrunk will there be more resources for a substantial increase in frontline audit staff<sup>68</sup>.

In short, collegiality was there at the beginning and is not about to go away unless there is Treaty change, which would require considerable political backing. Arguably collegiality has been weakened by enlargement and subsequently the creation of Chambers. At the end of the day, collegiality is about many things—transparency, representation and access to information—but first and foremost about consensus, deliberation, partnership, all of which supposedly make for quality decision-making. And ultimately, it is about the *common belief* that collegiality itself embodies and guarantees these values, making the group more important than the individual. Collegiality is a core *value/norm* of the Court, arguably the keystone. A recently retired member of the Board defended the difficulties of the collegial system, but recognised the need for timeliness and efficiency: “Decision-making in a collegial body is not easy, but it does ensure that a balanced decision is reached. So I don’t want to call into question the nature of the collegial body, even though I do believe that decisions should be made faster”<sup>69</sup>.

## VI. Conclusion

Three recent rounds of enlargement have almost doubled the number of members of the College, bringing in even more audit traditions and managerial cultures. The fact that not all members of the College are audit

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<sup>67</sup> FLIZOT, S., see fn 30.

<sup>68</sup> KARLSSON, J. O. and TOBISSON, L., see fn 7.

<sup>69</sup> CAROTTI R., “Interview with Harald Woegerbrauer, Austrian Member of the Court”, *Journal of the Court of Auditors*, 7 February 2014.

experts or have an extensive background in finance threatens the credibility of the Court and challenges the notion of proper public accountability of the EU budget. The creation of four vertical chambers and one horizontal chambers was intended to overcome the decision-making gridlock post-2007 by delegating decision-making, but the result has been a loss of managerial overview crucial for broader institutional decision-making, as flagged up in recent peer review exercises. Being timely, efficient and responsive to new developments in the economics and politics of the EU is crucial for the external perception, and therein, legitimacy, of the Court.

Despite clear arguments for reforming the Court in the last 15 years, with various different scenarios envisaged by scholars and practitioners, there seems to be little political will to engage in any kind of reform process that would threaten the notion of ‘one member per member state’, meaning an almost one-third/two-thirds split between management and the rest of the Court’s staff. Moves to change the size of the College of the Court have required the activism of the EP’s Budgetary Control Committee, but ultimately depend on Treaty change. The Court itself, timid, eager to please, insecure in terms of its institutional status, and still trying to interpret its legal mandate, has had windows of opportunities to push for change, but seems unlikely to do so in the future, though the findings from international peer review exercise many give help it justify future reforms vis-à-vis the Council. Meanwhile, in its speeches and reports at every opportunity, its President will keep on with his rhetorical efforts to drive home to Brussels both the Court’s value-added to its ‘clients’ and the values at the heart of its own identity: independence, impartiality, professionalism, integrity, and first and foremost, collegiality—as if collegiality itself, no matter the size, were some kind of *raison d’être*.