SEPTEMBER 2015

NO. 08

EUROPEAN COURT OF AUDITORS

Journal

European Court of Auditors

Past editions of the Journal can be found on:
ECA's website: http://eca.europa.eu/en/Pages/Journal.aspx
EU bookshop: http://bookshop.europa.eu

PRODUCTION
Rédacteur en chef / Editor in Chief : Rosmarie Carotti
Tél. / tel.: 00352 4398 - 45506 - e-mail : rosmarie.carotti@eca.europa.eu
Mise en page, diffusion / Layout, distribution : Direction de la Présidence - Directorate of the Presidency
Photos : Reproduction interdite / Reproduction prohibited

© ECA

The contents of the interviews and the articles are the sole responsibility of the interviewees and authors and do not necessarily reflect the opinion of the European Court of Auditors

Cover:
- Alex Brenninkmeijer, ECA Member; Koen Lenaerts, Vice-President of the Court of Justice of the European Union and professor of European law at the University of Leuven
- Special Report N° 7/2015
  The EU police mission in Afghanistan: mixed results
- Nikolaos Milionis, ECA Member and Tassos Giannitsis, Professor at the University of Athens and former Minister

TABLE OF CONTENTS

02 

04 

11 

16 

19 

20 

23 

28 

29 

33 

Auditing is listening

A symposium on audit principles and audit standards : their origins, connections and consequences, 2 July 2015

By Rosmarie Carotti

The symposium at the invitation of Alex Brenninkmeijer, ECA Member, attracted a full-house of different stakeholders from inside and outside the ECA. It hosted different speakers, including Koen Lenaerts, Vice-President of the European Court of Justice, and Ferdinand Wollenschläger, professor in law at the University of Augsburg and a well-known specialist in public procurement. The innovative set-up of showing short video testimonials on concrete audit experience between the speeches created an interactive atmosphere and triggered interesting input from the audience. These testimonials concerned not only audits by the ECA, but also audit work by the European Commission and on its behalf by private sector auditors.

From left to right: Piotr Senator, auditor; Geoffrey Simpson, Director of the Presidency; Danièle Lamarque, ECA Member; Vítor Caldeira, ECA President; Alex Brenninkmeijer, ECA Member; Koen Lenaerts, Vice-President of the Court of Justice of the European Union and professor of European law at the University of Leuven; Ferdinand Wollenschläger, professor in law at the University of Augsburg; Louis Galea, ECA Member

The aim of the symposium was to provoke and promote a discussion on what represents good public audit. ECA President Vítor Caldeira reminded participants that in the 15th century accounts were examined orally, while today audit and its follow-up are defined by principles and standards.

Koen Lenaerts spoke first and elaborated on the principles which are fundamental to the application of European law and confronted the principles of audit with the EU law (see next article).

The ECA when auditing EU's spending must respect the general principles of EU law, which are inter alia legal certainty and protection of legitimate expectations, proportionality, transparency, privacy and sound administration.

The ECA applies audit principles based on international standards on auditing (ISAs), translated in international standards of supreme audit institutions (ISSAIs) and adopted by the ECA in November 2010. Before describing them it is important to note that these principles stem from a different discipline than the legal discipline governing the general principles of law.

General principles that auditors apply mostly derive from international standards developed as informal law on the basis of (inter)national co-operation in (inter)national NGO-like organisations and organisations of audit professionals. One can say that the professional audit standards should always be applied with the principles on good administration in mind, as expressed in the newly released audit manual of the Finnish national audit office.

Professor Ferdinand Wollenschläger examined more closely the EU law principles as they relate to Public Procurement and the lessons to be learnt for developing audit principles and standards.

Audit standards are not set by the EU legislation; they are self-imposed policy rules, so-called soft law instruments. And they pose no concern in terms of legal certainty if they are clearly formulated.

But there is more. The relation between auditors and the auditee who is subjected to audit is not only guided by the professional standards – for instance ISSAIs – that auditors apply, but also by general principles of good audit which give shape to auditors' professional judgement and which can limit their discretion, says Alex Brenninkmeijer (see article on page 11).

General principles of good administration are developed in the different legal systems of member states as well as at the level of the European Union. They partly derive from case law, partly from confirmation of it in legal texts. The question remains, however, whether audit practice is adjusted to the obligations which derive from the general principles of good administration. Moreover the question is whether the norms applied by auditors comply with those principles.

Audit principles versus good administration

Audit principles versus good administration set the framework for the discussion with the stakeholders and staff attending the symposium.

Criticism was expressed on the work of auditors in general. It was said that the more here are individual entities involved in handing out money, the more complicated, bureaucratic and heterogeneous become the rules governing the spending and the audits.

"We want to apply rules but we need to know what those rules are" *Wolfgang Suttner, Fraunhofer Institut*

Do audit principles need to be codified and by whom? This question was put by Louis Galea, ECA Member, who felt that the challenges of multilayer governance were not the sin of audit but of a federal State.

"I suggest maintaining close cooperation between auditors and the legal service". *Johanne Vermer, ECA*

Auditors need detailed guidance and the main problem is a lack of training in the Member States.

"Single audit would be useful" Matthijs van Miltenburg, MEP

The theory of single audit was discussed but also doubts were raised about how well it would work in practice.

"The length of the audits creates legal uncertainty" *Florence Poutriquet, SNECMA*

"There should be guidelines for the auditors about their legal powers" *Gabor Kitley, Geonardo Ltd.*

Conclusion

Many different points of view were collected. Has audit to be trust-based or is professional scepticism the feature of any good audit? And how to bring 'professional scepticism in line with general principles of law'?

Trust is given and has to be earned. This involves listening.

The Activities of the European Court of Auditors and the General Principles of European Union Law

4

By Koen Lenaerts, Vice-President of the Court of Justice of the European Union and professor of European law at the University of Leuven

Alex Brenninkmeijer, ECA Member and Koen Lenaerts, Vice-President of the Court of Justice of the European Union and professor of European law at the University of Leuven

Introduction

The European Union (EU) "is based on the rule of law".[1] According to the Court of Justice of the European Union (ECJ), this implies that the acts of the EU institutions have to comply "with EU law and, in particular, with the Treaty [provisions] and the general principles of law".[2]

The general principles of law are thus an essential part of the body of EU law. These principles have been drawn by the ECJ mainly from the constitutional traditions common to the Member States. General principles of EU law therefore normally have a counterpart in the national laws of the Member States. One may think e.g. of the principle of non-discrimination on grounds of sex and sexual orientation, the principle of proportionality, the principle of legal certainty, etc. which are guaranteed both in the national and EU legal orders.

General principles of EU law have been called upon to fulfil a triple function.[3] First, they have enabled the ECJ to fill normative gaps left either by the authors of the Treaties or by the EU legislator, thus ensuring the autonomy and coherence of the EU legal system.[4] Second, they have served as an aid to interpretation. To the extent that general principles are to be equated with primary EU law, secondary EU law and national law implementing EU law must be interpreted in the light of those principles.[5] Finally, they have been relied upon as grounds for judicial review. EU legislation in breach of a general principle of EU law is to be held void.[6]

As an institution of the Union,[7] the European Court of Auditors (the "ECA") must, in the performance of its tasks, respect the general principles of EU law. Today, it is certainly not my intention to give an exhaustive overview of those general principles. I have, instead, decided to focus on what, in my view, seem to be the general principles that are the most relevant for the daily operations of the ECA, namely the principles of legal certainty and protection of legitimate expectations, the principle of proportionality, the principle of transparency, the right to privacy and the principle of good administration.

Furthermore, I would like to draw your attention to the fact that the latter three general principles are also fundamental rights enshrined in Articles 42[8], 7[9] and 41[10] of the Charter of Fundamental Rights of the European Union (the 'Charter') which, as we all know, has the same legal value as the Treaties.[11] In that regard, it follows from Articles 51(1) and 52(1) of the Charter that the acts of the ECA that constitute limitations on the exercise of those fundamental rights must be provided for by law, respect the essence of these rights, and comply with the principle of proportionality.

1 ECJ, E and F, C-550/09, EU:C:2010:382, para. 44; see also ECJ, Les Verts/European Parliament, 294/83, EU:C:1986:166, para. 23.

2 ECJ, E and F, C-550/09, EU:C:2010:382, para. 44; see also ECJ, Les Verts/European Parliament, 294/83, EU:C:1986:166, para. 23.

3 See K. Lenaerts and J.A. Gutiérrez-Fons, 'The constitutional allocation of powers and general principles of EU law' (2010) 47 *Common Market Law Review* 1629.

4 In relation to the principle of effective judicial protection, see e.g. ECJ, Francovich and Others, Cases C-6/90 and C-9/90, EU:C:1991:428.

5 ECJ, Sturgeon and Others, C-402/07 and C-432/07, EU:C:2009:716; ECJ, Nelson and Others, C-581/10 and C-629/10, EU:C:2012:657.

6 ECJ, Kadi and Al Barakaat International Foundation/Council and Commission, C-402/05 P and C-15/05 P, EU:C:2008:461.

7 See Article 13 TEU.

8 Right of access to documents.

9 Respect for private and family life.

10 Right to good administration.

11 Article 6(1) TEU.

The principle of legal certainty and protection of legitimate expectations

Article 287(1) TFEU provides that the ECA examines the accounts of all revenue and expenditure of the Union. The ECA applies a set of rules when reviewing the accounts of the different Union institutions and bodies.

The principle of legal certainty requires the effects of those rules to be clear, precise and predictable.[12] *But is this actually the case?*

On the basis of the information available on the ECA's website I understand that the ECA conducts its audits in accordance with the international standards on auditing issued by the International Organisation of Supreme Audit Institutions ('INTOSAI').[13] *In addition, the principles and details of the ECA's approach to auditing are set out in a set of manuals, standards and guidelines that describe the way in which those international standards are to be applied to the specific EU audit context.*

It follows that the ECA's audit standards are not set by the EU legislator and not even by a body entrusted with law-making powers. The audit activities of the ECA are indeed governed not by rules of law sensu stricto but rather by self-imposed policy rules.

As such, the fact that self-imposed policy rules apply to the operations of the ECA does not raise concern from the point of view of legal certainty, provided that the applicable rules are clear, precise and predictable to the persons concerned.

As a matter of fact, other EU institutions also apply soft law instruments. For example, in the context of second-round infringement proceedings, the Commission applies self-imposed guidelines when calculating a lump sum or a periodic penalty payment to be imposed on a defaulting Member State. It also applies self-imposed guidelines when imposing a fine on undertakings which have infringed the EU competition rules.

It is, however, essential that the content of those guidelines is unambiguous and publicly accessible.

Recently, the General Court of the European Union ("EGC") annulled a Commission decision refusing a refund of antidumping duties paid on imports on the ground that that decision had been based on vague rules set out in a Commission notice. In that regard, the EGC pointed out that such a notice sent out mixed signals regarding the requirements for submitting an application for a refund of anti-dumping duties, and, more particularly, regarding the time-limits for bringing such an application.[14]

Compliance with the principle of legal certainty also requires that the self-imposed rules are applied in a consistent manner. Otherwise, the ECA runs the risk of violating not only the principle of legal certainty but also the principle of equal treatment.[15] Indeed, such course of action would imply that the rules applied are no longer predictable and are furthermore not the same for everyone.

This does not mean that the ECA is prevented from changing its own auditing standards, but when it decides to do so, the new standards cannot, in principle, be applied retroactively. However, this principle does not only apply to audit standards as such, but also to the rules auditors use in assessing whether the European Commission or beneficiaries of EU funds have complied with EU law.

Allow me to illustrate this point by looking at a case concerning state aid granted to the steel sector. The Commission had adopted a code in which it explained under which circumstances a Member State could grant aid to steel companies. At a certain moment, the Commission decided to adopt a new code which was applied retroactively, i.e. it was applied to aid already paid out while the previous steel code was in force. According to the ECJ, such retroactive application of the Commission's new code violated the principle of legal certainty.[16] Indeed, as a general rule, the principle of legal certainty precludes an EU measure from taking effect from a point in time prior to its publication. This may only exceptionally be

12 ECJ, European Parliament/Council, C-48/14, EU:C:2015:91, para. 45 and case law stated.

13 See also A. Brenninkmeijer, R. Debets, B. Hock and G. Moonen, "The application of audit standards in the ECA's work".

14 EGC, Beco/Commission, T-81/12, EU:T:2014:71.

15 ECJ, Dansk Rørindustri and Others/Commission, C-89/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, para. 211; ECJ, Banco Privado Português and Massa Insolvente do Banco Privado Português, C-667/13, EU:C:2015:151, para. 69.

16 ECJ, Falck and Acciaierie di Bolzano/Commission, C-74/00 P and C-75/00 P, EU:C:2002:524.

otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.[17]

Such exceptional circumstances were present when the Commission decided to adopt a new method for calculating fines to be imposed on undertakings for infringements of the EU competition rules. The new guidelines which had the effect of increasing the level of fines imposed were also applied to infringements committed before the entry into force of these guidelines. The ECJ held that the fact that the Commission, in the past, imposed fines of a certain level for certain types of infringement does not mean that it is estopped from raising that level within the limits indicated in the basic competition Regulation[18] if that is necessary to ensure the implementation of EU competition policy. On the contrary, the proper application of the competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy. Such change was therefore foreseeable for the economic operators concerned and thus did not violate their legitimate expectations.[19]

It should, however, be stressed that it is only exceptionally that the retroactive application of new rules will comply with the principle of legal certainty.

A diligent administration should respect the principle of legal certainty in all circumstances. This also implies that the ECA and auditors in a brother sense should not, in principle, reconsider statements it made with respect to accounts.

This may again be illustrated by another case relating to competition policy, namely the *Lagardère* case[20]. In that case, the Commission had adopted a decision on 22 June 2000 declaring a merger in which *Lagardère* was involved compatible with the internal market. The decision commented on the various contractual clauses notified to the Commission as being directly related and necessary to the implementation of the merger. Most of these clauses were accepted by the decision of 22 June 2000 as being ancillary to the implementation of the merger. On 10 July 2000, however, the Commission notified the parties to the merger of its decision amending the decision of 22 June 2000. The introductory part of the decision stated as follows: 'As a result of a handling error, the text of the decision of 22 June 2000 ... which was signed and notified to you was incorrect. Consequently the Commission has decided to make certain textual amendments to it.' In this new decision the contractual clauses concerned, except for one, were no longer considered to be ancillary to the implementation of the merger and were therefore no longer covered by the "approval" decision.

According to the Court of First Instance of the European Communities ("CFI"), now the EGC, this retroactive withdrawal of the decision of 22 June 2000 was illegal. Indeed, the retroactive withdrawal of a *legal* measure which has conferred individual rights or similar benefits is contrary to the general principles of law[21]. Only the retrospective withdrawal of *illegal* administrative acts may be admitted and such withdrawal is subject to very strict conditions. It is only permissible where the withdrawal occurs within a reasonable time and if the institution from which it emanates has had sufficient regard to how far the parties concerned might have been led to rely on the lawfulness of the measure[22]. So even assuming that the decision of 22 June 2000 was illegal, which was not considered to be the case, the withdrawal would not be acceptable since the decision had all the characteristics of an act which was not tainted by an error. It was thus not bound to give rise to doubts as to its legality in the mind of a careful business undertaking[23].

17 ECJ, Falck and Acciaierie di Bolzano/Commission, C-74/00 P and C-75/00 P, EU:C:2002:524, para.119.

18 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 TFEU and 102 TFEU] (OJ L1/1).

19 ECJ, Dansk Rørindustri and Others/Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paras 226-232.

20 CFI, Lagardère and Canal+/Commission, T-251/00, EU:T:2002:278.

21 ECJ, Algera and Others/Common Assembly of the ECSC, 7/56 and 3/57 to 7/57, EU:C:1957:7, 115; CFI, Chomel/Commission, T-123/89, EU:T:1990:24, para. 34; CFI, Gooch/Commission, T-197/99, EU:T:2000:282, para. 53; CFI, Lagardère and Canal+/ Commission, T-251/00, EU:T:2002:278, para. 139.

22 ECJ, Algera and Others/Common Assembly of the ECSC, cited in previous note, p. 116; ECJ, Herpels/Commission, 54/77, EU:C:1978:45, para. 38; CFI, Gooch/Commission, cited in previous note, para. 53.

23 CFI, Lagardère and Canal+/Commission, T-251/00, EU:T:2002:278, paras 139-149.

My final remark with respect to the principle of legal certainty is as follows: the fact that auditors, and in particular the ECA apply self-imposed auditing standards which emanate from international non-public bodies is not, as such, incompatible with that principle, provided that those rules are clear, precise and predictable. Any changes made to those rules should, in principle, not be applied retroactively. But the same applies to the rules and regulations auditors use in assessing whether beneficiaries of EU funds have complied with EU law.

The principle of proportionality

The ECA's audits are based on records. Article 287(3) TFEU explicitly provides in this respect that "institutions of the Union, any bodies, offices or agencies managing revenue or expenditure on behalf of the Union, any natural or legal person in receipt of payments from the budget, and the national audit bodies […] shall forward to the [ECA], at its request, any document or information necessary to carry out its task."[24]

Thus, the question is whether a request for information of the ECA could violate the principle of proportionality. In this respect, it was brought to my attention that the reporting system used by some companies or public authorities may make the gathering of some specific information very cumbersome.

It is an undeniable truth that the ECA, in the performance of its tasks, has to comply with the principle of proportionality. According to that principle, which is enshrined in Article 5(4) TEU, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

In order to assess whether a request for information of the ECA complies with the principle of proportionality, one finds, in the absence of any specific case law of the ECJ or the EGC regarding the activities of the ECA, once again guidance in the case law relating to state aid. The *Deutsche Post* case is in this respect very helpful.[25]

Following a complaint submitted by some operators against alleged state aid granted to Deutsche Post, the Commission started an investigation. In the course of this investigation, the Commission addressed an injunction decision to the Federal Republic of Germany requiring it to provide extensive information regarding the activities of Deutsche Post. The latter company brought an action for annulment against that decision before the EGC on the ground that the information requested infringed the principle of proportionality. Responding to the questionnaire would, according to Deutsche Post, indeed have required a disproportionate investment in terms of time and work.

In the *Deutsche Post* case, the EGC ruled that an institution can only request information which is relevant for the performance of its tasks which, in the case at hand, meant that the requested information had to be relevant for the assessment of whether the measure concerned constituted state aid and whether that aid was compatible with the internal market.[26] However, it is important to note that the relevance of the information requested is assessed at the moment the request for information is made and not at a later stage of the procedure. That assessment is thus not based on the *actual* need for the information in the subsequent procedure before the Commission; that need is dependent on many factors and cannot therefore be determined with certainty at the time the request for information is made.

This case law has been confirmed in other fields of competition law[27] and allows us to consider that any institution of the EU, including the ECA, may, without violating the principle of proportionality, request information from companies or public authorities, provided that the institution concerned has the power to do so and that it can be reasonably held that, at the time the request in question is made, the information is relevant for the performance of its tasks.

That said, it is true that the EGC has, in its case law, stressed the fact that compliance with the principle of proportionality also implies that the obligation

24 The Member States must cooperate in good faith with the ECA when it carries out an audit having a direct link with the powers conferred to it by Art. 287 TFEU (see ECJ, Commission/Germany, C-539/09, EU:C:2011:733).

25 EGC, Deutsche Post/Commission, T-570/08 RENV, EU:T:2013:589.

26 EGC, Deutsche Post/Commission, T-570/08 RENV, EU:T:2013:589, para. 118.

27 EGC, Omya/Commission, T-145/06, EU:T:2009:27 (concentration control); EGC, Slovak Telekom/Commission, T-458/09 and T-171/10, EU:T:2012:145 (infringement of Articles 101 TFEU and 102 TFEU).

imposed on an undertaking to supply information should not be a burden on that undertaking which is disproportionate to the needs of the inquiry.[28] However, if the information requested is relevant for an inquiry or for an audit, it can hardly be held that the burden imposed on the company will be disproportionate.

The principle of transparency

According to Article 15(3) TFEU each institution "shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents". The rules which the ECA adopted in this regard[29] aim at promoting "good administrative practice on access to documents".[30] As the preamble to ECA Decision No 12-2005 on access to documents indicates, "[o]penness enhances the [ECA's] legitimacy, effectiveness and accountability, thus strengthening the principles of democracy".[31]

However, the principle of transparency has to be balanced against certain public and private interests. Decision No 12-2005 of the ECA thus contains certain exceptions to the general rule of openness. These exceptions are generally a literal reproduction of exceptions which can be found in Regulation No 1049/2001 regarding public access to documents of the European Parliament, the Council and the Commission. The case-law regarding the latter regulation is therefore relevant for the interpretation of the ECA rules on access to documents.

According to ECA Decision No 12-2005, this institution will inter alia refuse access to a document where disclosure would undermine the protection of audits.[32] There is a recent case of the EGC concerning the identical exception of Regulation No 1049/2001.[33] This case concerned a request of a person to have access to certain documents of an audit performed by the Commission. The Commission refused to grant the request on the ground of the exception regarding audits. The EGC ruled that the Commission was right to do so. It did however stress in this regard that the audit was still ongoing.[34] By contrast, where the audit is completed, the institution concerned will have to examine in a concrete and individual manner whether non-disclosure of documents relating to the audit is still justified. This may be the case if an investigation is still in progress against a company which could be jeopardised by the disclosure.[35]

When deciding whether or not to grant access to a certain document, the ECA is also under a duty to respect the rights of persons to their privacy and to the protection of their personal data. These rights, which are an integral part of the general principles of EU law, are furthermore enshrined in Articles 7 and 8 of the Charter. For this reason ECA Decision No 12-2005 on access to documents provides that disclosure of a requested document will be refused where it would undermine the 'privacy and the integrity of the individual'.[36] Article 4(1)(b) of ECA Decision No 12-2005 refers in this respect to the EU legislation regarding the processing of personal data, i.e. Regulation No 45/2001.[37]

A document of the ECA can contain personal data, such as the names of certain persons present at a certain meeting. The disclosure of such document would amount to the processing of those data by the ECA for the purposes of Regulation No 45/2001. However, it seems difficult to respect at the same time the provisions of Decision No 12-2005 on access to documents and the provisions of Regulation No 45/2001 on the processing of personal data.

28 EGC, Slovak Telekom/Commission, T-458/09 and T-171/10, EU:T:2012:145, para. 81;

29 Article 30 of ECA's Rules of Procedure ([2005] OJ L 18/1) and Decision No 12-2005 of 10 March 2005 regarding public access the Court documents, as amended by Decision No 14-2009.

30 Decision No 12-2005, preamble, third para.

31 *Ibidem*.

32 Art. 4(3).

33 EGC, Technion and Technion Research & Development Foundation/Commission, T-480/11, EU:T:2015:272.

34 EGC, Technion and Technion Research & Development Foundation/Commission, T-480/11, EU:T:2015:272, paras 59 and 65.

35 See EGC, Franchet and Byk/Commission, T-391/03, EU:T:2006:90, paras 110-112; EGC, Toland/Parliament, T-471/08, EU:T:2011:252, paras 42-58. These cases concerned a request for access to audit reports. However, Article 4(2) of ECA Decision No 12-2005 provides that the ECA "shall refuse access to its audit observations. It may also refuse access to documents used in the preparation of those observations". Article 4(3) of this Decision further provides that the ECA "shall refuse access to a document where disclosure would undermine the protection of […] inspections, investigations and audits".

36 Art. 4(1)(b).

37 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, [2001] OJ L 8/1.

Let me illustrate this. Under Article 5 of Decision No 12-2005, '[t]he applicant is not obliged to state reasons for the application.' When someone asks access to a document of the ECA containing personal data, the applicant would under a literal reading of this decision not need to state reasons. However, according to Article 8(b) of Regulation No 45/2001, personal data can only be transferred to another person 'if the recipient establishes the necessity' of such transfer.

It follows from the *Commission v Bavarian Lager* case – concerning the Commission's refusal to grant access to a document containing personal data – that the applicant requesting access must first comply with the provision of Regulation No 45/2001, i.e. he or she must prove the necessity of having the data transferred. It is only after having met that requirement that the ECA may proceed to examine whether the exception for protecting the right to respect for a person's private life laid down in Article 4(1)(b) of Decision No 12-2005 applies.[38] *Commission v Bavarian Lager* thus shows that transparency is not an absolute value, but can only be applied in so far as its application respects fundamental rights.

The right to privacy and the principle of good administration

It is one thing to mention in a document the names of persons present at a meeting. It is an entirely other thing to criticize a person's behaviour in a document. Can the ECA do this?

For once, I can refer to a case which effectively involved the ECA, namely the *Ismeri* case.[39] This case concerned an action for damages for injury allegedly suffered by the applicant undertaking following criticisms made against it in a report of the ECA. According to the applicant, these criticisms were unfounded and, in any event, the ECA should not have mentioned the applicant's name in its report.

It follows not only from the case law of the ECJ, but also from Article 52(1) of the Charter that the rights enshrined in Articles 7 and 8 of the Charter are not absolute. They can be subject to restrictions, on the condition that these restrictions correspond to objectives of general interest pursued by the Union and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights protected.[40]

The reporting of malfunctioning affecting the lawfulness and regularity of revenue and expenditure of the Union is one of the main tasks with which the ECA has been entrusted by the Treaties. The reporting of the full facts of such malfunctioning – including the names of the persons directly involved – has to be weighed against the interference in the private life of these persons. The CFI decided in the *Ismeri* case that the ECA may exceptionally in the performance of its tasks give the names of any parties directly involved in a *serious* malfunctioning. The naming of those involved is, according to the CFI, all the more necessary where anonymity may give rise to *confusion* or cast doubt on their identity, which is liable to harm the interests of those concerned by the investigation of the ECA but not implicated by its critical assessments.[41]

This case-law was confirmed by the CFI in a case concerning a report of the European Ombudsman finding an instance of maladministration of the Commission and in which the name of an administrator of that institution had been explicitly mentioned. The CFI recalled in that case that the nominative designation of a person in a report of an institution may be admitted where such designation is necessary given the gravity of the facts and taking into consideration the objective pursued by the EU institution or body. It may also be necessary in order to avoid the risk of confusion. If, e.g., an instance of maladministration concerns a very small unit of an institution, an objective description of the facts, which does not specify which administrator is involved, may cast doubt on the conduct of the other administrators in the same unit unconnected with the irregularity.[42]

Whilst the CFI considered that the nominative designation of a person in the report of the Ombudsman was not necessary for the proper performance of his tasks[43] or in order to avoid

38 ECJ, Commission/Bavarian Lager, Case C-28/08 P, EU:C:2010:378, paras 59, 75 and 77.

39 CFI, Ismeri Europa/Court of Auditors, T-277/97, EU:T:1999:124, confirmed on appeal ECJ, Ismeri Europa/Court of Auditors, C-315/99 P, EU:C:2001:391.

40 ECJ, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, para. 65; CFI, M/Ombudsman, T-412/05, EU:T:2008:397, para. 126.

41 CFI, Ismeri Europa/Court of Auditors, T-277/97, EU:T:1999:124, para. 109.

42 CFI, M/Ombudsman, T 412/05, EU:T:2008:397, paras 129-131.

43 See also CFI, Nikolaou/Commission, T-259/03, EU:T:2007:254, paras 212-214: in which a leak by agents of OLAF concerning

confusion, it came to the opposite conclusion in the *Ismeri* case.

In any event, whenever the ECA or any other EU institution or body intends to adopt a decision which perceptibly affects a person's interests[44], the principle of good administration, enshrined in Article 41 of the Charter, requires that person to be heard. The purpose of this right is to enable the person concerned to exercise his or her rights of defence.[45]

Ismeri had made observations to the ECA on its report in writing, and had requested rectifications to be made, yet the ECA had refused to do so. On appeal, the Court of Justice confirmed that the right to be heard was applicable in the specific context of ECA reports. The Court held that "[a]lthough the adoption and publication of reports of the [ECA] are not decisions directly affecting the rights of persons mentioned therein, they are capable of having consequences for those persons such that those concerned must be enabled to make observations on those points in such reports which refer to them by name, before those reports are definitively drawn up."[46]

Finally, it goes without saying that the allegations made concerning identified persons in the reports of the ECA will be fully subject to review by the EGC. They may constitute maladministration and thus give rise, where appropriate, to non-contractual liability on the part of the Union, if either the facts reported are not substantively correct or the interpretation placed on facts which are substantively correct is erroneous or one-sided.[47]

Conclusion

To conclude, I would like to emphasize that the Union – as a legal order based upon the rule of law – imposes upon the ECA respect for the general principles of EU law, an essential part of EU law. Despite the fact that the ECA's audit rules are not determined by the EU legislator, the general principles of legal certainty and protection of legitimate expectations require that those standards are clear, precise and predictable in their effects. These rules should be applied consistently and with due regard for the principle of non-retroactivity. Assessments of whether payments have been compliant with EU law create legal certainty for beneficiaries. The actions of the ECA should also comply with the principle of proportionality, according to which its actions should not exceed what is necessary to achieve the objectives they purport to achieve. The ECA should furthermore have due regard for the private life and the personal data of individuals in its reports. Finally, the ECA must comply with the principle of good administration. That implies a right to be heard for any individual who would be *nominatim* criticized in a ECA report.

an investigation of the latter against the applicant was held to constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals which gave rise to the Union's liability.

44 See ECJ, Ismeri, C-315/99 P, EU:C:2001:391, para. 28; ECJ, M/EMEA, C-197/09 RX-II, EU:C:2009:804, para. 41.

45 Para 61 of the preamble of 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 and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L298/1) provides in general: "The Court of Auditors should ensure that any of its findings that could have an impact on the final accounts of auditees or the legality or regularity of their underlying transactions, are transmitted to the institution or body concerned in good time in order to allow such auditees sufficient time to address those findings".

46 See, ECJ, Ismeri, C-315/99 P, EU:C:2001:391, para. 29.

47 CFI, Ismeri Europa/Court of Auditors, T-277/97, EU:T:1999:124, para. 110.

The need for principles of good audit

By Alex Brenninkmeijer, ECA Member

The relation between auditor and the auditee who is subjected to audit is not only guided by the standards – for instance INTOSAI standards - auditors apply, but also by general principles of good audit which give shape to auditors' professional judgement and which can limit his discretion. In what kind of cases do those principles apply and what is their relevance for the audit practice? Those general principles are well known in the administration of justice and in public administration. In audit their existence and recognition are to a certain extent overshadowed by the implications of audit standards. This article analyses on the basis of concrete issues the relationship between general principles of good audit and internationally adopted audit standards. And the implication of general principles of good audit for the audit practice.

Alex Brenninkmeijer

1. Introduction

Research institute X is beneficiary of European funding "EU funding" is not only controlled by their own auditors, but as well by external auditors hired by the European Commission. From year to year they get some comments, but there are no serious problems with their financial administration. During the fourth year of the programme a private audit firm hired by the EU commission raises serious objections against the calculation of overhead costs. The beneficiary asked the auditor what rules he applies to know the basis of which these objections are raised. The answer is: "These rules are secret." Such audit practice does not only result in frustration but creates also a serious threat to legal certainty for the auditee. In the beneficiary's view compliance is an important issue, but one should know on beforehand what the rules are you have to comply with. Moreover, the question is how legal certainty as general principle of law is protected in this case.

A large industry Y is beneficiary of EU research grants (so-called Seventh Research Framework Programme'[1]). The controlling auditor asks for detailed financial information, which cannot be provided by the administrative system which the industry has in place. Their answer to the auditor is that, although their system is highly sophisticated, delivering the required information will cost too much in relation to the amount of the EU funding involved. This case raises the question to what extent the claim for more detailed information is proportionate, and maybe what the relevance is for good audit at all.

Another entrepreneur receives 152.000 euro of EU subsidies. After the audit this amount is corrected by 40 euro or 0, 01% of the payable amount. This case raises the question to what extend a 'reasonable' correction is justifiable.

During an audit of some public procurement files, the auditor applies a checklist with concrete requirements for proper procurement procedures. The lawyer who deals with these cases feels quite uncomfortable about some of the requirements and asks the auditor for clarification on bases of the case law of the Court of Justice. The auditor is not willing to do so and simply applies the rules he has put on paper. This lawyer observes on the basis of contacts with colleagues that in audit rules are applied which cannot or can hardly be deducted from the relevant case law. Notwithstanding this fact auditees comply with these rules because there is no feasible remedy[2] to contest their application.

1 Seventh Framework Programme for Research and Technical Development 2007-2013 (the 'Seventh Research Framework Programme')

2 Starting a case for the Court of Justice might be an option but a beneficiary might not want this in view of future prospects for EU grants etc.

Only four examples out of a long list provided by different groups of auditees show what items come up in practice. It is not only the question to what extent the issues at stake are covered by the audit standards, but also the question who answers this question and what the consequences are in daily practice. It goes without saying that the risks are high. The European Commission (Commission) is firm in recovering money which is not spend in an eligible way or with other compliance errors. After years Institutions, (small and medium) enterprises can be confronted with financial claims, which are not foreseen. Recoveries can be subjected to legal scrutiny by the Court of Justice, but the time lap between the decision of the Commission and the decision of the court might be considerable.

In some policy fields one can observe that the risks of unexpected outcomes of financial control and subsequent recoveries are that high that potential beneficiaries refrain from making use of EU moneys. For a beneficiary the risks mainly accumulate around three topics:

- the setting of rules (not directly available or complete, extensiveness, available capacity);
- the interpretation and application of rules (guidelines available and to what extent agreed with by parties, updates on changes in interpretation, administrative burden);
- auditing of rules (different auditors, different opinion when project evolves, timeliness of audit and reporting, focus of audit on details or big picture, fair treatment compared with other beneficiaries, possibility to be heard).

An area were several of these risks materialised was the Seventh Research Framework Programme, leading to less applications from potential beneficiaries The EU Commission has introduced considerable changes in their schemes in Horizon 2020 in order to be less unattractive for beneficiaries.

The question remains, however, whether the audit practice is adjusted to the obligations which derive from the general principles of good administration. Moreover the question is whether the norms auditors apply do comply with those principles.

Another important question is to what extent the professional norms auditors apply, such as norms of the *International Institute of Internal Auditors (IIA)* and *the International Organisation of Supreme Audit Institutions (INTOSAI)* already do incorporate principles of good administration or not. In order to answer these questions we start with a description of the principles of good administration. The following step will be a comparison between those principles and the general principles applied by auditors.

2. General principles of good administration

General principles of good administration are developed in the legal systems of member states as well as on the level of the European Union. They partly derive from case law, partly from confirmation of it in legal texts. In this respect article 41 from the Charter on Fundamental Rights – as a part of the Lisbon treaty - marks an important moment in the development of general principles of good administration in EU law. Article 41 introduces since 2009 the right to good administration, which encompasses the right to have his or hers affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. According to the Charter this right includes among other things the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy and the obligation of the administration to give reasons for its decisions. The rights in Article 41 of the Charter hold a confirmation of previous case law of the Court of Justice.

On basis of this case law other principles of good administration do apply. In the first place the principle of proportionality, on bases of which there should be a balance between the objectives to be reached and the efforts it takes[3]. Secondly the principle of legal certainty and legitimate expectations is important. Individuals should know on beforehand the rules which are applicable in

3 The proportionality principle has a much broader scope, as it is laid down in Article 5 of the TEU. The criteria for applying this Article is set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

order to determine their legal position. Another important general principle of good administration concerns the right of defence, which encompasses the right to be heard. A principle of good administration related to all the principles just mentioned is fair time delays and application of proper and reasonable deadlines.

Those general principles are applicable on any action of European Institutions, agencies and other bodies and they are applicable as an auxiliary to the laws and rules which are formulated for specific subjects. Individuals (including companies, institutes or other entities) have the right to be treated in accordance with those principles in the preparation or execution of any action of EU institutions and agents acting in their name. This implies that internal auditors and external (private) auditors hired by the Commission and the European Court of Auditors have to respect these principles when doing their work. The complexity of EU's organisation and management implies that less obvious entities are subjected to those general principles of EU law. For instance many EU programmes are executed in shared management by management authorities in member states. Those management authorities and related administrative bodies should also apply those general principles of administrative law.

3. Audit principles

Before describing audit principles it is important to note that these principles stem from a different discipline as the legal discipline governing the general principles of law. For that reason there is a risk of introducing confusion, in the sense that even the wording 'general principle' does not mean the same in those different disciplines. General principles of administrative law can be considered as the commonly accepted legal foundations of EU law, and more generally of law. General principles that auditors apply often derive from international standards developed as informal law on the basis of (inter)national co-operation in (inter)national NGO-like organisations and organisations of audit professionals. For internal audit in the public sphere the *International Institute of Internal Auditors (IIA)* has enacted *Standards for the Professional Practice of Internal Auditing* which belongs to the wider scope of the *International Professional Practices Framework (IPPF)*. For external audit by supreme audit institutions (SAIs) INTOSAI has enacted ISSAIs[4], inspired by the private sector's *International Standards on Auditing (ISA)*. National supreme audit institutes and the European Court of Auditors (ECA) have adopted these standards by transforming them into soft law instruments for their own organisation. For this purpose the ECA has adopted the Court's Audit Policies and Standards (CAPS). On bases of this policy document important internal instructions have been developed for the different audit tasks, such as financial and compliance audit and performance audit.

As noted before, general principles of administrative law and general audit principles stem from different disciplines – the legal discipline and the audit discipline - and have a different normative basis. For example, audit standards are important for auditors' professionalism as such. If they violate those professional norms they may be held responsible under disciplinary law of their professional organisations. Audit principles are to a large extend a reflection of good audit practices which have been developed over the years. However some audit principles have a more fundamental nature. INTOSA's Lima declaration and Mexico declaration are considered by the profession as the 'bible' for audit. These Lima and Mexico declarations provide for definitions of auditor's work and for instance institutional arrangements like independence from the executive and basic rights of auditors such as access to documents. For the ECA fundamental principles (i.e. independence among others) are confirmed in articles 285 to 287 TFEU as legally binding rights and obligations. It is by this way that those fundamental principles are incorporated in the work of ECA's auditors.

4. General principles of good administration and audit principles

Audit principles provide for conscious fact finding procedures which are based on the 'no surprise' principle and two rounds of consultation. Subsection 61 of the Common Provisions to EU's Financial Regulation[5] stipulates:

4 International Standards of Supreme Audit Institutions, issued by the International Organisation of Supreme Audit Institutions (INTOSAI).

5 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 and repealing Council Regulation (EC, Euratom) No 1605/2002.

> 'The Court of Auditors should ensure that any of its findings that could have an impact on the final accounts of auditees or the legality or regularity of their underlying transactions, are transmitted to the institution or body concerned in good time in order to allow such auditees sufficient time to address those findings.'

The first consultation takes place after the fact finding during the audit in the form of a statement of preliminary findings (or a letter containing those findings) and the second one on bases of the draft report during the adversarial procedure. ECA's audit is mainly aimed at activities of the European Commission, but many other parties may be involved. Those parties are referred to as 'the beneficiaries' of EU funds, for instance a University under Horizon 2020 subsidies or a farmer under the programme on agriculture and rural development. Those parties are often subjected to audits of the European Commission (eventually by external private auditors hired by the Commission) and the ECA. In those relations general principles of good administration do apply. An analysis of the audit instructions, for instance the Financial and Compliance Audit Manual shows that on the one hand the procedures and criteria for audits are described in detail. On the other hand, a manual like this is not written with the principles of good administration in mind. However, with these principles in mind one can identify the following 'good administration' elements, which apply to planning the audit, the audit process itself and the subsequent reporting.

- The auditor should prepare audit documentation on a timely basis (1.10);
- The audit process is submitted to systemic quality control (1.11);
- Professional judgment and scepticism should be exercised when planning, as well as performing and reporting on audits (2.1.3);
- Auditors should acquire an understanding of the entity so as to have a frame of reference within which to plan and perform the audit and to exercise sound professional judgment (2.3.2);
- Sufficient, relevant and reliable audit evidence is needed to substantiate audit conclusions in relation to the audit objectives (2.4.2-4);
- If necessary confidentiality of audit evidence should be safeguarded (2.4.10), and
- The rights of third parties get special protection, in case they are or could be identified in the report (4.1.5).

It is obvious that the consultation of beneficiaries and the commission during the audit process contributes to good administration, but it is important to discuss separately the implications of principles like proportionality and legal certainty for the audit process. The examples given in the Introduction raise two questions. Firstly, to what extent auditees or beneficiaries can rely on general principles of good administration during the audit process? Secondly, the question what remedy is in place for a beneficiary or other interested party.

The first question should be answered in the positive, in the sense that the general nature of principles of good administration imply that they are applicable to audit as well. Public or private auditors acting on behalf of the European commission or other European organisations like agencies are bound by those general principles of good administration. Auditors should apply them during the audit process as us them as a frame of reference in applying audit standards. This means that auditors, in order to form sound professional judgement on the audit issue at hand, need to look at:

- the text, i.e. the rules that should apply;
- the context in which these rules are used, taking into account specific circumstances where necessary and applicable;
- intention of the rules, i.e. whether the rules where used in line with their overarching purpose and principles, including principles of good audit/administration.

The answer to the second question is not an easy one. Reading all audit standards and applicable procedures there are no special procedures available in which principles of good audit can be protected. Indeed a decision on recoveries by the EU commission is subjected to legal protection by the Court of Justice. However, many decisions during the audit process acts are not (yet) reviewable acts. Waiting until the Commission takes a recovery-decision may take too long and might be ineffective, for instance if the recovery will cause serious financial problems for the beneficiary. And not every 'error' will lead to a recovery, but may lead to a replacement of projects in the Member State. Many debates on the regularity of (elements of) projects take place in shared management where national management authorities are competent. What if there is a dispute on the regularity of some elements of a project?

5. Conclusion

Feedback from beneficiaries on audit practices concerning EU programmes raise the question which general principles of audit exist and where do they derive from. Principles of good audit need to encompass a number of general principles of good administration. Otherwise auditors would act against the Treaty, against certain provisions of the Charter of fundamental Rights. In order to be in line with that Charter also auditors have to respect, when forming their professional judgement, certain eminent principles like the one of proportionality, legal certainty and the right to be heard while respecting reasonable deadlines. While the latter one is specifically arranged for in audit standards the first two are not directly apparent in those standards. And there is no immediate need for that since the general nature of principles of good administration imply that they are applicable to audit as well. To see that in practice public auditors, at whatever level, need to realise the relevance of these general principles of good administration for their day-to-day audit work. So that these principles of good administration become part of the principles of good audit.

For beneficiaries of EU subsidies the application of these general principles of good administration is fundamental to perceive to be treated fairly and just when dealing with the EU and to develop a relation of trust between auditor and auditee. For the European Union in general, trust between European institutions and citizens or entrepreneurs is key in gaining their support to and involvement in EU programmes. General principles of good audit need to be further developed, building upon general principles of good administration and general principles of law. Such a development should decrease the risk that detailed rules become a predominant factor when forming and auditor's opinion while general principles of good administration may indicate a different direction.

The VIII EUROSAI-OLACEFS Joint Conference was held in Quito, Ecuador 24-26 June 2015

By Nikolaos Milionis, ECA Member

In the presence of 115 heads and representatives of SAIs of Latin America, the Caribbean, Europe, Africa and the Middle East, the VIII EUROSAI-OLACEFS Joint Conference was held in Quito, Ecuador.

Dr. Carlos Polit, Comptroller General of Ecuador, extended a warm welcome to all his colleagues and expressed his best wishes for the work sessions. He expressed his confidence in strengthening institutions towards development and transparency, with the objective of guarding the use of public resources, and creating innovate mechanisms in order to be more efficient.

Meanwhile, Aroldo Cedraz de Oliveira, President of Court of Auditors of Brazil and President of OLACEFS, stated that "integration and dialogue between all SAIs of the world, is the opportunity to share progress made and combine a wealth of experiences" around the topics of "coordinated audits, development support, transparency, ethics and open data".

The vice-president of the Constitutional Court of the Republic of Ecuador, Jorge Glas, said that this initiative constitutes a milestone for Ecuador, because it seeks the objective of recovering public faith and restore the citizens' faith in the correct use of public resources. He also said that the relationship between the Executive and the control authority is about independence and respect, and this lets us take fundamental steps in accountability, the fight against the corruption, guaranteeing independence and strengthening the democracy.

Regarding the global approach to coordinated audits, the representatives of INTOSAI, CBC, OLACEFS, EUROSAI and AFROSAI-E shared the experiences of their respective organisations about the strengths of working together in coordinated audits. The coordinated or cooperative audits expand areas such as institutional capacity of SAIs, the capabilities of the organisational systems and professional skills of the staff.

To achieve these goals it is important to promote continuous training programs, using e-learning tools to share experiences from around the world.

Representatives of AFROSAI highlighted that coordinated audits are a practical tool for sharing ideas, describing and comparing methods, and improving the skills of auditors in the region.

The importance of strengthening coordinated audits was related to relevant regional issues and quality of services. Participants agreed that the audits foster integration of SAIs. However, they recognised the problems in regional legislation regarding the application of international standards. In this sense, the necessity of training for officials of SAIs was highlighted, as well as of all activities that enrich their knowledge. In closing, the members of this group suggested that they should link to international organisms in order to validate technical reports and allow said reports greater legal force.

They suggested that one important role of SAIs is to realize specific audits as tools for sustainable development. They consider that the use of coordinated audits in the SAIs could have a positively influence on countries' governance. On the other hand, they argued that the role of SAIs should be related to transparency and accountability. This group recommended that internationally coordinated audits must set priorities for implementing sustainable development goals; and that their progress should be monitored during the process to ensure the achievement of goals and objectives.

They also highlighted the importance of the search for an alternative to promote and recognize the work of auditors as well as strengthening the use of multimedia tools and technology platforms for coordinated audits. They cited an example of the importance of environmental audits: water resource management. Finally, this group concluded that more awareness should be sought among citizens on the role played by the auditors.

Coordinated audits add value to the institutional development of the SAIs as long as knowledge is transferred within each institution, to improve processes and methodologies.

We must improve monitoring mechanisms and follow up recommendations, to generate greater impact. It is necessary to develop a specific methodology for monitoring the implementation of recommendations, including on performance audits.

It is necessary that consolidated reports are shared within the institutions and with the public, in an accessible language. This strengthens a positive perception of the work of SAIs.

Regarding the good governance, Arno Visser, President of EUROSAI, reported that the contexts of Good Governance are different in each county, but all have common origins. He cited the Netherlands as an example, since it bases its good governance in the Dutch Revolution of 1600, caused by tax matters. In North America, the revolution was related to tax issues as well. What all of them have in common is that they have identified issues in which change could occur in established values. These values generate changes for a new democracy. In this sense, the role of SAIs is to lead institutions towards ethical behaviour and to promote citizen participation.

Regarding the open data, the representative of the Organisation for Cooperation and Economic Development (OECD), defined open data as the information of the public sector which is available to any citizen. He highlighted the close relationship between open data and the use of technology because this allows us to create applications that enable transparency, innovation, public sector efficiency and citizen participation. The challenge of SAIs is to think about open data as an auditing topic since these are potential inputs in the process of coordinated audits.

One of the conclusions reached was to strengthen the open data linking technology platforms that allow greater citizen participation. It is not only about having information of an accounting nature, but rather about relating them to applications that provide an efficient service to the people so that they can have their rights upheld. Moreover, the strategic use of this information should lead to good governance reflected in a process of respect for democracy.

Important issues related to the mechanisms that must be implemented to improve transparency, audit processes, the promotion of ethical conduct in the public sector, social control, and accountability were also discussed. SAI representatives agreed with several approaches that will help overcome obstacles to transparent management: access to public information, an educational handling of audit reports, greater social control, accountability, among others. They shared the need to implement "ethical audits" in public administration, considering that "ethics frees auditors".

The following three areas were analysed separately: SAI audits, transparency, and ethics in public administration. The ability to improve performance in public institutions was demonstrated through examples of good management practices conducted in various countries,. The conclusion was that ethics is auditable and that there is a need for legislation to support this work.

The importance of SAIs and their relation to Open Government was also highlighted. The discussion focused on globalization and the development of communication technologies that allow interrelation with users allowing them their management schemes to inform the citizenry. However, it should be considered that there are reports that are sensitive and therefore should not be considered public.

The Mayor of the Metropolitan District of Quito, declared the Authorities and Heads of SAIs participating in the VIII EUROSAI-OLACEFS Meetings as Distinguished Guests.

The mayor stated that: "It's a true honour for Quito to receive the heads of these solid control entities. We can assure you that the role they play in their Institutions is vital for transparency, honesty and proper management of public resources, which contributes to the strengthening of democracy".

Arno Visser, Vice President of the Court of Accounts of the Netherlands and President of EUROSAI gave thanks for "the kindness, hospitality and quality of the people". He also said he admired the cultural wealth of the country and its landscapes. "I've seen that Ecuador is a country of happy people. The city of Quito has allowed us to discuss important topics with joy," he said.

The closing ceremony of the VIII EUROSAI OLACEFS Meetings was held in a joyful environment. Dr. Carlos Pulit, Comptroller General of Ecuador, mentioned that the results of the plenary and group sessions have been synthesized, producing intellectual contributions that will be disseminated throughout the international community.

He also mentioned that SAIs have common problems and addressing them requires joint efforts. The event showed that progress can be made as a community.

However, he said there is obvious concern regarding the implementation of the Millennium Development Goals, the fight against poverty and the fight against corruption, but he ratified that the strengthening of the coordinated audits and the use of technological tools will aid good governance practices and open data.

"We have fulfilled our duties in an environment of camaraderie with great results and close ties. The Atlantic Ocean is the only thing that separates us now", he said.

In closing, he thanked Arno Visser, President of EUROSAI and Aroldo Cedraz, President of OLACEFS, for their initiative, availability and dedication and he ratified his appreciation of the human talent of the General Comptroller's Office of Ecuador who contributed to the meetings.

The text is based on the information published by the two news bulletins of the VIII EUROSAI-OLACEFS Conference.

The audit mandate of the European Court of Auditors needs to be strengthened

By Margit Spindelegger, Head of the Private Office of the Austrian Member

During a meeting between Oskar Herics, the Austrian Member of the European Court of Auditors, and the members of the Austrian Parliament's Court of Audit Committee (Rechnungshofausschuss) on 24 June 2015 in Vienna, members of the Committee along with Josef Moser, President of the Austrian Court of Audit (Rechnungshof), supported the call to strengthen the ECA's audit mandate, particularly in relation to banking supervision by the European Central Bank, the European Stability Mechanism and the European Fund for Strategic Investments

The Austrian Parliament in Vienna

The first ever joint meeting between an ECA Member and the Austrian Parliament's *Rechnungshofausschuss* took place on 24 June 2015 in the Parliament in Vienna. The meeting was the initiative of Gabriela Moser, Chairwoman of the *Rechnungshofausschuss*. Oskar Herics, the Austrian Member of the European Court of Auditors, assisted by Margit Spindelegger, the head of his private office, presented the ECA's work and discussed various aspects of the EU's accountability and audit architecture with the Committee, in the presence of Josef Moser, President of Austria's *Rechnungshof*.

The meeting largely focused on the cost-effectiveness of EU funding, cooperation with national audit institutions and the ECA's current audit mandate in relation to the supervisory role of the European Central Bank, the European Stability Mechanism and the European Fund for Strategic Investments.

Oskar Herics stressed that the EU's financial management did not yet meet the high standards required, particularly as regards the efficiency and effectiveness of funds allocated. He also said that there was considerable need for improvement in terms of compliance, in order to bring the estimated error rate (4.7 % for the 2013 financial year) down to the tolerance threshold of 2 %, particularly in the areas of rural development and regional policy.

He underlined that cooperation between the ECA and the national audit institutions is already working well, as demonstrated by regular exchange of views and a wide range of joint cooperation activities at different levels, including annual meetings between the respective Presidents of the ECA and of the national Supreme Audit Institutions in the context of the Contact Committee. Nevertheless, Oskar Herics said he considered a further strengthening of cooperation between the various external audit institutions to be essential, which would not need to be limited to the shared management of the EU budget. Given the different audit arrangements at EU level, he said he believed that the external audit institutions would need to learn from each other in order to pool their individual strengths, capabilities and perspectives.

In the further course of the meeting, members of the *Rechnungshofausschuss* and Josef Moser, President of Austria's *Rechnungshof*, supported the ECA's call for a clear and comprehensive audit mandate, with particular reference to ensuring effective monitoring of banking supervision by the European Central Bank, the European Stability Mechanism and the European Fund for Strategic Investments. The meeting also touched upon the need to simplify the complex management and control systems of EU aid programmes, while ensuring an adequate level of EU added value, cooperation between the ECA and the European Anti-fraud Office (OLAF) in cases of suspected fraud and a greater focus on results in the 2014-2020 EU programming period.

Special Report N° 7/2015 The EU police mission in Afghanistan: mixed results

Interview with Hans-Gustaf Wessberg, ECA Member Chamber III

By Rosmarie Carotti

R. C.: EUPOL was launched in 2007 and shall be terminated in 2016. The ECA special report covers the period 2007 – 2014 with a special concentration on the period 2012 -2014. What has been accomplished?

Hans-Gustaf Wessberg: After a very difficult start, EUPOL has contributed considerably in laying the foundations for a professional civilian police force but there still is a lot to be done.

EUPOL is a Common Security and Defence Policy mission supporting the Afghan Government in building a civilian police force that is connected to the judicial system and the general rule of law in Afghanistan. That can be compared to other police forces such as the gendarmerie which can also participate in military style operations.

One of the problems for Afghan national police is that they have been doing both. On the one hand trying to be a civilian police force and on the other being heavily involved in fighting the Taliban insurgency.

EUPOL will be terminated in 2016 and this is a problem. In our conclusions we say that there is some doubt about sustainability after 2016 of what has been accomplished.

R. C.: Who decided the EUPOL mission in the first instance?

Hans-Gustaf Wessberg: A joint EU assessment was carried out in 2006 followed by a fact finding mission which proposed a joint EU intervention. The European Council decided in 2007 to create EUPOL as part of the European response.
The total cost of EUPOL for the period from May 2007 to the end of 2014 was close to €400 million.

R. C.: When have you been to Afghanistan? How do you rate the present situation there?

Hans-Gustaf Wessberg: In September 2014 when we did the audit mission. But I have been in Afghanistan before that.

One must say that it is a very tough situation, a very dangerous area to operate in. It is a tough job to be an Afghan policeman but it is also a very risky job to be the person who trains Afghan policemen.

It is a country full of violence. You cannot move around without protection teams; the country is certainly in need of further development of the police.

R. C.: Is it really the EU's task to be there at this point?

Hans-Gustaf Wessberg: I definitely think that the EU has a role to play. In 2007 the EU decided to try to coordinate the Member States' activities in Afghanistan and also contribute more as a Union. It was a political decision to go there and it is not up to me to decide whether this is right or wrong, because we are auditors. But personally I definitely agree that this was a worthy task to undertake. If the EU wants to play its role in the world, the Union also has to work in the difficult areas.

R. C.: From the special report I understood that we worked together, and not always together, with other international bodies.

Hans-Gustaf Wessberg: That is usually the case when the EU works on development aid and assistance in countries like Afghanistan. The EU is never alone; Member States are always there as well, the US, and of course the United Nations. You could call it a bit of a competition and we also point that out in the report. In this case, the fact that there was competition between actors complicated things. But this is normal; I have seen it in most of the audits I have done.

R. C.: Such a mission costs a lot of money, we talk about €400 million between 2007 and 2014, and the mission will continue for two more years. Is that expense warranted or should this money be used in a different way, always for the purpose of helping the Afghan society?

Hans-Gustaf Wessberg: One of the best ways of helping the Afghan society is to create the foundation of a democratic society under rule of law. A well-functioning police force is definitely important. That is one of the most important things that can be done.

R. C.: We want to bring democracy to countries which have different backgrounds and traditions than ours.

Hans-Gustaf Wessberg: I was not speaking about democracy; I was speaking about rule of law. And that is one of the foundations for a society. Without rule of law, there can be no development; and without development, probably no future.

R. C.: What does this special report add to the picture in Europe of the situation in Afghanistan and the role of the EU outside its borders?

Hans-Gustaf Wessberg: The most important effect of our report is that we highlight a number of conclusions and make recommendations that could greatly influence future missions like this. We point at two things mainly: Firstly, that the start-up phase is very complicated in a tough environment like Afghanistan and much more planning is probably needed to be quickly efficient. Secondly , we point out the problem with sustainability when a project like this has to be handed over to the country authorities. I think that the experiences drawn here can be of value when the EU decides next time to do something in a very tough environment.

R. C.: Is there discussion within the Commission and between the Commission and us about a follow-up?

Hans-Gustaf Wessberg: The Commission and the European External Action Service (EEAS) have said that they have adopted all our recommendations. From our side we acknowledge that the EU has contributed to lay one of the fundamental bases for development. There will be a proper follow-up of this report according to Chamber III practices and procedures.

R. C.: When you were in Afghanistan and you talked to people employed by EUPOL what were the major problems they reported?
Hans-Gustaf Wessberg: If you speak to the staff, they are in two groups: people on secondment from Member States and contracted people by the EEAS and the EU. They all were very positive in respect of what they were doing but they saw, most of them, the problem of sustainability, and questioned what will happen when this goes into Afghan ownership.

R. C.: Does that mean that there has been bad planning of the EU?

Hans-Gustaf Wessberg: Yes, that's one of our conclusions. At this point in time, much more consideration should of course be put into what happens as the mission is nearing the end of its mandate.

R. C.: What fears do Afghans have for the future? What are the main risks that the situation might deteriorate again?

Hans-Gustaf Wessberg: People who work in EUPOL are very much concerned with what they are doing now and they find it worthwhile but some of them think that there might be a problem when EUPOL leaves and things would have to be handled by the Afghans themselves.

The bigger issue about who takes over and rules the country is not a main concern for the police. The risk that they see is that the development towards a civilian police organisation working within a rule of law framework slows down or stops altogether.

R. C.: If you had to say a word to the Commission what would you say? How have they reacted to our remarks?

Hans-Gustaf Wessberg: Prepare and plan better, and elaborate as soon as possible a clear and comprehensive exit strategy.

The Commission has agreed with all the points we make in the report. This includes our criticism on the absence of a well-defined exit plan, that there was no time set for withdrawal when they started, so it was not easy to plan for it.

R. C.: EUPOL is a Common Security and Defence Policy mission and as such is also a part of the European Union's External Action service. How was your relation with the European External Action Service? How were your contacts with the Afghan authorities?

Hans-Gustaf Wessberg: Relations with the Commission and the EEAS were excellent. We had no problems at all getting the information we needed, getting assistance on the spot. In this case, I considered both as a whole.

The Afghan authorities were really grateful for the help in developing the Afghan police organisation and they also gave the impression of having a very good relationship with EUPOL. They were very open with the problems they have and with the situation on the ground.

One must remember that being an Afghan policeman is a very demanding and dangerous job but being the person that trains Afghan policemen, which EUPOL does, is also demanding and very dangerous. When EUPOL started, in reality there was no Afghan police organisation. The circumstances were of course extremely difficult and that should be taken into consideration.

R. C.: Is the civilian population aware of what the EU and EUPOL do for their country?

Hans-Gustaf Wessberg: It is hard for me to answer this question because this time I only visited Kabul. It would be wrong to say that the whole Afghan population understands everything of this complicated issue but people I met in Kabul definitively did.

R. C.: Can Afghans distinguish between EU and US help?

Hans-Gustaf Wessberg: I do not think they really care. They want to go on with their lives.

R. C. Does Afghan clan-thinking also play a role in police forces?

Hans-Gustaf Wessberg: Yes, of course. Afghanistan is a clan society and this affects all parts of life. They also have, on top of that, other problems that we should not be afraid to mention. They have corruption; they have quite a lot of political influence that should not be there on the police force. They also have the problem that roughly 80% of the policemen cannot read and write.

R. C.: Are we, in the EU, aware of who holds the threads?

Hans-Gustaf Wessberg: The decision-makers know. One should remember that Afghanistan went through a process of democratic elections with a new government, parliament and president in place, just before I arrived there. Organising that election without serious incidents was a success. Definitely, for the first time there are signs that the country has the chance to pursue the necessary changes and reforms on the way to becoming a developing and just society but all this will depend on achieving stability and peace in the whole region.

Greece: solidarity and adjustment in times of crisis

By Rosmarie Carotti

Anastassios Giannitsis, Professor at the University of Athens and former Minister presented on the invitation of Nikolaos Milionis, ECA Member, a study by himself and Stavros Zografakis. The study of March 2015 was supported by the Macroeconomic Policy Institute of the Hans-Boeckler-Foundation
3 July 2015

Nikolaos Milionis, ECA Member, introduced Professor Giannitsis who presented the exhaustive statistical work he had carried out on the financial situation of the Greek households since the start of the crisis.

This presentation, said Nikolaos Milionis, was an input of the narrative of the crisis which has developed into a three-fold, economic, social and political crisis. Professor Giannitsis studied the evolution of income and wealth during the crisis. While the taxable income has declined by about a quarter, the effective decrease is close to 40% when taking into account additional taxes and inflation. Professor Giannitsis also demonstrated that the "average" hides huge differences between the richer and the poorer or the different types of revenue. In other words, the policy response to the crisis did not fully allow for sharing the burden fairly.

The objective of the study was to explore the distributional and the equity impact of both the recession and the adjustment policies implemented during the crisis period. In particular, to explore the specific impact of the main policy measures (wage and pension cuts, direct, indirect and property taxes) on incomes; to depict the extent to which the principle of solidarity has been taken into consideration in policy-making during these years, and to explore the determinant factors of inequality and its components during this period.

The study also aimed at examining the crisis-related policies on poverty, and whether the consolidation and adjustment policies have facilitated or impeded the adjustment process and growth.

The study demonstrates the scale of impoverishment following the crisis and makes clear that the impact of the adjustment measures was not spread equally across Greek society. On the contrary, post-crisis policies had very different effects on different groups. Although not shown by headline statistical indicators, a more in-depth analysis reveals that, during the crisis, there were winners and losers in all income classes. As Nikolaos Giannitsis suggests, the measures taken in response to the crisis also negatively affected the general recovery path by making it more complicated and painful for society.

We quote the study: "In conclusion, the policies pursued included many inefficiencies. In the years 2009-2014, the *primary* fiscal deficits accumulated additional debt of EUR 42 billion, the additional loans to Greece were EUR 230 billion, nominal GDP fell by EUR 55 billion (-24.7%), headcount unemployment increased by one million, income

Income in 2008 and 2012 and number of tax declarations by income source (in €, millions)

	2008	2012	% change 2012-2008
Total Income:	**120,789**	**93,481**	**-22.6**
- Wage-related income	47,818	34,737	-27.4
- Pensions	25,768	29,077	+12.8
- Income from commercial activities	9,306	4,903	-47.3
- Income from independent activities	4,424	3,196	-27.7
- Agriculture income & subsidies	3,041	3,838	+26.2
- Income from dividends and interest	16,251	7,543	-53.6
- Rental income	8,861	7,066	-20.3
- Other	5,320	3,122	-41.3
Total capital income	37,459	23,350	-37.7

3

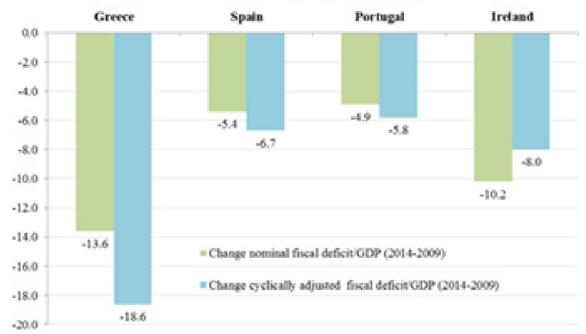
from wages was cut by 27.4% and the country's prospects are still surrounded by high uncertainty. All these changes sum up to an exorbitant bill, suggesting that policymakers (national and European) showed neither solidarity nor effectiveness in crucial crisis management issues.

It could be said that the accumulation of a high external debt by Greece in the pre-crisis period came at a high price. However, borrower responsibility is the flipside of lender responsibility, and in this case neither side behaved responsibly. Moreover, after the crisis broke out, the "lender responsibility principle", stating that lenders are responsible for their own wrong choices or practices, which has been central to decisions on the Banking Union in 2014, was ignored in 2010-12. Aiming to protect private bank lenders and their countries from the risk of being sanctioned for their business conduct, the euro area countries turned bank loans to Greece into official (public) loans.

Accepting that a crisis management with such a bottom line result was effective and that therefore there was no room for a more positive alternative, would be a very heroic stance. However, an analysis of these issues would be another long chapter beyond the scope of this study".

In the following interview Anastassios Giannitsis took the opportunity to reflect on the situation in Greece at the eve of the country's referendum.

Nominal and cyclical adjusted decrease of fiscal deficits in Greece and other crisis countries (in percentage of GDP)



Note: 2014 estimations.
Source: Cyclical Adjustment of Budget Balances (European Commission, Autumn 2014).

A triple crisis: economic, social and political

Interview with Tassos Giannitsis, Professor at the University of Athens and former Minister

By Rosmarie Carotti

Anastassios Giannitsis, Professor at the University of Athens and former Minister

R. C. : We are all waiting for the result of the Greek referendum. In any case, whichever the answer will be, there will be losses for the EU, as Greece may not be in a position to pay everything back. Can you quantify these potential losses?

Tassos Giannitsis: It is impossible and risky to make such quantifications. The crucial issue lies elsewhere. More important than the monetary losses are elements like trust, cohesion and the perspective of the Eurozone, and the message that would be sent to the international community should a country leave the Eurozone.

As Greek I should not forget that the losses for Greece would be immense. It is a bad approach to think who will lose most, the Eurozone or Greece. What we should try to see is how to get to a win/win situation and how to overcome the crisis and the present impasse.

R. C.: When was the point reached in the negotiations that things went so wrong that no more understanding was possible? What was the mistake Europe made?

Tassos Giannitsis: All these last months were bad in terms of what the one and the other side asked. I think that both sides made significant mistakes in this time, but particularly the Greek negotiation approach and the Greek political forces.

From the very beginning of the crisis in 2010, Europe focused its approach just on fiscal consolidation without taking into account to what an extent a country like Greece could reach a fiscal balance and at what cost. Greece was forced to bring down the fiscal deficits from 15.5% of GDP to nearly 0% of GDP and even to primary surplus within four to five years.

R. C.: Other countries were not asked to make such efforts. How come? One often blames Germany but it was a European position.

Tassos Giannitsis: No other country, especially no other developed country at least in the last two decades had to make such an effort. It simply was an inefficient concept, the implementation of which proved to have profound destabilising effects in other areas.

It was a European position and it does not matter whether it was imposed by Germany or the coalition. It was a mistake to look just at economic figures and numbers because the crisis in Greece evolved. First it started as a fiscal crisis, it was extended to the financial sector, then it was transformed to a social crisis and now we have the culmination as a political crisis.

In comparison to five, six years ago, a completely new political architecture has evolved. In the study which I will present today to the staff we see that on average the incomes in Greece decreased by 38-39% within very few years (2010-2014). That means that we have broader parts of the population which experienced even higher cuts in their income. Of course, on the other side, there are also people who within the crisis managed to be productive and earn. All this led to a deep economic but also social and political de-stabilisation. The social and political dimensions never appeared in the discussions and reflexions on the European side.

Another dimension was overlooked. Besides fiscal consolidation, one should also try to design policies which enhance growth, not necessarily positive growth rates for Greece during the years of the crisis but at least less negative growth rates.

The success of consolidation depends on two main figures: fiscal deficits or surpluses and growth.

R. C.: Is the Juncker Plan an answer?

Tassos Giannitsis: It could be. Surely it will be helpful but I think that Greece now is not under normal conditions. We need something which goes beyond the business as usual under the European funds. It is not necessary to think on additional resources. What would matter is to have an efficient plan to use these resources as strategic drivers of growth. The Juncker Plan can contribute but Europe should also start to think why the European South, not only Greece but also Portugal, Spain and Italy had problems. There is something more systemic and structural than just the failure of one government or country. In my view, we need to focus more systematically on the productive system. It should be enhanced, reoriented and supported to become more competitive and more supportive of growth.

Growth and convergence were achieved in the past, before the crisis, mainly through the transfer of resources and of debts, which led to a conversion of incomes, and much less through the conversion of productive systems.

R. C.: Is the ECB's quantitative easing helpful for Greece?

Tassos Giannitsis: The quantitative easing is not something which has been conceived for crisis countries, it has been conceived for the Eurozone itself. I consider it a positive step. Of course, when it will be implemented, it will be helpful also for Greece, but this means that Greece has to be on track, that it has to be in a programme and in a position to be able to benefit from this policy.

R. C.: Is this ECB still giving money to Greece?

Tassos Giannitsis: The ECB stopped giving money but fortunately they have not asked for any to be paid back. For the moment the relations between the ECB and Greece are frozen and we will see after the referendum.

R. C.: Are there parallels with the crisis in Cyprus?

Tassos Giannitsis: There is a big difference. At the very critical moment, Cyprus was in a programme, so the ECB could support the Cypriot banking system by giving liquidity. They had capital control but the banks could provide liquidity to individuals and enterprises even if on a lower scale.

Greece is not in a programme and if Greece defaults, the liquidity of its banking system will be zero.

R. C.: Today, what margin of action do national governments have in Europe and in the Eurozone?

Tassos Giannitsis: Under normal conditions, all governments of the Eurozone have margins of action although they have to respect commitments taken and apply common rules. If necessary, they have to fight for changing them.

Even theoretically 'autonomous' countries have to respect rules and the social and economic reality when they pursue monetary stability and growth. Consequently, in my view, it makes no big difference to be in the Eurozone or to have a national currency. If the rules are not respected, the outcome will be huge inflation, deficits and imbalances.

R. C.: What is changing in the relations of Greece with Russia?

Tassos Giannitsis: I do not believe that much is changing there. Greece and Russia historically have had close relations. Russia is an energy power. The present government tries to show that it will make this relation stronger. As far as this does not lead to any distance from Europe and the alliances we are part of, it could be a positive development.

R. C.: What is the prevalent feeling in Greece?

Tassos Giannitsis: After all the sacrifices Greece has made: six years of depression, cuts of income, huge unemployment and poverty, there is no positive perspective.

People can tolerate making sacrifices but they expect that at some point there will be a promising future. The latter still lacks and is a very destructive factor in many aspects.

R. C.: Where does the European idea stand today? Has Europe become too distant from the citizen?

Tassos Giannitsis: The European idea is not as strong as it was ten years ago. In this respect, Europe is faced not only with the problem of the crisis countries in the South, but also with a broader growing anti-European sentiment in the continent.

Europe has become too distant from the real problems of the citizens. If things go wrong in Europe, even if there is shared responsibility between Europe and national governments, you cannot expect that citizens make a distinction between who is more responsible: national government or Europe. They expect that Europe can guarantee some very basic achievements and this social and political instability creates the problem in Europe. The extreme right and the populist movements are the product of this evolution.

Special Report N°2/2015

EU-funding of Urban Waste Water Treatment plants in the Danube river basin: further efforts needed in helping Member States to achieve EU waste water policy objectives

Waste water and sewage sludge can affect the quality of waters and soils. In response to this, the EU has adopted Directives and co-financed the building of collecting systems and waste water treatment plants. The ECA checked the implementation of the Urban Waste Water Treatment Directive in four Member States of the Danube river basin. It also examined a sample of 28 treatment plants, to see how they treated waste water, handled sewage sludge and assured financial sustainability. The ECA makes recommendations on reporting, on ways to improve effectiveness, efficiency and the sustainability of treatment plants, on the relevance of concentration limits, on the use of sewage sludge and on monitoring pollutants in sludge.

This report was published on 13 July 2015

Special Report N°8/2015

Is EU financial support adequately addressing the needs of micro-entrepreneurs?

Micro-entrepreneurs across the EU are experiencing difficulties to access the conventional credit market. With a view to improving this situation the EU provides financial support through grants and financial instruments.

With this report, the ECA assessed whether the programming and design of the EU financial support was addressing the actual needs of micro-entrepreneurs and whether robust performance reporting systems were in place. In addition, the ECA examined whether sufficient information is available on the implementation costs of the different EU funding mechanisms supporting micro-entrepreneurs.

This report was published on 14 July 2015

The ECA says:

Hello to:

Marianne VAN REENEN
Daniel TIBOR

Goodbye to:

Christian BURCKEL
Andrew JUDGE
Peter KOVACS

La surveillance des finances publiques nationales en Europe

Par Giuseppe Diana, Conseiller en matière de politiques d'audit

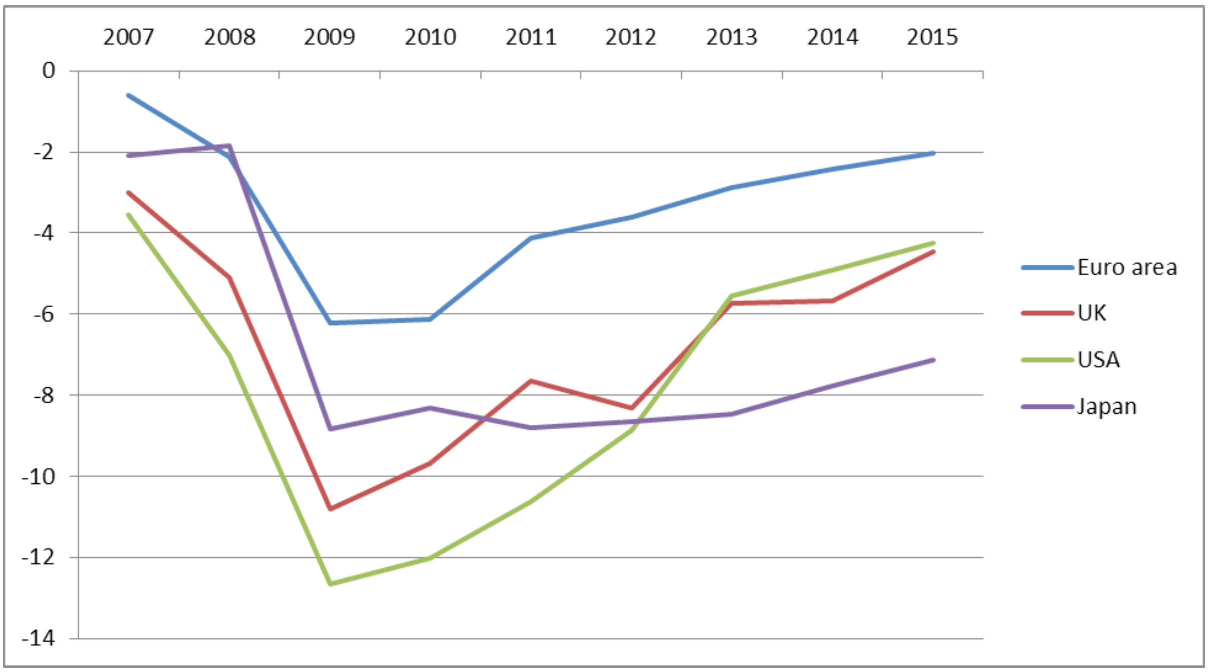
Giuseppe Diana

La **10ème édition des Rendez-vous européens de Strasbourg** s'est tenue au Parlement européen du 18 au 21 mai 2015

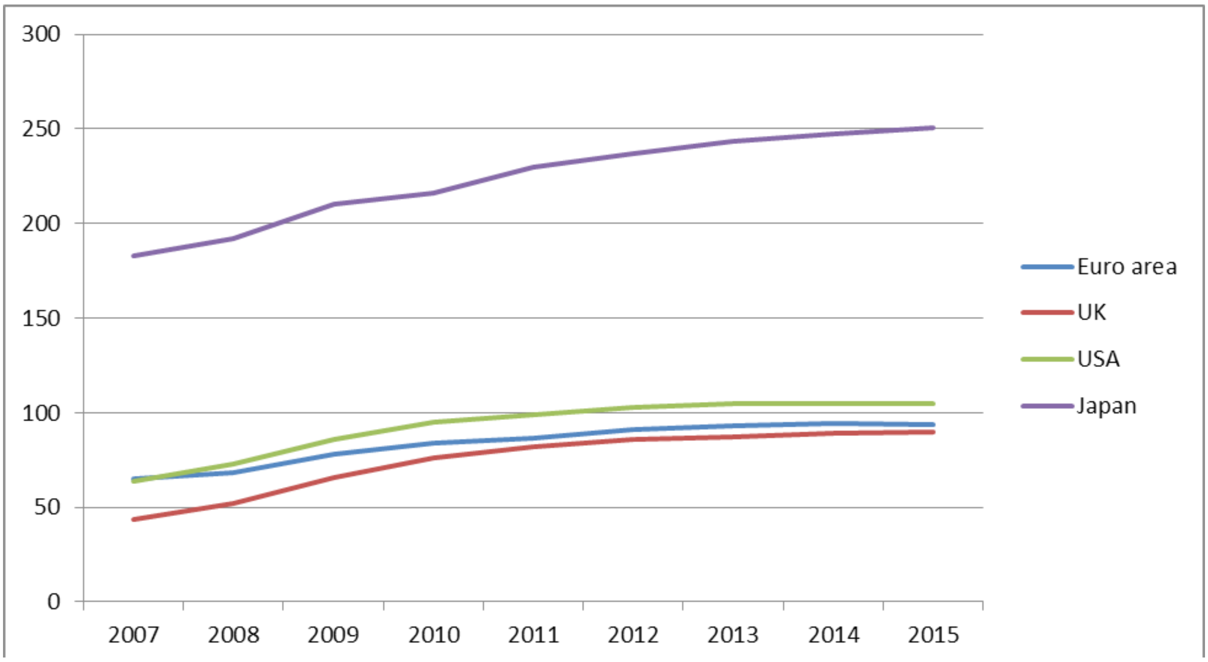
Cette manifestation est l'occasion, chaque année, d'organiser des ateliers sur des problématiques européennes dans les domaines juridiques, politiques et économiques, animés par des personnalités issues des institutions européennes, des administrations nationales, du milieu académique et du secteur privé.
Dans l'un de ces ateliers intitulé « Quelle gouvernance économique pour la zone euro ? », Giuseppe Diana est intervenu sur le thème « Enjeux et perspectives pour la surveillance des finances publiques nationales ». Cet article reprend l'essentiel de son intervention.

La surveillance des finances publiques nationales constitue sans conteste l'un des défis majeurs de la gouvernance économique au sein de la zone euro. Pour illustrer ce point, il suffit de consulter les graphiques 1 et 2 suivants retraçant respectivement l'évolution du déficit public et de la dette publique dans quatre grandes zones économiques développées : la Zone Euro, les USA, le Japon et le Royaume-Uni.

Graphique 1 : Déficit public (% PIB) source : Ameco



Graphique 2 : Dette publique (% PIB) source : Ameco



La lecture de ces graphiques montre sans ambiguïté que, de ces quatre zones, la zone euro est celle qui, dans son ensemble, a la situation financière la plus saine : un déficit public significativement plus faible qu'ailleurs et une dette sensiblement comparable à celle du Royaume-Uni et des USA et très nettement inférieure à celle du Japon. Pourtant c'est uniquement dans la zone euro que l'on parle de soutenabilité de la dette publique ou de crise de dette souveraine. Cela montre bien que c'est la gestion des déficits et des dettes au sein de la zone euro qui pose problème. Autrement dit, il s'agit bien d'un problème de gouvernance. Pour en comprendre les raisons, il est nécessaire de présenter l'organisation de la coordination et de la surveillance des politiques budgétaires au sein de la zone euro.

L'Union Économique et Monétaire est une construction originale qui combine une politique monétaire de type fédérale conduite par la Banque Centrale Européenne (BCE) et des politiques économiques nationales. La politique monétaire de la BCE vise principalement à la stabilité des prix (inflation inférieure mais proche de 2%). Il est important de rappeler que la BCE n'est pas autorisée à acheter les instruments de dette des États. Cette caractéristique institutionnelle permet un gain de crédibilité dans la lutte contre l'inflation mais fragilise la situation des pays endettés durant les phases de conjoncture défavorable.

Dans cet ensemble intégré, les politiques économiques des uns affectent les autres et il est donc fondamental de les coordonner. Cette nécessité est inscrite à l'Article 121 du Traité sur le fonctionnement de l'Union Européenne (TFUE) : « Les États membres considèrent leurs politiques économiques comme une question d'intérêt commun et les coordonnent au sein du Conseil ».
La coordination des politiques fiscales se concentre particulièrement sur la soutenabilité des finances publiques. De ce point du vue, l'Article 126(1) du TFUE est d'une clarté exemplaire : « Les États membres évitent les déficits publics excessifs ».
Pour éviter les déficits excessifs, les États membres ont décidé de s'appliquer des règles sur les finances publiques. Ces règles budgétaires qui constituaient déjà un des critères de Maastricht pour l'accession à la monnaie unique ont été reprises dans le Pacte de stabilité et de croissance (PSC) de 1997. Elles fixent des valeurs de référence pour le déficit public et la dette publique.
Ainsi, le déficit public ne doit pas excéder 3% du PIB, à moins que ce rapport « n'ait diminué de manière substantielle et constante et atteint un niveau proche de la valeur de référence ou que le dépassement de la valeur de référence ne soit

qu'exceptionnel et temporaire et que ledit rapport ne reste proche de la valeur de référence »[1]. La dette publique quant à elle ne doit pas dépasser 60% du PIB « à moins que ce rapport ne diminue suffisamment et ne s'approche la valeur de référence à un rythme satisfaisant »[2].
Le choix de ces critères s'explique par le fait qu'avec un taux annuel de croissance nominale du PIB de 5%, un déficit public de 3% stabilise la dette publique à 60%. Or, au début des années 90, quand ces valeurs ont été adoptées, le ratio de dette moyen des pays membres de l'UE12 était approximativement de 60% et une hypothèse de croissance nominale de 5% apparaissait tout à fait crédible. Par ailleurs, et toujours en supposant une croissance nominale de 5% du PIB, si le ratio de dette est supérieur à 60%, un déficit de 3% permet de diminuer le ratio d'endettement et d'en réduire l'écart à la valeur de référence de 5% par an.

Depuis 1997, le PSC et plus généralement l'ensemble des procédures de coordination et de surveillance des politiques nationales ont évolué vers davantage de sophistication et de complexité. Ainsi la Reforme de 2005 du PSC introduit un nouveau critère en termes de déficit structurel : l'objectif budgétaire à moyen terme (OBMT). Chaque pays se voit assigné un OBMT propre qui prend en compte son niveau de dette publique et les défis financiers liés à son évolution démographique (vieillissement de la population). L'OBMT ne peut cependant en aucun cas être inférieur à -1% du PIB.
Considérer le déficit structurel, c'est-à-dire le déficit corrigé des impacts du cycle[3] semble pertinent et apporte de la flexibilité à la règle des 3%. Les autorités européennes reconnaissent ainsi qu'on ne peut pas tenir un gouvernement responsable des évolutions du déficit qui ne sont pas de son fait mais liées aux variations cycliques de l'activité économique ; cela permet aussi de limiter l'impact pro-cyclique des politiques visant à atteindre les critères nominaux.
Cependant, le choix du déficit structurel comme OBMT pose un problème opérationnel. En effet, le déficit structurel est un concept économique non observable (ni *ex-ante*, ni *ex-post*) dont l'estimation repose sur les choix techniques retenus pour corriger les impacts du cycle. Afin d'opérer dans un cadre homogène, la Commission Européenne applique la même méthodologie à l'ensemble des pays membres. Celle-ci comporte trois étapes : i) évaluer le PIB potentiel (*Potential output)*, c'est-à-dire le niveau d'activité « normal » qui correspondrait à une situation de calme conjoncturel ii) mesurer l'*output gap*, autrement dit l'écart du PIB potentiel au PIB observé iii) évaluer l'impact de l'*output gap* sur le déficit et enfin, pour obtenir le déficit structurel, retrancher cet impact du déficit observé. Cependant, bien que s'appuyant sur une unique méthodologie[4], les estimations restent sujettes à des révisions fréquentes et significatives. Ainsi, il arrive que les révisions de l'*output gap* soient d'une amplitude supérieure à l'*output gap* lui-même. On peut alors légitimement s'interroger sur la pertinence opérationnelle du choix d'un critère comme le déficit structurel dans le cadre d'une surveillance à court terme des finances publiques.

La crise de 2008 a mis en lumière les divergences entre les États membres et souligné les faiblesses de la gouvernance économique européenne.
En particulier elle a illustré l'inefficacité du PSC à inciter les États membres à assainir leurs finances publiques dans les « bonnes » années qui ont précédé la crise. Face à ce constat, largement partagé au niveau européen, il était nécessaire de faire évoluer les mécanismes de gouvernance. Cette évolution s'est traduite par un approfondissement de la coordination et de la surveillance des politiques économiques. Dans cette logique, la Commission proposait en mai 2010, la mise en place d'un "semestre européen", c'est-à-dire d'un processus visant à coordonner *ex ante* les politiques économiques et budgétaires de la zone euro, en lien avec le PSC et la stratégie Europe 2020. Le semestre européen est mis en œuvre pour la première fois en 2011, année qui voit également l'adoption d'un paquet législatif sur la gouvernance économique de l'UE, le « *six pack* ».
Le « *six pack* » introduit notamment la procédure pour déséquilibre macroéconomique (PDM). Celle-ci concerne plus généralement la coordination macroéconomique et pas spécifiquement les

1 Article 126 (2a) du TFEU.

2 Article 126 (2b) du TFEU.

3 Plus précisément, le déficit structurel se défini comme le déficit corrigé des impacts du cycle et déduction faite des mesures exceptionnelles. Pour des raisons de simplicité, nous ne considérons pas les mesures exceptionnelles dans notre exposé.

4 Si le choix d'une méthodologie unique peut se justifier pour des questions d'égalité de traitement entre les États membres de l'UE, il est beaucoup plus critiquable d'un point de vue économique. Comme le souligne l'*Office of Budget Responsability* (breafing paper n°2, 2011, p. 3), "There is significant uncertainty around any estimate of the output gap and it would be unwise to base an assessment of economic prospects on the belief that any single approach will consistently deliver the 'correct' answer."

questions budgétaires, mais est symptomatique de cette volonté de renforcer la coordination et la surveillance.

Le « *six pack* » modifie également le PSC et introduit deux nouveaux critères. Le premier concerne l'augmentation des dépenses publiques qui doit être inférieure ou égale au taux de croissance potentiel du PIB à moyen terme, sauf si le dépassement est compensé par une augmentation équivalente des recettes. Le second critère est celui de la réduction de la dette excessive. Ce critère est satisfait si l'écart à la valeur de référence (60% du PIB) a diminué dans les trois années précédentes à un rythme annuel moyen de 5%. Il faut souligner que ce rythme de décroissance de la dette publique est celui que l'on aurait mécaniquement atteint avec un déficit de 3% et une croissance nominale de 5%. En d'autres termes, ce qui était implicite dans le PSC de 1997 doit devenir explicite car les conditions garantissant cette convergence automatique ne sont plus assurées. En effet, depuis la crise de 2008, un taux de croissance nominal de 5% n'est plus réaliste. Ce qui signifie qu'avoir un déficit de 3% ne garantit plus une stabilisation ou une convergence de la dette publique vers l'objectif de 60% du PIB.

Le 2 mars 2012, 25 des 27 pays membres de l'UE (à l'exception de la République Tchèque et du Royaume-Uni) signent le Traité sur la stabilité, la coordination et la gouvernance (TSCG). En mai 2013, le « *two pack* », un nouveau paquet législatif s'appliquant aux pays membres de la zone euro entre en vigueur. Le « *two pack* » reprend certains des éléments du TSCG visant à améliorer la coordination et la surveillance budgétaire pour la zone euro mais ne modifie pas les règles du PSC. Les pays membres sont en particulier tenus, dans le cadre d'un calendrier harmonisé, de présenter, avant leur adoption par les instances nationales, leurs projets de plans budgétaires pour l'année suivante. Ils doivent par ailleurs établir un comité budgétaire indépendant chargé de produire des prévisions pour le budget, surveiller les performances fiscales et conseiller le gouvernement sur les questions budgétaires.
Le PSC comporte aussi un volet répressif prévoyant des sanctions financières pour les pays qui ne respecteraient pas les règles. Les procédures de mise en œuvre de ces sanctions ont aussi évolué afin de les rendre plus précoces et plus automatiques. Le PSC ne constitue cependant pas un exercice de contrôle rigide et la Commission doit tenir compte, dans ses évaluations, des clauses de flexibilité prévues. Ceci explique aussi pourquoi, à ce jour, jamais aucune sanction financière n'a été imposée.

La surveillance des finances publiques en Europe est donc actuellement caractérisée par un ensemble de règles complexes qui s'appliquent avec un degré de flexibilité important, rendant la mise en œuvre du PSC et les décisions prises souvent difficiles à comprendre. Ces caractéristiques et l'absence effective de sanction, font s'apparenter le mécanisme de surveillance davantage à de la discrétion qu'à de la règle et ne plaident pas en faveur de la crédibilité du PSC.
Toutefois, compte tenu de la conjoncture économique récente, il faut admettre qu'une partie de l'effet des politiques d'assainissement budgétaire a été annihilée par une activité économique atone. Une lecture plus souple des critères du PSC a ainsi permis, dans une certaine mesure, de ne pas sacrifier la reprise de la croissance sur l'autel d'une rigueur budgétaire qui aurait pu s'avérer contreproductive. Néanmoins, pour regagner en crédibilité et assurer la soutenabilité des finances publiques, il faudra appliquer avec rigueur et fermeté les règles du PSC lorsqu'une croissance économique robuste se manifestera à nouveau dans l'UE et la zone euro. Cela permettra de ne pas répéter les erreurs passées et d'affronter, dans de meilleures conditions, les prochains retournements du cycle économique.

Economic and monetary policy-Powers of the European Central Bank-Legality of the Outright Monetary Transactions (OMT) programme-Interpretation of EU law

Judgement of the Court of Justice of 16 June 2015, C-62/14, *Gauweiler and others*

By the ECA's Legal Service

For the first time in its history, the German Constitutional Court (Bundesverfassungsgericht) addressed a reference for a preliminary ruling[1] to the Court of Justice of the EU, which raised two main issues: whether by certain decisions of the Governing Council of the European Central Bank ("ECB") of 6 September 2012, the ECB exceeded its monetary policy mandate and encroached upon the competence of the Member States[2] and whether the programme described in those decisions is compatible with the prohibition of monetary financing laid down in Article 123(1) TFEU[3].

The action before the Bundesverfassungsgericht was lodged following a press release of 6 September 2012, in which the ECB set out the main parameters of a programme for the purchase of government bonds issued by States of the Euro area, transactions which were to be known as "Outright Monetary Transactions" (OMT). The applicants in the national procedure argued that the ECB exceeded its monetary policy mandate provided by the TFEU, by adopting a programme that should be viewed as a measure of economic policy (which falls outside the competences of the ECB), rather than a measure of monetary policy.

According to the TFEU, the ECB has the task to conduct the monetary policy of the EU. Its role is narrowly defined in the Treaties. However, its role has expanded during the years, through the adoption or announcement of "non-standard" measures in response to the financial crisis. As mentioned by the Advocate General in his opinion[4], the OMT programme is an "unconventional monetary policy measure" which the ECB may take in exceptional circumstances in order to restore monetary policy instruments.

The Court considered the programme to be compatible with EU law. The judgment has important implications for emphasising the powers of the ECB and ESCB to conduct the monetary policy of the EU, especially in a context where the measure was merely announced and not implemented yet, for the relationship between the Bundesverfassungsgericht and the Court of Justice and for the constitutional framework of the EU's economic and monetary policy.

Powers of the ESCB

After recalling that the EU has exclusive competence for the monetary policy of the Member States whose currency is the Euro[5] and that the ECB together with the national central banks of the Member States whose currency is the Euro (together form the ESCB) shall conduct the monetary policy of the EU[6], the Court stated that in accordance with the principle of conferral[7], "the ESCB must act within

1 Under Article 267 TFEU, any court or tribunal of a Member State may as a rule submit a request for a preliminary ruling to the Court of Justice on the interpretation or validity of European law.

2 The Articles for which the interpretation is requested are: Articles 119 TFEU, 123(1) TFEU, 127(1) and (2) TFEU and Articles 17 to 24 of Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank.

3 According to that Article, the ECB is not allowed to buy government bonds directly, as this would amount to monetary financing or to ECB becoming a lender of last resort to a Member State. Instead the ECB may buy the government bonds on the secondary market.

4 Opinion of Mr Advocate General Cruz Villalón delivered on 14 January 2015, paragraph 114.

5 In accordance with Article 3(1)(c) TFEU.

6 According to Article 282(1) TFEU.

7 Set out in Article 5(2) TEU.

the limits of the powers conferred upon it by primary law and it cannot therefore validly adopt and implement a programme which is outside the area assigned to monetary policy."[8] In addition, "in order to ensure that the principle of conferral is complied with, the acts of the ESCB are … subject to review by the Court".[9]

The Court has also ruled that the TFEU does not contain a precise definition of monetary policy but defines both its objectives and the instruments that are available to ESCB to implement that policy. According to the TFEU[10], the primary objective of monetary policy is to maintain price stability. The Court concludes that the Protocol on the ESCB and the ECB gives a clear mandate to the ESCB aimed to ensure price stability and provides it the means[11] to achieve the objectives of monetary policy.

Is it a measure of monetary policy?

Applying the same approach as in a previous case[12], the Court assessed whether a measure falls within the area of monetary policy by analysing its objectives and the instruments which the measure employs in order to attain those objectives.

The Court observed that the aim of the programme is to safeguard both "an appropriate monetary policy transmission and the singleness of the monetary policy", which contributes to the objective of maintaining price stability. In case of disruption of the transmission mechanism, the effectiveness of the measures adopted by the ESCB is undermined and that affects the ability of the ESCB to maintain price stability. Therefore, the Court considered that measures aimed to preserve that transmission mechanism pertain to the objective of maintaining price stability.

That qualification is not called into question by the mere fact that a monetary policy measure may have indirect effects on the stability of the Euro area which is an objective of the EU economic policy.

8 Paragraph 41 of the judgment.

9 Ibidem Paragraph 41.

10 Article 127(1) TFEU in conjunction with Article 282(2) TFEU.

11 Chapter IV of the Protocol on the ESCB and the ECB sets out the monetary functions and operations of the ESCB and the instruments that the ESCB can use in the framework of monetary policy.

12 Judgment in Case C-370/12 Pringle of 27 November 2012.

As regards the instruments used, the Court ruled that in order to achieve the objectives of the ESCB and carry out its tasks, "the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in Euro"[13]. Therefore the programme falls within the area of monetary policy.

The Advocate General arrived at the same conclusion, with one difference. In his view, the fact that the OMT programme is conditional upon the Member State's compliance with a programme of macroeconomic reform adopted within the framework of the ESM or EFSF and the fact that the ECB plays a significant role in the design, adoption and regular monitoring of those financial assistance programme, means that the ECB's activity may go beyond a measure of monetary policy and "support" for economic policy, as allowed by the TFEU. Therefore, if the OMT programme were to be activated, in order for it to maintain its character of monetary policy measure, the ECB should "refrain from any direct involvement in the financial assistance programmes to which the OMT programme is linked"[14].

The Court took the view that the conditions associated to the programme did not exceed the boundaries of monetary policy. Furthermore, the ESM and ESCB pursue different objectives. The OMT programme may be implemented only if it is necessary to preserve price stability (monetary policy), while the ESM intervention aims to safeguard the stability of the Euro area (economic policy).

Proportionality of the measure

In conducting its analysis, the Court recognised that the ESCB enjoys a broad discretion to make technical choices and complex assessments in the area of monetary policy. It ruled that the programme is appropriate for contributing to the achievement of ESCB's objectives, is proportional, given the limited nature of the programme and the conditions associated for its use, as explained in the press release, and that the ECB provided sufficient reasons.

13 Paragraph 54 of the judgment.

14 Paragraph 158 of the Advocate General's opinion.

Compatibility of the programme with the prohibition of monetary financing (Article 123(1) TFEU)

The TFEU prohibits the ECB from buying government bonds directly from a Member State. The Court stated that the ESCB would not have the authority to buy government bonds on secondary markets under conditions which would amount to a direct purchase from the public authorities of the Member States, as this would circumvent the prohibition contained in Article 123(1) TFEU.

Therefore, the Court agreed with the Advocate General, and ruled that "when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU"[15].

The Court considered that the ECB provided sufficient assurances that the ESCB's intervention on the secondary markets would contain the necessary safeguards: e.g. observance of a minimum period between the issue of a security on the primary market and its purchase on the secondary market and lack of any prior announcement of the ECB's intention to purchase bonds or of the volume of the purchase. In the light of those safeguards and of other factors such as the use of the OMT programme "only in so far necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy"[16] and the necessity for the Member States to comply with the structural adjustment programmes which precludes them from considering bond-buying as an alternative to fiscal consolidation, the Court concluded that the OMT programme is compatible with the prohibition on monetary financing.

15 Paragraph 102 of the judgment and 227 of the Advocate General's opinion.

16 Paragraph 112 of the judgment.

Ethics in business

A balancing act between God, gold and greed?

Professor Erwin Teufel, former prime minister of Baden-Württemberg, gave a lecture at the *Konrad-Adenauer-Stiftung on* 16 April 2015 in Luxembourg

By Rosmarie Carotti

What is ethics?

Professor Erwin Teufel believes that the US Federal Reserve's lifting of all restrictions on competition and frameworks governing the economy, with the UK following suit, along with the emergence of the euro, have made ethics in business a highly sensitive issue.

Ethics, Professor Teufel explained, is the study of proper conduct and action, of acting responsibly in relation to our own health, our children, our ageing parents, nature, the environment, finite resources such as water and commodities and human labour. It is the study of dealing fairly with others and respecting life and human dignity. Nowadays, Professor Teufel stated, every profession requires specialist expertise. However, this specialist knowledge needs to be accompanied by a form of knowledge that guides our actions.

Many people view ethics and business as incompatible, given that the aim of commercial activity is to maximise profit. However, Professor Teufel does not believe that there is a contradiction between what is proper and what is profitable. He believes doing business properly can itself be a moral virtue. Where people are free, have jobs and are not burdened by financial need, he continued, ethical decisions, laws and structures have triumphed. Professor Teufel argued that social market economies are not antithetical to ethics, but rather the product of ethical commercial action.

Commercial success safeguards investment and jobs, and is therefore not morally objectionable. The aim of business ethics is simply for commercial activity to be guided by ethical principles; the aim of economic policy is to ensure that normal ethical standards are also applied to commercial activity. The aim of academic ethics is to apply these same principles in teaching and research.

The rule of law and the individual

In our age of pluralism, in which everyone has their own individual and differing values, ideas and opinions, we all still need to share some fundamental points of consensus in order to be able to coexist. The most important of these, Professor Teufel argued, is the rule of law, our greatest cultural and historical achievement.

However, human rights are conferred upon individuals not by law, but by virtue of their humanity. Human rights are an essential prerequisite for harmonious coexistence and democratic freedoms, but also for control and power.

Freedom does not come without responsibility. Everyone has a right to enjoy the benefits of our social security systems, but they also have a responsibility to contribute as much as they can to them financially and not to exploit them. All individuals have a responsibility towards their community. After all, the first sentence of Germany's Constitution reads 'Conscious of their responsibility before God and man...'.

Almost every world religion has an underlying principle with an almost identical wording: do unto others as you would have them do unto you. In our age of globalisation, this maxim is incredibly important.

Social market economy

Professor Teufel regards the social market economy as the most successful system in the world. It is not unfettered capitalism, and certainly not socialism's planned economy: it is the third way. It combines the most efficient system for commercial activity, competition, with social justice. Social market economies offer fairness of opportunity rather than equal opportunity. Man is the measure of the economy. Social market economies favour free enterprise but also aim to deliver social justice.

Nobody living under the rule of law should presume themselves to be above it. In this respect, Professor Teufel called it regrettable that stability criteria had not been adhered to – including by Germany – when the euro was introduced.

© European Union, 2015
Reproduction is authorised provided the source is acknowledged/Reproduction autorisée à condition de mentionner la source

ISSN 1831-449X

Main Contents

For more information and paper copies :

European Court of Auditors
12, rue Alcide De Gasperi
1615 Luxembourg
LUXEMBOURG
eca-journal@eca.europa.eu

eca.europa.eu

@EUAuditorsECA

EUAuditorsECA

QJ-AD-15-008-2A-N