



EUROPEAN
COURT
OF AUDITORS

Communication to the European Parliament

concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in paragraph 29 of the 2016 discharge procedure (2017/2188(DEC))

Adopted by Chamber IV at its meeting of 13 December 2018

Background

01 The European Court of Auditors (ECA) is the European Union's independent external auditor and the independent guardian of the financial interests of the citizens of the Union. In this capacity, the ECA conducts performance audits¹ to improve sound financial management, accountability and transparency. The ECA publishes the results of these performance audits as special reports.

02 In November 2016, the ECA published its first special report (29/2016)² on the Single Supervisory Mechanism (SSM). The SSM is the prudential supervision system for banks in the Euro area. During this audit, the ECA faced severe difficulties in obtaining audit evidence from the European Central Bank (ECB), the central supervisor of the SSM. As the ECB did not provide many of the required documents³, the scope of the audit was of necessity limited and, thus, a number of important areas remained unaudited.

03 In December 2017, the ECA published its first special report (23/2017)⁴ on the Single Resolution Board (SRB). The SRB is the resolution authority for large banks in the Eurozone. During this audit, the SRB insisted on removing any data originating from the ECB from the audit evidence provided to the ECA and did not provide any documents it possessed that originated from the ECB. This prevented the ECA from assessing the completeness of resolution plans and the accuracy of much of the information originating from recovery plans.

04 In January 2018, the ECA published its second special report (02/2018), this time on the ECB's crisis management in relation to its banking supervision tasks⁵. Again, the ECB denied access to the documents needed for the ECA to perform its task. Therefore, the ECA only published provisional conclusions on some aspects of the ECB's crisis

¹ Based on International Standards of Supreme Audit Institutions (ISSAI) 300.

² ECA special report 29/2016: Single Supervisory Mechanism - Good start but further improvements needed.

³ See in particular paragraph 19 and Annex II of ECA special report 29/2016.

⁴ ECA special report 23/2017: Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go.

⁵ ECA special report 02/2018: The operational efficiency of the ECB's crisis management for banks.

management in relation to banking supervision tasks. As a result, the ECA was not able to confirm the efficiency of the ECB's crisis management in practice.

05 In April 2018, in the context of the 2016 Commission discharge, the European Parliament acknowledged the ECA's efforts and the problems faced. The Parliament concluded in particular that it was unacceptable from an accountability point of view for the auditee to decide single-handedly to which documents the external auditor may have access. It called on the ECB to cooperate with the ECA and to provide full access to documents required. Furthermore, the Parliament asked the ECA to inform it by November 2018 as to whether a solution was found to the problem of access to information.

The problem and the ECA's efforts

06 External public audit is an essential element of a democratic society and the rule of law in the EU. It plays an important role in ensuring efficiency, accountability, effectiveness and transparency of public administration.⁶ The rule of law is a key principle of democracy that guarantees that all members of society (including those in government) are equally subject to publicly disclosed legal codes and processes. Accountability and transparency enable citizens and their parliament to hold their representatives and those who are implementing decisions accountable for their actions. The independent reports produced by the external auditor are an important contribution to this accountability process.

07 In the European Union, accountability is particularly important in banking supervision. Risks materialising in this area can endanger the stability of financial systems and the single market. Following the financial crisis, the legislator entrusted banking supervision to the SSM under the legal umbrella of the ECB. Supervisory powers were delegated to the ECB because the Meroni doctrine⁷ limits the powers that can be transferred to EU agencies. While the ECB provides the legal framework and delegates five representatives to the SSM Supervisory Board, the competent national authorities also participate by delegating 19 of their own representatives to the board. They also provide staff resources, play an important role in on-site inspections and supervise smaller banks directly. The result is a complex system, in which the ECB enjoys a high degree of discretion based on expert judgement in a very technical and complex area,

⁶ As recognized by the United Nations in resolution A/66/209.

⁷ As established in cases 9/56 and 10/56, *Meroni & Co, Industrie Metallurgiche v. High Authority*, [1957-1958] ECR 133.

although it also relies on collaboration with competent national authorities. The lack of accountability and transparency of such a complex system could have a huge negative impact on public finances. Even now that the Single Resolution Mechanism has been established, under certain conditions the legal framework still allows state aid or resolution aid for banks. Examples include precautionary recapitalisations, the government stabilisation tool and the use of the Single Resolution Fund.

08 Since 2015, as described in paragraphs 2 and 4, the ECA has made a significant effort to promote the accountability of banking supervision in the Euro area with a view to providing information to the legislators and the public about the level of efficiency achieved in the newly established system of EU-wide banking supervision. However, the ECB refused to provide important information.

09 In June 2015, the Contact Committee (CC) of Supreme Audit Institutions of the European Union warned that an audit gap regarding banking supervision had emerged after many supervisory tasks were transferred to the ECB.⁸ In response, in December 2015, the president of the Euro group stated in a letter to the CC that no audit gap had emerged, as the ECA had sufficient audit rights. Nevertheless, he invited the European Commission to explore the legal feasibility of a possible framework agreement between the ECA and the ECB. This call for action was followed up in July 2016 in a joint letter to the European Commission from the presidents of the Supreme Audit Institutions of Germany and the Netherlands in their capacity as chairs of the CC Task Force on Banking Union. In December 2017, the Contact Committee's Task Force on European Banking Union published a report⁹ concluding that an effective audit gap resulting from the ECB's behaviour still existed. Moreover, in November 2018, the CC called on legislators to align fully the ECA's mandate for ECB banking supervision with its mandate for other institutions of the Union.¹⁰

10 The European Commission, in its review of the SSM Regulation¹¹ published in October 2017, emphasised that the ECB was obliged to provide the ECA with any

⁸ Statement of the CC "Ensuring fully auditable, accountable and effective banking supervision arrangements following the introduction of the Single Supervisory Mechanism".

⁹ Report of the Task Force on European Banking Union to the Contact Committee of Supreme Audit Institutions of the European Union and the European Court of Auditors (14/12/2017).

¹⁰ CC statement (CC 1/2018) from 13 November 2018:
https://www.eca.europa.eu/sites/cc/Lists/CCDocuments/CC_STATEMENT_2018/CC-STATEMENT-SSM-DEFICIENCIES-EN.pdf

¹¹ Regulation (EU) No 1024/2013.

document or information necessary for the ECA to carry out the tasks corresponding to its legal mandate. The Commission review also called on the ECB and the ECA to conclude an inter-institutional agreement to specify the procedures for information exchange to allow the ECA access to any information needed for performing its audit mandate.

11 Following the Commission's proposal, in February 2018 the ECA provided the ECB with a draft version of a Memorandum of Understanding (MoU) that would facilitate the ECA's access to any information required for its tasks and provide assurance to the ECB regarding the processing of confidential information.

12 As at November 2018, the ECB has not provided answers or comments on the MoU proposed by the ECA. Following an inquiry by the ECA, the ECB informed the ECA in April 2018 that it was consulting the relevant stakeholders. Following another inquiry in June 2018, the ECB informed the ECA that it was awaiting a reply from the Commission on the issue (see [Annex I](#)).

The ECA's position

13 The ECA's mandate to conduct independent external audits of the ECB is enshrined in the Treaty on the Functioning of the European Union.¹² It is specified in Art. 27(2) of Protocol No 4, which states: "*The provisions of Article 287 of the Treaty on the Functioning of the European Union shall only apply to an examination of the operational efficiency of the management of the ECB*". Furthermore, the Regulation establishing the SSM specifically asks the ECA to "*[...] take into account the supervisory tasks conferred on the ECB by this Regulation*".¹³ While the word "operational" does not exist in the French and German versions of the Treaty and is not defined in international audit standards, the concept of efficiency has long been clearly defined in international audit standards as well as in the financial regulation applicable to the general budget of the Union and in the ECA's publicly available Performance Audit Manual.¹⁴

¹² Articles 285 and 287(2) TFEU.

¹³ Article 20(7) Regulation (EU) 1024/2013.

¹⁴ Based on Article 33 of the Financial Regulation (EU, Euratom) 2018/1046, the principle of efficiency "*concerns the best relationship between the resources employed, the activities undertaken and the achievement of objectives*". The ECA's Performance Audit Manual, chapter 1.2.2, defines the principle of "efficiency" as the best relationship between resources employed and outputs, results and impacts achieved.

14 The ECA considers that in the area of supervisory activities, the assessment of efficiency implies an assessment of whether the supervising institutions are performing their duties in a manner that minimizes the risk of financial instability and potential cost for budgetary resources.¹⁵ The performance audits conducted by the ECA will refrain from assessing the regularity of individual supervisory decisions, thus not performing this aspect of compliance audit, as they are subject to legal review by the ECJ. Similarly, financial audits will continue to be conducted by independent private auditors, as envisaged in the legislation.

15 Based on all applicable international standards, it is the responsibility of the auditor to establish the information it needs to perform their tasks and draw conclusions.¹⁶ Furthermore, there is international recognition of the importance for Supreme Audit Institutions to have unrestricted access to information.¹⁷ This also applies to the ECA, which has the right to request from the ECB "*any document or information necessary to carry out its task*"¹⁸, as enshrined in the Treaty It would therefore be unacceptable if any auditee were to determine the extent of access to documents or restrict access to documents in any way. However, since 2015 the ECB, as auditee, has single-handedly decided which information it deems necessary for the ECA to perform its tasks.

16 In the past, the ECB has argued that being subject to external performance audit would not be compatible with its independence as central bank. However, it is common practice in many advanced economies and in EU Member States for banking supervision to be subject to external public audit, even if the banking supervision is performed by a central bank.¹⁹ This proves not only that public external audit is compatible with the independence of central banks and the Basel principles for bank supervisors, but also that it is a fundamental principle of good public administration. In line with these facts,

¹⁵ The ECA considers that the interpretation of efficiency in banking supervision is not necessarily the same as in monetary policy.

¹⁶ E.g. ISA 200, ISSAI 1 and 10.

¹⁷ ISSAI 1, Section 10; and ISSAI 10, Principle 4 as recognized by the United Nations in resolution A/66/209.

¹⁸ Article 287(3) TFEU, which fully applies to the ECA's mandate regarding the ECB.

¹⁹ E.g. in the USA and Canada (see ECA special report 29/2016, Annex V) as well as for example in Germany, France, Spain, the Netherlands (see Report of the Task Force on European Banking Union to the Contact Committee of Supreme Audit Institutions, Appendix 1).

a Member of the Governing Council of the ECB has also acknowledged the need for adequate accountability requirements, including external public audit (see **Box 1**).²⁰

Box 1

Extracts from Yves Mersch's keynote address on "Central bank independence revisited"

"Article 130 of the Treaty and the jurisprudence of the Court of Justice of the European Union make it clear that the independence the ECB enjoys is limited to the performance of the tasks conferred on the Eurosystem [...]. Tasks and functions conferred on the ECB by secondary legislation [such as banking supervision] do not, therefore, fall within the scope of the principle of independence in Article 130 of the Treaty [...]."

"The ECB's accountability for its supervisory tasks is different from and more enhanced than that for its monetary policy task owing to the potential impact on taxpayers [...]"

17 Moreover, the Court of Justice of the European Union made it clear that, while the ECB enjoys great independence to perform the tasks conferred on it by the Treaty, this does not "separate it entirely from the EU and exempt it from every rule of EU law". In particular, the Court of Justice stated that the ECB is subject to "review by the Court of Justice and control by the ECA"²¹. It also stated that while these tasks may overlap, they are completely different: "[...] the Court of Justice does base its decision in general on the subject-matter of the proceedings. The Court of Auditors, on the other hand, may also act on its initiative [...] and, in doing so, determine the object of the audit itself, having regard to its powers."²²

18 In a statement to a Member of the European Parliament²³, the ECB argued that it was not in a position to provide certain information to the ECA due to its confidentiality requirements. However, the primary law requires any EU institution to "forward to the

²⁰ Keynote address by Yves Mersch on "Central bank independence revisited" on 30 March 2017.

²¹ Judgment of 10 July 2003, Commission/ECB, C-11/00, ECLI:EU:C:2003:395, paragraph 135.

²² Opinion of Advocate General Trstenjak delivered on 25 May 2011, European Commission v Federal Republic of Germany, paragraph 71.

²³ Answer from Danièle Nouy, Chair of the SSM, on 21 March 2018 to the letter (QZ006) from Miguel Viegas, Member of the European Parliament.

Court of Auditors, at its request, any document or information necessary to carry out its task."²⁴ Accordingly, the ECA has a broad right to have direct access to all the information it considers necessary in order to perform its audit tasks, including, where necessary, confidential documents and bank-specific information. If in the course of a future audit the ECB refuses to provide audit information to the ECA or takes no action with respect to a request by the ECA to provide it with audit information, the ECA has the option to bring the issue before the Court of Justice of the European Union.

19 It is therefore standard practice for the ECA to assess and safeguard confidential information. This has been the case in many audits, including audits of the European Securities and Markets Authority or the Single Resolution Board. It should also be highlighted that the ECA and its staff are bound by clear professional secrecy obligations arising directly from the Treaty, the Staff Regulations of Officials of the European Union and the ECA's ethical framework.²⁵ These provisions provide sufficient safeguards to ensure that confidential documents received by the ECA from its auditees are not shared with any unauthorised parties.²⁶

20 In the past, the ECB has stated that other accountability requirements, such as its annual reports or reviews of the Commission, compensate for the absence of adequate public audit. It should be noted that annual reports, reviews by legislators and replies to their inquiries are not unique to the EU, as they are common in countries that fully allow performance audits of banking supervisors. More importantly, accountability arrangements that depend on the willingness of the institution to disclose information can hardly be effective. Only performance audits with full access to information, conducted by independent professional auditors, based on international standards can provide effective accountability.

21 In this context, the ECA must emphasise that international standards clearly require adequate public audit arrangements for public administrations in all democracies (see paragraph 6). Other accountability arrangements cannot replace the right of citizens and parliaments to appropriate public audits, in particular within an area

²⁴ Article 287(3) TFEU.

²⁵ Article 339 TFEU and Article 17 of the Staff Regulations of Officials of the European Union and Section 4 of the Ethical Guidelines for the European Court of Auditors (Decision No 66-2011).

²⁶ In addition, some ECA staff have security clearance (obtained by the Member States) that permits them to access EU classified information up to Confidential or SECRET level. The ECA also has a robust physical, logical and organisational information security policy in place.

that concerns the financial interests of citizens as much as the adequate supervision of banks. Public audits provide assurance and information on the use of public funds and the risks to which taxpayers are exposed.

Summary and call for action

22 The ECA has made extensive efforts to fulfil its role and promote accountability and transparency in the area of banking supervision and resolution. However, the ECB's current position regarding the ECA's access to audit documents and information prevents the ECA from properly carrying out its statutory responsibilities. Therefore, in the area of banking supervision, which entails significant risks to the public purse, adequate public audit is still unfeasible and accountability is still insufficient.

23 Therefore, especially the ECA calls the attention of the European Parliament, the Council and the Commission to the lack of progress in discussions with the ECB and asks for:

- full support for the ECA's tasks and rights to access documents with regard to the ECB and banking supervision in particular
- amend Regulation (EU) No 1024/2013, establishing the SSM, with a view to clearly stipulating that the ECA is empowered to perform performance audits of the ECB's supervisory functions and that, in line with the Treaty, the ECA enjoys full rights to access any document it considers necessary for this purpose.

Annex I - Timeline of the ECA's efforts

Date	Publication	Description
October 2011	CC published resolution following ideas for a deeper EMU	The CC recognised envisaged changes in the EU's financial and economic governance. It emphasised that the principles of sufficient transparency, appropriate accountability and adequate public audit were essential.
December 2012	Council position on the legislative proposals to establish the SSM	
February 2013	ECA opinion regarding the envisaged audit rights for the SSM	The ECA considered that operational efficiency included the audit of sound financial management.
May 2013	CC published statement on EMU legislative proposals	The CC recognised the clear proposals for a deeper EMU. In this context, it emphasised again the importance of a coherent audit and accountability framework as well as the importance of external audit in EU legislation, in particular regarding the establishment of a Banking Union.
October 2013	SSM Regulation was published in the OJ	
June 2014	ECA informed the ECB that it intended to start a performance audit	Audit of the operational efficiency of the SSM.
July 2014	ECA published special report 05/2014 on the EBA	The ECA recommended clear responsibilities between EBA, SSM and NCAs.
June 2015	ECA informed the ECB that it had adopted an Audit Planning Memorandum	The APM on the SSM was delayed significantly following lengthy discussions with the ECB about the ECA mandate.
June 2015	CC published statement on potential audit gap and mapping of SAls' audit rights on banking supervision	The EU SAls warned that an audit gap regarding banking supervision in Europe might have arisen and called for adequate accountability. Furthermore, the mapping of audit rights regarding banking supervision was published, emphasising that similar audit rights were necessary for the ECA, given the establishment of the SSM.
December 2015	The president of the Eurogroup answered the CC statement with a letter	The Eurogroup considered that the ECA had a mandate to audit banking supervision but asked the Commission to consider a MoU between the ECB and the ECA.

July 2016	Joint letter from the German and Dutch SAIs on behalf of the CC to the European Commission	Call for the European Commission to address the problems faced in its review of the SSM Regulation.
November 2016	ECA published special report 29/2016 on the SSM	The report highlighted the ECB's refusal to provide essential documents.
October 2017	European Commission published review of the SSM Regulation	The Commission reiterated the ECA's right to access documents and called on the ECB and the ECA to conclude a MoU.
December 2017	Task Force Banking Union of the CC published its report on the parallel audit conducted on banking supervision in the EU	The Task Force concluded that an "effective" audit gap had arisen due to the ECB's behaviour.
December 2017	ECA published special report 23/2017 on the SRB	The ECA stated that its access to documents was partially restricted as the SRB redacted information originating from the ECB or failed to provide information.
January 2018	ECA published special report 02/2018 on the ECB's crisis management	As the ECB refused to provide access to important documents, the ECA concluded that scope would have to be limited and that on certain parts of the ECB's work only provisional conclusions were possible.
February 2018	ECA provided the ECB with a draft proposal for a MoU	The ECA provided the ECB with a five-page draft MoU to clarify access to documents, as proposed by the Commission.
March 2018	ECB provided replies to an MEP on questions regarding the ECA's access to documents	The ECB stated that it only shared limited documents with the ECA as it interpreted the ECA's mandate as being very limited.
April 2018	European Parliament statement within the 2016 discharge procedure	The European Parliament acknowledged that the ECB did not respect the ECA's right to access information and asked the ECB to cooperate fully. It also asked the ECA to update it on the situation by end 2018.
April 2018	ECB informed the ECA that it was analysing the proposed MoU	The ECB informed the ECA that it had received the proposed MoU and was analysing it. The ECB also said that it intended to consult stakeholders.
June 2018	ECA asked the ECB about a reply to the proposed MoU	The ECA asked the ECB about the status of its analysis of the proposed MoU and when a reply could be expected.

July 2018	ECB informed the ECA that it was still consulting stakeholders	The ECB informed the ECA that it was still consulting stakeholders and was awaiting a reply from the Commission in particular.
October 2018	ECB informed the ECA that a reply was still not possible	The ECB informed the ECA that it was still not able to respond to the proposed draft MoU, as it was still consulting stakeholders.
November 2018	CC published statement	The CC called on decision-makers to strengthen accountability and audit arrangements in the area of banking supervision, and ensure that the ECA had a clear, broad mandate.
December 2018	ECA published a communication to the European Parliament	The ECA published its reply to the European Parliament's request (from April 2018). It informed the European Parliament of its efforts and explained that the issues remained unresolved. It therefore remained impossible to adequately audit the ECB's banking supervision and accountability remained limited.

Source: ECA.