



EUROPEAN  
COURT  
OF AUDITORS

**Klaus-Heiner Lehne**

President of the European Court of Auditors

**Mr Franklin Dehousse**

E-mail: [ask+request-6267-38a44d88@asktheeu.org](mailto:ask+request-6267-38a44d88@asktheeu.org)

By e-mail

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Dear Mr Dehousse,

1. This letter concerns your request for the European Court of Auditors (“the ECA” or “the Court”) to reconsider its reply of 31 January 2019. That reply gave you access to a number of documents concerning ECA [Special Report No 14/2017](#) “Performance review of the case management at the Court of Justice of the European Union”.
2. After careful analysis of your request, we regret to inform you that we must maintain our position to provide you with access only to certain documents concerning the review in question. Our reasons for maintaining our initial position are set out below.

**I. Internal inventory of documents**

3. In your reply, you question the ECA’s lack of an official inventory of documents, which, in your opinion, leads to the ECA breaching the principles of transparency, information, good administration and accountability towards the public. We note that the Court of Justice of the EU (“the CJEU”) considered that Regulation (EC) 1049/2001<sup>1</sup> does not directly link the obligation to create a register of documents (under Article 11) to the right to access to documents under Article 2(1) of the same Regulation. It stated that “*Compliance with the duty to register documents cannot therefore be enforced by means of an application for access to documents*”<sup>2</sup>. In this case, therefore, we take the view that an applicant cannot challenge the existence of an ECA internal inventory of documents through a request for access to documents.
4. If such a claim were true, not only would the ECA be unable to carry out its administrative duties properly, but – more importantly – it could not perform its main function as the EU’s external auditor, since that core activity involves receiving, storing and analysing significant numbers of documents. The ECA has an internal registration system for all official exchanges with outside interlocutors. Internal documents prepared for Chamber/Court meetings and official exchanges

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

<sup>2</sup> Judgment of 2 October 2014, Strack/Commission (C-127/13 P), paragraph 44.

between ECA departments are also registered. However, as regards audit documentation<sup>3</sup>, there is no requirement that every single working document received or sent during an audit should be given a registration number in the ECA's central system.

5. As regards its core duty, the ECA's audit methodology – which reflects international auditing standards – stipulates that audits should be documented<sup>4</sup>, especially where significant matters are concerned<sup>5</sup>. This requires audit documentation to be organised and filed correctly according to its purpose. The ECA's [Performance Audit Manual](#) lays down, in Section 4.6.1 on audit documentation, that *“A guiding principle in documenting audit evidence is that audit documentation should enable an experienced auditor, who has had no previous connection with the audit, to establish and understand the evidence that supports the auditors' significant judgements and conclusions. All audit work should be documented in ASSYST”*. Audit documentation therefore includes only the evidence which supports the findings and conclusions, not all the information and documents collected by the audit team. Besides ASSYST, the ECA has several internal systems that enable it to comply with the requirements for proper filing and organisation of audit documents and appropriate documentation of its audits.
6. However, the question as to whether such inventories of audit documentation exist is separate from the question of whether the documents stored in such inventories should be made publicly available. In your reply, you state that for the review in question, *“the least that the ECA can provide is a list of the exchanges between the two institutions and their topic, and of the working documents”*.

## **II. List of exchanges between the ECA and its auditees**

7. While the information contained in the audit file must comply with the principles of safe custody, integrity, accessibility and retrievability, the list of exchanges between the ECA and an auditee, which takes place during an audit, is not compiled by default, as this is not a legal requirement. Moreover, such a list cannot be generated automatically and would have to be created manually. Certain documents are provided by the auditee on a confidential basis, and in some cases the mere indication of the existence of such documents in a list may compromise their confidentiality. In addition, not all exchanges at operational level between the ECA and the auditee will be considered to be part of the audit file, for instance if they do not contain any evidence or clarifications which support the audit findings and conclusions.
8. For the reasons set out above, the list of exchanges between the ECA and the CJEU does not exist as a document. In accordance with Article 9.4 of ECA Decision No 12-2005 on access to documents, as further amended by ECA Decision No 14-2009 (*“the ECA Decision on access to documents”*), *“the Court is not obliged to create a new document or to compile information at the applicant's request”*. We also note that your request for *“all documents exchanges between the EU Court of Auditors and the Court of Justice regarding the Performance review of case management at the Court of Justice of the European Union”* is general in nature and does not state with sufficient precision which documents you are interested in. If, in addition to the official exchanges between the ECA, the Court of Justice (*“the CoJ”*) and the General Court (*“the GC”*)

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<sup>3</sup> According to the ECA's methodology, *“audit documentation”* is defined as *“ [...] audit procedures performed, relevant audit evidence obtained, and audit conclusions reached (‘working papers’ or ‘work papers’). [...] It includes documents prepared by the auditor but also documents received from sources internal or external to the audited entity.”*

<sup>4</sup> ISSAI 40 Quality control for SAIs, element 5; ISSAI 100/43 Fundamental Principles of Public-Sector Auditing; ISSAI 300/34 Fundamental Principles of performance auditing; ISSAI 1230/P3 Audit documentation

<sup>5</sup> ISSAI 1230/A11 Audit Documentation, e.g. matters that give rise to special audit consideration, treatment, conclusion or opinion.

which have already been made available to you, you are interested in knowing if a specific document/documents was/were part of those exchanges, we would invite you to revert back to us, stipulating exactly which documents are concerned so that the ECA might identify them. Access to such documents would then depend upon their nature.

### **III. Professional secrecy obligation and the need for transparency – Limitations**

9. The relationship between the ECA and its auditees is based on trust and the ECA's commitment that its staff comply with the professional secrecy obligation, deriving from the legal framework established by the Treaty of the Functioning of the European Union, the Staff Regulations of EU Officials and the ECA's internal policies<sup>6</sup>.
10. It is undeniable that the ECA, as an EU institution, is bound by the principles of transparency and openness, as set out in Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union. These provisions, as interpreted by the constant case law of the EU courts, aim to give the citizens of the Union and natural or legal persons residing or having a registered office in a Member State the widest possible access to the documents of the Union's institutions, bodies, offices and agencies. However, that right of access is nonetheless subject to certain limitations on grounds of public or private interest.
11. Such a limitation is set out in Article 4.2 of the ECA Decision on access to documents. This stipulates that the ECA shall refuse access to its audit observations and may refuse access to documents used in the preparation of those observations.
12. Most of the audit file concerning the review of the CJEU consists of documents either provided by the CoJ and the GC or taken from publicly available sources. The file also contains the ECA's internal analysis of the documents received from the auditee, or of the auditee's replies.
13. As we mentioned in our previous reply, the audit documents the ECA received from the CoJ and the GC are covered by the exception stipulated in Article 4.5 of the ECA Decision on access to documents. They cannot be made available to the public, as the ECA is not their author.
14. The ECA's internal analysis of the documents received from the auditee, or of the auditee's replies, is reflected in the different drafts of its audit observations, which constitute working documents.
15. The confidentiality regime which Articles 258(1) and 259(1) of the Financial Regulation<sup>7</sup> apply to the audit observations that the ECA believes should appear in its annual report or special reports concerns the preliminary observations after adoption by the Court/Chamber and before the adversarial procedure. The main reason for maintaining their confidentiality is that they reflect only a preliminary position and may be changed after they have been "cleared" with the auditee during the adversarial procedure. The adversarial procedure serves to resolve any disagreements over the facts and any differences of opinion between the ECA and the auditee as regards interpretation of the evidence. During the procedure, the auditee may provide additional clarification and evidence, which can lead to some preliminary audit observations being amended, strengthened or dropped. The adversarial meeting is also used to finalise the institution's replies to the observations.

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<sup>6</sup> Article 339 of the Treaty on the Functioning of the European Union, 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).

<sup>7</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 193, 30.7.2018, p. 1.

16. We note that the above-mentioned provisions of the Financial Regulation do not set a limit on how long the preliminary audit observations should remain confidential. We believe that the absence of a time limit means that their confidentiality regime applies indefinitely. Consequently, they should remain confidential even after the ECA's report has been published. A different interpretation would render the provisions ineffective. In the event that preliminary observations would be released into the public domain taken out of their context, i.e. without being cleared with the auditee or being accompanied by the auditee's position, they could be considered detrimental by the auditee, as they might contain factual inaccuracies or incomplete conclusions. Moreover, they could trigger the ECA's responsibility for failing to respect the right to be heard.
17. For the reasons set out above, we believe that the other draft versions of the audit observations (i.e. the ones preceding the preliminary observations) should also be covered, by analogy, by the same confidentiality regime set out in Articles 258(1) and 259(1) of the Financial Regulation and reflected in the exception stipulated in Article 4.2 of the ECA's Decision on access to documents. That latter article extends the confidentiality regime to all "audit observations" which precede the final published version. Like the Financial Regulation, it does not set a limit on how long those draft observations should remain confidential.
18. Being a collegial body, the ECA is only legally bound by documents that are formally adopted by its College of Members (e.g. reports and opinions). Documents leading to formal adoption of a report or opinion by the ECA are preparatory in nature and, as such, are comparable to the deliberative process at the CoJ and the GC, which is deemed confidential.

#### **IV. Derogations in the event of overriding public interest in the disclosure of documents**

19. By derogation from Articles 4.2 and 4.5 of the ECA Decision on access to documents, the ECA may decide, notwithstanding the above-mentioned exception, to allow access to a document where there is an overriding public interest in its disclosure (in application of Article 4.8 of ECA Decision No 12-2005). We note that, contrary to case-law<sup>8</sup> (applicable by analogy in this case), you have not adduced any proof as to how disclosing the requested documents to you would serve the interest of protecting the transparency and public control of the ECA's activity.
20. Even in the event that the existence of an overriding public interest had been demonstrated, we believe that the public interest is better served by not disclosing preparatory versions of the audit observations and documents used to prepare the ECA's audit observations. Releasing to the public only the final version of its reports as adopted by the Chamber/Court allows the ECA to respect its auditees' rights to be heard, which is a fundamental principle of law. It also allows the ECA to produce reports which are factually accurate and contain observations and recommendations supported by all the relevant evidence, and which ultimately provide added value for the discharge authorities and for the auditees in the reviewed areas.
21. Furthermore, if documents provided by ECA auditees were to be released to members of the public requesting access to ECA documents, the ECA would breach the professional secrecy obligation incumbent upon its staff and also its auditees' right to decide themselves whether their documents should or should not be released to the public. Moreover, those auditees would be less willing to cooperate with the ECA in the future. As well as restricting the ECA's ability to perform its audit function, reduced cooperation could result in the scope of the ECA's audits being limited and could negatively impact the effectiveness of its audits for the discharge authorities and for the public in general.

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<sup>8</sup> *"in so far as concerns the last clause of Article 4(2) of the regulation [(EC) No 1049/2001], it is, by contrast, for the party alleging an overriding public interest, within the meaning of that clause, to prove that interest."* (Judgment of 25 September 2014, Spierlea/Commission (T-669/11), paragraph 97)

## **V. IT systems**

22. We wish to emphasise that the ECA's analysis of the CoJ's and the GC's IT systems did not constitute the main focus of the review (the audit team did not spend a year analysing the IT systems). This was only one of the elements examined in order to assess whether the systems enhanced the productivity of the two courts or constituted a possible weakness. As mentioned above, the ECA's analysis of the IT systems was reflected in its various preliminary audit findings, which preceded the final observations published in ECA Special Report No 14/2017. Since the draft versions of the audit observations serve as preparation for the final report and as releasing them to the public without the auditee's reply could be considered detrimental by the auditee in the event that they contain factual errors or judgements that are not entirely accurate, we are unfortunately not in a position to grant you access to them (see paragraphs 15-17 above).

## **VI. Productivity of the judges' chambers**

23. Although the published report clearly shows that the ECA sought to analyse the productivity of the judges' chambers, the scope of its analysis was restricted. The CJEU considered that, due to its Treaty obligation to maintain the secrecy of the deliberative process, documents concerning that process should not be made available to the ECA. See, in this connection, Special Report No 14/2017: paragraphs 13 and 19, Figure 4 concerning the average duration of the main steps for cases closed in 2014 and 2015 by the CoJ and the GC, paragraphs 33-35, paragraphs 46-50, figures 7 and 8 concerning the most frequent factors affecting the duration of the handling of the selected cases at the CoJ and the GC, Box 3 containing comparisons of the frequency of specific factors in the CoJ and the GC, paragraph 93 and Annex II concerning the analysis of factors affecting the duration of the sampled cases. The ECA's intermediary analysis as contained in the draft documents, which preceded the published report, cannot be made available to you for the reasons set out above (see paragraphs 15-17).

## **VII. Remedies**

24. Please note that you may bring legal action against the ECA before the GC within two months of receiving notification of this reply to your request for reconsideration. At the same time, if you believe that the ECA may have mishandled your request, you may lodge a complaint with the European Ombudsman after having first contacted the ECA with the aim of settling the dispute. Your complaint should be forwarded in writing to the European Ombudsman within two years of the date when the facts upon which your complaint is based first came to your attention. An online complaint form is available on the [European Ombudsman's Website](#). Lodging such a complaint shall not have the effect of suspending the aforementioned time-limits.

Yours sincerely,

Klaus-Heiner Lehne

President