



AUDITING

EU PUBLIC PROCUREMENT-RELATED AUDITS

THE WORK OF THE EUROPEAN COURT OF AUDITORS (1977-2018)



University Master's Degree in Legal Practice
Master Thesis

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AUDITING EU PUBLIC PROCUREMENT-RELATED AUDITS

- I. Abbreviations and acronyms
 II. Index: figures and tables

1. INTRODUCTION	1
1.1 Thesis subject (a brief justification)	1
1.2 Objective of the thesis	2
1.3 EU public procurement framework	2
1.4 The European Court of Auditors (ECA)	4
1.5 Legal framework	5
2. AUDIT SCOPE AND APPROACH	7
3. ANALYSIS OF THE RESULTS	10
3.1 Annual reports	10
3.1.1 Types of irregularities and other audit observations	10
3.1.1.1 Breakdown per type of irregularity and other audit observations	11
3.1.1.2 Nature and scope of the irregularities and other audit observations	12
3.1.1.3 Evolution and quantification over time	13
3.1.2 Types of the Commission's replies to the Court's audits	17
3.1.2.1 Breakdown per type of reply	17
3.1.2.2 Nature and scope of the replies	20
3.1.2.3 Replies versus irregularities and remarks	24
3.1.2.4 Evolution over time	26
3.1.3 Specific errors cited as examples by the ECA	27
3.1.4 The ECA's follow-up to previous audit observations	28
3.2 Special reports	30
3.3 Discharge procedure	30
4. CONCLUSIONS	32
5. ANNEXES	36
6. BIBLIOGRAPHY	40
7. LEGAL FRAMEWORK	48

I. Abbreviations

ACR: Annual Control Report
AR: Annual Report
CJEU: Court of Justice of the European Union
CF: Cohesion Fund
COCOF Committee of the Coordination of Funds
DG EMPL: DG for Employment, Social Affairs and Inclusion
ECA: European Court of Auditors
EU: European Union
ERDF: European Regional Development Fund
ESF: European Social Fund
ESIFs: European Structural and Investment Funds
EGESIF: Group of experts in Structural and Investment Funds
FR: Financial Regulation(s)
GPA: Agreement on Government Procurement
OJ: Official Journal of the European Union
OP: Operational Programme
OLAF: European Anti-Fraud Office
SF: Structural Funds
SME: Small to Medium-size Enterprise
SR: Special Report
TFEU: Treaty on the Functioning of the European Union

II. Index: Figures & Tables

Figures

Figure 1: Governance of public procurement
Figure 2: Types of audits & audit reports and opinions
Figure 3: European Structural and Investment Funds
Figure 4: Number of irregularities and other audit observations (1977-2018)
Figure 5: Number of irregularities and other observations (2006-2018)
Figure 6: Breakdown – Irregularities & Remaining audit findings
Figure 7: Breakdown – Irregularity 1.8. & Remaining irregularities
Figure 8: Types of the Commission’s replies
Figure 9: Breakdown of the Commission’s acceptance replies
Figure 10: The Commission’s reply degree per most frequent audit findings
Figure 11: Replies of the Commission - Evolution
Figure 12: Examples of errors cited by the ECA & Procurement procedure phase

Tables

Table 1: Breakdown per type of irregularity
Table 2: Breakdown per type of audit observation other than irregularities
Table 3: Public procurement procedure - Four-step analysis
Table 4: Breakdown per type of the Commission’s reply

Extracts from the own created Database:

Table A: Type of irregularity/audit observation per audited financial year
Table B: Type of irregularity and other audit findings *versus* type of reply

1. INTRODUCTION

1.1 Thesis subject (a brief justification)

This research aims to assess the effectiveness of the EU audit function in public procurement. It provides a systematic analysis of reported procurement errors over time as irregularities arising from non-compliance with legal and administrative provisions. It also covers any further audit observation issued on the subject. The investigation addresses the results of the European Court of Auditors' (ECA) audits on procurement expenditure, from the financial year 1977 to 2018.

Thus, the subject of the thesis brings together two fields, auditing, and public procurement, under a historical approach. Both audits and legislation involved are long-standing, as the European Court of Auditors was created by the Second Budgetary Treaty, signed in 1975, and EU public procurement legislation dates back to the 1960s when various legal acts were adopted.

These two fields are of significance beyond doubt. On the one hand, public procurement laws have contributed to the process of European (economic) integration insofar as they have played a key role in the establishment and implementation of the internal market, helping to ensure its proper functioning. Moreover, public procurement represents a share of about 14% of the EU Gross Domestic Product (around €2 trillion per year)¹, which means a major impact on the EU public funds so that rules on the purchase of services, works and supplies are a meaningful instrument for spending public money economically and effectively.

On the other hand, audits have also evolved alongside European integration, helping it develop. Since the early beginnings, the European Court of Auditors has underlined the need for efficient and effective control over the EU budget, and audit reports have issued opinions and recommendations to foster approximation of laws and procedures, as well as in particular, to further procurement legislation². In this respect, audits, when reporting errors, have always specifically invoked and relied on the principles flowing from the Treaties, such as free competition, transparency, or equal treatment and non-discrimination³. These are principles underlying EU public procurement directives and all procurement procedures, irrespective of expenditure thresholds, or whether or not EU funds are involved⁴.

¹ European Commission (Internal Market, Industry, Entrepreneurship and SMEs), Public Procurement (https://ec.europa.eu/growth/single-market/public-procurement_en)

² The holdings deposited in the Historical Archives of EU Institutions from 1958 onwards, since the first Audit Boards are a keen exponent of that.

³ The Treaty on the Functioning of the European Union (TFEU) lays down freedom of movement of goods and services (Articles 28 and 56), freedom of establishment (Article 49) and freedom to provide services, non-discrimination and equal treatment, proportionality, transparency and mutual recognition (Articles 18 and 53).

⁴ See Heading 7. *Legal Framework*, for Treaties and other legal references cited hereon.

1.2 Objective of the thesis

According to audits carried out by the ECA, procurement errors' rates are considerable in several EU spending areas⁵. Just as the ECA has often remarked it is essential that the citizens of the Union have reasonable assurance that European public funds are managed in a legal and regular manner⁶ while ensuring efficient and effective use of public resources. Besides, it may also lead to a much-needed increase of trust in public institutions, with a probable direct effect on the very credibility of audit authorities, such as the European Court of Auditors. Indeed, public auditors are often brought into the spotlight when public sound financial management and public accountability of institutions are challenged.

In this context, the current study aims to assess the effectiveness of the EU audit function in public procurement expenditure and to evaluate, inter alia, the ECA's contribution over time to address the fight against fraud and other irregularities affecting the EU budget. Nonetheless, this research also seeks to make it known to an audience who lacks expertise in auditing, public procurement, or even the European Union itself, but still, an audience concerned about public spending or proper functioning of the institutions. Efforts are needed to get an overview of such broad fields and over such a long period, but it is well worth trying to make it intelligible to reach a wider audience than the skilled and experienced one.

As a last remark, it is worth noting that there is still room to deepen and go further based on the research done for this study but it would considerably extend the range of the master thesis and exceed the set length. Nevertheless, topics raised through various headings would open-up interesting lines of research.

Finally, I wish to thank the 2019 Postgraduate Research Grant Programme (European Court of Auditors & Historical Archives of the European Union) and single out, in particular, Gilberto Moggia and Dieter Schlenker for their invaluable help and willingness to assist in my research.

1.3 EU public procurement framework

EU public procurement legislation dates back to the 1960s when several laws were passed before the first package of public procurement directives was adopted in the 1970s. This European Union legislation has now reached the fourth package of directives on public procurement⁷. However, it should be noted that the basis of the EU public procurement regulation is found in the provisions of the European Union Treaties. The

⁵ E.g. Failure to comply with public procurement rules *has been a perennial and significant source of errors in the area of Cohesion Policy*. See Special Report No 10/2015 "Efforts to address problems with public procurement in EU cohesion expenditure should be intensified", p. 8 (<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=32488>)

⁶ See, for instance, the Court's Annual report on the implementation of the budget concerning the financial year 2005 (OJ C 263/1, 31.10.2006).

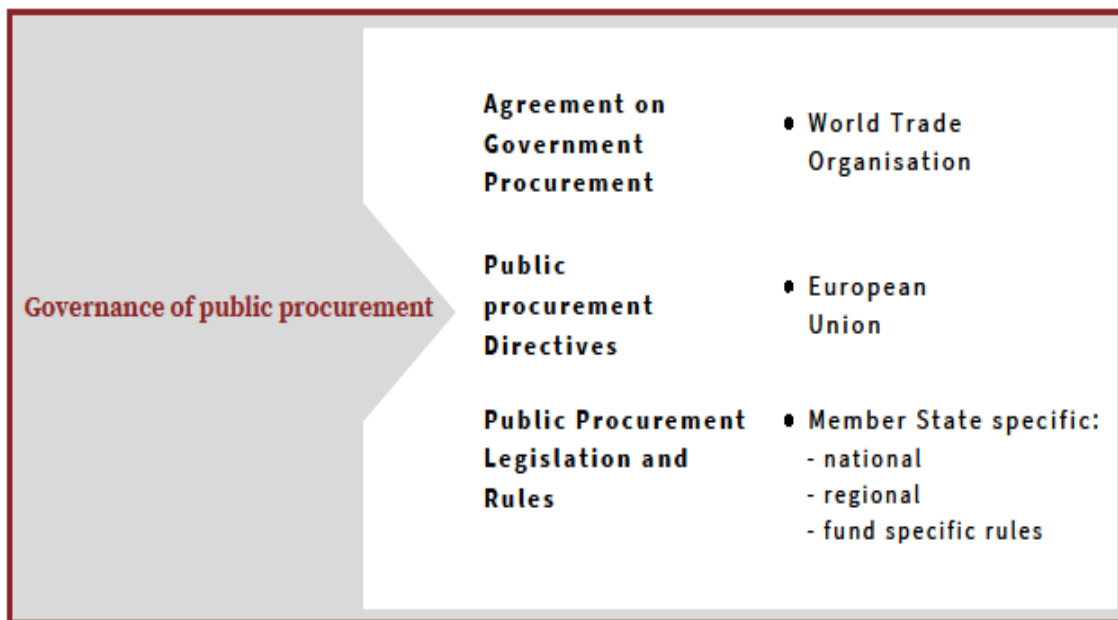
⁷ See heading 1.5 *Legal framework*, for the development of the EU directives.

above-mentioned fundamental principles laid down by the TFUE, as well as the general principles of law arising from the case-law of the Court of Justice of the European Union (CJEU) constitute the key principles governing the EU public procurement, such as openness, transparency, and equal treatment and non-discrimination of potential suppliers.

On the one hand, the EU directives on public procurement constitute the EU common legal framework for the purchase of goods, works, and services by public organisations. These are contracts most capable of affecting trade between the Member States, namely, high-value contracts and contracts with objects amenable to cross-border trade. Public authorities must comply with the obligations arising from the directives and give full effect to the provisions thereof by transposing them into national laws. Yet, there is scope for the Member States to regulate beyond this common framework (mainly procedural rules). Public administrations receiving support from the EU budget must follow these rules and procedures on procurement. In particular, EU directives set out rules concerning the publicity of proposed contracts and tendering procedure, tender specifications and selection/award criteria, evaluation and selection of tenderers and award of contracts, and performance of contracts.

On the other hand, the EU public procurement framework is based on the Agreement on Government Procurement (GPA), a multilateral agreement between a number of World Trade Organisation members that regulates the procurement of goods and services by public authorities⁸. **Figure 1** shows the governance structure of public procurement:

Figure 1: Governance of public procurement



Source: European Court of Auditors (Special Report No 10/2015 "Efforts to address problems with public procurement in EU cohesion expenditure should be intensified", p. 12)

⁸ See Special Report No 10/2015 "Efforts to address problems with public procurement in EU cohesion expenditure should be intensified", p. 8

1.4 The European Court of Auditors (ECA)

The European Court of Auditors has been the EU's external auditor since its establishment by the Treaty of Brussels of 22 July 1975. It started work in October 1977 with its headquarters in Luxembourg. The ECA replaced the two former audit bodies of the Communities: the Audit Board of the European Communities set up by the Treaty of Rome of 25 March 1957⁹ and the office of the European Coal and Steel Community Auditor, established by the Treaty of Paris of 18 April 1951. The role and structure of the ECA have developed as the EU has evolved. For instance, the Court became an institution on 1 November 1993 with the entry into force of the Maastricht Treaty, and extended its audit powers to more policy areas with entry into force of the Treaty of Amsterdam, in 1999.

The Court of Auditors carries out the European Union's audit to *examine the accounts whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound*. The Court also *submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union* (Articles 285 to 287 of the TFEU and Articles 158 to 163 of the Financial Regulation (FR)¹⁰).

Pursuant to the provisions referred to and in compliance with the international auditing standards and code of ethics, the ECA carries out different types of audits across the different areas of the EU budget. Audit manuals with detailed instructions for carrying out these audits and guidelines on auditing methods are available on the Court's website¹¹. The results of the audit work are published in various reports, depending on the type of audit, also available on the ECA's website in the official EU languages¹². **Figure 2** shows these types of audits, and the audit reports and opinions:

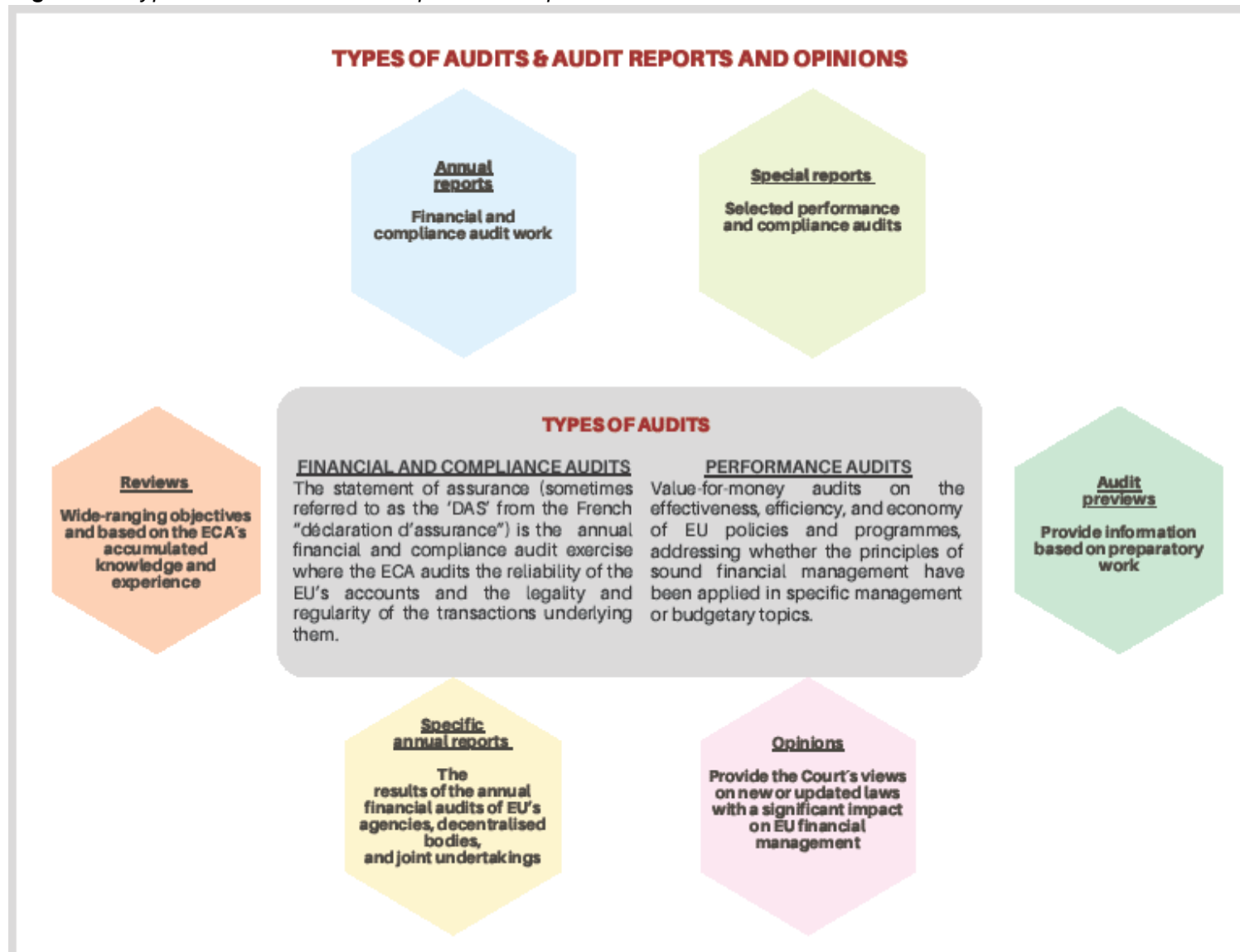
⁹ The Historical Archives of the European Union (HAEU) hold the fonds comprising documents created by the Audit Board of the European Communities which include the annual reports concerning the financial years 1958 to 1976, as well as other valuable documentation (<https://archives.eui.eu/>). The documents created by the European Court of Auditors are also deposited and accessible until the year 1991 (30-year period disclosure legislation).

¹⁰ Regulation (Eu, Euratom) No 966/2012.

¹¹ European Court of Auditors, Audit Methodology (<https://www.eca.europa.eu/en/Pages/AuditMethodology.aspx>)

¹² European Court of Auditors, Publications (<https://www.eca.europa.eu/en/Pages/PublicationSearch.aspx>)

Figure 2: Types of audits & audit reports and opinions



Source: based on the European Court of Auditors' website and manuals (work and products) (<https://www.eca.europa.eu/en/Pages/ecadefault.aspx>)

1.5 Legal framework

This study does not aim to analyse the content and evolution of the applicable regulations, but it is necessary to identify the legal framework to properly contextualise and understand the audits carried out by the ECA and all audit findings and remarks referred to over time.

After Annexes, a timeline of this evolution is available in heading 7. *Legal Framework*. It provides an overview of the relevant regulations for audit and public procurement fields within the European Union, from 1951 to 2018. References include Treaties, EU public procurement legislation, and Financial regulations, with some meaningful remarks.

In respect Financial regulations, although not applicable to the procurement activities of the Member States, they are to be noted as they set out provisions governing EU Institutions (even their own procurement rules), and the principles and procedures governing the establishment and implementation of the EU budget and the control of the European Union's finances.

Other relevant regulations have not been included, such as regulations referring to structural funds (complex and large legal framework), audit standards, and so on (due to academically set maximum length reasons).

2. AUDIT SCOPE AND APPROACH

The observations and conclusions of this master thesis are based on a review of the ECA's annual reports concerning the financial years 1977-2018 as the main and primary source of audit evidence. Other audit evidence was collected or examined by means of interviews, and analysis of documents and data (e.g., funds deposited in the Historical Archives of the European Union, existing rules, specific procedures such as discharge procedure, and various reports of the ECA and the EU Institutions or other organisations).

In particular, the investigation focuses on the procurement expenditure under European Structural and Investment Funds (ESIF funds). EU procurement directives apply to the procurement activities of the Member States concerning these funds. Insofar as the ESIF expenditure is almost entirely or mostly part of the audit population for the annual reports of the ECA, these procurement activities fall within the ECA's compliance audit produced on the subject.

Other expenditure areas have been excluded from this audit scope, such as the European Development Funds (outside the framework of the EU's general budget), external action, or administrative expenditure, which is assessed under Financial regulation (although it must comply with the directives on public procurement as the case may be, according to the thresholds involved)¹³. Utilities and concessions directives have not been considered either, due to lack of sufficient or relevant data.

In respect audit method, the research has consisted of identifying the procurement-related audit results in the ARs to collect relevant data and provide a basis for our conclusions. To that purpose, a comprehensive and quality database has been built under proper methodology to examine and classify audit evidence and other gathered information. It has served the empirical assessment of the errors, audit findings, conclusions, recommendations, replies and follow-ups set out in the annual reports so as to perform a systematic-comparative analysis of them.

However, it should be noted that the results of procurement-related audits in the annual reports do not cover all findings and irregularities arising from the audit work, but rather a sample which the ECA has considered to be reflected in the annual reports according to its discretion and the specific audit methodology applied. The comprehensive results of transactions testing (based on a representative sample of the payments contained within the policy group involved) are available in the Court's audit working papers and other documents, although not accessible due to confidentiality laws.

At this point, we must clarify what is deemed as error, irregularity, and fraud:

- **Error.** The ECA considers an error as *the result of an incorrect calculation or an irregularity arising from non-compliance with legal and contractual requirements*¹⁴.

¹³ It should be noted as the only exception in this audit scope, that two irregularities, one for the financial year 1977 and one for the financial year 1985, have been reported under Financial regulations and other specific regulations, in the area of research and energy. The ECA drew attention to the monitoring and evaluation of cost-sharing contracts performance -indirect action- and on the lack of an appraisal of the choice of contractor for study contracts.

¹⁴ Annual report concerning the financial year 2018 (glossary).

Regarding audit methods, the Court classifies errors according to its own quantification criteria¹⁵ and reports them as such in the annual reports (sometimes non-quantifiable errors are also expressly referred to). Errors may be quantifiable depending on their value (whether it is possible to measure how much of the amount paid from the EU budget is affected by an error), their nature (breached principles involved, eligibility criteria infringement for payments, etc.) and the context in which the errors occur.

The material level of error is calculated on this quantifiable error basis. Errors are material if they exceed the threshold set out for DAS audits (in general, 2% of total expenditure in our case), which is the maximum level of illegal or irregular expenditure that is judged as tolerable.

- **Fraud.** If the legal breach has been committed intentionally, then it is fraud. The intentionality element defines fraud. The ECA regards fraud in line with EU legislation¹⁶, which in respect of procurement-related expenditure comprises any intentional act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, the nondisclosure of information (*in violation of a specific obligation*) and the improper use of EU funds. The ECA doesn't have investigative powers to determine when fraud occurs but forward to the *European Anti-Fraud Office (OLAF)* or court of laws, cases suspicious of fraud.
- **Irregularity.** The ECA considers an irregularity as *an infringement of EU (or relevant national) rules or contractual obligations*¹⁷. It is a broader concept than error since it can comprise either fraudulent or non-fraudulent legal breaches.

This thesis uses the concept of irregularity instead of the concept of error because the existence of fraud (if so) cannot be determined on the data collected neither is that distinction the purpose of the investigation.

Furthermore, it must be noted that audit standards and methodologies, ESIF funds and procurement laws have evolved over the years as the structure of the annual reports has also illustrated. The ARs' chapter structure reflects the headings of the multi-annual financial framework (MFF)¹⁸ in force at the time, and it makes easier to relate the report's findings to the relevant spending area. This research does not aim to evaluate these issues but a brief overview of them is needed to provide an appropriate context to the investigation:

- The **audit methodologies and procedures** applied by the ECA have evolved according to EU legislation and international audit standards. The Court explains in the ARs the audit approach and methodology applied for tests transactions.

A major milestone in this regard was the annual report concerning the financial year 1994 when the content and presentation of the annual reports were

¹⁵ 'Non-compliance with the rules on public procurement – types of irregularities and basis for quantification'

https://www.eca.europa.eu/Lists/ECADocuments/Guideline_procurement/Quantification_of_public_procurement_errors.pdf

¹⁶ Article 3.2 of Directive (Eu) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law

¹⁷ Annual report concerning the financial year 2018 (glossary).

¹⁸ MFF is intended to determine the size and distribution of EU spending over the period concerned

significantly affected by the entry into force of the Maastricht Treaty. The Court was required to draw up a statement of assurance (DAS) as to the reliability of the accounts and the legality and regularity of the underlying transactions.

- The **European Structural and Investment Funds** are the five main EU funds which together support economic development across the EU¹⁹:

Figure 3: European Structural and Investment Funds

European Structural and Investment Funds (ESIF / ESI funds)	Cohesion Policy (CP)	European Social Fund (1958 - Treaty of Rome)	ESF	<i>EU fund for creating educational and employment opportunities and improving the situation of people at risk of poverty.</i>
		European Regional Development Fund (1975)	ERDF	<i>EU fund that strengthens economic and social cohesion in the EU by financing investments that reduce imbalances between its regions.</i>
		Cohesion Fund (1992 - Maastricht Treaty)	CF	<i>EU fund for reducing economic and social disparities in the EU by funding investments in Member States where the gross national income per inhabitant is less than 90 % of the EU average.</i>
	European Agricultural Fund for Rural Development (1964)	EAFRD	<i>EU fund for financing the EU's contribution to rural development programmes.</i>	
	European Maritime and Fisheries Fund	EMFF	<i>EU fund that supports fishermen in the transition to sustainable fishing, and coastal communities in diversifying their economies.</i>	

The European Structural and Investment Funds are covered by a common set of rules decided by the Council and the European Parliament based on a proposal from the European Commission. The ESIF are one of the largest EU budget items, *Cohesion policy* accounting for a *major* share of the budget, and they are implemented in shared management with Member States. A significant part of this money, particularly for the ERDF and the CF, is spent through public procurement.

- **Eu public procurement law.** See heading 1.3. *EU public procurement* and heading 7. *Legal framework*.

¹⁹ European Commission (https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/european-structural-and-investment-funds_en)

3. ANALYSIS OF THE RESULTS

3.1 Annual reports

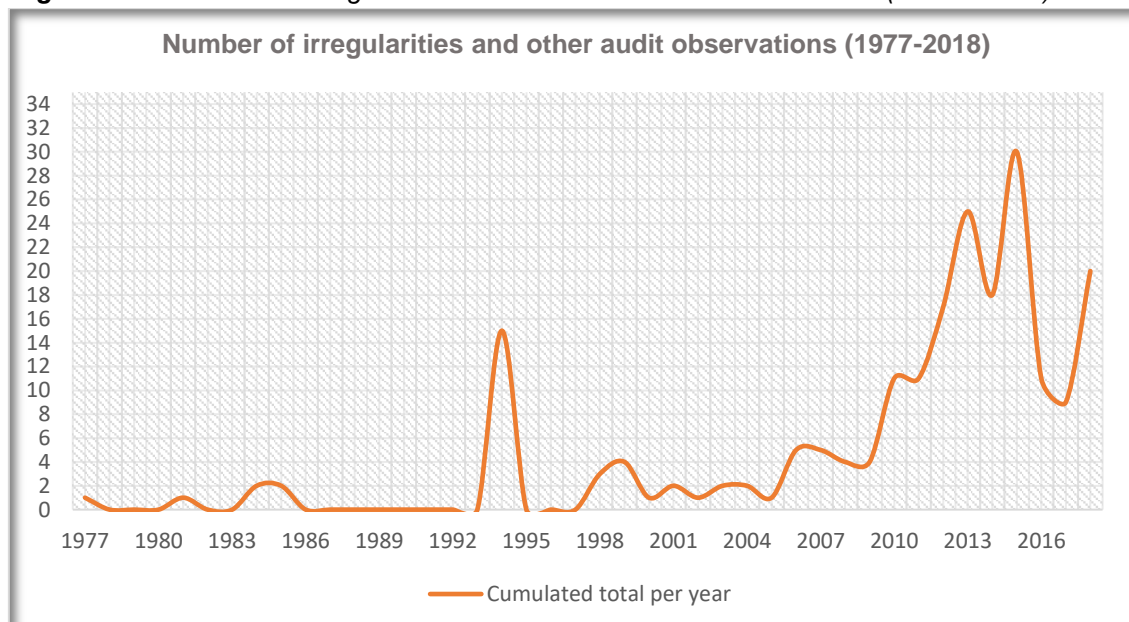
3.1.1 Types of irregularities and other audit observations

From 1977 to 2018, the ECA has incorporated in the annual reports a wide range of observations on procurement, through varied mentions and references. Such mentions vary from describing specific situations and facts to specifically pointing out procurement errors, practices not complying with regulations or legal infringements, whereas frequently issuing observations, requests, remarks, or recommendations. However, it should be borne in mind, as explained above, that these mentions do not encompass all findings and irregularities arisen in the audit works, but rather a sample that the ECA has deemed to be reflected in the annual reports according to its criteria and the specific audit methodology applied.

The procurement-related mentions overall illustrate the changes in laws and procurement practices over the years, the developments within the European Union itself, as well as the concerns raised by the European Court of Auditors since its establishment. Moreover, they are linked closely to the evolution of the Structural and Investment Funds, both quantitatively and qualitatively, as will be seen.

Before a more detailed analysis, an initial overview may show the quantitative evolution of the irregularities and the rest of the procurement remarks referred to over time, from 1977 to 2018, as shown in **Figure 4**:

Figure 4: Number of irregularities and other audit observations (1977-2018)



Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Figure 4 shows how the ECA has reported consistently on procurement issues from the first annual report (although residual and irrelevant until 1994). The year 1994 stands

out, with a very significant increase. It has obviously to do with the newly adopted second package of directives on public procurement (in the early 90s) and with the entry into force of the Maastricht Treaty requiring the Court to draw up a statement of assurance (DAS) as to the reliability of the accounts and the legality and regularity of the underlying transactions. The annual report regarding the financial year 1994 was also published as the first year of the new Commission draws to a close and a year of enlargement of the Community. Furthermore, 1994 was the first year to be affected by the reform of the Structural Funds. Indeed, the analyses concerning procurement that ECA incorporates in its reports cannot be dissociated from the progressive implementation of the Structural Funds, under both quantitative and qualitative approaches. The Cohesion Fund, for instance, was created by the Maastricht Treaty, which has led to a progressive increase in procurement references since 1998, with the initial kick-off peak in 1994, as **Figure 4** shows.

From 2006 onwards, procurement mentions and references included in annual reports have grown greatly, except for the last 3 years showing a more smoothed trend. In truth, the increasing trend already observed since 1998 was intensified in 2006. It clearly evidences the upward concern of the ECA about procurement issues, with a larger share in audit reports and works carried out over the last 15 years, which is also parallel to the growing public concern on that subject (on public expenditure as a whole). But it is also noteworthy that this increase begins after the previous (third) package of directives on public procurement adopted in 2004, which constituted a major boost in the EU public procurement laws and procedures. In fact, the ECA adopted in 2006 its first special report dealing exclusively with public procurement

Ultimately, this trend that started in about 1994 is not but a mere reflection of the European integration itself, which as it enlarged, moved forward by broadening the scope of EU competences and financial arrangements to further the single market or resources for the Structural Funds.

All of the above shows a clear correlation between the thrust of the EU legislation and the ECA's action through the ensuing audits works on the expenditure and various procedures involved across the EU. It shows the Court's efforts to address thoroughly public procurement and to fulfill the objectives set for that purpose, together with the financial ones, which reveals the ECA's commitment to sound financial management.

3.1.1.1 Breakdown per type of irregularity and other audit observations

All the above-mentioned irregularities and the remaining audit observations from 1977 to 2018 (**Figure 4**) have been studied individually in this investigation and accordingly classified by their nature. On the one hand, both the underlying specific irregularities and the expressly indicated irregularities as such in the ARs have been identified and categorised by type and listed in **Table 1** (Annexes), grouped per phase of the procurement procedure as indicated in **Table 3** below. On the other hand, the remaining procurement observations have been sorted out, as shown in **Table 2**, below.

Table 1: Breakdown per type of irregularity

****See Annexes

Table 2: Breakdown per type of audit observation other than irregularities

Acronym	Description - Breakdown per type of audit observation other than irregularities
Rt	Procurement error rates & contribution to the estimated level of error (by policy area).
Rq	Requests, recommendations, underlined needs. Calls for changes in procedures and processes. Appeals for measures to foster improvements. Calls on the auditee to take action on the audit observations.
Rec	Recommendations expressly stated as such.
Audit	Audit related procurement issues.
X	Incorrect or lack of transposition of EU Directives into national public procurement laws.

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Table 3: Public procurement procedure - Four-step analysis

Phases	Public procurement procedure. Four-step analysis
Phase 1	Tendering Procedure and Publication
Phase 2	Technical Specifications and Selection/Award Criteria
Phase 3	Evaluation and Award of Contracts
Phase 4	Performance of Contracts

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Note: see Annexes - **Table 1:** Breakdown per type of irregularity

3.1.1.2 Nature and scope of the irregularities and other audit observations

The breakdown of the irregularities (**Table 1**) provides clear and precise insight by each item number. It is the breakdown of all procurement audit observations included in the ARs from 1977 to 2018 capable of being broken down into specific irregularities. However, remarks other than individual irregularities (**Table 2**) are not likely to be narrowed down to such a comprehensive typology. The Commission's replies afford a deeper insight and awareness on their scope and dimension, as will be seen in the following chapter. Nonetheless, we may briefly outline these types of remarks:

- **Rt.** The Court provides information on procurement error rates and their contribution to the estimated level of error (usually, by policy area), widely complemented by varied data, such as the number and type of transactions audited, the amounts involved thereof (contracts values), the quantifiable errors' rate, the variations in percentages compared to previous audits, other policy areas or even between types of expenditure. The estimated level of error takes account of quantifiable errors only and is expressed as a percentage.
- **Audit.** These types of remarks are wide-ranging, as will be appreciated in the Commission's replies in the following heading and include audit recommendations. The Court assesses procurement control systems set up either by the Commission or the Member States, focusing, for instance, on audit methodologies, sample selection, checklists, checks to be undertaken and transparency standards to be applied, and risks as regards the legality and

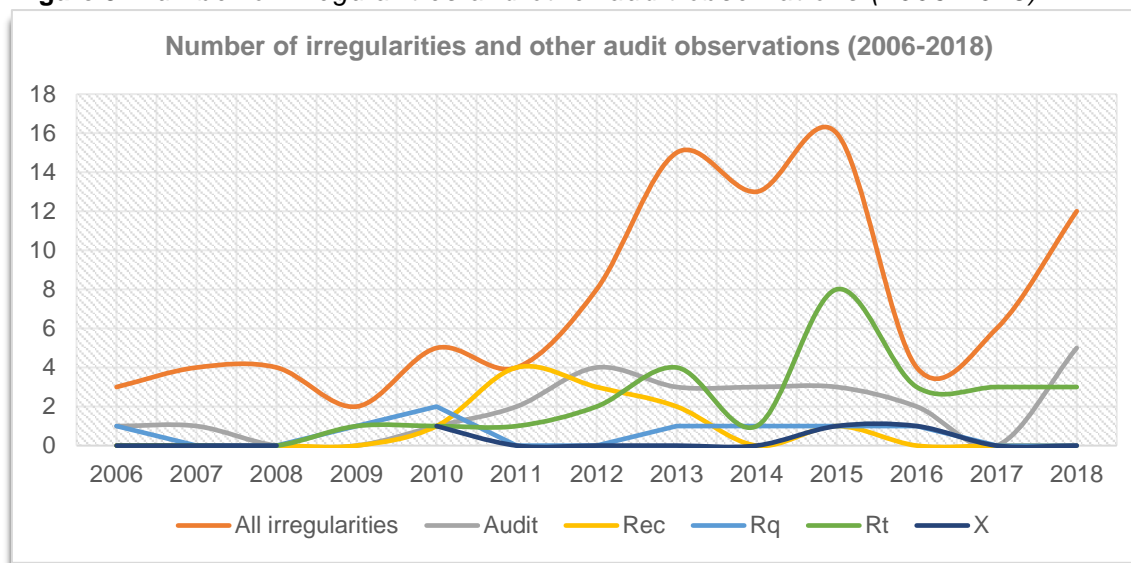
regularity of the underlying expenditure. The annual reports also conclude on management systems in procurement procedures, regarding the skills, training, and practices carried out by the authorities and staff of the Member States and the Commission.

- **Rec.** Recommendations range, for instance, from calls on a continuous monitor of the correct application of EU and national public procurement rules to demands to ensure better enforcement of the existing rules while urging to adopt effective actions on public procurement, either by the Commission or by the Member States.
- **Rq.** Requests expressly underline needs, calls for changes in procedures and processes, appeals for measures to foster improvements, or even calls on the auditee to take action on the audit observations.
- **X.** Those remarks point out incorrect or lack of transposition of EU directives into national public procurement laws.

3.1.1.3 Evolution and quantification over time

The data analysis has been carried out based on this classification contained in **Tables 1, 2** and **3**²⁰. It is interesting to begin this analysis by focusing in more detail on the growing evolution noticed over the past 15 years, as explained above.

Figure 5: Number of irregularities and other audit observations (2006-2018)



Source: Own elaboration based on the ECA's annual reports from 2006 to 2018

Legend. See **Table 1:** Breakdown per type of irregularity (**Irregularities**) and **Table 2:** Breakdown per type of audit observation other than irregularities:

- **Rt** (procurement error rates & contribution)
- **Rq** (requests)
- **Rec** (recommendations)
- **Audit**
- **X** (Directives' transposition)

²⁰ An extract from the own created database is available in Annexes, **Table A:** Type of irregularity/audit observation per audited financial year

All irregularities (**Table 1**) have been grouped into a single line in **Figure 5**. Greater weight is noticeable in comparison to the rest of the procurement remarks, although, as explained below, we must point out that more than half of these irregularities are of the 1.8. type, that is, the Court notices a failure to comply with public procurement rules overall, without providing further details on the specific facts.

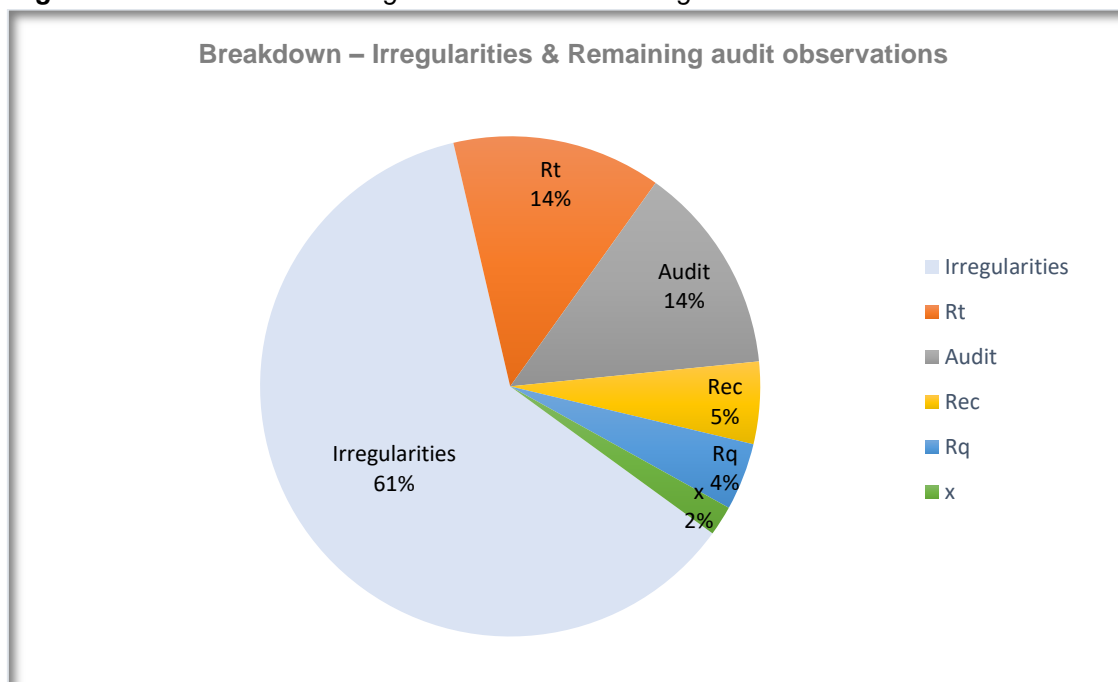
References of these irregularities have evolved since 1977 in line with the general trend described above (**Figure 4**). However, mentions regarding irregularity 1.8 have accounted for a larger share since 2006. It may have something to do with the fact that the specific examples cited by the ECA as from 2008 have been analysed separately. These are real cases highlighted showing irregularities other than 1.8.²¹

As regards audit findings other than individual irregularities (**Table 2**), the following can be concluded while analysing **Figure 5**:

- **Rt.** The ECA has gradually incorporated more Rt analyses since 2009, which account for, together with Audit type, the largest number of remarks other than irregularities.
- **Audit.** Audit-remarks present a more stable pattern thorough these years compared to other remarks since the ECA started to incorporate them in 2006 (except for a couple of previously noted facts).
- **Rec.** The Court began issuing recommendations expressly stated as such, in 2010. We can see how the recommendations reached their peak in 2011 to slowly decline again.
- **Rq.** Requests are not as many as the previous types of remarks. However, they are also constantly evolving since 2006 (with only one specific request previously issued).
- **X.** Those remarks pointing out incorrect or lack of transposition of EU directives into national public procurement laws are of minor importance in terms of quantity.

The accumulated weight of irregularities and the remaining findings from 1977 to 2018 is similar to that noticed from 2006 to 2018, and it provides insight on the focus shown in the reports over time, as illustrated in **Figure 6**, as follows:

²¹ See, heading 3.1.3. *Examples of specific errors found cited by the ECA*

Figure 6: Breakdown – Irregularities & Remaining audit observations

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Legend. See **Table 1:** Breakdown per type of irregularity (**Irregularities**) and **Table 2:** Breakdown per type of audit observation other than irregularities:

- **Rt** (procurement error rates & contribution)
- **Rq** (requests)
- **Rec** (recommendations)
- **Audit**
- **X** (Directives' transposition)

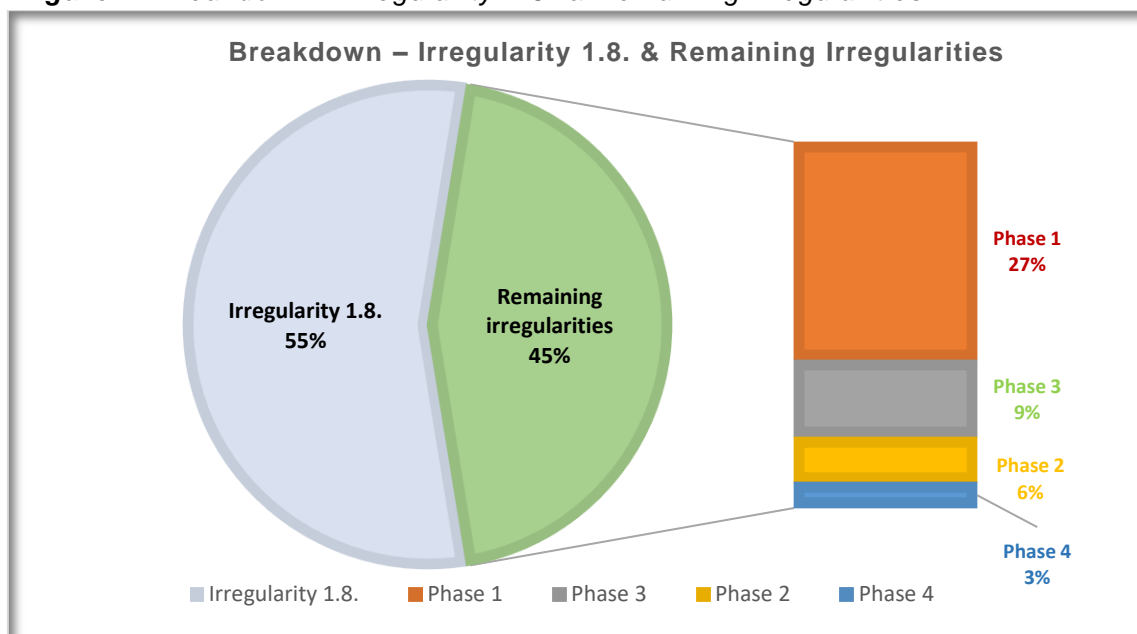
As shown, irregularities (of **Table 1**) account for 61% of all references concerning procurement in annual reports, followed by **Rt** and **Audit** remarks, with 14% each. Finally, it is noticeable that the Court made fewer recommendations, requests, and remarks on the incorrect transposition of EU directives, which make up 5%, 4%, and 2% respectively.

On the other hand, focusing on the 61% of irregularities we may remember that they are wide-ranging as **Table 1** shown, so the further graphical analysis will be based on a grouping of errors according to the phase of the procurement procedure, as determined as follows (see **Table 3**):

- Phase 1 - Tendering procedure and publication
- Phase 2 - Technical specifications and selection/award criteria
- Phase 3 - Evaluation and award of contracts
- Phase 4 - Performance of contracts

The type of irregularity 1.8. is set aside as a generic audit finding it may have been detected in any phase of the procurement.

Figure 7: Breakdown – Irregularity 1.8. & Remaining Irregularities



Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Figure 7 presents the extent to which the different types of irregularities contribute to the full rate of 61% for all procurement mentions and references as seen in **Figure 6**. Irregularity 1.8., that is, failure to comply with public procurement rules, reaches 55% of all mentions made on procurement irregularities over the years. Thus, the remaining irregularities, reporting more specific infringements, account for 45% of the total.

Among these remaining irregularities (45%), phase 1 irregularities prevail with 27% of the total (tendering procedure and publication), followed by phase 3 irregularities representing 9% (evaluation and award of contracts), phase 2 irregularities with 6% of the total (technical specifications and selection/award criteria), and phase 4 irregularities, with a 3% (performance of contracts). As can be seen, the Court identifies in its annual reports a much higher number of irregularities detected in tendering and publication phase than any other phase. Yet, remarkably the irregularities coming up in the contract management phase are residually incorporated into the annual reports (3%). It may imply a greater awareness of the preparatory, evaluation, and award phases than of the performance one, a citation criteria focused on some phases, or maybe suggests more irregularities arisen in some phases as recorded in the audit papers (due either to a greater incidence or as a result of the specific audit scope as defined).

Nevertheless, it may be recalled that procurement mentions in the annual reports should be considered as such mentions according to the ECA's discretion since the actual incidence of errors is that resulting from the data collected and the irregularities identified in the audit working documents. As noted above, there is, of course, no access to these internal working documents (confidentiality reasons) but the Court has adopted reports providing further information on this subject, in particular through special reports, as will

be discussed below (heading 3.2. *Special Reports*). These special reports are very rigorous and comprehensive, strongly recommended to gain insight and deepen understanding of public procurement procedures and practices within the European Union, as well as the specific shortcomings, weaknesses, and risks detected by the Court.

To conclude, and returning to our analysis, we note that irregularities other than irregularity 1.8., taken individually, present the same trend as those observed previously, with the upturn in 1994 and subsequent gradual increase. Although the vast majority of those irregularities have come up once, the most frequently reported irregularities are the following, in the order indicated:

- Failure to respect rules on the award of public contracts (irregularity 1.9.)
- Failure to observe the rules governing invitations to tender (tendering procedures) (irregularity 1.7.)
- Shortcomings in the tender specification (irregularity 1.11.)
- Failures to meet publicity requirements/rules (irregularity 2.5.)
- Unjustified direct award (irregularity 1.2.)
- Incorrect application of the selection criteria (irregularity 3.1.3.4. and 3.1.8.)

It is noted that replies given by the Commission to these irregularities and the remaining audit findings will be analysed below (3.1.2.3. *Replies versus irregularities and remarks*).

3.1.2 Types of the Commission's replies to the Court's audits

3.1.2.1 Breakdown per type of reply

The Commission's replies to audit findings have been streamlined and accordingly classified as follows, in **Table 4** below:

Table 4: Breakdown per type of the Commission's reply

Description - Breakdown per type of Commission's reply		Acronym	
Acceptance	Reply - Acceptance with Explanatory remarks (without mentioning any specific measure)	RAE	
	Reply - Acceptance with Explanatory remarks on the relevant measures taken(^), measures to be taken (*) or both (^*)	RAEm	RAEm^
			RAEm^*
			RAEm^*
Partial Acceptance	Reply - Partial Acceptance (with or without explanatory remarks & without mentioning any specific measure)	RPA	
	Reply - Partial Acceptance with indication of the relevant measures taken(^), measures to be taken (*) or both (^*)	RPAm	RPAm^
			RPAm^*
			RPAm^*
Non-Acceptance	Reply - Non-Acceptance	RNA	
No reply	No reply	N	

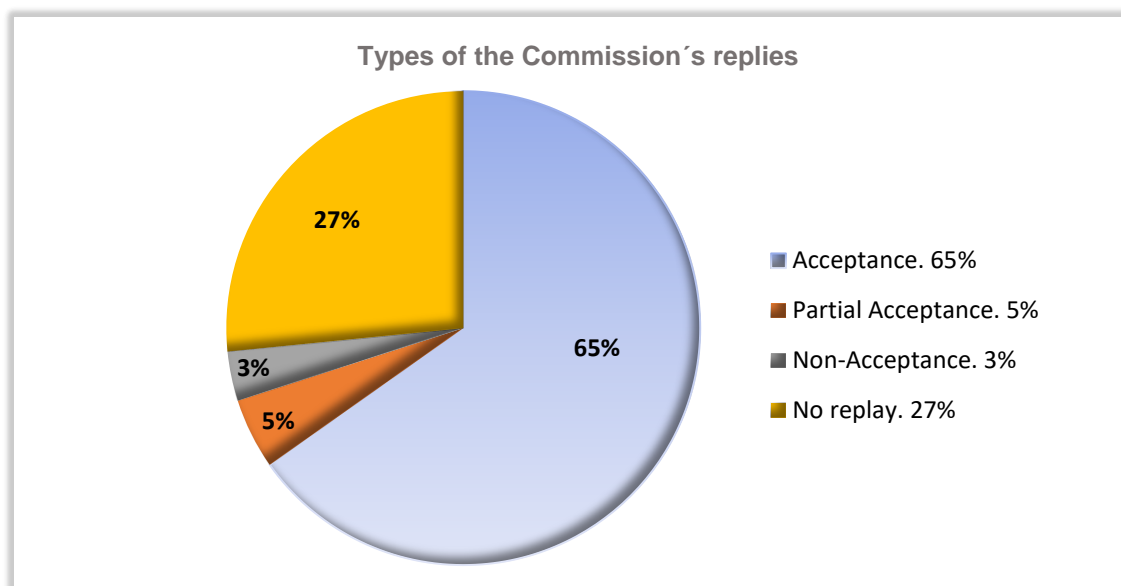
Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

The data analysis is carried out based on of the classification of **Table 4**, which depends upon whether the audit irregularities, findings, recommendations and whatever other remarks have been replied or not, and if so, whether they have been accepted, in whole or in part.

In case of acceptance, a further sub-classification has been made to determine if the Commission reports on specific measures already adopted or intended to be adopted in response to the irregularities and overall to the audit findings pointed out by the Court. It reveals the Commission's level of commitment to comply with the Court's recommendations and observations by taking corrective action.

Before an in-depth analysis, a first approach may show the accumulated weight of each type of reply over time, from 1977 to 2018, as shown in **Figures 8** and **9** below:

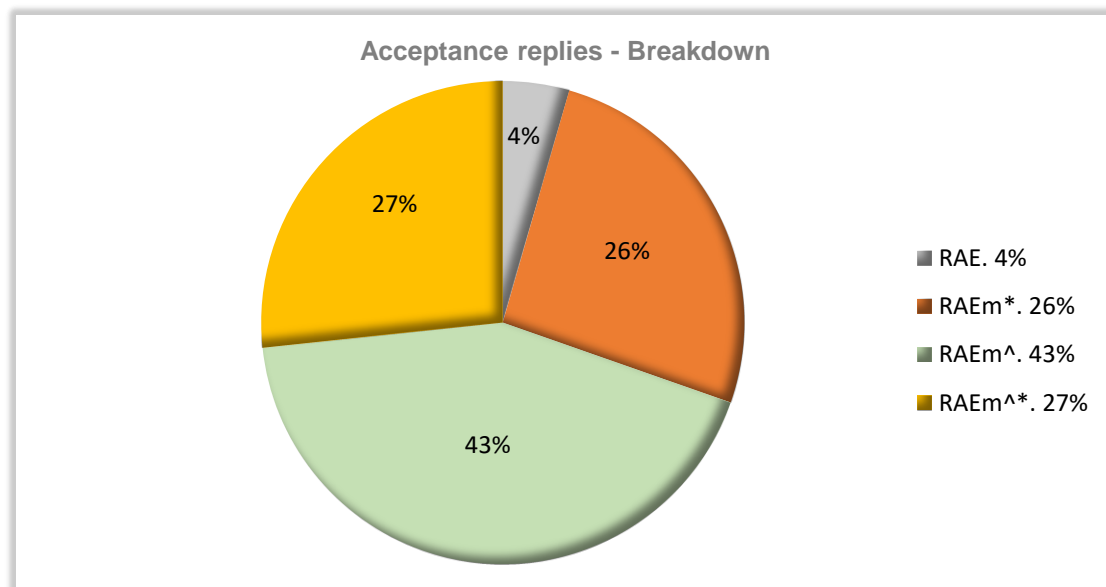
Figure 8: *Types of the Commission's replies*



Source: *Own elaboration based on the ECA's annual reports from 1977 to 2018*

As illustrated in **Figure 8**, it is remarkable how the Court's observations are largely replied by the Commission, at 73%, with 27% remaining unanswered. Furthermore, it is noteworthy, the degree of acceptance shown by the Commission, since almost all the replies imply full acceptance (65%) and only 5% constitute partial acceptance and 3% non-acceptance.

Figure 9 below presents the extent to which the different types of acceptance replies contributed to the full acceptance rate of 65%, according to the classification specified in **Table 4**.

Figure 9: Breakdown of the Commission's acceptance replies

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Legend: See **Table 4:** Breakdown per type of the Commission's reply

- RAE. Acceptance with explanatory remarks
- RAEm* Acceptance with explanatory remarks on the relevant measures to be taken
- RAEm^ Acceptance with explanatory remarks on the relevant measures taken
- RAEm^* Acceptance with explanatory remarks on the relevant measures taken and to be taken

Figure 9 shows how in almost all the replies (96%), the Commission provides not only mere explanations but explanatory remarks on the relevant measures in response to audit findings. Only 4% of the replies are explanations without further action.

Nearly half of the acceptance replies (43%) provide explanatory remarks on the relevant measures already taken. In those cases, the Commission considers those measures as remedial actions to the Court's findings and remarks on the issue. In 26% of cases, the Commission takes note of the audit and identifies future measures to address the irregularities and remarks pointed out. It is also worth mentioning how in a considerable number of cases (27% of the replies), the Commission points out both measures already put in place and additional measures to be adopted.

It definitively shows an overall proactive and comprehensive attitude towards the audit work which shows the effective impact of the recommendations and observations issued by the ECA.

Finally, we can add that while partial acceptance replies account for only 5% of all replies, they also contain measures already taken (40%), measures to be taken (20%) or both (40%). It shows an effort to justify those positions differing from those of the ECA, which means due analysis of audit findings through a well-founded exchange of views.

3.1.2.2 Nature and scope of the replies

We have classified the Commission's replies incorporated into the annual reports from 1977 to 2018, which get us enabled to gain further insight on measures related to public procurement rules and procedures pointed out by the Court.

The ECA's audit work has evolved and ranged from identifying irregularities, risks of fraud or misuse of public funds, to drawing remarks and observations, or issuing recommendations and suggestions, even specific requests to address the problem of public procurement errors. In response, the Commission has reported on many and varied types of measures either taken or envisaged to be taken, intending to follow the ECA's audit findings and ensure strict compliance with procurement rules, to improve procurement procedures and to mitigate risks. Measures are outlined as follows, depending on their nature, type of expenditure, auditees involved, specific managerial and policy area or other varied issues:

- Concerning the **financial measures** taken in its supervisory role, the Commission reports on both preventive and corrective actions such as the interruption of payment deadlines or the adoption of suspension decision on operational programs where serious deficiencies or irregularities have been detected, until, as allegedly stated, necessary corrective measures are implemented by the Member States. The Commission frequently reports on substantial net financial corrections to be applied, if needed.
- With regard to **audit related measures**, the Commission underlines targeted audit activity on the riskiest areas (corrective actions), monitoring of compliance with procurement rules through its regular audit activity and the follow-up of all EU and national audits (internal reporting through the annual activity reports of Directors-Generals). Occasionally, the Commission has reinforced ex-ante and ex-post controls *particularly* in the field of public procurement. It has also communicated the launch of dedicated audits on procurement and conformity audits in the Member States to verify that the expenditure paid complies with the rules.

As more concrete measures where the Member States are regularly involved, the Commission has reported on sample check implementations, guidance on best practices in day-to-day management checks and guidelines on the scope and extent of audits. It has also conducted examinations of the methodology for system audits and exchanges of audit tools and methodologies, including the Commission's own checklists. The Commission has also provided seminars, training, and recommendations to audit and managing authorities in the Member States as well as exhaustive guidance and guidelines, as stated above (e.g., drawing on the *lessons learned in the 2007-2013 programming period and the Court's findings*). In the same way, the Commission mentions the elaboration of a compendium of errors to be avoided, which provides further guidance, including on the reporting of audit findings, and integrity pacts for audit authorities who have the responsibility to perform audits of the management and control systems. The Commission has also referred regularly specific guidance documents on most common irregularities and

guidelines for determining financial corrections to be made to expenditure financed under the shared management, for non-compliance with the rules on public procurement.

The Commission has also reported on a working group with the participation of several audit authorities and the ECA as an observer, aiming to set up a common understanding and practice in procurement, taking due account of the need for an appropriate balance to ensure sound and efficient administrative procedures.

- **Specific measures for the vast majority of irregularities** pointed out in the ECA's annual reports are those which expressly state commitment to follow-up the cases identified by the Court and propose actions as it deems necessary (actions such as detailed analysis and complete investigation of audit findings, information requests and recommendations for improvements to the Member States, follow-up of the cases referred, financial corrections and other corrections and corrective measures, verification of the Member States' arguments, better-evidenced checks and updates to the procedures, recovery of unduly paid amounts, etc.).
- Sometimes the ECA addresses **requests** so that the Member States take corrective actions (or remedial action). Thus, the measures have ranged from the implementation of specific action plans (e.g., *following the Court's recommendations in special report No 23/2014*) to the setting up of any updated public procurement action plan or new initiatives (e.g., under an action plan put in place *in 2013 between DG Regional and Urban Policy and DG for Internal Market, Industry, Entrepreneurship and SMEs to improve the implementation of public procurement rules*). Other measures to comply with those requests have consisted of country-specific action plans and targeted actions to prevent and detect cases of non-compliance with public procurement procedures. The Commission has also met the ECA's requests to audit the application of the EU directives on public procurement by carrying out enquiries in certain cases or by asking the Member States' audit authorities to perform such enquiries on its behalf.

Occasionally the ECA has drawn attention to the problems addressed in the action plans set up with the Member States for reducing the error rates. The Commission refers several times, in particular, its Action Plan on public procurement set up in 2013 and endorsed by the Commission in December 2015, as well as the sharing with the Member States of an analysis of the types of errors detected in cohesion by the ECA's audits. The Commission also refers to the launch of an exercise to collect best practices and possible answers by the Member States to remedy such errors and reduce their occurrence. It points out how it conducts technical meetings, identifies and shares good practices between the Member States, and establishes a comprehensive manual for practitioners, or the setting-up of a new peer-to-peer exchange platform.

- **Measures related to legal and legislative issues.** Occasionally the ECA has drawn attention to the Commission to monitor the correct implementation of EU directives or to monitor closely the state of transposition in the Member States. In

this regard, the Commission calls on the Action Plan on Public Procurement of the Commission was updated in March 2017 to include new actions related to the transposition of the new Public Procurement directives and a stronger focus on strategic procurement and transparency. Likewise, the legal framework for European Structural and Investment Funds 2014-2020 also introduced ex-ante conditionalities for the effective and efficient use of Union funds, which cover inter alia Member States' public procurement systems.

Besides, the Commission has also reported on the reinforcement of the rules for the interruption of payments in rural development in cases where the Member States do not correctly play their role under shared management rules. In this regard, the Commission alleges that the implementation of the Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013²² will clarify the scope and content of the administrative, on-the-spot and ex-post checks. By this measure, the Commission considers that the EU financial interest will be better protected, reinforcing the rules where infringements on public procurement arise (among others).

The Commission also alleged how the 2014 directives on public procurement introduce simplifications, as demanded by the ECA, stating that they were to be transposed into national laws by April 2016. In this regard, the Commission showed the willingness of the directives start producing its effect on the ground. Furthermore, the Commission calls on retrospective evaluation of the relevance, effectiveness, and efficiency of the basic EU public procurement legislative framework.

- **Judicial or administrative measures** are also addressed occasionally, such as cases subject to be submitted to the European Court of Justice or sent to OLAF for assessment. Commission reports on those issues based on procedures established in the Treaties. In this regard, the Commission refers to timely opened infringement procedures under article 258 TFEU against all Member States failing to comply with their transposition obligations, or specifically to e.g., sending of 21 letters of formal notice in May 2016 and subsequently 15 reasoned opinions to the Member States concerned in December 2016.
- Some measures involve **internal instructions and varied tools**. The Commission has adopted instruments of all kinds likely to address the ECA's findings, such as the following mentioned in the reports:
 - ✓ Guidance Document on controls and penalties for the 2014-2020 period.
 - ✓ Checklist for assessing the reasonableness of costs produced by the Court and annexed in the Special Report 22/2014.

²² Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008

- ✓ Staff Working Documents (Analysis of errors in the Cohesion Policy for the years 2006-2009 (SEC (2011) 1179 of 5 October 2011)).
- ✓ New initiatives under a comprehensive action plan set up in 2013 to improve the implementation of public procurement rules and politically endorsed by the Commission in December 2015.
- ✓ A comprehensive guidance note on management verifications for the 2014-2020 programming period, drawing on the lessons learned in the 2007-2013 programming period and the ECA's findings regarding public procurement.
- ✓ To enforce the existing rules on public procurement the Commission adopted Decision C(2013)9527 final which sets out guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management (with regard non-compliance with the rules on public procurement).
- ✓ Updating in 2013 of its decision on the quantification of public procurement errors in shared management, including inter alia cohesion spending and rural development (referring Commission decision C (2013) 9527 final).
- ✓ Follow-up of all errors reported by the Court following Commission decision C (2013) 9527 final.
- ✓ Public Procurement Action Plan in the context of the use of ESI Funds 2013-2020²³, setting out a series of initiatives such as a study on administrative capacity of the EU' (2016), including country-specific recommendations²⁴, Guidance for practitioners on the avoidance of the most common errors in public procurement of projects funded by the European Structural and Investment Funds' (2015)²⁵, or an e-library of good practices²⁶.
- ✓ Application of flat-rate corrections in Cohesion policy, based on the COCOF²⁷ guidelines, such as:
 - Guidelines for determining financial corrections to be made to expenditure co-financed by the structural funds or the cohesion fund for non-compliance with the rules on public procurement, COCOF note 07/0037/03 of 29 November 2007²⁸

²³ European Commission and the European Investment Bank (EIB), 2013 and regularly updated, *Public Procurement Action Plan in the context of the use of ESI Funds 2013-2020* (https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/action_plan_pp.pdf)

Summary of all the actions, the relevant actors, outputs and deadlines available here: https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/action_plan_pp_annex.pdf

²⁴ European Commission, PWC, (2016), *Stock-tacking administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds*. Luxembourg: Office for Official Publications of the European Communities.

²⁵ European Commission, 2015 and regularly updated, *Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds*. Luxembourg: Office for Official Publications of the European Communities.

²⁶ European Commission, regularly updated, *E-library of public procurement good practices* (https://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/e-library/)

²⁷ Committee of the Coordination of Funds, replaced by COESIF (Coordination Committee for European Structural and Investment Funds) and EGESIF (Group of experts in Structural and Investment Funds).

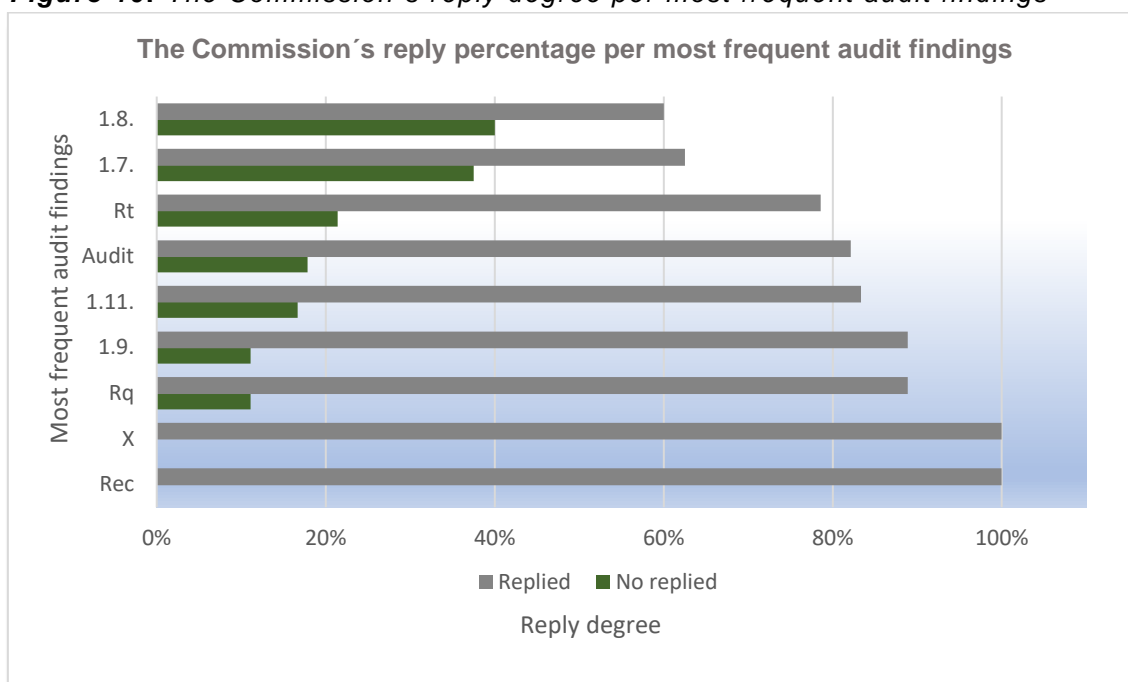
²⁸ COCOF, note 07/0037/03 of 29 November 2007, (https://ec.europa.eu/regional_policy/sources/docoffic/cocof/2007/cocof_07_0037_03_en.pdf)

- Guidance document on management verifications to be carried out by Member States on operations co-financed by the Structural Funds and the Cohesion Fund for the 2007 – 2013 programming period” (COCOF note 08/0020/04 of 5 June 2008)²⁹.

3.1.2.3 Replies versus irregularities and remarks

We can analyse the extent to which the Commission has specifically responded to each type of audit finding mentioned in the annual reports. According to the analyses carried out in the previous heading (*Types of irregularities and other audit observations*) the most frequent recommendations, comments, conclusions, and other audit findings are those reflected in the following **Figure 10**:

Figure 10: The Commission’s reply degree per most frequent audit findings



Source: Own elaboration based on the ECA’s annual reports from 1977 to 2018

Legend. See **Table 1: Breakdown per type of irregularity (Irregularities)** and **Table 2: Breakdown per type of audit observation other than irregularities:**

- **1.8.** Failure to comply with public procurement rules overall
- **1.7.** Failure to observe the rules governing invitations to tender
- **Rt** Procurement error rates & contribution
- **Audit**
- **1.11.** Insufficient justification of the tendering procedure
- **1.9.** Failure to respect rules on the award of public contracts.
- **Rq** Requests
- **X** Directives’ transposition
- **Rec** Recommendations

It is illustrative how all recommendations (Rec) and calls on the correct transposition of the directives (X) are expressly replied by the Commission. It shows the effectiveness

²⁹ COCOF, note 08/0020/04 of 5 June 2008,

https://ec.europa.eu/regional_policy/sources/docoffic/cocof/2008/cocof_08_0020_04_en.pdf

level of these audit work insofar the Commission elaborates individual analysis, identifying or establishing appropriate measures to each finding and remark, in fact, the largest type of reply (providing specific measures beyond explanations).

However, it is also significant the high degree of the response given by the Commission to other audit findings such as the Court's requirements (Rq) which are replied to by 89%, irregularity 1.9. on the failure to respect rules on the award of public contracts (replied to by 89%), irregularity 1.11. on the justification of the tendering procedure (replied to by 83%), and the audit-related issues (replied to by 82%).

Finally, audit findings replied below 80% are those concerning Rt remarks-procurement error rates (79%), irregularity 1.7. on the failure to observe the rules governing invitations to tender (63%) and irregularity 1.8. on the failure to comply with public procurement rules overall (60%), which shows how the most generic audit findings remain unanswered to a greater extent.

In conclusion, there is a low rate of audit findings that remains unanswered with several types of audit findings being fully responded to. It shows how the ECA's audit work contributes to the effort and commitment to comply with procurement rules, improve procedures and mitigate risks since the Commission addresses the audit remarks by developing replies and customized actions in almost every finding.

On the other hand, concerning the specific sub-classification of the replies (see **Figures 8 and 9**), there are several significant issues³⁰. Overall, most of the replies in these particular audit findings (**Figure 9**) are replies giving explanatory remarks on the relevant measures already taken (RAEm[^]), 43% of the total replies. It is followed by replies addressing measures both taken and to be taken (RAEm^{^*}), accounting for 27% of the total, and replies which establish measures to be adopted (RAEm^{*}), 27% of the total replies. However, it is interesting to identify the prevalence of each type of reply for each type of irregularity or audit finding, as shown on the **right**.

The prevalence of each type of reply for each type of irregularity or audit finding

The majority type reply per each type of irregularity, except for irregularities 1.7. and 1.11. provides explanatory remarks on the relevant measures taken (RAEm[^]) as valid measures already in place to address the audit observations of the ECA. It is noteworthy its high percentage (73%) regarding audit recommendations (Rec), ahead of the rest of the audit findings and remarks. Thus, this type of response, with measures already underway, accounts for half of the replies to the requests (Rq), 48% of the replies to the audit-related findings (Audit) and 45% of the replies to the error rates findings (Rt).

However, replies which identify measures to be adopted prevail in case of irregularities 1.11. and 1.7. (RAEm^{*}), with 60% of the replies for the audit findings reporting on the justification of the tendering procedure (irregularity 1.11) and for the audit findings reporting on the failure to observe rules governing invitations to tender (irregularity 1.7).

And most of the replies addressing measures both taken and to be taken (RAEm^{^*}) have been given to the mentions about procurement error rates and contribution to the estimated level of error (audit finding Rt), in 41% of the replies. However, it should be noted that this reply is the second most frequent type of response after the aforementioned reply providing explanatory remarks on the relevant measures taken (RAEm[^]).

On the other hand, the only non-acceptance replies (RNAs) have been given to audit findings related to irregularities. Nonetheless, it is hardly significant since this type of reply account for only 3% of the total replies to all audit findings. However, it should be noted that the Commission has only replied with non-acceptance when the ECA reports on failure to comply with rules on public procurement overall, with rules governing invitations to tender and with rules on the award of public contracts (5%, 20%, and 25% respectively).

Partial acceptances, although they represent only 4% of the total replies to all audit findings, are given almost entirely in the audit findings reflected in **Figure 10**.

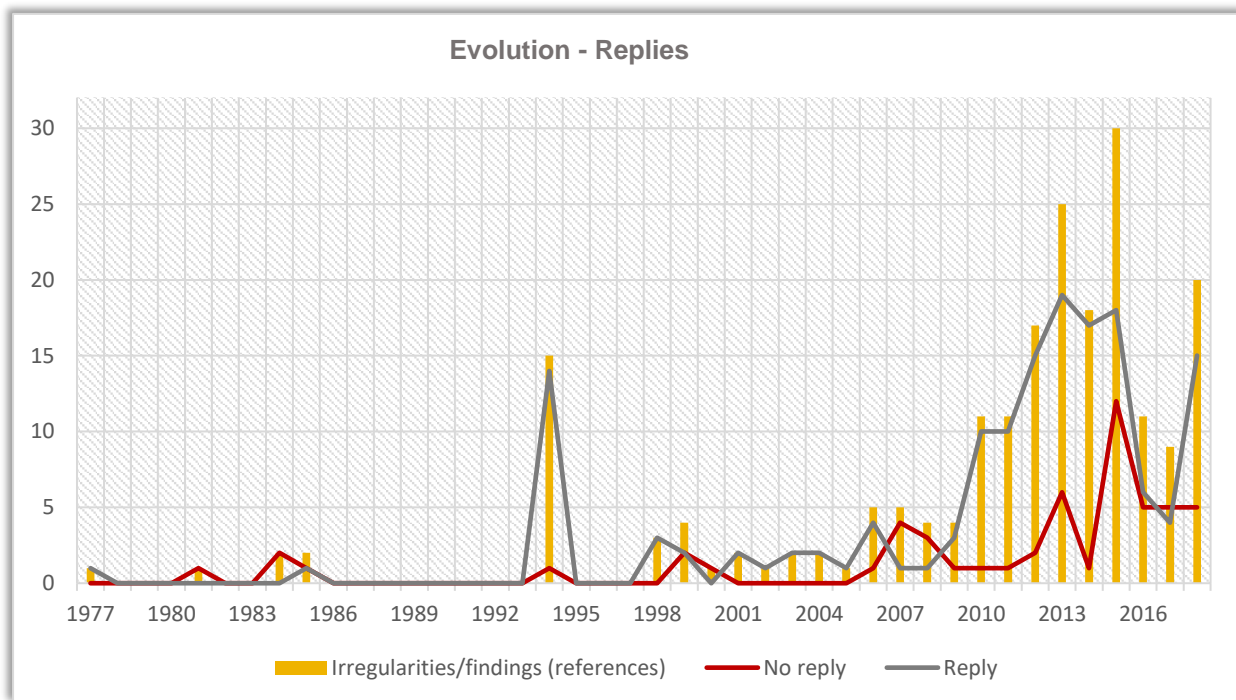
Finally, replies with explanations without any measure or action (RAE), although equally residual in the total replies, arise mostly when the ECA calls on the incorrect or of lack of transposition of EU Directives into national public procurement laws (25%) and in a smaller percentage in the audit findings Rq and 1.9., with 13% each one.

³⁰ An extract from the own created database is available in Annexes, **Table B: Type of irregularity and other audit findings versus type of reply**.

3.1.2.4 Evolution over time

The following **Figure 11** allows assessing the progression of replies level to the audit findings and irregularities mentioned in the annual reports from 1977 to 2018.

Figure 11: Replies of the Commission - Evolution



Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

Replies evolve in line with the quantitative evolution of audit findings and remarks expressly referred to in the ARs, which in any case, have been largely replied over time, as we have seen in previous sections. Nevertheless, the analysis of the first years is somewhat minor since it was not until well into the 1990s that a clear trend towards greater procurement references in annual reports began. It is here that we can most consistently establish patterns in the Commission's replies as contained in the ARs.

It is remarkable how there are years that we may identify and lump as very prone to obtain replies, such as the period between 2001 and 2005, where the Commission replies all audit remarks. We can also underline years where the reply rate is much higher than the average, such as 2010 and 2011 with 91% of replies, 2012 with 88% or 2014 with 94%.

However, it is noteworthy that the period between 2015 and 2018 shows a significant increase in non-replies, although 2018 resumes the positive trend, with 75% of audit findings being responded to.

In any case, as already examined in previous headings, this **Figure 11** reflects how the ECA has progressively incorporated procurement audit findings and remarks into its annual reports, thus displaying a growing awareness to ensure compliance with

procurement rules, improvement of procedures and mitigation of risks, which in the end tackles public funds misuse under sound financial management principles.

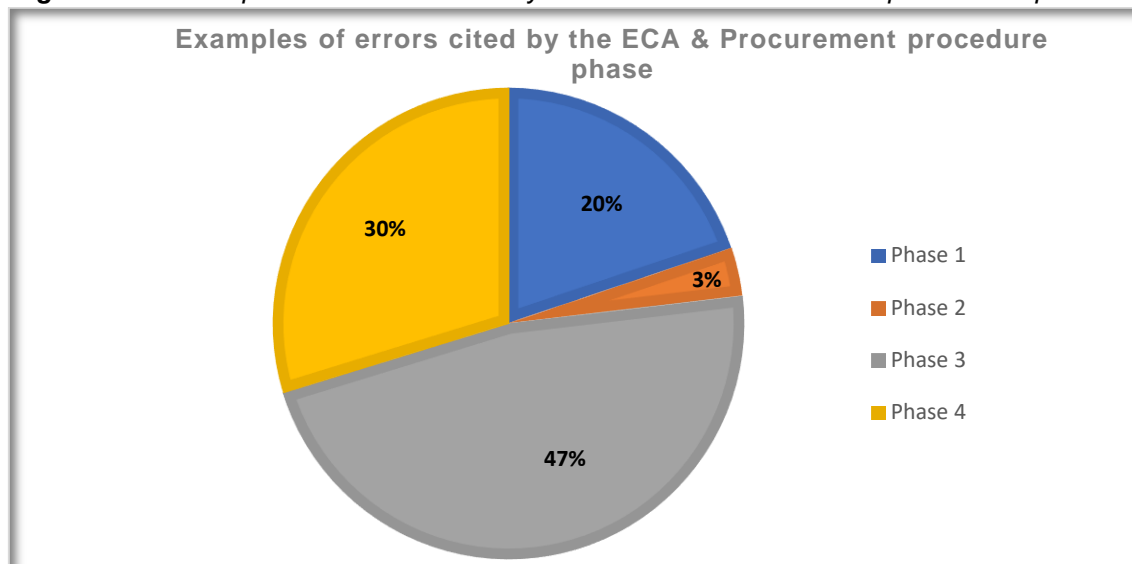
3.1.3 Specific errors cited as examples by the ECA

In the annual report concerning the financial year 2008, the Court included the first examples of specific procurement errors identified when examining samples of transactions. The ECA endeavors to bring precise and intelligible insight of the irregularities pointed out, insofar as it provides further details by highlighting concrete cases and describing particular circumstances concerned. This certainly helps to an easier comprehension of procurement-related audits and contributes to better understand procurement practices and financial procedures involved within the European Union.

Moreover, it is remarkable that the Commission also responds to these examples of errors, although expressly to only one quarter. In other cases, the Commission refers to the reply given to the general irregularity to which the examples belong. In more than half of the cases, the Commission responds by accepting the Court's audit conclusion and making explanatory remarks on the relevant action to be taken (*RAEM* type*). It proves how the Commission deals irregularities as specified down to the smallest detail, which reinforces the effectiveness of the ECA's audit work.

On the other hand, these examples of errors differ from the pattern discussed above (irregularities as a whole in **Figure 7** - heading 3.1.1. *Types of irregularities and other audit observations*), as shown in the chart below:

Figure 12: Examples of errors cited by the ECA & Procurement procedure phase



Source: Own elaboration based on the ECA's annual reports from 2008 to 2018

Legend. See **Table 3: Public procurement procedure – Four-step analysis**

- Phase 1 - Tendering procedure and publication
- Phase 2 - Technical specifications and selection/award criteria
- Phase 3 - Evaluation and award of contracts
- Phase 4 - Performance of contracts

Figure 12 highlights a much larger prevalence of errors concerning the performance of contracts (phase 4), rising from 3% to 30%, as well as an enormous increase in errors regarding evaluation and award of contracts (phase 3), rising from 9% to 47%. It shows how the specific cases highlighted by the ECA, that is, irregularities as detailed further, present a more balanced incidence over procurement procedure between performance, and preparation and award phases. It makes sense since the audits cover the entire cycle of public procurement. The most frequent irregularities arising from the examples cited by the ECA are the following, in the order listed:

- Unjustified direct award (absence of tendering procedure without justification) (irregularity 1.2.)
- Unjustified substantial modification of the contract without a new procurement procedure - Unlawful amendment of contract (4.3.)
- Unjustified application of negotiated procedure / negotiated procedure unduly applied (irregularity 1.1.1.)
- Non-compliance with the publication and/or transparency requirements (irregularity 1.6.)
- Artificial split of works/services/ supplies in several tenders (irregularity 1.5.)
- Irregular award of a contract due to incorrect application of award criteria (irregularity 3.1.3.3.)

3.1.4 *The ECA's follow-up to previous audit observations*

The annual reports contain Annexes showing the results of the ECA's review of progress in addressing recommendations made in previous annual reports. This is certainly a substantial added value to ARs, as it fosters transparency and tracks audit observations. It provides evidence on the effectiveness of audits by strengthening oversight to ensure compliance with previous audit findings. Besides, it allows stakeholders to assess the efficiency of audit work, which indeed increases confidence in the ECA as an audit institution that is.

Annexes in the annual report concerning the financial year 2009 refer to the first procurement-related follow-ups which merit a special mention. Likewise, the annual report concerning the financial year 2018 contains the first procurement-related follow-ups to recommendations issued in non-annual reports, such as the Special report 10/2015 (*Efforts to address problems with public procurement in EU cohesion expenditure should be intensified*).

The measures reported by the Commission do not differ from some of those described above, but it is interesting to show how the ECA considers them, so a brief reference is required:

- According to the Court's opinion, the Commission implemented in most respects recommendations issued in Cohesion policy concerning the financial year 2009 when the ECA stated that the Commission should monitor compliance with the eligibility requirements for EU funding, including the correct application of the EU and national public procurement rules. The Court accepted various actions taken by the Commission, such as training and guidance to Member States' managing

and audit authorities, specific enquiries carried out for the Cohesion Funds (2000-2013), the Green Paper on the modernisation of EU public procurement policies (COM(2011) 15 final), evaluation of the EU public procurement legislative framework, and other specific actions undertaken to mitigate the risks identified.

- Concerning financial years 2011, 2012 and 2013 the ECA issued several recommendations concerning rural development, environment, fisheries and health (Chapter 4 of the annual reports), requesting the Commission to ensure that the procurement rules were better enforced, to address the weaknesses identified in systems for procurement, and to ask the Member States for improvement in their existing administrative checks to assure compliance of public procurement procedures with the applicable EU and/or national rules. The Commission reported on measures such as conformity clearance procedures to put in place, or guidelines for determining net financial corrections to be made to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement (Commission Decision C(2013) 9527), as well as several measures to improve the quality of administration and control systems with the Member States. The Court considered with these actions that recommendations were implemented either in most or some respects.
- In respect of the employment and social affairs as reported in the financial year 2012 (Chapter 6), the Court insisted again on the improvement in the work done by audit authorities and the quality and reliability of the information provided in the annual control reports (ACRs) and audit opinions. The Court regarded that this recommendation was implemented in most respects by considering the improvements done significant, especially in the areas of sub-sampling and public procurement checks. Instead, recommendations issued in 2013 on this same policy area were deemed as fully implemented, addressing weaknesses identified in the DG EMPL's³¹ risk-based thematic audit of management verification urging to strengthen the checks related to compliance with public procurement rules. The Court also considered implemented fully the recommendations issued in the annual report of the financial year 2014, regarding further strengthen the control system for audit authorities to appropriately cover in their audit of operations checks of compliance with public procurement rules (Chapter 6 - Economic, Social and Territorial Cohesion 2014), although pointing out that the implementation should continue (throughout the 2014-2020 programming period).
- The Court also considered that the Commission fully implemented the recommendations issued in Natural Resources (Chapter 7) when the Commission was asked to ensure that all Member States' action plans addressing errors in rural development included effective actions on public procurement.
- To conclude, concerning follow-ups to recommendations issued in Special Report 10/2015 (*Efforts to address public procurement problems in EU cohesion*

³¹ DG for Employment, Social Affairs and Inclusion

spending should be intensified), this study does not cover the analysis of non-annual reports as it would greatly exceed the maximum length set for this master thesis, albeit of great interest. Yet, according to Annex 3.3. (*detailed status of 2015 recommendations by report*) of the annual report concerning the financial year 2018, the Court considers that 2 recommendations out of 8 fully implemented, 2 in most respect, 1 in some respects, and 1 not implemented, as well as 2 remaining recommendations which could not be verified.

3.2 Special reports

The ECA's special reports set out the results of its performance and compliance audits of specific budgetary areas or management topics. The Court has issued several special reports dealing, in particular, with procurement issues as regards shared management with the Member States, besides the reports dealing with operational procurement expenditure. It is not the purpose of this study to analyse special reports (due to length limitation), but, I would strongly recommend reading the following reports, in particular, SR 10/2015, as containing detailed, rigorous and comprehensive information on the CP audits and follow-ups carried out on procurement as well as on the replies and measures taken to that effect³²:

- [Special Report No 10/2015](#). *Efforts to address problems with public procurement in EU cohesion expenditure should be intensified.*
- [Special Report No 23/2014](#). *Errors in rural development spending: what are the causes and how are they being addressed?*
- [Special Report No 17/2006](#). *The EU institutions can do more to facilitate access to their public procurement.*
- [Special Report No 1/2019](#). *Fighting fraud in EU spending: action needed.*

Other relevant reports:

- [Agriculture and cohesion: overview of EU spending 2007-2013](#).
- [Landscape review No 2/2014](#). *Making the best use of EU money: a landscape review of the risks to the financial management of the EU budget.*

3.3 Discharge procedure

The EU Parliament, acting on a recommendation from the Council, shall give annually a discharge to the Commission in respect of the implementation of the budget (articles 317, 318 and 319 TFEU, and article 165 FR). The EU Parliament decides whether the Commission has satisfactorily fulfilled its budgetary responsibilities and accordingly releases the Commission, from any further liability in respect of its budget management. According to articles 287 TFEU and 162 FR, the annual report by the European Court of Auditors together with any relevant special reports provide a basis for the discharge procedure.

³² Further reports are cited in the Bibliography

The EU Parliament adopts Decisions on discharge and Resolutions with observations forming an integral part of these Decisions, which frequently have included procurement-related remarks and requests in the light of the Court's reports. It illustrates the extent of the impact of the audit observations and shows how the discharge authority deals with, and follows up, the ECA's procurement-related findings and results. Moreover, the Court's contribution to the EU sound financial management is also valued through procurement audits, given the many procurement referrals in discharge procedures, in particular, after 2008, and the specific follow-up of the discharge authority on the Commission's actions taken thereof as reported in several reports³³. Although it is not possible in this study to analyse the entire incidence of procurement audits on the discharge procedure over the years, a brief overview can be shown, as follows:

- The EU Parliament often calls on the Commission to provide a detailed analysis of the shortcomings and weaknesses identified by the Court of Auditors. In line with the ECA's view, the Commission has been often asked to verify the origin of the lack of compliance with procurement rules, to cooperate with the Member States to overcome the procurement infringements and improve the quality of the data available and to mitigate risks and give guidance and training to managing authorities, as well as to improve supervision of correct transposition of Union directives into national public procurement law.
- Discharge decisions expressly showing concern have also been a few, noting, for instance, a significant number of shortcomings and infringement of public procurement rules. EU Parliament also endorses expressly listed recommendations of the Court and expressly welcomes the Commission's positive reaction to the Court's findings in Special reports (e.g. Special Report 10/2015 'Efforts to address problems with public procurement in Union cohesion expenditure should be intensified').
- The EU Parliament, in line with the ECA's view, has on several occasions urged the Commission to take legal measures, concerning simplification of legislation on public procurement and reform of public procurement taking due account of the Court's audit findings. In this regard, it is also noted how the EU Parliament has often asked both, the Commission and the Court to take action together, setting up control methodologies or working on harmonisation on the treatment of public procurement errors (quantification of errors, etc.).
- The EU Parliament frequently draws attention to the specific proportion of the estimated error rate attributable to serious failures to respect public procurement rules, while some actions taken by the Commission have also been welcomed, like Commission's Green Paper on the modernization of the EU public procurement policy.

³³ For instance:

- Commission's annual reports to the European Parliament on the follow-up to previous year discharge decisions and to the Commission staff working documents accompanying that report.
- Commission's annual report to the discharge authority on internal audits carried out on the financial year concerned and to the Commission staff working documents accompanying that report.

4. CONCLUSIONS

➤ We have reviewed the ECA's **audits on the ESIF funded procurement expenditure** as set out in the annual reports concerning the financial years from 1977 to 2018. We have observed that procurement-related mentions and references are wide-ranging, beyond the mere identification of the type of error involved. Audit results vary, for instance, from describing relevant situations and facts to drawing attention on specific risks, shortcomings, and weaknesses, both concerning procurement practices and procedures, and the management and control systems within the Commission and the Member States. The Court points out errors, contributions to the estimated level of error, practices not complying with regulations, and clear legal breaches, whereas frequently issuing observations, requests, remarks, and recommendations.

This is an all-encompassing approach, though it should be recalled that the results of transactions testing are fully available only in the Court's audit working papers, which are not accessible due to confidentiality laws (at least, after 1991). Still, this approach helps to gain insight into procurement practices and related financial procedures within the EU. It also results in a more comprehensive EU response to address shortcomings in public procurement. This dual effect in both public in general, and institutional and private stakeholders, broadens the usefulness and the impact of the ECA's audits.

➤ Furthermore, the Court includes in the annual reports the **replies** of the Commission to the audit findings. We can highlight that replies evolve in line with these audit findings, both in quantitative and qualitative terms. We have verified that the audit findings and remarks included in the ARs have been largely replied over time by the Commission (up to 73%), which shows how the Court furthers the Commission's effort and commitment to comply with the Court's recommendations and observations. Moreover, in almost all the replies, the Commission provides not only mere explanations but explanatory remarks on the relevant measures in response to audit findings, with only 4% remaining replies without any action involved. Even partial acceptances, though minor (5%), provide details on actions to put in place.

On the one hand, this Commission's approach is widely perceived as an overall proactive and comprehensive attitude towards the audit findings of the ECA, which reinforces the effectiveness of the ECA's audit work. Even the Commission's efforts to justify differing positions are evident, with due analysis of audit findings through a well-founded exchange of views. Errors cited as examples have also been sometimes individually replied, with the Commission dealing with irregularities as specified down to the smallest detail. In this regard, I believe that the ECA's efforts to enhance inter-institutional relations have revealed effective, adding value to the audit function itself.

On the other hand, this investigation has examined the types of measures reported by the Commission to implement the ECA's recommendations. It has revealed an intensified impact of the audit work, since the Commission's replies, in most cases, go beyond simple explanations by offering measures that also cover a wide range of areas and fields, as described in the research. Actions range from audit and financial

measures, to judicial, administrative, legal, and legislative measures, as well as from specific corrective (or remedial) actions to individual-specific measures per each type of irregularity. They also cover the management and audit authorities across EU institutions and the Member States. Also remarkable is the fact that the Commission has often adopted internal instructions and varied tools to tackle shortcomings in procurement within the EU and the Member States. Therefore, we can say that the ECA's audit work has contributed to ensuring compliance with procurement rules, improving procedures, and mitigating risks.

➤ Another major issue in the annual reports is the ECA's **follow-ups** to previous audits observations, showing the results of the reviews of progress in addressing recommendations made in previous annual reports. This is certainly a substantial added value to the annual reports and provides evidence on the effectiveness of audits as it monitors the implementation of previous audit recommendations. Moreover, it fosters transparency and allows stakeholders to assess the efficiency of audit work, which may lead to increased confidence in the ECA as an audit institution that is.

➤ Besides annual reports, the study has briefly referred to the **ECA's other reports and opinions**, which are noteworthy, though not subject to this thesis. **Performance and additional compliance audits** on public procurement have revealed to be valuable to gain insight and deepen understanding of public procurement procedures and practices within the European Union, as well as to address shortcomings, weaknesses, and risks detected by the Court. These reports are very rigorous and comprehensive, and I strongly recommend taking into account them as listed in the thesis.

➤ Furthermore, beyond audit function, the ECA's annual reports have proven to be very effective, in particular, regarding **EU discharge procedure**, when EU Parliament decides whether the Commission has satisfactorily fulfilled its budgetary responsibilities and accordingly releases the Commission. The annual reports of the Court combined with other audit reports, provide a basis for the discharge procedure. As regards this research the Court's contribution to the EU sound financial management is also valued through procurement audits, given the many procurement referrals in discharge procedures, in particular, after 2008. The EU Parliament frequently has included procurement-related remarks and requests in the light of the Court's reports, as seen in this thesis. It certainly increases the impact of the Court's audit work insofar as the discharge authority deals with and follows up, the ECA's procurement-related audit findings and recommendations.

➤ From another perspective, it is noted that the Court of Auditors has reported consistently on procurement issues from the very first annual report, although **reporting** has been residual and irrelevant until 1994 (at least referrals falling within this research). As the investigation shows, the year 1994 stood out with a very significant


increase in procurement findings. Since then, procurement references in the annual reports have shown a progressive increase, greatly intensified as of 2006.

In this regard, audit results also reflect significant events in the EU development, such as, for instance, the evolution and reforms of the Structural and Investment Funds (e.g., the one operated in 1994, when also Cohesion Fund was adopted by the Maastricht Treaty), the adoption of directives on public procurement (appreciable audit boosts as of 1994 and 2006, right after the entry into force of the second and third packages of directives on public procurement), or the adjustment to audit requirements and methods (e.g., the introduction of statement of assurance -DAS- by the Maastricht Treaty).

Thus, procurement audit results let notice several major milestones in the history of the Union itself, which as it enlarged, moved forward by broadening the scope of EU competences and financial arrangements to further the single market and resources for the Structural Funds. The ECA's reporting comprises both sides, adjustments to the changes and contributions to promoting them (e.g., EU internal audit-control, varied simplifications and legal reforms, related financial issues, and management and audit authorities' practices).

Moreover, the audit reporting trend itself gives evidence of the upward concern of the Court about procurement issues, making efforts to improve assurance to the stakeholders, but also to rise to the growing public concern on the effective and efficient use of public funds. Efforts in deepening on the proper treatment of errors and carrying out audits beyond annual reports (e.g., performance and compliance audits on specific policy areas) are also noteworthy.

In view of this, EU audits reflect the European development and integration itself. Besides, it is noticeable a correlation between the European action and the audit action of the ECA through the launch of the relevant audits over time. I think that these are efforts to address thoroughly public procurement and to assess the achievement of the objectives set in this field, together with the financial ones, which certainly support the Court of Auditor's commitment to sound financial management.

 **To conclude**, returning to the objective of this thesis, I believe that this research has provided sufficient and relevant evidence on the effectiveness of the EU audit function. European Court of Auditors' audits have contributed to and promoted accountability and transparency in the (ESIF) public procurement field, and helped to promote effective procurement and fair competition, as well as value for money from procurement activities within the EU and the Member States.

EU audits contribute to improving EU financial management by addressing public funds misuse in procurement under sound financial management principles. EU audits also promote the approximation and simplification of laws, as well as the correct transposition and application of directives on procurement. Moreover, EU audits lead to mutual learning of the Member States, foster audit reporting, and share best audit and procurement practices within the EU, on an increasingly harmonised basis. In this regard, the impact of the EU audits on ESIF procurement expenditure can reach national non-EU funded expenditure on procurement, and therefore, benefit EU citizens in respect of

public expenditure as a whole. All this certainly adds value to the EU audit function and supports, ultimately, the EU added value itself.

Finally, in my opinion, it is essential that the ECA fosters digitalisation and continues promoting e-procurement and IT tools to be fully implemented, which no doubt would greatly improve all processes involved at all levels. It is also fundamental to continue reinforcing and deepening cooperation framework with other EU Institutions (e.g., Commission, OLAF and EPPO), the Member States, and Supreme Audit Institutions (SAIs) insofar as I believe it provides a basis for an effective audit function. And lastly, in order to enhance EU audits' added value, I think the Court should further follow-ups on the implementation of audit recommendations and further strengthen performance and additional compliance audits dealing with procurement and related spending issues. Moreover, as we move into the new multiannual financial framework (2021-2027), the European Commission has adopted a proposal for a new EU Anti-Fraud Programme, addressing the fight against fraud, corruption and other irregularities affecting the EU budget. In light of the findings of this research, concerning public procurement, I believe that the ECA will certainly contribute to properly facing these challenges.

5. ANNEXES

Table 1: Breakdown per type of irregularity

PHASE 1 –TENDERING PROCEDURE AND PUBLICATION	
1.1.	Insufficient justification of the tendering procedure other than open procedure
1.1.1.	Unjustified application of negotiated procedure / negotiated procedure unduly applied
1.1.2.	Unduly using an existing framework agreement
1.1.3.	Wrong use of a secondary competition in a framework contract (not allowing for identification of the most economically advantageous offer)
1.2.	Unjustified direct award (absence of tendering procedure without justification)
1.3.	Absence of competitive type of tendering procedure without justification
1.4.	Price determination without cost calculation
1.5.	Artificial split of works/services/ supplies in several tenders
1.6.	Non-compliance with the publication and/or transparency requirements
1.6.1.	Insufficient / Inadequate / Lack of publication
1.6.2.	Late publication
1.7.	Failure to observe the rules governing invitations to tender (unsatisfactory tendering procedures) (failure to comply properly with tender procedures)
1.8.	Failure to comply with public procurement rules overall
1.9.	Failure to respect rules on the award of public contracts
1.10.	Absence of public procurement procedure
1.11.	Shortcomings in the tender specification
1.12.	Unsuitable economic operators invited to tender
PHASE 2 - TECHNICAL SPECIFICATIONS AND SELECTION/AWARD CRITERIA	
2.1.	Lack of documents concerning the required tenderer's capacity
2.2.	Insufficient or no precise definition/description of the subject matter of the contract
2.3.	Unlawful/discriminatory or no objective <i>selection</i> criteria laid down in the contract notice or tender documents
2.4.	Unlawful/discriminatory or no objective <i>award</i> criteria laid down in the contract notice or tender documents
2.4.1.	Criteria not fully related to the nature of the works
2.5.	Failures to meet publicity requirements/rules
2.6.	Contract inappropriately subdivided into lots
PHASE 3 - EVALUATION AND AWARD OF CONTRACTS	
3.1.	Unjustified decisions of the evaluation committee with an impact on the outcome of the tender / Unlawful use of award criteria:
3.1.1.	Lack of an appraisal of the choice of contractor
3.1.2.	Exclusion without a procedure for determining abnormally low tenders
3.1.3.	A different outcome to the tender compared to the (correct) application of the original/lawful criteria
3.1.3.1.	<i>Failure to award the contract to the lowest bidder</i>
3.1.3.2.	<i>Awarding of the contract to the highest bidder</i>

- 3.1.3.3. *Irregular award of a contract due to incorrect application of award criteria*
- 3.1.3.4. *incorrect application of the selection criteria*
- 3.1.3.5. *The lowest offer had been excluded without a valid reason.*
- 3.1.4. The formula for evaluation of the financial offers penalises the lowest offers without giving the bidder the option to justify it
 - 3.1.4.1. *Eliminating the competitive advantage of bidders offering the lowest prices (price equal or below the average not differentiated)*
- 3.1.5. Contract awarded to a bidder whose price offer was abnormally low
- 3.1.6. Non-compliance of the winning tenderer with the tender requirements
- 3.1.7. Negotiations not carried out with all bidders which comply with tender requirements
- 3.1.8. Incorrect application of the selection criteria
- 3.1.9. Discriminatory selection criteria disallowing the equal access of tenderers in the procedure
- 3.1.10. The winning offer does not meet the selection criteria
- 3.2. Negotiation during an open or restricted award procedure with an impact on the outcome of the tender
 - 3.2.1. Amending of offers after the opening of bids following arrangements between bidders and the contracting authority
- 3.3. Procedural weaknesses in the evaluation of offers
 - 3.3.1. The principle of equal treatment was not respected during the evaluation process
- 3.4. Lack of documentation relating to public procurement procedures (such as the report by the evaluation committee and the applicant's winning offer)
 - 3.4.1. Report by the evaluation committee missing
 - 3.4.2. Applicant's winning offer missing
- 3.5. Contract award notice sent late or not sent at all
- 3.6. Conflict of interest
- 3.7. Offer prepared in conjunction with the same company which also prepared the technical specifications and bill of quantities for the tender

PHASE 4 - PERFORMANCE OF CONTRACTS

- 4.1. Failure of the contractor to fulfil contractual time-limits
- 4.2. Absence of systematic follow-up and evaluation of the performance of the contractors (execution of the contract is not adequately managed and monitored)
- 4.3. Unjustified substantial modification of the contract without a new procurement procedure - Unlawful amendment of contract
 - 4.3.1. Unjustified increase in the cost of the contract
 - 4.3.2. Amendments to projects (implementation of a project which differs substantially from the project for which the contract was awarded)
 - 4.3.3. Absence of tendering for additional works (direct award)
 - 4.3.4. Direct award of additional works in the absence of unforeseeable circumstances
- 4.4. Modifications of the contract elements set out in the contract notice or tender specifications, not in compliance with the Directives
- 4.5. Modification of the contract that does not arise from the operation of review clauses
- 4.6. Change of contract scope after tender
- 4.7. Non-delivery of goods/services

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

(**Extract from the own created Database). **Table A:** Type of irregularity/audit observation per audited financial year

Audited year	1.1.	1.10.	1.11.	1.2.	1.5.	1.6.	1.6.1	1.7.	1.8.	1.9.	2.2.	2.3.	2.5.	3.1.1.	3.1.2.	3.1.3.1.	3.1.3.2.	3.1.3.4.	3.1.8.	3.2.1.	3.3.	3.6.	4.1.	4.3.1.	4.3.2.	4.7.	Audit	Rec	Rq	Rt	X	TOTAL				
1977																																	1			
1978																																		0		
1980																																		0		
1981				1																													1			
1982																																		0		
1984											1	1																					2			
1985															1													1					2			
1986																																	0			
1987																																	0			
1988																																	0			
1989																																	0			
1990																																	0			
1991																																	0			
1994	1			1	1		1			2					1	1	1				1				1	1		1	1	1	1	15				
1995																																	0			
1996																																	0			
1997																																	0			
1998								2		1																							3			
1999				1				1	1	1																							4			
2000									1																								1			
2001									1																						1		2			
2002								1																									1			
2003								1		1																							2			
2004									1																		1						2			
2005									1																								1			
2006				2				1																				1	1				5			
2007									2	1			1															1					5			
2008								1	2				1																				4			
2009								1	1																					1	1		4			
2010			1		1					1												1						1	1	2	1	1	11			
2011									4																			2	4		1		11			
2012									8																			4	3		2		17			
2013				1					12				1							1								3	2	1	4		25			
2014				1					9	1			1							1								3		1	2		15			
2015				2			1		10	1							2											3	1	1	7	1	29			
2016									2														1				1	2		1	3	1	11			
2017									6																							3	9			
2018			1	1					9								1												5			3	20			
TOTAL	1	1	6	5	2	1	1	8	70	9	1	1	5	1	1	1	1	1	3	2	1	1	1	1	1	1	1	1	1	1	28	11	9	28	4	207

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

(Extract from the own created Database) **Table B:** Type of irregularity and other audit findings versus type of reply

Type of irregularity & Audit findings	N	RAE	RAEm*	RAEm^	RAEm^*	RNA	RPAm*	RPAm^	RPAm^*	TOTAL
1.8.	28	2	12	13	10	2		1	2	70
Audit	5		3	11	7				2	28
Rt	6		3	10	9					28
Rec			1	8	2					11
1.9.	1	1	2	2	1	2				9
Rq	1	1		4	2			1		9
1.7.	3		3		1	1				8
1.11.	1		3		1		1			6
X		1		1	1		1			4
2.5.	2		2				1			5
1.2.	3		1	1						5
3.1.3.4.	1		1		1					3
1.5.			1			1				2
3.1.8.			2							2
1.1.				1						1
1.10.					1					1
1.6.			1							1
1.6.1				1						1
3.1.1.						1				1
3.1.2.				1						1
3.1.3.1.				1						1
3.1.3.2.				1						1
3.2.1.				1						1
3.3.							1			1
4.1.		1								1
4.3.1.				1						1
4.3.2.				1						1
2.2.	1									1
2.3	1									1
3.6.	1									1
4.7.	1									1
TOTAL	55	6	35	58	36	7	4	2	4	207

Source: Own elaboration based on the ECA's annual reports from 1977 to 2018

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- Resolution on the Commission report on action taken in response to the observations contained in the resolution accompanying the decision giving discharge in respect of the general budget of the European Communities for the 1994 financial year (COM(97)0048 C4-0108/97). *OJ C 132, 28.4.1997*
- Resolution on the Commission report on action taken in response to the observations contained in the resolution accompanying the decision giving discharge in respect of the general budget of the European Communities for the 1994 financial year (COM(97)0048 C4-0108/97). *OJ C 132, 28.4.1997*
- 96/377/EC, ECSC, Euratom: European Parliament Decision of 17 April 1996 giving discharge to the Commission in respect of the implementation of the general budget of the European Union for the 1994 financial year as regards Sections I - Parliament, II - Council, III - Commission, IV - Court of Justice, V - Court of Auditors and VI - Economic and Social Committee/Committee of the Regions. *OJ L 148, 21.6.1996*
- 2000/135/EC, ECSC, Euratom: European Parliament Decision of 19 January 2000 giving discharge to the Commission in respect of the implementation of the general budget of the European Union for the 1997 financial year (Sections I-Parliament, II-Council, III-Commission, IV-Court of Justice and V-Court of Auditors). *OJ L 45, 17.2.2000*
- 2000/546/EC, ECSC, Euratom: Decision of the European Parliament of 6 July 2000 giving discharge to the Commission in respect of implementation of the general budget of the European Union for the 1998 financial year - Resolution of the European Parliament containing the comments which form an integral part of the decision giving discharge to the Commission for the implementation of the general budget of the European Union for the 1998 financial year (SEC(1999) 412 — C5-0006/1999 — 1999/2050(DEC)). *OJ L 234, 16.9.2000*
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Resolution of the European Parliament of 23 April 2009 with observations forming an integral part of the Decisions on discharge in respect of the implementation of the European Union general budget for the financial year 2007, Section III - Commission and executive agencies. *OJ L 255, 26.9.2009*

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2010/494/EU, Euratom: Decision of the European Parliament of 5 May 2010 on discharge in respect of the implementation of the European Union general budget for the financial year 2008, Section III — Commission. *OJ L 252, 25.9.2010*

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2011/550/EU, Euratom: Decision of the European Parliament of 10 May 2011 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2009, Section III — Commission. *OJ L 250, 27.9.2011*

Resolution of the European Parliament of 10 May 2012 with observations forming an integral part of its Decision on discharge in respect of the implementation of the general budget of the European Union for the financial year 2010, Section III — Commission and executive agencies. *OJ L 286, 17.10.2012*

Resolution of the European Parliament of 17 April 2013 with observations forming an integral part of its Decisions on discharge in respect of the implementation of the general budget of the European Union for the financial year 2011, Section III — Commission and executive agencies. *OJ L 308, 16.11.2013*

Resolution of the European Parliament of 3 April 2014 with observations forming an integral part of the decision on discharge in respect of the implementation of the general budget of the European Union for the financial year 2012, Section III — Commission and executive agencies. *OJ L 266, 5.9.2014*

Resolution of the European Parliament of 29 April 2015 with observations forming an integral part of the decisions on discharge in respect of the implementation of the general budget of the European Union for the financial year 2013, Section III — Commission and executive agencies. *OJ L 255, 30.9.2015*

Resolution (EU, Euratom) 2016/1461 of the European Parliament of 28 April 2016 with observations forming an integral part of the decisions on discharge in respect of the implementation of the general budget of the European Union for the financial year 2014, Section III — Commission and executive agencies. *OJ L 246, 14.9.2016*

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****See heading 7. Legal Framework, plus:**

Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. *OJ L 198/29, 28.07.2017*

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7. LEGAL FRAMEWORK

A timeline of the relevant regulations for audit and public procurement fields within the European Union, from 1951 to 2018 is available below (Treaties, EU public procurement legislation, Financial regulations, enlargements, and other meaningful remarks):

EUROPEAN UNION

EVOLUTION OF THE LEGAL FRAMEWORK

- TREATIES
- PUBLIC PROCUREMENT DIRECTIVES
- FINANCIAL REGULATIONS

EU public procurement Legislative background and very first directives

1951

(**Founding treaty) [Treaty of Paris](#). Treaty establishing the European Coal and Steel Community (1951) (ECSC Treaty). It establishes the ECSC Audit Board. Entry into force: 26 July 1952 - Expired: 23 July 2002. [Belgium, France, Germany, Italy, Luxembourg, the Netherlands](#).

1957

[Belgium, France, Germany, Italy, Luxembourg, the Netherlands](#)

(** Founding treaty) [Treaty establishing the European Atomic Energy Community \(1957\)](#). (EAEC or Euratom Treaty). Signed on 25 March 1957 together with the EEC Treaty. Entry into force: 1st January 1958.

(** Founding treaty) [Treaty of Rome](#). Treaty establishing the European Economic Community (1957) (EEC Treaty). Also referred to as the Treaty on the Functioning of the European Union (TFEU). Creation of the European Communities. It established the Audit Board of the European Communities (Commission de Contrôle), predecessor of the European Court of Auditors (ECA). Entry into force: 1st January 1958.

1962

[Règlement financier relatif aux modalités et à la procédure de la mise à la disposition de la Commission des contributions des Etats membres visées à l'article 172, paragraphe \(2\), du Traité instituant la Communauté européenne de l'énergie atomique \(article 183, alinéa b\) du Traité](#). OJ 32, 30.4.1962, p. 1070-1072

1963

[Règlement n° 113/63/CEE de la Commission, du 14 octobre 1963, concernant les modalités d'examen et de vérification des demandes de concours présentées au Fonds social européen](#). OJ 153, 24.10.1963, p. 2563-2565

1965

[Merger Treaty](#). Treaty establishing a Single Council and a Single Commission of the European Communities (1965). Treaty establishing the European Communities as a result of the merger of the institutions set up by the ECSC, the EEC and the Euratom. Entry into force: 1st July 1967.

1968

[Règlement financier, du 30 juillet 1968, relatif à l'établissement et à l'exécution du budget des Communautés européennes et à la responsabilité des ordonnateurs et comptables](#). OJ L 199, 10.8.1968, p. 1-20

1970

[Treaty of Luxembourg](#). Treaty amending certain budgetary provisions (1970). First Budgetary Treaty. OJ L 2, 2.1.1971. Entry into force: 1 January 1971.

1973

[Denmark, Ireland, the United Kingdom](#)

1975

[Treaty of Brussels](#). Treaty amending certain financial provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities (1975). Second Budgetary Treaty. It establishes the European Court of Auditors. OJ L 359 of 31.12.1977. Entry into force: 1 June 1977.

1962

[General Programme for the abolition of restrictions on freedom of establishment](#). OJ 36/62, 15.01.1962

1964

[Council Directive 64/427/EEC of 7 July 1964](#) laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries). OJ 117, 23.7.1964, p. 1863-1870

[Council Directive 64/429/EEC of 7 July 1964](#) concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries). OJ 117, 23.7.1964, p. 1880-1892

1966

[Commission Directive 66/683/EEC of 7 November 1966](#) eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability. OJ 220, 30.11.1966, p. 3748-3750

1969

First SUPPLIES Directive. [Commission Directive 70/32/EEC of 17 December 1969](#) on provision of goods to the State, to local authorities and other official bodies. OJ L 13, 19.1.1970, p. 1-3

1971

[Council Directive 71/304/EEC of 26 July 1971](#) concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches. OJ L 185, 16.8.1971, p. 1-4

First WORKS Directive. [Council Directive 71/305/EEC of 26 July 1971](#) concerning the co-ordination of procedures for the award of public works contracts. OJ L 185, 16.8.1971, p. 5-14. Substantially amended by Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC. OJ L 127, 20.5.1988

1975

ECSC, EEC: * Financial Regulation of 18 March 1975 supplementing the Financial Regulation of 25 April 1973 applicable to the general budget of the European Communities. OJ L 73, 21.3.1975, p. 45-46

75/375/Euratom, ECSC, EEC: Commission Regulation of 30 June 1975 on measures of implementation of certain provisions of the Financial Regulation of 25 April 1973. OJ L 170, 1.7.1975, p. 1-14

1976

SUPPLIES. Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts. OJ L 13, 15.1.1977, p. 1-14

1977

1977

European Court of Auditors starts work in October 1977 (Luxembourg), established by the Treaty of Brussels

1977

Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities. OJ L 356, 31.12.1977, p. 1-30

1981

Greece

1986

Spain and Portugal

The Single European Act (1986). It provides a basis for strengthening public procurement legislation and the internal common market as a whole. OJ L 169, 29.6.1987. Entry into force: 1st July 1987.

EU public procurement directives First package

1988

SUPPLIES. Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC. OJ L 127, 20.5.1988

1989

WORKS. Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts. OJ L 210, 21.7.1989, p. 1-21

*****REVIEW PROCEDURES (WORK & SUPPLIES). Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. OJ L 395, 30.12.1989, p. 33-35

1990

UTILITIES. Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. OJ L 297, 29.10.1990, p. 1-48

EU public procurement directives Second package

1992

1992

(** Founding treat) Maastricht Treaty. Treaty on European Union (TEU) (1992). The EEC becomes the European Community (EC) and the European Court of Auditors becomes an institution. Requirement to the Court to draw up a statement of assurance (DAS) as to the reliability of the accounts and the legality and regularity of the underlying transactions. OJ C 191, 29.7.1992, p. 1-112. Entry into force: 1st November 1993.

*****REVIEW PROCEDURES (UTILITIES). Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. OJ L 76, 23.3.1992, p. 14-20

First directive on SERVICES. Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public SERVICE contracts. OJ L 209, 24.7.1992, p. 1-24

1993

SUPPLIES. Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts. OJ L 199, 9.8.1993, p. 1-53

WORKS. Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts. OJ L 199, 9.8.1993, p. 54-83

UTILITIES. Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. OJ L 199, 9.8.1993, p. 84-138

1995

Austria, Finland, Sweden

1997

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997). Extension of the European Court of Auditors' audit powers to more policy areas. OJ C 340, 10.11.1997. Entry into force: 1 May 1999

1999

1999

Decision 1999/352. Establishment of the European Anti-Fraud Office (OLAF).

2001

Treaty of Nice amending the EU Treaty, the Treaties establishing the European Communities and certain related acts (2001). Reform of the institutional structure of the European Union. OJ C 80, 03.2001. Entry into force: 1 February 2003.

July, 2001. The Internal Audit Service (IAS) becomes an independent service as part of the changed audit architecture in the Commission.

2002

Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities. OJ L 248, 16.9.2002, p. 1-48

EU public procurement directives
Third package

2004

Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia

2004

UTILITIES. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. OJ L 134, 30.4.2004, p. 1-113

WORKS, SUPPLIES and SERVICES. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. OJ L 134, 30.4.2004, p. 114-240

2007

Romania and Bulgaria

Charter of Fundamental Rights of the European Union (2007). OJ C 303, 14.12.2007

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007). OJ C 306, 17.12.2007, p. 1-271. Entry into force: 1 December 2009.

2012

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 L 298, 26.10.2012, p. 1-96. Amended by 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. 1-222

2013

Croatia

EU public procurement directives
Fourth package

2014

CONCESSIONS. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance. OJ L 94, 28.3.2014, p. 1-64

PUBLIC WORKS, SUPPLIES and SERVICES. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance. OJ L 94, 28.3.2014, p. 65-242

UTILITIES. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance. OJ L 94, 28.3.2014, p. 243-374

2017

2017

April 2017, 16 member states agreed to establish a European Public Prosecutor's Office (EPPO), using the 'enhanced cooperation' procedure (work more closely together to better fight EU fraud)

AUDITING EU PUBLIC PROCUREMENT-RELATED AUDITS

THE WORK OF THE EUROPEAN COURT OF AUDITORS (1977-2018)