

Council discharge by the European Parliament - Finding solutions

Budgetary Affairs



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STUDY

Abstract

This study synthesises the main arguments behind the disagreement between the Parliament and the Council over the issue of whether the discharge procedure allows the Parliament to hold the Council to account concerning the management of its own administrative budget. It then examines the discharge procedure as an accountability mechanism and its impact on the EU legitimacy. It concludes that significant improvement is needed, regardless of which exit to the conflict is chosen. Four scenarios to break the deadlock are put forward, assessing their respective advantages and shortcomings.

This document was requested by the European Parliament's Committee on Budgetary Control. It designated Mr Bart Staes, MEP, to follow the study.

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LIST OF ABBREVIATIONS

- BUDG** Committee on Budgets (EP)

- CJEU** Court of Justice of the European Union

- COM** European Commission

- CONS** Council

- CONT** Committee on Budgetary Control (EP)

- EP** European Parliament

- GSC** General Secretariat of the Council

- FR** Financial Regulation applicable to the general budget of the European Union

- IAS** Internal Audit Service

- RAP** Rules of implementation of the Financial Regulation

- ROP** EP Rules of Procedure

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EXECUTIVE SUMMARY

Background

Since 2001, the European Parliament has interpreted its legal power to grant discharge as allowing for the separate discharge of those institutions with budget implementing powers, including the Council (Article 94 RoP). Interinstitutional unease has risen with the institutional changes introduced by the Treaty of Lisbon. The institutionalization of the European Council placed this former organ within the scope of new obligations -on transparency, good governance, and accountability-, applicable to all the Union's institutions. In recent years, the two institutions representing the Member States within the European Union –the Council and the European Council have carried out an increasing number of executive functions and care to eschew electoral accountability at the EU level (Curtin, 2014; Curtin & Egeberg, 2013).

The Secretary-General of the Council manages the budget of both the Council and the European Council. Within this arrangement, little detail is provided in the EU budget regarding the respective costs and activities of each institution, which does not really seem justified in the light of Treaty obligations. Any future efforts to provide greater detail should be preceded by careful impact assessment of the impact of increased accounting tasks on institutional efficiency. The ECA and the Commission's IAS might be helpful in this regard. A further concern arises from the difficulty to ascertain the level of mixed financing within them, considering that certain expenditure is covered by national treasuries, in accordance with the 'costs lie where they fall' principle. The Council embraces a strict reading of the Treaty framework and draws on a *gentlemen's agreement* from 1970 – whereby the Council and Parliament agree to refrain from examining each other's administrative expenditure- to reject Parliament's attempts at bringing it under scrutiny within the framework of discharge. The Council considers that the Commission is the sole subject of discharge, while Parliament insists on adopting separate discharge decisions for the EU institutions and bodies who implement their own budget. Various Council presidencies have engaged in constructive dialogue with the CONT committee of Parliament, but this issue is currently in deadlock (for a detailed account, see Benedetto et al, 2017). Legal contributions issuing from a 2012 workshop organized by the EP revealed that the issue is far from clear under the legal framework in force; however, neither institution has seen fit to disentangle the constitutional conundrum through resort to the Court of Justice of the European Union. Meanwhile, the Parliament refused to grant discharge to the Secretary-General of the Council in relation to the financial years 2009, 2010, 2011, 2012, 2013 and 2014, and postponed discharge in relation to the financial year 2015¹. The Council's budget is small proportionate to the EU budget as a whole and the European Court of Auditors has gathered no evidence of mismanagement². Nonetheless, the Parliament remains dissatisfied with the level of transparency of the Council's budgetary spending. Arguably, the institutional stalemate between the Council and the Parliament, which has come about in recent years, continues to undermine overall budget accountability. While the Commission abstains from stepping in the conflict, institutional views appear to have taken sides with the EP³.

¹ EP resolutions of 10 May 2011 (OJ L 250, 27.9.2011, p. 25), 25 October 2011 (OJ L 313, 26.11.2011, p. 13), 10 May 2012 (OJ L 286, 17.10.2012, p. 23), 23 October 2012 (OJ L 350, 20.12.2012, p. 71), 17 April 2013 (OJ L 308, 16.11.2013, p. 22), 9 October 2013 (OJ L 328, 7.12.2013, p. 97), 3 April 2014 (OJ L 266, 5.9.2014, p. 26), 23 October 2014 (OJ L 334, 21.11.2014, p. 95), 27 October 2015 (OJ L 314, 1.12.2015, p. 49), and 27 April 2017 (2016/2153(DEC)).

² ECA audits on institutions yield no significant material error (see eg Annual Report 2015, OJ C 375, 13.10.2016, p.9.16).

³ See letter dated 23.1.2014 of Commissioner Šemeta to MEPs Theurer and Sonik, Ares(2014)1483924. Also, written answer of 8 December 2014 by the Commission (Georgieva) to questions by von Storch MEP (ECR), E-008613/2014. Drawing on

Achieving and maintaining an adequate level of scrutiny across the entire EU budget represents a specific expression of the rule of law that the Union is expected to abide by, as reflected in general principles such as transparency, good administration, and sound financial management, which are explicitly mentioned in the Treaty. These values are paramount for the legitimacy of the European Union before its taxpayers. As such, the strictest interpretation of the principles of interinstitutional balance and sincere cooperation should not become a stumbling block for transparency, and one that ultimately places these principles in jeopardy. At the same time, these principles should not be relegated to mere declaratory intentions.

It is possible to pinpoint grounds for agreement between the Parliament and the Council. For instance, both institutions share the view that financial accountability should cover the entirety of the budget. Conversely, their fundamental disagreement over who should be held accountable for it has, until now, seemed insurmountable. While the Council rejects the notion of departing from a narrow (*de lege lata*) interpretation of the legal provisions, the EP interprets the current framework in the light of an ideal image of accountability (*de lege ferenda*), using the existing lacunae –perceived or real- to its benefit. Throughout the years, mutual mistrust has crept into their bilateral relationships within the discharge procedure, and other institutions such as the COM or the ECA feel affected.

Aim

This study has three main goals. First, it summarises the respective arguments of Council and Parliament, as reflected in the mutual exchanges over recent years. Second, it evaluates potential scenarios to break the deadlock, which cover, successively: internal reflection within Parliament, revising the various legal acts that make up the current legal framework, referring to the Court of Justice for clarification of the interinstitutional balance in discharge, and negotiating a revised interinstitutional agreement with Council. Careful consideration leads us to conclude that the nature of the disagreement is primarily political, and therefore any legal solution hinges on achieving consensus between EP and Council. Third, the discharge procedure as a financial accountability mechanism is considered and assessed along four dimensions of accountability (transparency, exposure, judgement, and liability), with specific attention given to the Council.

arts 335 TFEU (administrative autonomy), 55 FR (conferral of powers for budget implementation to each institution), and 13(2) TEU (mutual sincere cooperation), the COM then stated “*considering that the European Parliament has given discharge to the other institutions for several years, the Commission considers that this practice is established, in particular in view of the fact that the Commission cannot oversee the implementation of the budgets of the other institutions*”. Additionally, COM refuses to “*reply to questions addressed to other institutions, since this would infringe their autonomy to implement their respective sections of the budget*”. See also the answer to written question E-008684/2015 by Monica Macovei (EPP), of 30 July 2015, where the COM “*reiterates its view that the practice of giving discharge to each institution for their administrative expenditure should be pursued in the future*”. On 26 October 2016, Commissioner Cretu intervened in the plenary session on the Discharge 2014 and “*note[d] with regret this dispute between the two arms of the budgetary authorities, which has lasted for seven years now, thus preventing a suitable solution from being reached. The Commission can only encourage them to cooperate with a view to ironing out all their difficulties and to work towards a smooth functioning of the discharge procedure in full respect of the relevant provisions in the Treaty and in related secondary law*”.

Methodology

This note relies primarily on legal and political methods. The legal framework is approached with a clear distinction between what it actually allows for (*de lege lata*, what the law says – interpreting it⁴), and what it should aspire to (*de lege ferenda*, what the law ought to say – reassessing it⁵).

Members and staff from the EP, the ECA, the presidency of the Council and the Council accepted to answer questionnaires on the issues at stake. Interviews were conducted with some of them, either in person or by long-distance conference call. We are thankful for their meaningful responses, which provided practical context to the research.

⁴ The legal interpreter successively examines the letter –and silences- of the law (literal method), interactions between various norms and their respective hierarchy (systemic method), and the original intentions of the legislator (teleological method). This involves assessing the legal framework in chronological perspective, or reviewing the preparatory documents. When legal provisions remain silent on a given matter, it must be ascertained whether that gap represents a conscious exclusion by the legislator, or else a lacuna that should be filled by the judiciary through resort to the general principles of law. Resort to genuine EU general principles, general principles of Public International Law or of Constitutional Law shared by Member States often leads to radically different outcomes. This helps explain the differing opinions between the legal experts consulted by the Parliament in 2012. In the EU framework, the relevance attached to institutional practice, however well-established, remains limited if *contra legem*.

⁵ Judging the law against ideal versions thereof implies placing each of the participating actors around a balance of powers that translates a vision of what the EU system of governance should resemble, drawing on existing political models or else creating new ones.

1. THE DISCHARGE PROCEDURE AS ACCOUNTABILITY MECHANISM

The accountability of the executive is the hallmark of a healthy democratic system⁶. In representative democracies, accountability entails a relationship between the executive and the legislature in which the former bears four duties. Firstly, **transparency** may be passive (making available its documents to the general public) or active (periodically reporting on its activities). Secondly, **exposure** means the executive's obligation to bear questioning by and to justify its conduct to the legislative. Thirdly, **judgement** obliges the executive to bear criticism from the legislative. Lastly, **liability** is often merged with the previous dimension and means that, resulting from the accountability exercise, the executive will be bound by new obligations; also, it will bear the risk of some sort of sanction.

The scope and robustness of these dimensions varies across political systems and institutions. Additional accountability dimensions other than the political often include apolitical watchdog institutions within the system (such as administrative or judicial bodies); as well as non-state monitoring forces (professional associations, the media, advocacy organizations). The rationale is that no government activities go undetected, but are firmly on the radar of external, autonomous, and independent oversight. Accountability mechanisms ultimately guarantee that the executive serve the interests of the citizens in an efficient and selfless way; therefore preventing potential outcomes that risk destabilising citizens' trust in the system. Indeed, the suboptimal performance of accountability arrangements features prominently among those factors undermining the legitimacy of a governance system. **Financial accountability**, in turn, enforces these dimensions in the field of **the management of public funds by the executive**. Within the EU governance system, financial accountability builds on various mechanisms, the most important of which is the so-called discharge procedure.

The discharge procedure represents the last stage in the budgetary cycle and is one of three budget powers: budgeting power or the power to adopt the budget, ensured in the EU by the Budgetary Authority (Council and EP) under Articles 314-316 TFEU; managing power or the power to implement the budget (whether it is endowed exclusively to the Commission by Article 317 TFEU remains a bone of contention; and budget control power or the power to oversee budget implementation, which is carried out by the Discharge Authority (EP, upon recommendation of the Council), on the basis of ECA's audit reports and other sources, following Article 319 TFEU.

1.1. HISTORICAL EVOLUTION OF THE DISCHARGE PROCEDURE

It is often said that the regulation of budget implementation and control has remained stable in the Treaty since 1977. This is only true to a limited extent. From a broader perspective, the Lisbon Treaty reform attached greater constitutional importance to a set of general principles that reinforce the democratic quality of the European Union political system. Specifically, regarding the budget, there have been tiny tweaks to the Treaty provisions, combined with an ever-changing Financial Regulation (FR) which here and there resembles a 'patchwork quilt'⁷. Moreover, even in the wide,

⁶ See the concluding remarks in Committee of Independent Experts, *First Report on Allegations regarding fraud, mismanagement and nepotism in the European Commission*, 1999, p.9.3.3 "The principles of openness, transparency and accountability, are at the heart of democracy and are the very instruments allowing it to function properly". A warning ensues "it is imperative for all those working in the Community Institutions to understand that no strategy of cover-up may ever be considered acceptable. No information may be withheld from other institutions, such as Parliament [...]".

⁷ Attributed to former commissioner for Budget Schreyer (EP Debates, 30 May 2001) instead of the more traditional 'EU financial bible', as a way of demystifying this legal act of a quasi-constitutional nature (Sanchez-Barrueco, 2015).

unchartered territories of a changing (and changed) politico-legal policy-making environment, institutional practices have tended to remain consistent and tolerated by actors based on what they are used to. Institutional counterparts seem ‘locked-in’ to a practice that becomes routine, even when it might seem to depart from the legal framework.

Historically, the Commission’s ultimate responsibility as managing authority (currently in the first sentence of Article 317 TFEU) appeared in Article 205 EEC (1957)⁸, whereby COM implements the budget, in accordance with the Financial Regulation, and within the limits of the appropriations. In 1992, the Treaty of Maastricht added a reference to the principle of sound financial management, in rather light terms which qualified it more as a recommendation than an obligation (*‘having regard to’*), because the principle remains largely subjective. In the 25 years since Maastricht, treaty reforms have sought to take account of the actual involvement of Member States in the implementation of the EU budget. No breach of the general principle has permeated the Treaty yet, but two elements indicate some progress towards readdressing the present asymmetry between the COM’s real tasks in implementation and its exclusive legal responsibility. First, the responsibility of national administrations is evoked (and referred to the FR) (Article 317 para 2 TFEU)⁹; and second, the responsibility of each institution “concerning its part in effecting its own expenditure”, is also referred to the Financial Regulation (second sentence in Article 317 para 2 TFEU).

The early years of the integration process witnessed a profoundly different system. The ECSC Treaty left the issue of the political accountability of institutions in budget implementation wide open. Financial accountability was ensured by a report of the external auditor (the then ‘Commissaire aux comptes’), submitted to a ‘Commission of Presidents’ where all the institutions were represented, which –we assume- exercised some sort of oversight under the chairmanship of the President of the CJEU (under art. 78(3) para 2). When the discharge procedure was introduced in the Rome Treaties (206 para 4 EEC), its overarching principles departed in two senses: a) it identified the Council as sole authority for discharge; and b) it identified the COM as sole responsible for budget implementation.

The Council implemented discharge on its own until the 1970 Luxembourg Treaty acknowledged budgetary powers to the Assembly (later, EP). The Council prevailed until the 1975 Brussels Treaty reverted the order and established the controversial expression whereby “the Assembly, acting on a recommendation from the Council... shall give a discharge to the” (ECSC) High Authority and the (EEC/Euratom) COM. Interestingly enough, the 1975 Brussels Treaty stated that the discharge is made “in respect of the implementation of the *administrative* budget” (emphasis added) but the adjective was removed in 1992. The Maastricht Treaty also elaborated further on the previous hearings and subsequent follow-up obligations within the discharge procedure, by adding paragraphs 2 and 3 to article 206 EEC, now unchanged in 319 TFEU.

⁸ Despite the comparatively greater involvement of the High Authority in the executive activities of the organisation, the ECSC Treaty did not foresee a similar regime. The High Authority was not involved in the establishment of administrative expenditure of the other institutions, which was approved by a Commission of Presidents (chaired by the President of the CJEU) of the key institutions upon the estimations translated by each of them.

⁹ Member States do not derive autonomous obligations in budget implementation from the Treaty; their obligations derive from the principle of sincere cooperation with the Commission for the fulfilment of the latter’s budget implementation tasks, a feature that theoretically justifies the system but leads to a far from satisfactory accountability of national authorities. The 1997 Amsterdam Treaty (274 EEC) did not impose them obligations beyond that of cooperating with the Commission in the framework of the sound financial management of the EU budget. The reciprocal obligation for the Commission was further inserted in the Lisbon Treaty (current 317 TFEU para 1 second sentence), still within the framework of cooperation for the sake of sound financial management. The fact that the Lisbon Treaty referred the matter of the responsibility of national authorities for budget implementation to the [2012] Financial Regulation indicates some progress towards the rationalisation of Member States’ intervention. *Ibid.* 43 et seq.

1.2. THE DISCHARGE PROCEDURE AS ACCOUNTABILITY MECHANISM

Assessing the EU Discharge procedure against theoretical constructions of accountability yields the following reflections.

Transparency as a first accountability dimension is ensured through the publicity and reporting obligations of the managing authorities, currently enshrined in Article 318 TFEU. The procedure has remained unchanged since 1957, although the scope of reporting has broadened over time: on a yearly basis, the Commission submits the accounts (of the preceding year), and a financial statement (on the assets and liabilities) to the EP and the Council. Since 2009, a third document, the evaluation report, joins the package. The Lisbon Treaty added a second sentence to Article 318 TFEU, which obliges the COM to indicate follow-up measures to the recommendations formulated in the framework of discharge. The English version of the Treaty speaks of the accounts “relating to the implementation of the budget”, while the terms in the French version slightly vary: “comptes... afférents aux opérations du budget”. In any case, COM’s task is to merely consolidate the reporting package forwarded by the accounting officers of the other institutions. In turn, COM sends them to the ECA by 1 March of year n+1 (under Article 147 FR). Finally, all institutions are obliged to forward an annual financial and budgetary report to the EP, the Council, and the ECA by 31 March of year n+1 (Article 142 RF), describing their financial situation and degree of performance in accordance with the principle of sound financial management (Article 227 RAP).

As far as the transparency of the Council's financially relevant activities is concerned, its public website allows consultation of the Annual Activity Reports prepared by the authorising officers by delegation, the Financial Activity Report related to the European Council and Council section of the EU budget (section II), and other documents, such as the GSC mission statement, organisation structure, Section II of the EU budget, etc.¹⁰. The accounts of the European Council/Council are sent separately and directly to the European Parliament's BUDG and CONT committees every year¹¹, and feature in the consolidated accounts presented by the Commission¹².

Whereas the shared managing structures between the Council and the European Council arguably hamper budgetary transparency, other institutions also share internal audit structures for efficiency-related reasons that seem consistent with international standards on financial management (ECOSOC, CoR, European Data Protection Supervisor). This feature alone does not change our preliminary assessment that **the current framework ensures a satisfactory level of transparency, understood as openness**. If, conversely, transparency is understood in a broader sense, as a clear allocation of budget responsibilities within the system, the current conflict safely attests to its suboptimal level in the European Union.

Exposure as second accountability dimension implies that the recipients of discharge answer questions posed by and justify their conduct before the Discharge Authority. At the EP’s request, Article 319(2) TFEU obliges the COM (since the Maastricht Treaty) to “give evidence” on budget implementation, and to submit “any necessary information” (“for the smooth application of the discharge procedure”, Article 165 FR). Under the current state of EU law, this obligation concerns COM-EP relations. In theory, COM might draw on this provision to reject Council’s questioning. In practice, however, all institutions except the Council acquiesce by responding to the questionnaires sent out by the EP; and all institutions but the Council attend (represented by their Secretary-

¹⁰ Council website, <http://www.consilium.europa.eu/en/general-secretariat/staff-budget/>

¹¹ Answers from the Council, May 2017.

¹² http://ec.europa.eu/budget/library/biblio/documents/2015/EU_AnnualAccounts2015_EN.pdf

General) the EP debate on discharge and present their views when requested. To our knowledge, the Council is the only institution having refused exposure before the EP for budget-related matters. The lawfulness of such conduct hinges on whether article 317 TFEU is interpreted in the sense that its scope covers the whole EU budget, or else just operational expenditure (thus creating a lacuna on administrative expenditure); this is a question that only the CJEU may solve. Article 319.2 TFEU, if read alone, seems to provide a strong argument for the Council. Nonetheless, **financial accountability is suboptimal under this dimension. Reforming Article 319.2 TFEU to cover the responsible EU institution for each individual heading of the EU budget would rationalise the legal framework in the light of general institutional practice, and no doubt improve the financial accountability of the Council.**

Judgement is the third dimension of financial accountability, whereby the actors must bear criticism from the forum. Within the discharge procedure, judgement is passed via a *recommendation* of the Council and a *decision* of the EP. It is uncertain whether the different terms used to refer to the instructions of the EP ('observations') and the Council ('comments') carry a distinct meaning. EP's observations draw on, but go well beyond, the ECA's audit findings. The fact that both the Council's recommendation and the EP's decision are made public represents in itself an element of accountability, placing the addressees under a more intense critical spotlight by the media and external observers. Unlike similar accountability relationships at the national level, **refusal of discharge in the EU framework destabilises not only the targeted institution but mostly the European Union as a whole.**

Liability, finally, assesses the impact of the accountability mechanism, specifically the extent of new binding obligations (or even sanctions) imposed on the budgetary actors. Council recommendations are non-binding documents, devoid of legal effects *per se*. They may effect changes in the behaviour of the targeted bodies only from a *soft law* perspective, if and when the Council uses its leverage as legislator. By contrast, the EP's **discharge decision produces several effects**: a) closure of the budgetary cycle: it **releases the budget responsibility of the recipient**; b) discharge instructions are not opinions; they **translate a clear willingness** –beyond mere declarations- **to move the recipient body to change its conduct** in budget implementation and reporting -Article 319 (3) para 1 TFEU wants COM to implement ["take the necessary measures"] the recommendations formulated by the EP and the Council; c) Article 319 (3) para 2 TFEU creates a **new obligation** ("shall") **to report on follow-up measures** resulting from the discharge decision. *De lege lata*, this only affects the COM, to the extent of the availability of means and the respect of those core principles governing interinstitutional relations, such as institutional autonomy. Over the years, discharge decisions have contributed to institutional improvement in budget management. Additionally, the lack of implementation of past discharge instructions has gained ground as a key criterion for the EP to postpone or refuse subsequent discharges. However, **the current discharge procedure does not entail significant sanctions beyond soft law ones.** Whether they *bind* the Council is a question that remains largely incumbent on the interpretation given to Article 317 TFEU and on the EP's competence to issue separate discharges.

2. SUMMARY OF ARGUMENTS OF COUNCIL AND PARLIAMENT

KEY FINDINGS

- Both institutions agree that the discharge procedure extends to the entire budget, including the administrative expenditure of the Council
- The main source of disagreement is whether the Commission represents the single subject of the discharge procedure.
- EP's separate discharges are considered legal by the Council solely to the extent that they represent preparatory documents for the discharge decision on the Commission

2.1. ARGUMENTS OF COUNCIL

Drawing on a Note by the Legal Service of the Council dated 22 September 2011, the main arguments purported by Council can be summarized as follows:

- The current legal framework defines the institutional balance in budget implementation as one where powers derive from, and the corresponding responsibility returns to, the Commission.
 - Article 317 TFEU (budget implementation) should be read as covering the entirety of the budget and assigning the responsibility for its implementation exclusively to the Commission.
 - Article 58 FR (modes of implementation) should be read as also covering institutions' administrative expenditure
 - Article 319 TFEU should be read as providing for a **discharge of the Commission alone**, but covering the entire budget. Likewise, even if Article 165 FR does not make explicit reference to the Commission as addressee of the discharge decision when it states that "the discharge decision shall cover the accounts of all the Union's revenue and expenditure", the only interpretation is one connecting it to Article 164 FR, which does mention the Commission.
- The EP attempts at deviating from existing institutional balance
 - Conceding to the EP's wish to issue separate discharges would open the door to individual responsibilities of all kinds of subjects with intervention in budget management (MS, third countries, or international organisations)
- Separate discharge procedures for the Council and other EU institutions or bodies reflects the way in which the EP seeks to organise its internal arrangements in view of the discharge decision on the Commission, rather than separate exercises of holding these bodies to account, for which the Parliament lacks competence under current EU law, i.e. the process of preparing discharge may involve other EU bodies practically, but at present they participate on the implicit understanding that discharge ultimately concerns – and has implications for – the Commission alone.
 - Respecting the duty of sincere cooperation between institutions (article 13(2) TEU), the remaining institutions must assist the Commission when being held accountable by the EP.
 - That duty may well include responding directly to EP's requests for additional information regarding the section of the budget for which they have been conferred

implementing powers, to the extent of the ‘smooth application of the discharge procedure’ (Article 146(2) FR).

- The EP’s practice of separate decisions, if interpreted as separate discharges, would amount to an *ultra vires* practice that is, exceeding the Treaty.
- At present the Council interprets restrictively the scope of the principle of administrative autonomy (Article 335 TFEU) as limited to the management by each institution of its own employees, contracts, and buildings, and excluding budget implementation. Its rationale would be justified solely on practical grounds and without questioning the implications for political and financial accountability.
- The fact that existing institutional practices (e.g. the EP granting partial discharges, the COM refusing to oversee budget implementation by other institutions, these latter accepting being subject to EP scrutiny individually) are well-established over time or are tolerated by the Council does not suffice to override the balance enshrined in EU law.
- The duty of sincere cooperation is also binding for the EP. Drawing on its financial accountability powers to broaden the scope of political accountability in related areas encroaches upon others’ powers. The fact that Council tolerates it at present does not, however, preclude any future resort to the CJEU.

2.2. ARGUMENTS OF PARLIAMENT

Drawing on the views of the EP Legal Service (Passos, 2012), it seems that the EP reads **Article 317 para 1 TFEU as targeting the operational budget of the EU, rather than the whole expenditure side of the EU budget** (as argued by the Council). The Treaty would therefore **not exclude the responsibility of other bodies that participate in budget implementation** in their own capacity (the FR implicitly hints at it when establishing the budget implementation modalities). There are various legal and practical arguments to support the notion that EU institutions implement their section of the budget **not as Commission delegates, but as autonomous managing authorities:**

- The administrative expenditures of each institution occupy separate chapters in the budget¹³.
- **Budget implementation powers have been conferred upon EU Institutions** since 1977 (former Article 18.2 FR) over their administrative expenditure by the COM, as enshrined in the FR since 1977. Articles 55 FR (“The Commission shall confer on the other institutions the requisite powers for the implementation of the sections of the budget relating to them”), 65 FR (“Each institution shall perform the duties of authorizing officer”), and 66 FR (Powers and duties of the authorizing officer) must be considered. This is a **permanent conferral, constitutionally protected against potential revocation** by the Commission. Technically speaking, it should not be understood as a delegation, for the Commission has never enjoyed those powers and unlikely will (see further below, p. 17).
- Each institution appoints its **own accounting officer** (Article 68 FR), responsible for preparing the accounts in view of the discharge procedure. The Commission’s DG Budget is endowed with the sole role of consolidating the accounts forwarded by others.

¹³ EP (I), European Council/Council (II), CJEU (IV), ECA (V), ECOSOC (VI), CoR (VII), European Ombudsman (VIII), European Data Protection Supervisor (IX), and EEAS (X)

- Each institution appoints its **own internal auditor** (Article 98 FR, former 19 FR'1977), whose activity falls outside the remit of the Commission's Internal Audit Service (IAS). COM is arguably best placed to issue guidelines aimed at improving internal control, which the others implement in turn. Nonetheless, that does not change the latter's organic independence. COM has explicitly refused to oversee budget implementation as carried out by other institutions¹⁴, or else to play the role of EP's messenger by requesting documents from the Council¹⁵.
- Both the authorizing officers and the IAS within each institution **entertain direct relations with the ECA** (since 1977), notably without using COM's IAS as an intermediary.

Accordingly, Parliament considers **the Council/European Council as a managing authority, and thus, subject to discharge.**

¹⁴ Letter of 25 November 2011 from Commissioner Semeta to the chairman of the CONT Committee.

¹⁵ Letter of 23 January 2014 from Vice-President Sefcovic (on behalf of Commissioner Semeta) to the chairman of the CONT Committee

3. BREAKING THE DEADLOCK

This section provides an overview of several scenarios in an effort to break the current deadlock over the Council's accountability for budget implementation. The term 'solution' is avoided as it risks misleading the deliberation. Overcoming the stalemate to a large extent depends on exogenous factors to the EP and its legal mandate, and is conditional upon other actors' readiness to cooperate (the Council itself, the Commission, the Court of Justice, the Court of Auditors, and Member States). The following reflections leave room for debate and do not seek to cover all options in full.

None of the options will result in an optimal outcome. The interinstitutional balance varies considerably across scenarios. Those scenarios granting the EP a stronger position must be balanced against concerns linked to legality, effectiveness, and very often, time. Intra-institutional concerns must also be addressed: the success of most options heavily depends on the cooperation and/or support of other committees to CONT, a piece of the puzzle that sometimes seems amiss.

3.1. ASPECTS FOR INTRA-INSTITUTIONAL REFLECTION AND IMPROVEMENT

The EP might care to consider the following suggestions which, issued from an independent perspective, regard the financial accountability of the EU budget.

3.1.1. Setting an example in financial management and accountability

EP calls for an improved accountability of the EU executive are certainly justified because the complex multilevel governance of budget management in the EU allows for accountability gaps (Harlow, 2007; Laffan, 2003). However, EP's legitimacy suffers when the institution seems indifferent to accountability gaps affecting its own internal organization and functioning. The idea that the EP should first 'cast out the beam in its own eye' before targeting others was voiced by staffs from other EU bodies. External reviews of EP's activity have pinpointed shortcomings in need of redress. While some of them are simply linked to good governance, such as whistle-blower protection, the transparency register, and ethics regimes, others clearly indicate misuse of funds, occasionally severe (Transparency International, 2014). The European citizen would surely wish for a discharge authority that becomes a norm-entrepreneur regarding financial management, transparency, and accountability.

3.1.2. Polishing the discharge questionnaires

If there is no internal protocol in view of drafting the questionnaires to be sent out to other institutions, it would be advised to introduce internal checks and balances –applicable to CONT, BUDG, or even the whole institution- so as to ensure: a) that the questions address issues relevant for budget accountability, b) that basic standards of interinstitutional courtesy govern the relationship with the addressee, and c) that some form of peer-review is applied before the questionnaire is delivered, given the impact that the tone and the content of these informal documents may produce in the interinstitutional relations within the discharge procedure.

3.1.3. Raising broader awareness and consensus

The lack of internal consensus in Parliament undermines its negotiating position *vis-à-vis* the Council. In the VII Legislature, the lack of agreement between political groups prevented the institution from adopting a formal response to the Council's proposal for a solution to this conflict. CONT might want to identify the bones of contention among political groups and possibly take more aware-raising measures so that financial accountability of Council administrative expenditure is prioritised more in

the internal agenda-setting arenas. Failed intra-institutional attempts at linking the issue of Council discharge to other fields are interpreted by Council as lack of leadership inside the EP, a situation that weakens considerably the negotiating position.

3.1.4. Securing support within the Council

The strong institutional approach embraced by the legal service of the Council does not indicate –in our view- that Member States fully converge in their stance towards the financial accountability of the Council and its relationship with EU legitimacy. Sensitivities deeply vary across Member States. It might be interesting to explore ways of attracting Member States more prone to accountability towards EP's views. A first step might be to involve the four Member States whose Supreme Audit Institutions agreed to put in place pioneer strategies in view of state accountability for its implementation of the EU budget, namely, the Netherlands, Denmark, (the United Kingdom,) and Sweden (see Aden, 2015:321). Prospects for an in-depth revision of the current legal framework will improve if Member States are better informed of the stakes.

3.2. REVISING THE LEGAL FRAMEWORK

Several procedures allow amending the legal framework, but their effectiveness and the power of the EP vary across options, as displayed in Figure 1 below. Answers might be first sought through treaty reform. Under current Article 48 TEU, changes to Part Six of the TFEU (financial provisions) undergo the ordinary revision procedure, which endows Parliament with greater power to effect changes (it may submit proposals for treaty reform; it takes part in the Convention; and eventual adoption hinges on its assent). However, this represents a cumbersome procedure with uncertain results, given the large amount of actors involved. Oddly enough, the simplified revision procedure of Article 48 (6) TFEU allows for changes to the scope and implementation of internal policies, but not to their financial management¹⁶.

The Treaty abstains from solving certain matters and generally refers them to the Financial Regulation. To a certain extent, this provides with significant room to introduce changes while dodging treaty reform; however, a marked departure from the treaty system would certainly face an action for annulment. The EP position is strong because the adoption of the FR follows the ordinary legislative procedure. However, a marked shift might be countered through the annulment.

Changes in the annual budget –allowing for a strong EP role- might enhance the transparency of budget lines, but this legal act changes every year.

¹⁶ This shortcoming might be easily fixed with an adding to the first paragraph of art. 48(6) TEU, along the lines emphasised next: “The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union, *or the provisions of Part Six of that Treaty relating to the budget implementation and control of those areas*”. While making the treaty revision procedure more flexible might theoretically allow addressing more swiftly the needs of financial accountability, the European Parliament would not be forcefully interested in promoting it, given that its intervention in the simplified revision procedure is limited to an opinion. Allowing the ECA to participate in the Convention would also contribute to better mainstreaming sound financial management and financial accountability throughout treaty reform. The ECB enjoys a more privileged position in this sense. A potential amendment to Article 48(3) para 1 TEU might be (emphasised text): “...The European Central Bank shall ~~also~~ be consulted in the case of institutional changes in the monetary area. *The European Court of Auditors shall also be heard before introducing amendments in the treaty provisions relating to the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts, the checks on the responsibility of financial actors, and the protection of the financial interests of the Union*” (namely, the cases in which the ECA intervenes as consultative organ in the legislative procedure).

Finally, the EP has used its own rules of procedure to enshrine a broad interpretation of its powers. For obvious reasons linked to the hierarchy of laws, the rules of procedure are not the right legal act to achieve effective changes involving other institutions.

Figure 1: The EP power to effect legal changes in the system of budget management and discharge

Procedure	Legal base	EP power (can EP control the process?)	Strength (will changes be effective?)	Weakness (what might jeopardize the outcome?)
TREATY (Ordinary)	48(2) TEU	STRONG (assent)	HIGH effectiveness (top legal act)	<ul style="list-style-type: none"> • Long procedure (Convention) • High investment (many actors) • Uncertain outcome (national ratification)
TREATY (Simplified)	48(6) TEU	WEAK (opinion)	HIGH effectiveness (top legal act)	<ul style="list-style-type: none"> • Applies to internal policies, but not their financial management & accountability
FINANCIAL REGULATION	322 TFEU	STRONG (ordinary leg. proc.)	HIGH-MEDIUM effectiveness (quasi-constitutional)	<ul style="list-style-type: none"> • Changes may be annulled • Little use if clash with Treaty
ANNUAL BUDGET	314 TFEU	STRONG (special leg. proc.)	MEDIUM effectiveness	<ul style="list-style-type: none"> • Changes are not permanent
RULES OF PROCEDURE	232 TFEU	STRONG	LOW (helps practice gain ground)	<ul style="list-style-type: none"> • Internal rules cannot break hierarchy of laws

3.2.1. Treaty revision: rebalancing articles 317 and 319 TFEU

The interinstitutional dissent that triggers this note derives from what is essentially a treaty omission, which was taken advantage of when revising the Financial Regulation, in order to alter –though not forcefully breach- the interinstitutional balance that had long stood. As a result, treaty provisions and interinstitutional practice based on secondary legislation do not match. Council consistently sticks to a literal –narrow, in our view- interpretation of treaty provisions to refuse being subjected to parliamentary scrutiny, by drawing on its alleged nature of discharge authority. It must be acknowledged that consistency across provisions was not sufficiently ensured by the treaty draughtsmen, the result is a text that the Council has interpreted in a way that supports its views.

That is too formal an interpretation. Parliament might also argue that an instance of *soft* treaty revision has been made possible by secondary legislation of quasi-constitutional nature –the FR. As the legal framework now stands, the Treaty admits to being read in the light of the Financial Regulation. Between 1990 and 1993, the Financial Regulation imposed obligations regarding the principle of sound financial management on managing institutions that were not foreseen until the Maastricht Treaty crystallised them, bringing an addition to Article 205 EEC. If the negotiations leading to the adoption of the 2012 FR led the Council to believe that the Parliament was attaching a wrongful or even illegal interpretation to the FR, likely to alter the institutional balance or to breach the Treaty, then the Council should have continued negotiating. However, the FR was adopted through an early agreement between Parliament *and* Council (Sanchez-Barrueco, 2014). Once

adopted, any Member State could have sought its annulment by the CJEU (legally speaking, the Council would have also been legally entitled to do so¹⁷). Neither option happened, though. Accordingly, Council’s consistent reluctance to answer questions and judgement by Parliament might be considered as going against its own acts, precluded in law (*‘nemini licet venire contra factum proprium’* or estoppel¹⁸). We acknowledge, however, that this argument loses strength in the face of diverging interpretations between institutions, which only the CJEU can disentangle.

As explained in the next section, the view that the Council cannot escape democratic oversight by Parliament should prevail. Taking it from there, any revision of the legal framework would have to reassess three issues: the Council as discharge authority, the Council’s role as managing authority, and the Council’s nature as subject of discharge. The following paragraphs offer some insights in this regard.

Reassessing the role of the Council as Discharge Authority

As introduced above, EU dynamism has led to profound changes in the interinstitutional balance in and across the three stages of the EU budgetary cycle. An ancillary argument of the Council is that its nature of discharge authority collides with potential claims to render it the target of parliamentary oversight in budget matters. The extent of Council’s contribution to financial accountability in the framework of discharge should therefore be assessed. We compare the relative involvement of the two traditional branches of discharge in Figure 2 below.

Figure 2: The two branches of the Discharge Authority and dimensions of accountability

ACCOUNTABILITY DIMENSION	COUNCIL INVOLVEMENT	EP INVOLVEMENT
TRANSPARENCY (receives others’ reports)	STRONG	STRONG
EXPOSURE (can question others)	WEAK	STRONG
JUDGEMENT (issues criticism)	WEAK	STRONG
LIABILITY (imposes obligations/sanctions)	WEAK	MEDIUM/WEAK

- Regarding **transparent reporting**, the addressees of financial reports have always been the EP and the Council on an equal footing, although the order was inverted before the Lisbon Treaty. Transparent reporting is not exclusively necessary in budget control, but should be guaranteed in the three stages of the budgetary cycle. If –in turn- the role of the Council here is interpreted as a corollary of its role as Budgetary Authority, it would be justified on grounds that this institution represents the states who finance the bulk of the common budget. Regarding **exposure**, current 319(2) TFEU does not endow the Council –it mentions the EP alone- with a power to interrogate others; in legal terms, this option would depend on the willingness of the targeted body to cooperate, in practice, the Council rarely tries to question

¹⁷ By analogy, see CJEU Judgment of 12 July 1979, C-166/78, *Italy v Council*, ECLI:EU:C:1979:195, p.6.

¹⁸ See Judgment of 23 October 2003, C-109/02 *Commission v Germany*, p. in Opinions by AG Reischl in C-166/78 *Italy v Council*, by AG Kokott in C-117/03 *Draggagi and others*, ECLI:EU:C:2004:420, p.23, by AG Trstenjak in C-319/06 *Commission v Luxembourg*, ECLI:EU:C:2007:516, fn 24

the other institutions. Certain **judgement** permeates Council's recommendation, but it certainly fails to attract public attention. Besides, the importance attached to the discharge decision stems from the paramount role played by the Council as Legislative and Budget Authority. From a legal perspective, however, the legal value of the Council's recommendation in the framework of discharge is hardly different from the value of opinions of advisory bodies within the legislative procedure. Because of these factors, the Council's role in **liability** must be considered 'weak'.

- The expression 'budget authority' is often used in political discourse to imply discharge as well. However, the interinstitutional balance profoundly varies between articles 317 and 319 TFEU. If a distinct 'Discharge Authority' exists, the Council only plays a minor role. Whereas the Parliament and Council are placed on a close to equal footing as Budget Authority, the Treaty draughtsmen did not consider the indirect legitimacy of the Council as grounds enough to raise it to the same level of Parliament as Discharge Authority. Accordingly, **clarifying the references that imply a 'Discharge Authority' in the legal framework (see below Annex III)**, while maintaining an involvement of the Council in transparent reporting commensurate with its nature as Legislative Authority for the adoption of the budget **would allow greater consistency between the law and practice in discharge**.

Reassessing the role of the Council as managing authority

Future Treaty revision should have to clarify:

- Who confers budget autonomy on the institutions other than the Commission, whether the Commission (while retaining ultimate responsibility) or the Member States (and institutions would be directly accountable before the Parliament for their administrative spending), currently Article 317 para 2 TFEU in relation with Article 55 FR.

The Council argues that COM is endowed with exclusive powers for budget implementation which, in turn, it confers to the other institutions and bodies –regarding their chapter of the budget-, following Article 55 FR. Conferral would be similar to delegation, as applied in the context of the budget management modalities (art. 58 FR), in the sense that other subjects –such as Member States or international organisations- may partake in budget implementation but the ultimate responsibility stays in the Commission. Indeed, responsibility cannot be delegated. The Council draws on this argument to reject direct accountability before the Parliament, that is, as managing authority subject to discharge. While this is the right interpretation to attach to the involvement of non-EU actors in the implementation of Union's policies in accordance with Article 58 FR, notably Member States (although Cipriani, 2010, offers a fine overview of the contradictions of the system); three arguments allow us to contest that EU institutions other than the Commission are delegates of the latter when they implement their own administrative spending.

First, delegation implies that the delegating authority 'owns' the power it delegates upon other. In this case, however, the Commission is legally obliged to pass budget autonomy onto the other institutions. Conferral –as noted above- is irreversible and irrevocable, COM would not be entitled to claim those powers back because they it never owned them.

Second, if the Commission played a role of delegating authority, it would implement some sort of monitoring over the other institutions, which in practice it does not. The remaining institutions have created their own managing authorities and internal audit services, which entertain direct relations with the ECA and the EP, without the intermediary of the COM.

A third argument against the Council's views lies in the **lack of consistency across translations** of Article 55 FR. Most language versions have chosen synonyms of the English 'conferral'¹⁹ –thus suggesting that the competence over administrative spending is owned by the COM and then attributed to other bodies. Conversely, no less than eight versions use milder terms ('acknowledge') whereby the Commission would play a role of mere middleman between Member States and the other institutions²⁰. The latter would in turn be endowed with autonomous power for budget implementation and, therefore, autonomous responsibility.

In our view, **a revised Article 55 FR would reconcile the text with the institutional practice** (requiring, at worst, specific arrangements in the case of the Council) *"Institutions other than the Commission are conferred the requisite powers to implement the sections of the budget relating to them"*.

- The distinction between management and executive functions carried out by the Council.

This question does not arise in the case of the Commission. Being at the same time manager and executive, it can be subject to financial accountability (as manager) and political accountability (as executive). The rest of institutions do not fulfil executive functions, so their Secretary-General can be held to account as manager. In the case of the Council, however, the managing and executive roles are blurred. The GSC might be held accountable for its managerial activities, but it rightly points out that political accountability should be faced by the Presidency on behalf of the institution (as authorising officer).

Reassessing the scope of discharge (as regards the Council)

It is argued here that the legal framework has abandoned the former concept of Discharge Authority, the EP now enjoying an exclusive power to grant discharge; and that the Council displays the typical features of a managing authority. As a result, the Council should be subject to some form of accountability before the EP.

The scope of discharge as compared to audit should be determined in the legal framework. The scope of ECA and EP powers are based on a different logic. Whereas the ECA's audit powers are defined *ratione materiae* (the existence of a link with the EU budget grants the ECA a powers to 'follow the money', under Article 287(2) para 1 TFEU and 159(1) FR), the EP's discharge powers are literally defined *ratione personae* (on the Commission). **Better financial accountability might ensue from aligning both powers around a link to the budget.** In turn, the respective criteria of the audit and political dimensions of financial accountability should be sketched.

For the time being, the relationship between the EP's (political) and the ECA's (audit) sources of accountability is unclear. We ignore whether the EP must deliver an assessment qualitatively different than the ECA, it is bound by aspects tackled by the ECA, or it may even discuss legality/regularity/performance in the absence of ECA's opinion.

The EP should refine **the definition of the criteria it applies during its political assessment** within discharge and make them explicit –possibly in its own rules of procedure, if only in general terms. Uncertainty over questions that may or may not be asked within discharge leaves room for mood swings throughout time and feeds interinstitutional distrust. Specifically, it seems overly complex and rather byzantine to make a political assessment on financial management that goes beyond

¹⁹ Croatian "dodjeljuje", Danish "giver", Latvian "piešķir", Lithuanian "suteikia", Hungarian "átruházza", Maltese "tikkonferixxi", Portuguese "confere", Romanian "conferă", Slovak "deleguje", Slovenian "prenese", Swedish "ska ge",

²⁰ Czech "přiznává", Finnish "tunnustaa", French "reconnaît", German "erkennt", Greek "αναγνωρίζει", Italian "riconosce", Polish "przyznaje", Spanish "reconoce",

legality, regularity and sound financial management (already covered by the ECA), without encroaching on the right of the institutions other than the COM to organise freely its own services – assuming they do not fulfil executive functions, of course.

Council has firmly stated that it will not react to Parliament’s demands for explanation unless such demands correspond with remarks by the ECA in its reports. However, while the ECA has improved its efficiency significantly in recent times, its scarce resources oblige it to operate on the basis of: a) samples, which do not exclude completely the chances for mismanagement to go unnoticed; and b) risk, which is not specifically salient in the Council as compared to other budget areas. Besides, the ECA is not bound by EP requests to carry out a special audit on the Council when this does not match the Court’s own priorities. As shown in the past, a watchdog institution designed as a college of 28 auditors will likely avoid situations fuelling institutional conflict.

The EP draws on the ECA’s findings, but discharge is much more than audit. The EP has taken advantage of this lack of definition of discharge and the approach it takes, to push forward its own monitoring agenda in connected policy areas where parliamentary oversight has not permeated the Treaty (eg. CFSP).

Of limited relevance to this matter is the question –which this note leaves open- of whether the Council devotes Heading II of the Budget to the sole purposes of self-administration, or else includes certain executive functions in that Chapter. If that was the case, no executive functions should escape the political accountability of the EP *de lege ferenda*. However, even in the case in which the Council uses Heading II for purely administrative purposes (hiring people, buying equipment, renovating buildings, etc.), the current -and continued- uncertainty over the nature of spending by the Council, and uncertainty as to whether there should indeed be oversight sends a rather bad message on the quality of democracy in the European Union.

The current disagreement largely stems from issues unrelated to discharge, and notably **distrust over previous attempts to use its budgetary powers to secure political oversight in areas where the legal framework precludes it** (ie CFSP, new economic governance). The EP should act carefully in this regard. It has been noticed that questionnaires in view of discharge often include questions beyond strict sound financial management. Using its political leverage in the budgetary field to secure trade-offs in the institutional arena fuels distrust towards the EP, particularly in the Council but not only restricted to that institution. The success of the EP’s legitimate attempts at *de facto* pushing its own interinstitutional agenda beyond the scope of discharge ultimately depends on the others’ willingness to cooperate (which may or may not be moved by the perception that an EP decision to postpone or refuse discharge will effect negatively on their reputation) but is not covered by EP’s powers as an accountability forum in the framework of discharge. Asking other institutions to justify their internal decisions, adopted in accordance with the legal framework in force, and devoid of a strict link to budget management, likely represents an encroachment of their administrative autonomy and thus a breach of the duty of sincere cooperation in interinstitutional relations (article 13.2 TEU), regardless of whether the issue reaches the CJEU or not.

3.2.2. The Financial Regulation

If the treaty revisions suggested above are retained and agreed upon, the Financial Regulation should be amended accordingly.

A further suggestion may be included here, regarding the **documents that integrate the financial package** (article 142 RF and 227 RAP). Our analysis of the EP questionnaires to the Council reveals that they often contain similar issues on staff (gender and geographical balance), buildings policy,

and ethics concerns (conflicts of interests, regulating lobbies, whistleblowers protection). These topics might be merged in a yearly report to be added to the financial package transmitted to the discharge authority. By giving legally binding force to these requirements, the indifference of the Council towards the EP's questionnaires would lose relevance.

3.2.3. The budget: more detail in the Council (and the Parliament) chapter

The EP often complains about the lack of transparency in the respective budgetary lines of Council and European Council. The EP might make use of its powers as Budgetary Authority in the adoption of the budget to introduce a greater level of detail in the budget itself. In fairness, changes should affect the EP chapter as well. A warning should be issued as regards the managerial complexity this option entails for the authorising, accounting and internal audit staff within the institutions. Concerns linked to effectiveness would have to be considered.

3.3. SEIZING THE COURT OF JUSTICE FOR INTERPRETATION

Bringing these matters to Court represents a suboptimal scenario from the EP perspective, in our view. From a theoretical perspective, seizing the CJEU seems an interesting option, by all means, to shed light on the balance of powers in discharge. Yet there is no guarantee that the Court would give reason to the EP. Nobody can advance the reasoning of the Court, not even the Advocate-General, in some cases. An obvious risk arises that reason is given to the Council, while at the same time establishing restrictive criteria on the issues that can be addressed through questionnaires, and beyond which the EP would breach the principle of conferral in discharge. From the perspective of interinstitutional relations, it seems fair to assume that resort to the CJEU would escalate the bilateral unease anyway.

It is not our purpose to advance here an in depth analysis on whether the Parliament would enjoy a strong position in a potential discharge-related judicial proceeding before the CJEU. That would deserve a study in itself. Instead, this section purports that decades of EP-Council conflict before the Luxembourg Court allow drawing interesting lessons, which may or may not be applicable in the case of discharge.

First of all, it is worth highlighting that the CJEU cannot be seized to disentangle theoretical conundrums, regardless of their interest or relevance. Except for the case of opinions delivered prior to the ratification of international treaties by the Union under article 218(11) TFEU, the CJEU requires a concrete conflict to resolve. The current legal framework governing the jurisdiction of the CJEU does not cover abstract questions of legal interpretation such as whether references to the Commission in Article 317 TFEU preclude other bodies from being held directly accountable for financial management, or the respective legal consequences of conferral and delegation in the framework of discharge.

The above leaves only two possibilities for Parliament and Council to bring one another to Court: either an action for annulment (Article 263 TFEU), or an action for failure to act (Article 265 TFEU). Theoretically, the EP might introduce an action for failure to act against the Council on access to budget documents, or on its lack of answer to questionnaires. Conversely, the Council might introduce an action for annulment against Parliament's separate discharge decision (an unlikely scenario, given that it would imply acknowledging them as legal acts capable of producing effects outside the institution) or over Rule 94 of the Rules of procedure if it considered that it breached higher rules. The Commission would not make use of its powers as 'guardian of the Treaties' to bring

personally the matter to Court²¹, but would likely intervene in support of the Parliament's views (see fn 3).

Looking back at the interinstitutional conflict between the Council and the Parliament that reached the CJEU shows interesting features. Between 1986 and 2016, Parliament introduced 45 actions against the Council, of which it was given reason in 27 cases (60%). Conversely, the Council introduced only 4 actions, with a 75% success rate.

Although the Parliament has expanded its powers throughout successive treaty reforms, the rate of judicial action taken seems to have accelerated in the times of the Lisbon Treaty, with 16 judicial proceedings introduced in the 8 years of force. During the Single European Act, the Parliament brought 10 actions against the Council, the same amount as in the Maastricht period. The 6 years of the Amsterdam Treaty yielded only 1 action, whereas the Nice Treaty gave rise to 8 rulings of the Court within the same timeframe.

All actions introduced by Parliament share the link to legislative procedures of various sorts. Never has the EP introduced actions on the budgetary procedure. Conversely, all Council actions have regarded the adoption of the budget, although never the discharge procedure. Before the Lisbon Treaty, the Council won three times, on grounds that the EP had declared the budget approved before agreement with the Council was achieved (Cases C-34-86, C-284-90, and C-41-95). Since 2009, the Council attempted to equate the concept of budgetary authority to the one of legislative authority, and thus sought annulment of the budget adopted with the sole signature of the President of the EP (Case C-77/11).

Against this backdrop, it is not surprising that the main plea in law resorted to by Parliament regards the legal basis of the contested act, which applies to 23 cases out of 42. The allegedly wrongful legal basis chosen by the Council, with or without the support of the Commission, leads to a lesser involvement of Parliament than desired. Along a similar line, a sizeable amount of cases regard the lack of consultation by Council. These two pleas combined summarize the vast majority of proceedings in which the Parliament features as plaintiff, and they do not seem useful in the framework of discharge.

Very rarely has the EP acted for reasons linked to the selfless defence of the European legal order, for objective reasons unrelated to protecting its own powers or testing the boundaries thereof. Recent times have witnessed, however, greater EP concern in securing high legislative standards as regards fundamental rights protection, usually comforted by the Court (Cases C-40/03, C-317/04, and C-355/10).

The following paragraphs consider more specifically the potential implications of judicial action in discharge.

3.3.1. Parliament v Council action for failure to act

An action for failure to act, in accordance with article 265 TFEU, would lead the CJEU to consider whether the Council's conduct during discharge represents an infringement of the Treaties. In turn, it would need to further address whether the Treaties allow for direct accountability of the Council, or else through the intermediary of the Commission. As a result, the relationship between the EP and

²¹ See answer by the COM (Georgieva) to written question E-008684/2015 by Monica Macovei (EPP), of 30 July 2015. Asked why it does not bring an action against the Council and the European Council for their failure to comply with the requirements of the discharge procedure, the Commission simply "*welcomes the efforts made by [the Council and the EP] to reconcile positions to reach a 'modus vivendi'*"

the Council, on the one hand, and the Council and the Commission, on the other, would be clarified. Only twice has the EP brought this action against the Council to date, and in the two –old-cases the pursued goal was achieved²².

It is hereby not advised to challenge the Council’s refusal to answer the questionnaires using this avenue because the origin of the obligation is the Parliament’s rules of procedure, which *per se* do not create legal effects beyond the adopting institution. The Court has also declared repeatedly that EU law does not accept that institutional practice, however repeated over the years or else tolerated by the other parties, may override legal acts of a higher level.

On the positive side, a recent judgment on the EP’s right of information within CFSP might back up EP’s aspirations in the field of discharge. In Case C-658/2011, the Court annulled the Council Decision serving the ratification of the EU-Mauritius Agreement for the transfer and prosecution of suspected pirates, on grounds that the EP had not been properly informed during the negotiations. The CJEU argument is useful to frame bilateral relations in the field of discharge “the information requirement [arising under Article 218(10) TFEU, established in stricter terms than in discharge, though] is prescribed in order to ensure that the Parliament is in a position to exercise democratic scrutiny of the European Union’s [here, the reference to ‘external action’ might well be replaced by ‘discharge’] and, more specifically, to verify that its powers are respected precisely [in consequence of the choice of legal basis for a decision concluding an agreement]”.

3.3.2. Council v Parliament action for annulment

The action for annulment may serve the interests of the Council against the Parliament, if it considers that the EP is stepping outside its competences when forwarding a questionnaire to the Council or when adopting a separate discharge decision. The nature of the act, more complex to determine as to questionnaires, might raise concerns at the admissibility stage. According to settled case-law, all measures adopted by the institutions, whatever their nature or form, which are intended to have binding legal effects constitute actionable acts in annulment²³. By introducing an action for annulment, the Council would implicitly acknowledge the discharge decision as a final act, which goes against its own understanding²⁴. The CJEU will focus on the substance of the act and the intention of the author to assess whether the act is intended to produce binding legal effects²⁵, that is, whether they are “capable of affecting the interests”²⁶ or they may “modify the legal situation”²⁷

²² In the first case, the Council adopted the act during the proceeding so the action was eventually dismissed (Judgment of 12 July 1988 in *Parliament v Council*, C-377/87, ECLI:EU:C:1988:387). In the second, the Court declared that the Council had breached its obligations under the Treaty because it had failed to extend freedom to provide services to the transport sector before the expiry of the transitional period (Judgment of 22 May 1985 in *Case Parliament v Council* C-13/83 ECLI:EU:C:1985:220).

²³ See judgments in *Commission v Council*, known as ‘ERTA’ (22/70, EU:C:1971:32, paragraph 42); *Parliament v Council and Commission* (C-181/91 and C-248/91, EU:C:1993:271, paragraph 13); and *Commission v Council* (C-27/04, EU:C:2004:436, paragraph 44).

²⁴ Order EU:C:2010:37 para 46; notably if a measure amenable to annulment procedures followed that act (eg. the discharge to the Commission, CJEU Judgement Case C-521/06 P *Athinaïki Techniki v Commission* [2008] ECR I-5829, para 54. Likewise, acts of an internal character, devoid of effects outside the domestic sphere of the adopting institution are not actionable (Opinion by AG Ruiz-Jarabo, C- *Ismeri Europa v European Court of Auditors*, ECLI:EU:C:2001:243, 3 May 2001, para 47), just as acts of a purely informative nature, limited to explaining the state of the law governing the recipient’s situation (CJEU Order of 21 June 2007 *Finland v Commission*, C-163/06 P, ECLI:EU:C:2007:371, para 32)

²⁵ CJEU Judgement *Netherlands v Commission* (C-147/96, EU:C:2000:335, paragraph 27)

²⁶ See Opinion by AG Bot, C-521/06 P, ECLI:EU:C:2008:192, para 113. In that case, the closure of a file by the Commission produced negative effects on the applicant.

²⁷ For instance, the Commission decision to withdraw a proposal prevents the Council from continuing the legislative proposal, see Opinion by AG Jääskinen of 18 December 2014, Case C-409/13, ECLI:EU:C:2014:2470, *Council v Commission* (right of withdrawal) para 24-25.

of the recipient. The requirement to trigger a distinct change in the legal situation of the recipient might also represent an obstacle to admissibility²⁸. The CJEU also considers the nature of the role fulfilled by the adopting institution to ascertain whether its tasks, however indispensable, correspond with those of an auxiliary institution. In such a case, its acts would not be capable of producing legal effects because the power to adopt the final decision would reside in another body's hands (e.g. the ECA's reports)²⁹.

Whereas settled case-law considers the act of the Parliament whereby the budget is adopted clearly a clear actionable act, the case is not so clear as regards the discharge decision, and even less in the case of the separate discharge decision on the Council's administrative spending. In our view, it is highly likely that the CJEU accepts the general discharge decision as an actionable act, although it will ultimately depend on the approach followed by the CJEU. Discharge decisions are foreseen in the Treaty as closure of the discharge procedure (Case C-77/11, by analogy). They produce certain legal effects, which is further reinforced by their publication in the L series of the Official Journal. They close the budgetary cycle (formally releasing the responsibilities of the addressee), they translate an intention to create *soft law* obligations for the recipient and, in the very least, they create an obligation to report on follow-up measures in the future (under article 319 (3) para 2 TFEU). Nevertheless, the CJEU might embrace a stricter approach and consider (giving reason to the Council) the following: a) that the decision on the Council is an intermediate act in the procedure leading to the Commission's discharge, b) that its nature as act of closure is not real, for future responsibilities of the recipient are possible if –for instance- fraudulent management is disclosed at a later stage; and c) that neither the questionnaires nor the separate discharge decision introduce a distinct change in the legal situation of the Council –not even introducing *soft law* obligations. As a kind of ricochet, the question of EP power to issue separate discharges would be ascertained, but not forcefully in favour of Parliament.

In the case of the specific discharge decision on the Council's administrative spending, the fact that it is also published in the L series might be an argument, although the CJEU would probably examine the substance of the act instead.

Recent times also offer interesting developments in the budgetary field. In Case C-77/11, the Court rejected the Council's claim that the budget should be adopted by joint signature of the presidents of the EP and the Council, drawing on the terms included in the Lisbon Treaty. A notion of budgetary authority similar to that of legislative authority, one in which the EP and the Council would be placed on an equal footing seems a relic of past times, and indeed one that does not fit in the current legal framework, seems to be the message conveyed by this ruling.

3.4. RENEGOTIATING AN INTERINSTITUTIONAL AGREEMENT WITH COUNCIL

Renegotiating an interinstitutional agreement with the Council seems the best scenario in the shorter term; yet suboptimal, given that the Council would probably make reciprocity a condition of its consent. Under the legal approach followed by Parliament to this interinstitutional disagreement, this amounts to conceding powers that legitimately correspond to the institution under the current legal framework. In our view, however, a focus on improving bilateral relations with the Council would be a win-win situation. Based on reciprocity, overall financial accountability vis-à-vis European citizens would be improved while consensus would also be established among the Member States (who remain the asters of the treaties) to crystallize a new interinstitutional balance within a revised

²⁸ Order EU:C:2010:37 para 37

²⁹ Opinion by AG Ruiz-Jarabo, *C- Ismeri Europa v European Court of Auditors*, ECLI:EU:C:2001:243, 3 May 2001, para 47

discharge procedure. The accountability of the Council (in the *exposure* and *justification* dimensions of accountability) would be strengthened as compared to present. If both institutions have nothing to hide, and the ensuing contacts, dialogues, questionnaires and resolutions build on a spirit of mutual cooperation and trust, then this scenario would yield satisfactory results.

Taking this issue from the 2011 Council proposal, some new features could be added.

- Values and principles:
 - To make explicit a shared conviction that financial accountability must be comprehensive to be effective
 - To make explicit that both institutions act in a spirit of mutual cooperation and good faith so as to ensure better accountability before the European taxpayer/citizen
 - To make explicit a stronger commitment of both institutions to sounder financial management of their own administrative expenditure.
- To include neutral procedural clauses so as to prevent and resolve conflicts and reduce interinstitutional mistrust
 - Periodical meetings to exchange views on issues linked to the discharge procedure
 - Periodical meetings to evaluate the smooth functioning of the agreement.
- To place a lesser focus on transparency.
 - Transparency requirements are largely met under the current legal framework, which might also be enhanced, if need be, by adding new reports to the financial package the Commission must transmit (see above 3.2.3.).
 - At present, the Council has conceded in practice to forward its financial package separately to BUDG and CONT, which also receive it via the Commission. Unless Parliament has evidence of the contrary, it seems that a satisfactory level of transparency is achieved.
 - Separate management by the Council and the European Council would enhance the complexity of financial management, and this gathers concerns from the perspective of efficiency, as expressed by ECA staff during our interviews.
- To focus more on justification.
 - At present, the Council pays little attention to the dimension of financial accountability, as compared to the EP. Only a minor debate is held at the Council, usually after the EP has already held its own. Parliament has more to gain from reciprocity in this field.
 - If the Council rejects answering questionnaires from the EP: To obtain from Council an agreement that it will cooperate with the COM in answering EP's questions regarding the Council, among those addressed to it.
 - Determine with the Council the boundaries of an acceptable questionnaire. In exchange, Parliament might engage with the Council, in a spirit of sincere cooperation, to keep the discharge questionnaires as short as possible and within the boundaries of budgetary implementation matters. The use of the term 'link with the EU budget', as –largely- interpreted by the ECA, might be of help in this regard.
 - To engage with the Council, in a spirit of sincere cooperation, in order to reach a mutual understanding (including possibly some guiding principles) as to the

boundaries of the political accountability of budget implementation as compared to other policy areas where the EP lacks monitoring powers.

- The EP should not agree to keep its own appraisal of budget management restricted to what ECA considers worthy remarks. Such a case would diminish the added value of the political accountability carried out by the EP as compared to that of the financial accountability.

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ANNEX I. – RELEVANT LEGAL PROVISIONS

Article 13(2) TEU

“Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation”

Article 317 TFEU

Para 1 “The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management”.

Para 2 “The regulations shall lay down the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities. They shall also lay down the responsibilities and detailed rules for each institution concerning its part in effecting its own expenditure”.

Article 319.1 TFEU

“The European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of the implementation of the budget. To this end, the Council and the European Parliament in turn shall examine the accounts, the financial statement and the evaluation report referred to in Article 318, the annual report by the Court of Auditors together with the replies of the institutions under audit to the observations of the Court of Auditors, the statement of assurance referred to in Article 287(1), second subparagraph and any relevant special reports by the Court of Auditors.”

Article 319.2 TFEU

“Before giving a discharge to the Commission, or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the European Parliament may ask to hear the Commission give evidence with regard to the execution of expenditure or the operation of financial control systems. The Commission shall submit any necessary information to the European Parliament at the latter's request”.

Article 319.3 TFEU

para 1 “The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council.”

para 2 “At the request of the European Parliament or the Council, the Commission shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors”.

Article 324 TFEU

“Regular meetings between the Presidents of the European Parliament, the Council and the Commission shall be convened, on the initiative of the Commission, under the budgetary procedures referred to in this Title. The Presidents shall take all the necessary steps to promote consultation and the reconciliation of the positions of the institutions over which they preside in order to facilitate the implementation of this Title.”

Article 55 FR

“The Commission shall confer on the other institutions the requisite powers for the implementation of the sections of the budget relating to them.

Detailed arrangements may be agreed between the EEAS and the Commission in order to facilitate the implementation of Union Delegations' administrative appropriations. Such arrangements shall not contain any derogation from this Regulation or the delegated acts adopted pursuant to this Regulation”

Article 164(1) FR

“The European Parliament, upon a recommendation from the Council acting by qualified majority, shall, before 15 May of year n + 2 give a discharge to the Commission in respect of the implementation of the budget for year n.”

Rule 94 ROP : Other discharge procedures

The provisions governing the procedure for granting discharge to the Commission, in accordance with Article 319 of the Treaty on the Functioning of the European Union, in respect of the implementation of the budget, shall likewise apply to the procedure for granting discharge to:

- the President of the European Parliament in respect of the implementation of the budget of the European Parliament;*
- the persons responsible for the implementation of the budgets of other institutions and bodies of the European Union such as the Council, the Court of Justice of the European Union, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;*
- the Commission in respect of the implementation of the budget of the European Development Fund;*
- the bodies responsible for the budgetary management of legally independent entities which carry out Union tasks, insofar as their activities are subject to legal provisions requiring discharge by the European Parliament.*

ANNEX II. – CHRONOLOGY OF TREATY PROVISIONS RELATED TO DISCHARGE

a) Budget implementation

2009 Lisbon Treaty	1997 Amsterdam Treaty	1992 Maastricht Treaty	1957 Rome & 1951 Paris Treaties
317 paragraph 1 sentence 1 TFEU.- The [COM] shall implement the budget <u>in cooperation with the [MS]</u> , in accordance with [the FR], on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management.	Art. 275p1s1 n/a	205p1s1 The [COM] shall implement the budget, in accordance with the provisions of [the FR], on its own responsibility and within the limits of the appropriations, <u>having regard to the principles of sound financial management.</u>	<i>The ECSC did not contain provisions charging the High Authority with specific budget implementation tasks. Administrative spending was approved by the Commission of Presidents and each institution established its own budget</i> 205p1 EEC.- La [COM] exécute le budget, conformément aux dispositions du [FR], sous sa propre responsabilité et dans la limite des crédits alloués
317 para 1 sent 2 TFEU.- [MS] shall cooperate with the [COM] to ensure that the appropriations are used in accordance with the principles of sound financial management.	Art. 275p1s2 <u>“[MS] shall cooperate with the [COM] to ensure that the appropriations are used in accordance with the principles of sound financial management”</u>	n/a	n/a
317 para 2 sent 1 TFEU. <u>The [FR] shall lay down the control and audit obligations of the [MS] in the implementation of the budget and the resulting responsibilities.</u>	n/a	n/a	n/a
317 para 2 sent 2 TFEU.- [The FR] shall also lay down the <u>responsibilities and detailed rules for each institution</u> concerning its part in effecting its own expenditure.	n/a	205p2. The regulations [FR] shall lay down <u>detailed rules</u> for each institution concerning its part in effecting its own expenditure	205p2 EEC.- <u>Le [FR] prévoit les modalités particulières selon lesquelles chaque institution participe à l'exécution de ses dépenses propres</u>
317 para 3 TFEU.- Within the budget, the [COM] may, subject to the limits and conditions laid down in the [FR], transfer appropriations from one chapter to another or from one subdivision to another.	n/a	205p3. Within the budget, the [COM] may, subject to the limits and conditions laid down in the [FR], transfer appropriations from one chapter to another or from one subdivision to another.	205p3EEC.- À l'intérieur du Budget, la [COM] peut procéder, dans les limites et conditions fixées par le règlement [FR] à des virements de crédits, soit de chapitre à chapitre, soit de subdivision à subdivision.

b) Reporting obligations on budget implementation

2009 Lisbon	1992 Maastricht	1975 Treaty amending certain financial provisions	1957 Rome & 1951 Paris Treaties
<p>318p1 TFEU.- The [COM] shall submit annually to the [EP] and to the [CONS] the accounts of the preceding financial year relating to the implementation of the budget. The [COM] shall also forward to them a financial statement of the assets and liabilities of the Union.</p>	<p>205a.- The [COM] shall submit annually to the [CONS] and to the EP the accounts of the preceding financial year relating to the implementation of the budget. The [COM] shall also forward to them a financial statement of the assets and liabilities of the Community</p>	<p>78d ECSC.- <u>The High Authority shall submit annually to the [CONS] and to the Assembly the accounts of the preceding financial year relating to the implementation of the budget. The [COM] shall also forward to them a financial statement of the assets and liabilities of the Community</u></p> <p>205a.- <u>The [COM] shall submit annually to the [CONS] and to the Assembly the accounts of the preceding financial year relating to the implementation of the budget. The [COM] shall also forward to them a financial statement of the assets and liabilities of the Community.</u></p> <p>179a Euratom.- <u>The [COM] shall submit annually to the [CONS] and to the Assembly the accounts of the preceding financial year relating to the implementation of the budget. The [COM] shall also forward to them a financial statement of the assets and liabilities of the Community.</u></p>	<p>206p3 EEC.- La [COM] soumet chaque année au Conseil et à l'Assemblée les comptes de l'exercice écoulé afférents aux opérations du budget, accompagnés du rapport de la [COM] de contrôle. En outre, elle leur communique un bilan financier décrivant l'actif et le passif de la Communauté.</p>
<p>318p2 TFEU.- <u>The [COM] shall also submit to the [EP] and to the [CONS] an evaluation report on the Union's finances based on the results achieved, in particular in relation to the indications given by the [EP] and the [CONS] pursuant to Article 319.</u></p>	<p>n/a</p>	<p>n/a</p>	<p>n/a</p>

c) Discharge procedure

2009 Lisbon	1997 Amsterdam	1992 Maastricht	1975 Treaty amending certain financial provisions	1970 Traité du Luxembourg portant modification de certaines dispositions budgétaires	1957 Rome & 1951 Paris Treaties
<p>319.1 TFEU.- The [EP], acting on a recommendation from the [CONS], shall give a discharge to the [COM] in respect of the implementation of the budget. To this end, the [CONS] and the [EP] in turn shall examine the accounts, the financial statement and the evaluation report referred to in Article 318, the annual report by the [ECA] together with the replies of the institutions under audit to the observations of the [ECA], the statement of assurance referred to in Article 287(1), second subparagraph and any relevant special reports by the [ECA].</p>	<p>The [EP], acting on a recommendation from the [CONS] which shall act by a qualified majority, shall give a discharge to the [COM] in respect of the implementation of the budget. To this end, the [CONS] and the [EP] in turn shall examine the accounts and the financial statement referred to in Article 205a, the annual report by the [ECA] together with the replies of the institutions under audit to the observations of the [ECA], the statement of assurance referred to in Article 1 8 8c(1), second subparagraph and any relevant special reports by the [ECA]</p>	<p>206.1.- The [EP], acting on a recommendation from the [CONS] which shall act by a qualified majority, shall give a discharge to the [COM] in respect of the implementation of the budget. To this end, the [CONS] and the [EP] in turn shall examine the accounts and the financial statement referred to in Article 205a, the annual report by the [ECA] together with the replies of the institutions under audit to the observations of the [ECA]</p>	<p>78g ECSC.- The Assembly, acting on a recommendation from the [CONS] which shall act by a qualified majority, shall give a discharge to the High Authority in respect of the implementation of the administrative budget. To this end, the [CONS] and the Assembly in turn shall examine the accounts and the financial statement referred to in art. 78d, and the annual report by the [ECA] together with the replies of the institutions under audit to the observations of the [ECA].</p> <p>206b EEC The Assembly, acting on a recommendation from the [CONS] which shall act by a qualified majority, shall give a discharge to the [COM] in respect of the implementation of the administrative budget. To this end, the [CONS] and the Assembly in turn shall examine the accounts and the financial statement referred to in art. 78d, and the annual report by the [ECA] together with the replies of the institutions under audit to the observations of the [ECA].</p> <p>180b Euratom (copies EEC)</p>	<p>78.5 in fine.ECSC- “Le [CONS] et l’Assemblée donnent décharge à la Haute Autorité sur l’exécution du budget administrative. À cet effet, le rapport de la [COM] de contrôle est examine successivement par le [CONS], qui statue à la majorité qualifiée, et par l’Assemblée. La décharge n’est donnée à la Haute Autorité que lorsque le [CONS] et l’Assemblée ont statue.”</p> <p>206 EEC- “Le Conseil et l’Assemblée donnent décharge à la Haute Autorité sur l’exécution du budget administrative. À cet effet, le rapport de la commission de contrôle est examine successivement par le [CONS], qui statue à la majorité qualifiée, et par l’Assemblée. La décharge n’est donnée à la Haute Autorité que lorsque le [CONS] et l’Assemblée ont statue.”</p>	<p><i>The ECSC Treaty did not foresee a formal discharge procedure. The ‘Commissaire aux comptes’ presented a report (on regularity and financial management by the various institutions) to a Commission composed by the Presidents of the High Authority, the Assembly, and the [CONS], the President of the Court of Justice acting as chair</i></p> <p>78.6p2 ECSC.- Le commissaire aux comptes est chargé de faire annuellement un rapport sur la régularité des opérations comptables et de la gestion financière des différentes institutions. Il dresse ce rapport six mois au plus tard après la fin de l’exercice auquel le compte se rapporte et l’adresse à la Commission des Presidents.</p> <p>78.6p3 ECSC.- La Haute Autorité communique ce rapport à l’Assemblée en même temps que [le rapport general sur l’activité de la Communauté et sur ses dépenses administratives, art.17 ECSC]</p> <p>206p4 EEC.- Le Conseil, statuant à la majorité qualifiée, donne décharge à la [COM] sur l’exécution du budget. Il communique sa decision à l’Assemblée.</p>

d) **Discharge procedure: hearings and follow-up reporting obligations**

2009 Lisbon	1992 Maastricht
<p>319.2 TFEU.- Before giving a discharge to the [COM], or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the [EP] may ask to hear the [COM] give evidence with regard to the execution of expenditure or the operation of financial control systems. The [COM] shall submit any necessary information to the [EP] at the latter's request.</p>	<p><u>206.2. Before giving a discharge to the [COM], or for any other purpose in connection with the exercise of its powers over the implementation of the budget, the [EP] may ask to hear the [COM] give evidence with regard to the execution of expenditure or the operation of financial control systems. The [COM] shall submit any necessary information to the [EP] at the latter's request.</u></p>
<p>319.3 TFEU.- The [COM] shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the [EP] relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the [CONS].</p>	<p><u>206.3p1. The [COM] shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the [EP] relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the [CONS].</u></p>
<p>319.3p2 TFEU.- At the request of the [EP] or the [CONS], the [COM] shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.</p>	<p><u>206.3p2.- At the request of the [EP] or the [CONS], the [COM] shall report on the measures taken in the light of these observations and comments and in particular on the instructions given to the departments which are responsible for the implementation of the budget. These reports shall also be forwarded to the Court of Auditors.</u></p>

e) Duty of interinstitutional sincere cooperation in budget-related matters

2009 Lisbon	2001 Nice	1997 Amsterdam	1992 Maastricht	1987 SEA	1975 Treaty amending certain financial provisions	1970 Traité du Luxembourg portant modification de certaines dispositions budgétaires	1957 Rome & 1951 Paris Treaties
324 TFEU.- <u>Regular meetings between the Presidents of the [EP], the [CONS] and the [COM] shall be convened, on the initiative of the [COM], under the budgetary procedures referred to in this Title. The Presidents shall take all the necessary steps to promote consultation and the reconciliation of the positions of the institutions over which they preside in order to facilitate the implementation of this Title.</u>	n/a	n/a	n/a	n/a	n/a	n/a	n/a

f) Principle of administrative autonomy in budget-related matters (Legal capacity of the Union)

2009 Lisbon	1992 Maastricht	1957 Rome & 1951 Paris Treaties
335 TFEU.- In each of the [MS], the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the [COM]. <u>However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.</u>	211 EC In each of the [MS], the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the [COM].	76 ECSC.- La Communauté jouit, sur les territoires des Etats membres, des immunités et privilèges nécessaires pour remplir sa mission, dans les conditions définies à un Protocole annexe 211 EEC.- Dans chacun des États membres, la Communauté possède la capacité juridique la plus large reconnue aux personnes morales par les législations nationales; elle peut notamment acquérir ou aliéner des biens immobiliers et mobiliers et ester en justice. <u>A cet effet, elle est représentée par la Commission</u>

ANNEX III. – SUMMARY OF PROPOSALS FOR A REVISED LEGAL FRAMEWORK

Proposals to remove text are crossed out, while proposals to add text are included in italics.

ARTICLE 48 TEU

Article 48(3) para 1 TEU “...The European Central Bank shall ~~also~~ be consulted in the case of institutional changes in the monetary area. *The European Court of Auditors shall also be heard before introducing amendments in the treaty provisions relating to the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts, the checks on the responsibility of financial actors, and the protection of the financial interests of the Union*” [N.B. these are cases in which the ECA intervenes as consultative organ in the legislative procedure].

Article 48(6) para 1 TEU “The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union, *or the provisions of Part Six of that Treaty relating to the budget implementation and control of those areas*”.

ARTICLE 317 TFEU

To include a paragraph 3 in this article, along the following lines:

“By way of derogation from the first and second paragraphs of this provision, European Union institutions and bodies whose administrative expenditure is enshrined in a separate sections of the budget are conferred the requisite powers for the implementation of their respective budget allocations, in accordance with the provisions of the regulations made pursuant to Article 322, and having regard to the principles of sound management”.

ARTICLE 319 TFEU

Considering the proposed change to article 317 TFEU, article 319 TFEU should be updated accordingly. However, this requires that the respective position of the Council and Parliament are agreed upon beforehand.

ARTICLE 55 FR

Article 55 FR “~~The Commission shall confer on the other institutions~~ *Institutions other than the Commission are conferred* the requisite powers for the implementation of the sections of the budget relating to them”.

REMOVING REFERENCES TO “DISCHARGE AUTHORITY” IN THE LEGAL FRAMEWORK

Article 67(3) para 2 FR: “The Heads of Union Delegations shall fully cooperate with ~~institutions involved in the discharge procedure~~ *the European Parliament and the Council...*” (with the European Parliament and the Council)

Article 162(4) FR: “The Court of Auditors shall transmit to ~~the authorities responsible for giving discharge~~ *the European Parliament* and to the other institutions,”

Article 167 FR: “The EEAS shall fully cooperate with ~~the institutions involved in the discharge procedure~~ *the European Parliament and the Council* and provide, as appropriate, any additional necessary information, including through attendance at meetings of the relevant bodies.”

Article 208(2) FR: “The bodies referred to in paragraph 1 shall fully cooperate with ~~the institutions involved in the discharge procedure~~ *the European Parliament and the Council*”

This study synthesises the main arguments behind the disagreement between the Parliament and the Council over the issue of whether the discharge procedure allows the Parliament to hold the Council to account concerning the management of its own administrative budget. It then examines the discharge procedure as an accountability mechanism and its impact on the EU legitimacy. It concludes that significant improvement is needed, regardless of which exit to the conflict is chosen. Four scenarios to break the deadlock are put forward, assessing their respective advantages and shortcomings.

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