The European Parliament's Right to Grant Discharge to the Council

Documentation of a Workshop held on 27 September 2012

NOTE
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Abstract

This document contains the presentations by the three experts invited and the subsequent discussion with Members of the Committee on Budgetary Control and the representative of the European Parliament's Legal Service, as taken from the recording of the English interpretation.
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EXECUTIVE SUMMARY

The European Parliament’s workshop on the right to decide on the Council’s discharge has initiated a fruitful debate on questions of high democratic significance within the budget procedure. The discharge procedure is a central means for Parliaments to oversee budget implementation by the executive. It thus attributes accountability for the exercise of budgetary authority. While important controversies remain after the workshop, it has yielded agreement on some points. It remains for the political process to choose the way to move on. Beyond the central controversy the workshop may have shown options, however, for dealing with more precise problems and thus further understanding in the day-to-day-business of the two institutions.

In their written statements the experts agree to a large extent on the European Parliament’s right to information. Parliamentarians of different political groups asserted in the workshop that the right to information stands at the very core of an effective *ex post* budget control. It might thus be a way forward to find an agreement with the Council on this issue. All experts agree on the existence of a far-reaching right of the European Parliament to information. Both the Parliament and the Council have the right to receive certain specified documents according to Article 319 (1) TFEU. This has not lead to any controversies in the past. More interesting is the wider right to information under Article 319 (2) TFEU which exclusively authorizes the European Parliament. According to this provision, the European Parliament may request any information necessary for the exercise of its budget powers. The limits to this right are scarce. The information requested merely has to have a link to the budget procedure. Professor Matthias Rossi rightly pointed out that the right to information applies directly only vis-à-vis the Commission. However, this does not limit the right to information to the direct implementation of the budget by the Commission. Instead the other institutions, in particular the Council, have to cooperate with the Commission. According to Carlino Antpöhler, the Council is legally obliged to provide the requested information to the Commission by the duty of sincere cooperation. Whether there is an obligation of the Council to transmit the information directly to the European Parliament is controversial. As the indirect route of receiving information is, however, sufficiently secured, the importance of this disputed point should not be overrated.

As many of the past conflicts have centred on the European Parliament’s dissatisfaction of the Council’s conduct in providing information, the experts’ agreement on this issue might lend itself to further action. While the experts were very careful in guessing the chances of success of judicial action, there might be different routes to improve the relationship between the institutions in this regard and thus avoid future conflicts. Professor Florence Chaltiel has pointed out numerous possibilities of action beyond the judicial venue. On the basis of the workshop’s results the institutions might conduct further negotiations on the question of providing information. If that does not lead to satisfying results, the political process will have to determine whether the benefits of judicial action outweigh the risks.

While the workshop thus may have shown a pragmatic way out in focusing on the right to information of the European Parliament, the more fundamental controversy remains. The experts did not agree on whether the European Parliament may decide on the Council’s discharge. Professor Rossi denies the European Parliament this right. The two other experts as well as the European Parliament’s Legal Service favour granting the right to the European Parliament.
Professor Rossi argues that the Lisbon Treaty is sufficiently clear on the powers granted within the budget procedure. Accordingly, the Council is a responsible discharge authority and not itself subject to discharge. The only institution subject to discharge is the Commission. This division of powers cannot be altered by secondary law, particularly not by the Financial Regulation. The conferral of power to implement parts of the budget to other actors does not change the Commission’s sole responsibility. According to Professor Rossi, this is not only the situation as foreseen by current law, but follows an intrinsic logic which is also convincing as a policy decision. It is required by the division of powers. Establishment and implementation of the budget are sufficiently distinguished in the current legal framework. Furthermore, a right of the European Parliament to discharge the Council would violate the institutional balance and be in disharmony with the duty of sincere cooperation. This set-up also supports the stability of the Union’s political system. Professor Rossi concludes with the finding that the European Parliament’s refusal to grant discharge might be politically significant but has no legal consequences.

While Professor Chaltiel and Mr. Antpöhler as well as the Legal Service of the European Parliament converge in their opposition against Professor Rossi, their approaches differ substantially in their details. Professor Chaltiel focuses mainly on an abstract notion of European democracy. As the European Parliament is the only directly elected institution, the entire expenditure of the Union should be accountable to the Parliament. Limiting the European Parliament’s control to the Commission would be particularly worrying as large parts of the budget are implemented by actors other than the Commission. These considerations connected to European democracy are supported by developments within the European Union. The Lisbon Treaty for the first time encompasses a part on European democracy which, in Professor Chaltiel’s view, focuses on the European Parliament. This transformation needs to be taken into account when deciding the question at hand. In Professor Chaltiel’s view the European Parliament’s right is supported by custom and considerations of institutional balance. Both points, however, were challenged by the other experts. Furthermore, according to Professor Chaltiel the Council’s current practice shows that control is needed. The Court of Auditor’s criticism is evidence of the detrimental effects of insufficient control.

Mr. Antpöhler provided a detailed examination of the provision in question. According to him the norm leaves ample room for a separate discharge decision of the Parliament vis-à-vis the Council. While the provision originally might have been understood more narrowly, this historic interpretation fails to convince in contemporary circumstances. The institutional context has changed so immensely that a static interpretation seems not viable anymore. Mr. Antpöhler employs a teleological interpretation to overcome the provision’s ambiguity. According to the democratic concept of the Lisbon Treaty, exercise of authority in the European Union rests on two legitimizing strands, the European Parliament and national democratic processes. The latter is established by the accountability of national governments’ actions in the Council to their Parliaments. Neither strand of legitimacy is sufficiently represented in the ex post control of the Council’s budget at the moment. The national Parliaments play no role in the process of budget control. Furthermore, the Commission does not examine the Council’s expenditure which would establish an indirect route of accountability to the European Parliament. Similar to Professor Chaltiel, Mr. Antpöhler hence is of the opinion that strong reasons of European democracy favour a separate right of the European Parliament to grant discharge to the Council. According to Mr. Antpöhler, the most important argument militating against such a parliamentary right is the Council’s independence and thus reasons of institutional balance: the Council’s independence as a co-legislator needs to be protected. In line with the ECJ’s case law, Mr. Antpöhler adopts a narrow reading of the institutional balance, and
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Accordingly, this balance would not be violated. Teleological arguments hence tilt the balance in favour of an open interpretation according to which a separate discharge decision by Parliament vis-à-vis the Council is allowed.

The approach taken by the Legal Service of the European Parliament represented by its Director Ricardo Passos is similar. Mr. Passos also is of the opinion that a literal approach to Article 319 TFEU as brought forward by the Council is too narrow. This would, firstly, be in contradiction to European standards of representative democracy, transparency and good governance. Secondly, if the provision is read in conjunction with other Articles, it is more convincing to argue that primary law is more ambiguous than Professor Rossi has brought forward. Lastly, Mr. Passos is of the opinion that the Financial Regulation provides for a sound legal basis for the European Parliament’s practice. Mr Passos also pointed out that no other institution has disputed the European Parliament’s right; to the contrary: the Commission particularly expressed its support for a parliamentary right to decide on the Council’s discharge.

While the workshop thus did not manage to reconcile the differing positions on the fundamental question, it has provided some insights into how the conflict might be resolved in the future, and it has offered some standards against which current and future institutional practice might be judged. As the majority of the experts is of the opinion that parliamentary practice fails to convince as far as reference to the institutional balance is concerned, this is a further point particularly worth pointing out.

The European Parliament in its institutional practice constantly refers to the administrative autonomy as expressed in Article 335 TFEU to legitimize its decision on the Council’s discharge. The administrative autonomy expressed in Article 335 TFEU does not concern the field of budget discharge and is thus not directly applicable. It is, however, an expression of the more general principle of institutional balance. Professor Chaltiel is in favour of a reading of institutional balance which supports the Parliament’s right. The two other experts, however, do not share this opinion. While Mr. Antpöhler finds it more plausible to argue for a right of the European Parliament in general, he joins Professor Rossi in refusing the institutional balance as a basis of this right. The TFEU foresees a discharge decision by the European Parliament vis-à-vis the Commission. The experts agree that this discharge decision covers the entire budget and not only those parts implemented by the Commission directly. Discharge granted to the Council would merely complement this decision. As primary law provides for a discharge of the Commission on those parts which were implemented by other institutions, this decision cannot violate the other institutions’ autonomy. Primary law hence foresees restrictions to institutional autonomy. According to the majority of experts, it is thus not convincing to base the European Parliament’s right to discharge on the Council’s institutional autonomy. Furthermore, it might be questioned whether the European Parliament’s decision on discharge should be addressed to the Council’s Secretary General instead of the Council as such.

Additionally, the workshop gave insights into the relationship between the two institutions which might be of interest for future cooperation. It has been argued that Council and Parliament should act on an equal footing in the budget procedure. While it certainly is true that both institutions comprise the European Union’s budget authority, the Treaties emphasize the differences between the Council and the European Parliament. The Council is limited to a recommendation within the discharge procedure. Additionally, only the European Parliament has the very broad right to information under Article 319 (2) TFEU. It would thus be misleading to generally speak of a reciprocal relationship.
The workshop convened by the European Parliament’s Committee for Budgetary Control has given room to a fruitful exchange between practitioners and scholars. I hope that this brochure captures this debate and initiates further exchange. While the majority of experts finds the Council’s current conduct deplorable, the workshop might have shown a pragmatic way out focusing on the right to information. If the costs of further conflict are considered too high, both institutions might come to a joint solution by focusing on the precise right to information. This would, however, also require a change in the Council’s current conduct. The refusal to forward certain documents seems to be in violation of the Treaties. Both institutions should be urged to find a solution in a spirit of mutual cooperation. For the case that such a compromise should fail, the workshop has shown viable alternatives to take further steps in promoting European democracy.
Proceedings of the Workshop on the Discharge of the Council's Budget

Held on 27 September 2012
WORKSHOP PROGRAMME

Welcome by Michael Theurer, Chair
Chairman of Committee on Budgetary Control

Introduction by Inés Ayala Sender
Rapporteur for the 2010 Council Discharge

Presentations by 3 renowned academic experts:

Professor Matthias Rossi (Augsburg/Germany)

Professor Florence Chaltiel (Grenoble/France)

Mr Carlino Antpöhler (Heidelberg/Germany)

followed by Q&A and discussion

ALPHABETICAL LIST OF SPEAKERS

ANDREASEN, Marta, (MEP, EFD, United Kingdom), Member of the CONT Committee
ANTPÖHLER, Carlino, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
AYALA SENDER, Inés, (MEP, S&D, Spain), Rapporteur and Member of the CONT Committee
CHALTIEL, Florence, Professor of Law at the Institute for Political Studies, Grenoble, France
GEIER, Jens (MEP, S&D, Germany), Member of the CONT Committee
GRÄSSLLE, Inge (MEP, EPP, Germany), Member of the CONT Committee
MULDER, Jan, (MEP, ALDE, The Netherlands), Member of the CONT Committee
PASSOS, Ricardo, Director of Legal Affairs, EP secretariat
ROSSI, Matthias, Professor at the University of Augsburg, Germany
SØNDERGAARD, Søren Bo, (MEP, GUE/NGL, Denmark), Member of the CONT Committee
THEURER, Michael, (MEP, ALDE, Germany), Chairman of the CONT Committee
Now to the keynote item of our meeting today, discharge of the Council’s budget. We are very grateful to the Parliament’s services who have invited high level experts to today’s meeting.

Last year, the Parliament did not grant Council’s discharge and the Budgetary Control Committee has decided again this year to refuse it. We are thus discussing this question of discharge of the Council’s budget as Parliament interpretation of Article 319 differs from that of the Council.

The European Parliament, being the only directly elected institution, is an institution to which all other European institutions are accountable. This is widely accepted, except in the case of the Council of Ministers. Unfortunately, the Council of Ministers continues to be of the opinion that the European Parliament is only permitted to grant discharge to the Commission. On the basis of that legal position, Council does not answer Parliament’s questions; it does not transmit documents to Parliament and refuses to take part in the Committee’s sittings. This is a major curtailment of the European Parliament’s powers and prerogatives because it is not able to analyse Council’s spending. This is an unacceptable situation to Parliament, which is detrimental to both institutions.

With a view to finding a solution, the Committee on Budgetary Control has decided to invite academic experts to make presentations on the subject of discharge vis-à-vis the Council’s budget. I am thus very happy to be able to welcome experts to this meeting. May I start by welcoming Mr Carlino Antpöhler from the Max Planck Institute for Comparative Public Law and International Law in Heidelberg; I would also like to welcome Professor Florence Chaltiel Terral from Grenoble and Professor Doctor Matthias Rossi from Augsburg. Welcome and we look forward to hearing your views about this interesting legal issue!

Ricardo Passos is here to represent the Parliament’s Legal Service. Thank you very much, Mr Passos, for being here. The Legal Service of Council has, unfortunately, not accepted our invitation.

Our questions to the experts are:

- Does the European Parliament have a right to grant discharge to Council?
- Does the European Parliament, through its Budgetary Control Committee, have a right to obtain documents which are necessary to grant discharge and is Council officially required to transmit the documents concerned?
- Is Council required to take part in meetings of the Budgetary Control Committee as part of the discharge procedure?
- Under Article 319 of the Treaty, Council gives a recommendation to Parliament on the discharge where the European Parliament grants discharge. Do both institutions need the same basis in terms of appropriate documents to make their decisions?
- Refusal to grant discharge to Council for the 2009 financial year has not had legal or political consequences for Parliament. What other possibilities should the Parliament consider in future discharge procedures?

As you can see there is quite an array of questions that we have transmitted to the experts. Before I give the floor to our Rapporteur, Ms Ayala Sender, I would like to thank all of those who have taken part in the preparations for this seminar and who will do the follow-up work afterwards, and to welcome all visitors, journalists and others who have come to attend our seminar.

Today’s Workshop will be a major contribution to the work of the European institutions in the future because the basic principle is always that directly elected representatives must exercise scrutiny over the spending of all public expenditure. That principle is derived from the idea of no
taxation without representation. Democratic scrutiny on behalf of taxpayers is our job and it is what we are doing here today. I now give the floor to Ms Ayala Sender.

*Ines Ayala Sender, Rapporteur:*

Thank you, Chair.

I would like to start by saying that the case is one that has arisen as a result of a certain institutional immaturity. It is something we have overcome in previous situations and hopefully we can reach a constructive solution. We have the gentlemen’s agreement from the 1970s regarding discharge, but this is now an obsolete tool, as we have seen. In fact in 2009, under the Spanish Presidency, the Council accepted that the gentlemen’s agreement was a tool which was no longer useful; it was no longer up-to-date given the way in which the institutions have matured and Parliament and Council have evolved in particular. It is a point that I wanted to underline and think we need to bear in mind while continuing.

We have to remember that this is basically a political, institutional issue, rather than an issue of budgetary control and scrutiny. It is true that the Council expenditure is not entirely part of the general budget so it is a battle which we are fighting alongside some of the other battles that the Committee has. It is a very important issue when it comes to relations between the institutions. It is very important to be able to move forward and solve this problem and I do not think silence from the other side of the table is really going to make our life any easier. This seminar is just one more tool that Parliament can use in its effort trying to convince the other institution to embrace the same level of maturity that we have and to accept the fact that the entire European budget has to be scrutinised in order to be accountable to a political, democratic institution like the Parliament. We can no longer look for loopholes and other ways out.

So with the 2010 budget we have a rather complex situation; we granted discharge for the previous budget. We are trying to work to see how we can move forward now. It is a very important part of this Committee’s mandate but, in the past the Parliament has not given sufficient attention to it. Given the current situation, the President of the Parliament has accepted the fact that this Committee has to do its work to grant discharge. We have to work to grant the annual discharge but also in general find some kind of formula, some kind of working method with the Council. This is something that Mr Theurer and other Members of this Committee have clearly pointed out. The Council can restate its position, but we need to find new ways of working if we are going to ensure that the political battle is fought along political lines.

One idea that has come out from the studies that have been carried out is that, once discharge has been granted, the Council could actually take the Parliament to court and that would lead to a total block. The Council would then not come to Parliament to talk to us and to be involved in the discharge procedure; this is something that is not beneficial for either party. Hopefully the Parliament’s Legal Services can clarify some of the legal issues on this and that would help us move forward. Given that the Treaty says that discharge is granted to the Commission - they were already given the go-ahead on the administrative expenditure of the Council. The Council interpreted the granting of discharge on the Commission’s budget as approving of the Council’s as well. This legal opinion is something that we do not accept. Council’s view is, however, shared by some colleagues. Hopefully, in this seminar we will be able to discuss both views and the risks involved in them.

It is true that colleagues have expressed this opinion vis-à-vis the Council in the past. The Council, however, might still not accept it with the consequence that only discharge to the Commission is not disputed. This way to proceed involves certain risks that need to be looked at. The Commission has warned us of the risks, on previous occasions, of not negotiating and not reaching an
agreement with the Council. In other areas of the budget we are trying to find new ways of procedure as well, for instance on national expenditure.

A third possibility would be to try to reach an agreement through some kind of memorandum, so we could have the basis of an inter-institutional agreement where we try to identify the different roles that each institution should play. If the Council accepts that the Treaty sets out different institutional roles in discharge, we could go forward with an agreement. But the Council will have to show this in concrete terms, with some kind of agreement that we can use in the future. A discussion on this would be helpful as well.

I only received this document this morning so I have not had any of the experts’ reactions to this idea of a memorandum or some kind of basis for a future agreement to move forward. The discussion, the struggle between the Parliament and the Council on the budget, is part of a broader struggle on the overall budget for 2014-2020. Our battle is somewhat collateral damage to that. We should not lose hope; the vote will be held in the Committee, and I think that it shows the conviction of the Parliament and particularly the Budget Committee’s wish to move forward and to make progress in the inter-institutional relationship, particularly with regard to discharge.

Parliament’s permanent decisive role has to be recognised; the Council should come and talk to us, it should be here to try to establish some kind of working method. We do not just want to send them a document and see what they say; we want to work properly together to try to resolve this problem of institutional immaturity on its part. I know that there are a lot of political problems between the institutions, which are part of the immature relationship. This is something that we have to take seriously, particularly given the fact that the Council has not accepted our invitation to come here today. It is in times of crisis that there is a lot of mistrust towards politicians and the Commission needs to accept a more responsible position; hopefully, this seminar will help us to overcome this mistrust somewhat. I think that the Council actually mistrusts the Parliament to an extent, and that some attitudes in Parliament have contributed to this. We need to look at ourselves as well, that would help us too, in the eyes of our citizens. This is a small inter-institutional battle, but it is important to lay the correct foundation to move forward. It is part of the broader battle that we are facing at the moment which is that of the 2014-2020 budgets and it is going to be important, for the future of the Union, in overcoming mistrust and in political negotiations in the future.

However, I am optimistic. We can, and must, make progress and I very much welcome this seminar today. Hopefully, our experts will be able to help us, as you said Chair, to improve the relationships and to clarify what tools we can use to try to reach a solution to the problem which citizens are experiencing at the moment. Thank you.

Michael Theurer, Chair:

Thank you very much Ms Ayala Sender for that very committed introduction. We noted that the Rapporteur has invested a great deal of emotion and effort in this. She spoke of a battlefield on several occasions, well, fortunately enough, in the European Union the battlefields of the past have been replaced by an institutional framework within which we use the political epees and sabres and where, of course, we have the legal niceties to take into consideration, which is why I would like to pass the floor to our guests. Maybe you can come up to the top, Professor Rossi, we would like to hear what you have to say.
Matthias Rossi:

Chairman, Ladies and Gentlemen, I would like to thank you, first of all, for giving me the honour of addressing you here today. I feel that I am fairly well-versed not only in Union and European law, but also budgetary law, so I have a great deal of respect for this Committee. My respect does not extend so far that my academic independence could be called into question. I am very pleased that you have given me the floor here today because, if you read my thesis, you will know that your political commitment is not necessarily underpinned by the primary law of the European Union. Of course, the two subsequent colleagues will put forward their positions but when it comes to the law, to my mind, it seems more reasonable to support the side of the Council.

Let me be clear from the start that I am speaking as a legal expert on the basis of law, of valid law, first and foremost, so I am talking about the question as to whether there is a right of discharge vis-à-vis the Council, rather than whether there is a political need for Parliament to be granted the right to give discharge. Of course there could be a change to primary law subsequently, but it is something that lawyers and legal experts tend to do within the existing law: I am thus more working as a brake rather than changing the given architecture. That should be sufficient an introduction.

Moving on to today - by way of her introductory remarks, the Rapporteur already pointed to the provision. Article 319 of the TFEU says quite simply "On a recommendation of the Council the European Parliament grants discharge to the Commission on the implementation of the budget". This rule is so clear and unequivocal that the issues that you have raised here, perhaps, do not even need to be looked into. I was surprised, in my research, to find that nobody else had researched on the issue as to whether the Council ought to grant discharge to the Parliament. It has not been dealt with because the answer is a clear and unequivocal "no". The Commission is the only one who has to submit itself to discharge. This regulatory framework can be explained by regard to the functions of the institutions in budgetary proceedings. I do not need to go into the history, which you probably know better than I. The situation is that until 1970 it was the Council who granted discharge. Then, for seven years, it was the Council and Parliament who did this together. Since 1977, we have the rule that still is valid today, which is that Council gives a recommendation and Parliament provides a definitive solution or decision. We can discuss the binding discharge decision to other institutions if you like and on the Commission per se later, but the core of the issue is that it is the Commission who has to be granted discharge. That makes sense, as we have to take into account the interplay with Article 317 of the TFEU, according to which the Commission has a responsibility for the implementation and the execution of the budget. Well, who should be granted discharge if it is not the body being responsible for implementing the budget?

You may have read of different opinions in preparatory documents and you will hear of them during the course of this Workshop, I, however, think it is very clear in the law. Other participants will bring forward the argument that while the Commission has to be granted discharge, this does not exclude other discharge decisions. I do not find this very convincing because we could also raise the question as to whether the Member States, for example, should be granted discharge or other institutions - as it is your practice to grant discharge to other institutions - or a certain person needs to be granted discharge. In other words, to say that the Council is not excluded from being granted discharge is circumlocutory and does not apply in this case.

We have to take note very clearly of the fact that the Council and the Parliament together form the two strands of the budgetary authority. At the end of the day, there is a political fight over what is going to happen with the budget for 2014-2020 but they are the two arms of the budgetary authority. We have to recognise that in the discharge procedure, the Parliament has slightly more power because it is entitled to definitively decide on the discharge. It cannot be deduced from that, however, that the Council has changed sides from being responsible for granting discharge to be
responsible for having discharge granted to them: It would make no sense from the provision we have before us if those granting discharge and receiving discharge are the same person, the procedure as such has no effect. To be honest, I would say to this Committee that I do not think it is particularly sensible that it provides discharge to itself, the Parliament. I am waiting for the day when the Parliament refuses to grant discharge to itself, maybe because Members travel to do things that do not fall within their scope of work. We will see what happens. If Parliament measured the other institutions’ actions more thoroughly than its own, it would really be an abuse of power. If we are looking at this through a legal prism, the Parliament is bound by the same standards and norms. As legal experts, we have the European Treaties, which are comparable to a constitution and you are bound by that constitution and its provisions. The Member States have a degree of leeway but you cannot derogate from the provisions and they cannot in particular be derogated through practice regardless of how long this has been going on. If you have done so in 2002, 2007, 2009, 2012, your decision on discharge does not change valid law.

In international law, and international public law, there is a possibility of emerging law through a long and binding practice that becomes customary, but that is not something which is applicable to the European Union. Primary law sets out the rules from which you cannot derogate. As a side note, I do not know how the new Financial Regulation deals with transparency. I have not managed to get access to the new draft of the Financial Regulation. Unfortunately, I could not find it. I really spent hours looking for it. I would be extremely grateful if you could forward a copy to me (comments off-microphone by MEP Ms Grässle). Ok, I will ask my staff to get in contact with you, Ms Grässle. But the text of the draft is something I have not received and, to be honest, I do not know how the Financial Regulation deals with this particular topic.

A further issue - and I do not think I am going to make myself any friends here in saying this - but, to my mind, the European Commission is responsible for the execution of the budget in its entirety as set out Article 317 of the TFEU, including that part of the budget which is implemented by the Member States, which is the lion’s share by far. Maybe no one has thought of it yet, perhaps I can put forward the idea. If Lithuania or Germany did not exercise the budget appropriately, you might begin refusing discharge even to a country. No, the Commission remains the one who is the addressee of the discharge. They are responsible and liable, if the budget is not executed and implemented correctly in a Member State. This is where I pick up on what Ms Ayala Sender said by way of a proposal to the Council, which would be valid for the other institutions as well. If any institution fails to implement or execute the budget correctly, it is the Commission who is responsible, not the individual institution or agency concerned. So you can see, in which direction I am moving and that would be valid for the Council as well.

If you believe that discharge to Council should be refused, you have to turn to the Commission as the responsible institution, with all the ramifications attached to it. Coming from a German background, a comparison might make sense which only at first seems shocking. I am talking about different federal structures, which is not so unusual. Can one Chamber of the German Parliament grant discharge to the other, or what about the national parliament in Austria, can it grant or refuse discharge? No, it is the Government that is always responsible for the implementation of the budget, regardless of whether the mistakes fall within their own area of activity or that of other bodies or institutions. Germany or Austria as quite clearly federal countries provide an excellent example that can be applied by analogy to the Member States. Obviously, the Bundestag could not refuse discharge to Bavaria, Mecklenburg-Vorpommern, or Berlin, if the budget was not implemented properly. There is no great difference there with the federal budget because the administrative tasks are devolved unto the states. The regional states implement the budget but the central government remains ultimately responsible. You will probably not agree with the insights, which I draw for the European Parliament, the rest of the world and the European institutions. However, at the European level, the Commission is the only institution responsible for the budget implementation. They are accountable to you but also, internally, they have to review
the mistakes in the implementation of the budget in the Commission itself and in other institutions to draw the line between implementation and responsibility. Article 319 of the TFEU does set out an instrument and in my view - I cannot speak for all legal experts, on the contrary, others may share a different opinion, especially those who are to follow - we have different paragraphs. There is paragraph 1, which refers to the discharge itself and the details, which need to be looked at. You pass comments or remarks, which need to be picked up on by the Commission regardless of who they are addressed to. Furthermore, they have had recommendations in the past and are thus obliged to explain what action has been taken. It needs to be dealt with whether there are structural problems or they tend to be mistakes or errors of a one-off nature. That is a sufficient structure to do justice to the differentiation between implementation and responsibility there.

When it comes to inter-institutional balance, from an outside perspective - you will have to excuse me - I do not see that the European Parliament alone stands for the democratic legitimacy of the European Union. In the Treaty of European Union, it is made very clear and explicit that we have two pillars there, so you cannot ignore the Council as a non-democratic institution. The institutional architecture is not of that nature, the institutional architecture shows that, within it, the set up is that there is democratic legitimacy. I do not know, if Ms Ayala Sender was referring to this when speaking about the gentlemen’s agreement. I do not know the agreement of 1970, but when the European Parliament dealt with the discharge for the first time, they said, well hang on, we are not interested in the implementation of our own budget but we are looking at the Council budget and vice versa. If you look at comparative law and the practice in federal countries - I apologise for taking Germany all the time but it is very federal - we can look at Austria or outside the EU, the USA for example, where it is clear cut that you do not grant yourself discharge. To summarise - I know that I have not made any friends here - I do see a difference between the degree to which discharge must be granted and which information you require for doing your job and on the latter I am on your side. A discharge decision of such a comprehensive nature must be done on an informed basis, so the information that you believe necessary to fulfil your duties must be provided. That can be derived from Article 319, which sets out very clear and wide ranging powers for insight and access to documents. Regardless of your practice with different institutions, regardless of the fact that your practice might be violating the Treaties, you do have the right to get information from the Commission.

Once again we see the difference between actions within the EU, with the Commission and with other institutions. The Commission is your sole counterpart. You have to ask them for information. They have to provide that information. Whether the Council’s recommendation on discharge and your subsequent decision have to be based on the same information and documents, I would be of the opinion that is not the case. Recommendation and decision are independent from one another. If the Council does not want to use as much information, they are not bound to do so and I do not think you can establish anything from that line of enquiry. Where I would accommodate your view, is that you do have a right vis-à-vis the Commission underpinned by the current institutional architecture where the Commission is the institution to turn to, including when looking for information.

Despite the lack of time I do have three or four more points I would like to make.

First of all, you talk about a crisis. Is there really a crisis? I do not think that this is the way your conflict is perceived by the outside world. We have already heard that the size of the administrative budget of the Council is not enormous and the establishment of the European Council has not changed things greatly. Perhaps I have been wrongly informed but, apart from two or three agencies, I do not think the magnitude of what we are talking about is considerable. It is obviously a political assessment and that is up to you. Talking of a crisis has nothing to do with the law, but, to speak of this fight, of this difference of opinion, as a crisis, I am not sure that this is appropriate.
From a position of spite, if I heard at 5.00 pm last night that I would be refused discharge, if I were the Council, I do not think I would turn up either.

On your memorandum, Ms Ayala Sender, of course these are just theses, I have not drafted my final report yet, simply because I am not fully informed, but I am very interested in hearing that. I would like to work through it because the three proposed solutions that you have put forward do appear to be a constructive approach and once again, this brings me to my conclusion. I would urge that however you reach agreement, whether it is with the memorandum, an inter-institutional agreement, a gentlemen’s agreement, you will not be able to turn a blind eye to primary law and you certainly have to respect it. But it does not mean that we cannot argue for changes to the Treaties in future but, for the moment, Parliament does not have the right.

Thank you for having given me the floor.

*Michael Theurer:*

Thank you very much Professor Rossi, I am sure there are many, many questions. However, we did agree to hear the different opinions first and foremost and I now to give the floor to the next speaker Professor Florence Chaltiel.

*Florence Chaltiel:*

Thank you, Chairman and good morning, Ladies and Gentlemen.

It is also an honour for me to come here and be able to speak on this very important topic. It is a fundamental issue in our society and in the European project. It touches on European democracy. The Chairman spoke about the Parliament representing the European people and I must say I am very happy to hear this kind of words because my colleague was talking about the German federal case but I know more about the French case and I am actually carrying out research on the idea of European people. I am doing a lot of work on that and it was not very well received, but the idea behind what you are asking is the issue of European people, European democracy and the need to be accountable to European people, even if the idea of a Community of European citizens does not yet exist. You have to be accountable to them and perhaps we can use the term European citizens instead of people, which is less controversial.

For me things are quite clear, the European Parliament is the authority for democratic scrutiny. The Council is not undemocratic, but it is not the authority for democratic scrutiny either. It has its own way of scrutinising democracy through the Member States and they, themselves, are subject to scrutiny. Coming back to the budget, as you know better than me, the European budget is funded largely by national contributions basically through taxes that we, citizens of the European Union, pay nationally as obviously there is no European tax. Given this situation, every euro spent by each institution has to be subject to scrutiny; by whom? By the democratic scrutiny body, that is the European Parliament. The problem that we are here to discuss today has been around for a while. The Council will not deliver documents and will not respond to questions. The Parliament wants to see more cooperation between itself and the Council in order to ensure that the budget is scrutinised effectively and transparently. The Council refuses to cooperate with the Parliament in its work of budgetary scrutiny deciding whether or not it will grant discharge to the Commission and the Council. The conflict is based on different readings of the Treaty. I disagree with a lot of what Professor Rossi just said, particularly about the idea of primary law and his idea of the law being clear and transparent. I am also a legal expert and would say that European law is never clear
and transparent. You only have to look at the Court of Justice and its rulings to see how unclear things can be.

The Council and Parliament read Article 319 very differently. As far as the Council is concerned, it is the Commission, which is responsible for implementing the budget, so discharge has to be granted to the Commission. When it has been granted to the Commission it is, therefore, valid for all institutions, including the Council and the Parliament. Parliament, however, believes that it can only carry out its mission of democratic scrutiny, if it has access to all of the documents it needs for this, if it can hold discussions with the Council, receive answers to its questions and receive the necessary documents. This conflict is very difficult to resolve, because of these two, quite different, readings of the Treaty.

The question I will be looking at here is what can be done to move beyond this conflict. My argument is that Parliament should have access to the Council's accounts and we agree on that point. Parliament should have access to the documents it requests from the Council. However, I also believe that the Parliament should be able to give individual discharge to the Council and I think there is a method to reach this. We have to look at the current law in force, look at its contradictions because the law is not clear at the moment, look at the current practice through analytical eyes, and then make suggestions. We cannot only analyse the current position, but should employ relevant arguments to make suggestions for the future.

First of all, looking at Article 319 of the Treaty, the text shows considerable ambiguity. It has been said several times that the Parliament grants discharge to the Commission based on the recommendation of the Council and also with the agreement of the Court of Auditors. The provision is not entirely clear and transparent. The first ambiguity is the Council recommendation; this wording leads us to believe that the Council is also a budget authority and I will come back to that in a moment. The second ambiguity is that the text seems to be based on the assumption, this is what the Council says anyway, that the Commission is the sole authority for implementing the budget, so they only should be subject to discharge. However, practice shows that the Commission is very far from being the only budgetary implementation authority. This is a very important point because if you want to ensure the effective scrutiny and you accept that the Commission is not the only implementing authority - which it is not - each authority, each institution which implements the budget has to be subject to democratic scrutiny. If you look at the Financial Regulation, particularly Article 50, you see that the Commission gives authorisation to other authorities in different sections for their own budget.

The Inter-Institutional Agreement of 2006, in part 2, works along these lines because authorisation is split between the Council, Commission and Parliament. Article 319 is clarified by secondary law. The text and practice shows that the Commission is not the only authority responsible for implementing the budget. Although the text is ambiguous, the letter of the law and practice shows that the Commission is not the only implementing authority and this is a very important point, which needs to be used as a starting point for the argumentation and the practice.

Since 2001, the European Parliament has adopted the habit of scrutinising all the institutions' budgets and, speaking as a lawyer, this might appear to be a custom in the legal sense of the term; a practice which is repeated and accepted by current dominant legal opinion - we can discuss what dominant opinion means - but this is what has happened for several years now, based on the Treaties. However, and this why we are here today, for many years the Council has refused to cooperate; and I was quite surprised to see how strongly the Council refused. They refused to cooperate, they refused to communicate, to send in documents, and this refusal is repeated, and I am surprised that they are not here today when we are just holding discussions in an informal debate.
I was also quite surprised when I read the Court of Auditors’ reports on the criticism of Council’s budget implementation. Their considerations really have to be taken into account in our discussions and in any analysis. If the Court of Auditors’ report had said that they had nothing to say on budgetary implementation, perhaps we could have said, well there is nothing to look at, there is no problem and we can just drop the idea of the Parliament granting discharge. However, the situation is actually quite different, the situation is not clear, there is not correct management of European funds and there is a lack of democratic scrutiny, so we have to look at the letter and the spirit of the Treaties. This is the main area where I would disagree with Professor Rossi in terms of how clear the Treaties are. I do not think the text can ever be entirely clear, that is true of national constitutions and it is even more so the case for the European Treaty. You can see how many ambiguities there have been and how many times we have had to have a Court ruling to have articles interpreted.

There are two sides to the Treaty that we have to look at today - the Parliament has become more important now in terms of institutional decision making. The Parliament started off as not being very involved and now it is involved in almost everything. The budget is just one example of that. Furthermore, if you look at the institutional balance, the Court of Justice has always been quite vigilant about this, even in the past when the Parliament was only an advisory body and was just there for consultation. In the past, the Court of Justice compelled the Council to re-consult with Parliament when they had amended bills too far, when any draft laws had been changed too much in the discussions between Council and Commission, so the Court has always been quite vigilant to ensure that the Parliament was consulted and the institutional balance was maintained.

The other important argument is that of European democracy and I will just dwell on this slightly, if I may. The Lisbon Treaty is the first document that has been entirely dedicated to European democracy. The Council is part of that democracy, it is not undemocratic, but it is not quite the same as the Parliament because of the way in which Member States vote, it is not the directly elected democratic body. The democratic authorities referred to in the Article on European democracy are only the European Parliament and National Parliaments, and I will come back to this when I talk about national constitutional Courts.

The situation is quite difficult when it comes to democracy. Some suggestions to improve the situation: The texts are not clear; you can see that legal experts are in disagreement amongst themselves, it is just not clear. Judges are focussing more on institutional balance and protecting the Parliament. There have been a lot of rulings on this, but I would just go back to a ruling in 1983. This has to be looked at in the light of institutional balance. In the 1983 Agreement, the Court says that internal organisation in the institutions should not, in anyway, harm the institutional balance. If you look at this in the light of what has happened over the last 30 years and also the gentlemen’s agreement, if you put this together with the 1970 agreement, what is clear is that the Council wants to be responsible for its own affairs and this is going as far as refusing to grant the necessary documents for budgetary control. What they are doing is running counter to institutional balance and that is how I read the 1983 ruling on institutional balance.

If you look at the Agreement, it is not part of secondary law. The Court has never ruled on this but it is quite reasonable to think that it is not part of secondary law and it runs counter to what has happened over the last 40 years or the progress made with democracy and with the European Parliament. If looked at in light of what has happened in the past, the Council is not comparable to the Bundestag or a Chamber in a national system. The tendency is to compare all of the European institutions to what we know nationally. We have seen that in recent years and it is difficult sometimes to find the right terms or the right concepts for things. If you look at the Court, it is trying to avoid an institutional overlap and that gives us an interpretation for the 1983 ruling.
When the Parliament wants to scrutinise budgetary implementation by the Council, it concerns not its actions as a legislator, because they are co-legislators; but as an executive. The Council is not the only executive body. The Commission is also not the only body responsible for implementing the budget; the Council also has huge powers here. They say that Parliament should not get involved in Council affairs. They should not get mixed up in that, and that is true, but we have to be clear about what the Council is. It has a double role - on the one hand it is a legislator but at the same time it has executive powers. I think the 1970 Agreement is in contrast to transparency and the actual reality of budgetary implementation. So, if you link that up with the 1983 ruling, the Court passed rulings in 1983, 1990 and 1995 and it is trying to ensure cooperation in good faith between the Council and the Parliament.

Looking at the body of law, of case law and of practice, it is possible that it could be taken to Court, if you use all of the arguments. If you look at what has happened in the past with the Court of Justice on democratic requirements, on the increasing power of the European Parliament, an action is possible. You have to look at what has been ruled in national constitutional courts as well. I think this is an important part of democracy as well.

The Article in the Treaty on democracy refers to the European Parliament and to national parliaments. The most recent rulings of national constitutional courts, particularly the French Court and the Karlsruhe Court, are important because they were looking at it from a democratic angle which can be applied to the dispute over budget would. What they held, particularly the Karlsruhe Court, is that it respect for democratic principle needs to be ensured in Europe. They were looking mainly at national parliaments, but if the European Parliament received more respect at the European level, national courts could be helpful in this, they could play a role; they would accept the complementary nature of European and national democracy, and national democracy as expressed through the European Parliament. So, what would be my conclusion?

Firstly, we need to look at the wording of the Treaties on which the Council claims to be basing its behaviour. We have to accept that the Commission is not the only budget-implementing body and to accept that Article 319 does not exclude individual discharge decision in any way. It does not say that the Commission is the only authority for implementing the budget.

Secondly, the reading suggested by the Council is not in line with the legal principles of institutional balance and it is not in line with democracy and good financial management.

Thirdly, we have to use case law from European and national courts to ensure that the Treaty is respected. On several occasions, the Court has referred to the real objectives of that Treaty, which is a term employed by the Court. Something that was not in my documents, but I have heard being said today, is that the Council is already a democratic body. I was thinking about the Court of Human Rights - I have not really thought this out properly - but if you look at the Matthews ruling in 1999, where the UK lost because it did incorporate Gibraltar in the European elections. This was the Court of Human Rights, which has nothing to do with the European Union. The reason the judgment came to mind is because it says that the European Parliament is the authority for democracy in the European Union. If you look at the fact that we are paying our taxes and there is not sufficient scrutiny at a European level, this is idea point we have to improve. The ruling of the Court of Human Rights is something we should bear in mind, particularly if we are considering the possibility of judicial action. We also have to emphasise the fact that the Council plays an essential role in implementing the budget, but we have to show that the situation is not working properly at the moment, there is not sufficient control, and effective budget scrutiny is necessary.

Time is ticking by, but I just have a few words to say on some other actions that could be undertaken, rather than just refusing discharge. This is not an exhaustive list, but there are some areas where action could be improved.
First of all, use the media by working together with the Commission to build a stronger relationship. Pre-judicial or judicial action should be considered as well. Media action: the press could be used. Make press statements which would make the risk of refusal to discharge in all of the national media public. You could either have a brief press statement or you could have discussions, involve European and national Members of Parliament and ask for their opinions on the fact that Parliament is refusing discharge because they have not been consulted as they should be. This might be in line with the memorandum you are suggesting, you could go through newspapers specialising in European issues.

The second idea would be to either work with the Commission or enter into conflict with them, depending on their stance. Perhaps we could exploit the fact that the Parliament and the Commission could stand on the same side and show that the Council is refusing to allow progress in democracy, which would go back to what Ms Ayala Sender was saying. If we were to refuse discharge to the Commission, that might have more sensitive effects but, here, we could show that the Commission is not encouraging the Council to send in the required documents and is not being wholly democratic.

There is pre-judicial action - alert the Council to the fact that we need these documents urgently if we are to grant discharge. Then there is judicial action - attack the Council based on all of these arguments: institutional balance, Article 319, customary practice; and show that the 1970 agreement is no longer valid.

Sorry if I spoke for too long and thank you very much for listening.

Carlino Antpöhler:

Chairman, Ms Ayala Sender, honourable Members, Ladies and Gentlemen; first of all let me thank you for having organised this workshop and inviting me. It is a great pleasure for me to support you in your work.

Does the European Parliament have the right not to refuse granting discharge to the Council? Unlike one of the previous speakers, I think this is the case and I will explain in more detail why I am of that opinion. I will proceed in three stages:

- Firstly, I will show that the provisions of the Treaty and the Financial Regulation are open to different interpretations.
- Secondly, I will apply a teleological interpretation of European principals to demonstrate that the European Parliament does, indeed, have the right to refuse the granting of discharge.
- Lastly, I will lay out the consequences of this view for Parliament’s right and prerogatives.

Let me start with the wording. The discharge procedure is set out in Article 319 TFEU and the Financial Regulation.

Under the legislation, Parliament grants discharge to the Commission for the entire budget. There is no explicit provision on the discharge to the Council. Whether that rules out a separate discharge to the Council is not specified. The legislation does not say that Parliament only grants discharge to the Commission.

As the presentations of my two previous speakers show, the law can be understood differently: either, as Professor Rossi has argued, it can be seen as a closed system whereby there is only one
discharge granted to the Commission or, as Professor Chaltiel has presented, it can be interpreted as an open system allowing for separate discharge decisions to the individual institutions.

If you interpret legislation within its original context, at first sight you might be lead to believe that the law allows only for one unified discharge decision vis-à-vis the Commission. Article 317 TFEU, which has been referred to on a number of occasions, provides for the Commission to be responsible for the entire budget that is including Council’s expenditure. This view would come to the conclusion that only one unified discharge decision can be taken.

The question which needs thus to be answered is whether the legislation should still be interpreted in the same manner? Finding a response requires a look into the institutional history. Union law is generally static. Changes in law require Treaty change or legislation, if secondary law is concerned. I share Professor Rossi’s view that you have to draw a distinction between de lege lata and de lege ferenda. While the socio-economic context can thus lead to certain changes in interpretation, it may not lead to the border between interpretation and legislation to be blurred. The interpretation of legislation can thus change as long as this is in line with the wording of the provision.

These abstract considerations can now be applied to the case in question. The provision dealing with discharge dates back to 1977. It has not been amended since. The circumstances, however, have changed significantly. The Parliament’s role in providing the Union with democratic legitimacy has increased immensely. Council has an increasingly executive role; let me just give you three brief examples.

The European Council, which will be treated together with the Council as they share a budget, is increasingly significant and fulfils governmental functions. On top of that, in foreign and security policy and in economic policy, the Council is very much active in an executive sense. Democratic accountability and the executive action of Council are significant factors when it comes to answering the question about whether the Parliament should have a right to grant discharge to the Council. The discharge legislation has thus not changed since 1977 but the institutional architecture has been through a root and branch change. As I have shown already, the wording can be interpreted in different ways, either as allowing just one single discharge decision, or as allowing a number of separate discharge procedures towards the other institutions, the Council in particular. While the provision has been understood historically probably as allowing only one discharge, this interpretation is no longer applicable. Article 319 TFEU is hence not unambiguous and can be interpreted in different ways.

I will take a teleological approach on the basis of European principles to come to a conclusion in this state of ambiguity. Let us start with democratic accountability, which is a central foundation of the European Union. As far as the budgetary procedure is concerned, that means that the EU budget derives its democratic legitimacy among other means from ex-post control. This facilitates a public debate and thus leads to transparency, which is another cornerstone of European democracy.

How could democratic accountability be established, if we followed the model of one of the previous speakers and did not allow a decision by Parliament on the Council’s discharge? European democracy rests on two strands of legitimacy. The citizens are on the one hand represented in the Council via their Member States. On the other hand they directly elect the European Parliament. Council is legitimized through accountability to national parliaments through the intermediary of national governments. Ex-post control by national parliaments, however, is severely limited. National parliaments’ role under EU law is confined to the legislative procedure. It is further questionable whether scrutiny by national parliaments can be effective at all. The execution of the budget concerns the Council as a whole and cannot be attributed to individual delegations.
National parliaments' scrutiny of Council spending is thus neither of interest to the national parliaments nor is it then very effective.

Democratic legitimacy can then only be acquired via the second strand, which means via the European Parliament. Under Article 319 TFEU, Parliament is the decisive budget authority. If we still hypothetically assume, Parliament did not have the right to grant discharge. To establish democratic accountability an indirect line of responsibility in *ex-post* control leading to the Parliament would be needed. This would for instance be the case, if Parliament approved the Commission's approval of Council's budget. However, this chain of responsibility does not exist. The Commission exercises no control over Council spending. Parliament's discharge decision on the Commission's spending fails thus to legitimise Council's expenditure. At present, the Council's spending is not effectively legitimized via either strand. This generates an immense democratic deficit.

There are two possible solutions. Scrutiny over the Council's budget could be carried out by the Commission or the European Parliament directly. I prefer the latter. In the case of the Commission's scrutiny, responsibilities would be blurred. There are hence considerable democratic advantages, if the European Parliament was able to grant discharge to Council.

A possible obstacle to the Parliament's right could be the autonomy in internal proceedings. This principle was developed by the Court of Justice. The principle is particularly relevant as the Council spends most of its expenditure on buildings and staff. While the principle of autonomy can indeed limit Parliament's powers, it cannot negate the right as such. Council can decide autonomously on the necessity of its expenditure but it cannot exercise scrutiny over the lawfulness. Violations of the principle of economy as laid down in the Financial Regulation affect the interest of the Union as a whole. They can thus not be assessed as being internal proceedings of the Council. Parliament's scrutiny is thus limited to a control of the lawfulness of spending. This encompasses the principles of economy, efficiency and effectiveness laid down in the Financial Regulation, if violations are sufficiently serious. Parliament's scope of scrutiny can thus be quite wide. It is, however, limited to lawfulness.

The strongest point against a right to discharge of Parliament can be derived from the principle of institutional balance. According to the Court of Justice, there is a clear delimitation of roles between the institutions as foreseen in primary law. Council's independence is guaranteed to ensure that the Council and the European Parliament are equal co-legislators. To refuse the European Parliament a direct right of scrutiny over Council rules out even abstract dangers for the Council's autonomy. This might also have been the historic reason for the provision as it stands. Although that is a significant objection, the principle does not rule out a separate right of granting discharge to Parliament. Council's independence is not absolute. Its autonomy in budget procedure is limited. Regardless of how the question at hand is dealt with, Council's independence in the budget procedure is always only institutionally, but not materially guaranteed. No one is of the opinion that Parliament cannot check the content of Council's budget. The dispute merely arises on the question whether the scrutiny has to be via the Commission or can be direct. The detrimental effects of a possible parliamentary right are thus limited.

If, hypothetically speaking, the legislation did not cover material scrutiny of Council's budget then there would be no room for a dispute on whether Parliament can scrutinize Council directly. Yet, Council has only strongly limited autonomy in the budgetary sphere. The interesting question then is whether detrimental effects to the Council's only procedural autonomy reach the threshold of a violation of the institutional balance. The Court of Justice case law on the principle of institutional balance is vague. Without any deviation from the jurisprudence the law can be interpreted as the inter-institutional balance not being violated by encroaching on the procedural aspect.
The various principles cannot be seen isolated from one another in a teleological interpretation. The interpretation of the institutional balance has to be in line with the reading of the other principles, democracy in particular. As shown already many reasons mitigate strongly for a right of Parliament to direct scrutiny. Democratic legitimacy of ex-post budgetary control would support the right. In addition, Council's increasing executive functions need to be borne in mind. The budget right is a decisive tool for parliamentary control over the executive. Crucial is not whether the single expenditure is operational, but the partial character of the Council as an executive institution as such. Inter-institutional balance thus needs to be interpreted in a narrow sense in light of the democratic principle. Parliament, hence, should have the right to discharge the Council.

It could be argued that Parliament's right of discharge should be confined to Council's executive activity on the grounds that that is particularly important and does not involve many problems. Rule 77, in the Rules of Procedure of this House, refers to parliamentary scrutiny over Council in its executive role. Under the Treaties, Council meets in public when it acts as legislator. Those would in theory be good reasons for restricting Parliament's rights. They are, however, not practicable. In the case of staff and buildings, it is impossible to distinguish between executive and legislative purposes. The theoretical advantages this solution might offer would be more than diminished by the significant administrative costs.

In conclusion, I just want to raise a couple of points about the right to information, and the consequences of not granting discharge. The previous speakers have spoken at length on this, so I will just add some comments and be brief. In the discharge procedure vis-à-vis the Commission, Parliament has a comprehensive right of access to information from the Commission, including the part of the budget which is not executed by the Commission directly, as Professor Rossi has said. Moreover, given the duty of sincere cooperation I would deduce a right of the other institutions, the Council in particular, to provide the Commission with the information that is requested.

Furthermore, I would argue for a direct right of Parliament to obtain information from Council on the basis of the implicit right to individually decide on discharge to the Council. However, as important interests of Council are touched upon, the ancillary rights of Parliament should be confined to those absolutely necessary for the effective exercise of the right to discharge. I doubt whether that necessarily means that Council should appear in committee and respond to oral questions. Further rights could only be granted, if there was a specific provision. There is a 1973 note from Council in which it commits itself to answer questions comprehensively, both oral and written. The extent to which this is binding on Council and whether this applies to committees will be set out in my final briefing paper.

The right to information of Council is in any case limited to certain specified documents, as Professor Rossi has rightly remarked. Again in the interest of sincere cooperation when it comes to significant information, I think that Parliament is obliged to deliver the documents to the Council.

The consequences of refusing discharge was already comprehensively discussed by Professor Chaltiel, thus only some brief remarks from my side. Secondary law obliges all institutions take all appropriate steps to act on the Parliament’s observations. This is a duty, which can be invoked in Court. The Court of Justice's scope of review, however, is limited as the institutions have a great leeway to decide what is appropriate. Parliament could not take the Council to Court on the abstract question whether it can grant discharge. There is no act of the Council with sufficient legal effects. Parliament could, however, challenge the Council’s refusal to act on a certain ancillary right of Parliament. If the right to grant discharge directly to the Council extended beyond the explicit rights of Article 319 TFEU, the Court of Justice would have to decide whether or not the Parliament had a right to grant discharge for Council spending.

Thank you very much for your attention.
Michael Theurer, Chair:

Thank you very much Mr Antpöhler; and thanks to the other experts for their presentations.

We thought we could now take some questions before we turn to the Legal Services of the European Parliament, and then have a general debate at the end. So I would ask for any specific questions that we have for the three expert speakers.

Before I give the floor to Members, maybe I could just point out, Professor Rossi, that the secretariat of the Budgetary Control Committee has set up a special homepage on the Financial Regulation. If you did not find the links to that page, I think we would like to know the reason for that. It is, of course, a concern of our committee that we generate as much transparency as possible in the legislative process, because it is not always easy to see through the trilogue process, so it would be interesting to hear it from you.

Having said that, onto my list of speakers.

Søren Bo Søndergaard:

Thank you, Chair, and thank you for the three very interesting contributions, which have helped to clarify the situation considerably. In the Budgetary Control Committee, we have never really looked into whether or not we should get information directly from Council or from the Commission. That is of secondary importance to us. The fundamental point is that we believe, according to European law, we have the right to obtain the documents.

I have listened to the three speakers and, according to them all, Parliament has the right to receive this information. What I am interested in is whether we have access to this information, regardless of whether or not we should get information directly from Council or from the Commission. That is of secondary importance to us. The fundamental point is that we believe, according to European law, we have the right to obtain the documents.

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Marta Andreasen:

Thank you, Chair. Well, I think that the conflict is more political than technical, and, to a certain extent, it reflects the crisis that the European Union is going through, because it talks about who is responsible for what. What is not clear here is who is responsible for the EU budget. Who is responsible for the discharge? Who is responsible for the interest of taxpayers? From what I have heard, I think that the law, or our Treaty, is pretty clear in that the Commission is responsible for the implementation of the budget. Of course it has to go to other institutions to request information, but the responsibility lies with the Commission. What I think, is that we should go to the essence of the problem. I see the solution is to ask for the information through the Commission, as we do for other institutions. I would like to hear the points of view of the speakers in this respect. I think the solution is simple; it is the Commission which is the entity that we have to go to. Thank you.
Ines Ayala Sender, Rapporteur:

Thank you, Chair. I have understood the three speakers as two being in favour and one against our position, but I think all have helped to further our knowledge on certain problems.

Obviously we are not going to block the entire budget of the European Union for the 0.39%, which is the part of the Council administrative expenditure in the entire budget, but I think the situation will continue becoming more critical as the European Union grows. I think that Professor Rossi had a position slightly more in favour of the Council, I would say. I respect his position as a legal expert, but I think that, given what is written, it is not explicitly written that the Council is not subject to discharge, and that has to be part of our reasoning.

If you look at Article 319, it refers to the responses of the bodies which are scrutinised. It says "... the replies of the institutions under audit..." - that's a small sentence, but it is important. I do not know what it says in German, but in Spanish certainly, it's in the plural and it says that they have to be scrutinised and that would include the Council.

Then it is being said that the Council discharges itself. So we are not disputing their position, it's the Court of Auditors which is disputing it, so I think that the Council is going to have to accept that it is responsible to us and the Court of Auditors. That should open up some areas for a settlement of the conflict.

Then there are other Articles which say that the expenditures of the Council and Commission have to be kept separate. Separate, not in terms of spending, but in terms of monitoring. Then Article 335 talks about administrative autonomy. The institutions have administrative autonomy but that does not mean that they are not subject to scrutiny in any way. It also says that the Presidents of the institutions, including that of the Council, have to reach co-operation to facilitate the implementation of the budget and its scrutiny. So I think that the Council has an obligation to facilitate implementation and to co-operate. In order to do that, this includes not only the execution of the budget but also it later being scrutinized. These are all points which have to be taken into account when looking at the Council's responsibilities.

Now, it's not written anywhere that the Council is not responsible for its budget, so I think that we have to use this to make progress, which we would welcome.

Then to Professor Chaltiel, who, I think, helped to open up a lot of possibilities and made some interesting recommendations, particularly when she referred to the Court of Human Rights. She also referred to customary practice, what status does that have at European level? We are used to working in co-decision with the Council. We decide together with the Council and we have the Court of Justice and both aspects should be used to make legal progress, but customary practice which she referred to, which exists in Member States might be a part of what we are looking at to reach an outcome. What role could that play here in the budget? In the past, even if we refused discharge, the Council did it itself; that is no longer the case. Professor Chaltiel said that the Council has to commit to providing all the necessary legal documentation, but what legal effect does that have? Given that the Gentlemen's Agreement is no longer in force, what legal effect would the 1973 declaration of the Council have? Thank you.

Jan Mulder:

Thank you, Chair. I have been listening with a lot of interest to the introductions and I have found them of very good quality. Not being a lawyer myself or having anything to do with this, I would think that it is two against one. I am not sure, if they are representative of the whole legal
profession, but what we have to note is that we are all are united on one point and that is that the Council should forward the information. I think that is a clear point which was shared by all three speakers.

One of the best examples of our conflict is that we are having this, more or less, academic session with a free exchange of opinions, and even then the Council refuses to be present. I wonder how the imperial hardiness of the Council could be better illustrated than in this way. So here we are in the situation we are in, with one institution that shows disregard for the Parliament. Therefore, as regards democratic responsibility, it is without precedent in a national democracy, that one institution would just refuse to give information or to defend its attitude in the Parliament. We are at an impasse.

I think Professor Chaltiel already gave us some good recommendations. Could I hear from the other two as well? What do they think the Parliament should do? The easiest way would be to go to the Court, because once the Court has expressed itself, that’s the end of the argument, as far as I know. Should we muddle through these kinds of sessions then argue each year with the Council about something they do not want to do, or is the panel of the opinion that the only way out of the impasse is to go to Court?

**Jens Geier:**

First of all, I would like to express my gratitude to the interpreters. I was lucky to hear two of the contributions in my mother tongue so I know how complex it all is, and I understand the interpreters have worked very hard there, so I thank them, and I think I can say, on behalf of my other colleagues, you have done an excellent job of work.

All three contributions were extremely interesting. I would just like to underscore what Jan Mulder said in his conclusions. The only point where all three experts agreed and, maybe that is the point to make progress on, is that each one of the three specialists spoke of the fact that there is an obligation to provide information. Ladies and gentlemen, that is the nub of the issue.

I can support Søren Søndergaard as well. The way in which we obtain the information - should we send a nice friendly letter to the General Secretariat of the Council who will be unfriendly and just dismiss or ignore it, or should we turn to the Commission who is responsible for implementing the Treaties (as the guardian of the Treaties). Whom we turn to, does not really matter.

When it comes down to political terms, the Council, in one way or another, either has to be an opponent to the Parliament or does. I have found today a way that we can make headway. The Treaty is very clear; yes, I would agree with Professor Rossi on that. However, the European Union is a dynamic construct. Over time, the Treaties, and I guess this is what the legal experts would refer to, the Treaties do not always cover all of the questions that come up. You pointed out yourself that, and I think justifiably so, there is a lot of case law from the Court of Justice that has clarified aspects or filled in the gaps. No criticism to you, Professor Rossi, but we, as a Parliament, will be pressing for an extension of powers under the Treaties and we think that, where there should be clarification, we will certainly press on in that direction and continue to do so.

I think that on the issue of discharge and the Council, we will have to address this in such a way that we proceed via the Commission to request the necessary documents to judge whether discharge is appropriate. That would at the moment be the only way of getting out of this impasse. The Council, and probably this is why they are not here today, believes that they have made an offer to us, i.e. to negotiate on the basis of the principles of reciprocity. That is something that this committee has always rejected so the Council will, no doubt, continue to stick to that position.
They have put us in a situation where they have to react. We are obliged to come up with an answer so from their perspective, the ball is in our court, so I understand that position. If we want to come up with a solution here, based on the solution that I hope we will find, if we do not agree with the Council’s position, we would not grant discharge.

How would you assess the ramifications of refusal to grant discharge? As far as I am aware, the Treaties do not explicitly spell out any consequences of that. The Santer Commission, back in 1999, resigned rather than subjecting itself to Parliament refusing discharge. That is not necessarily a model that will be followed; there is no corollary to that, but it is important if we do not grant discharge, how do you judge the inter-institutional consequences?

Inge Grässle:

Thank you very much. Well, the Council did not need to turn up because they have all the answers; you know, they know everything and I am not being ironic at all.

I would like to put some questions to Professor Rossi. What you have put forward as a position, is something that we hear quite often from the Council. For example, I am the Rapporteur for the Financial Regulation; I have dealt with the Council for many long hours on this and I am very pleased that you have tried to get the final copy of the draft Financial Regulation. You will be very disappointed to find that the points on discharge have not changed, because we could not reach any agreement.

You did not mention Article 335, the administrative autonomy of the institutions. This administrative autonomy must be valid for the institution that is answerable to us in terms of discharge. There seems to be a contradiction between Articles 319 and 335, at least we as the Parliament have put forward amendments to resolve the tension between those two articles, and that would be quite easy if we were to say that there are institutions, according to the first article of the Financial Regulation, and we have to be provided with the information and the documents that we need.

The current article of the Financial Regulation, pursuant to the Treaties, is that we provide discharge to the Commission. And why was that the case when the articles were established? Well, that is because all the accounts fell within the budget of the Commission; so the idea of having separate accounts on separate institutions was not something that the Treaty had experienced at that time. Why has it not been done in the meantime? Because when there are changes to the Treaties, you have foreign policy experts and other people who have nothing to do with budgetary rights and obligations, it is just that nobody thought of adjusting the discharge procedure to take account of practice regarding the other institutions. Those who had thought of that, well the Council Secretariat, the Legal Service in the Council, of course, did not say anything about that, because any change in that setup would be detrimental to them.

Can we really say that the EU has not changed at all since 1977? If it has changed, it is obviously not reflected in the Treaties when it comes to the rights of the Parliament to grant discharge. That is actually set up in primary law as a responsibility of the Parliament.

We have had real tough luck in this Committee. We have been told what our tasks in primary legislation are, and yet we are not granted the means to actually do it. We have, sort of, muddled along to date. So I would like to hear what you think of Article 335. Why can we not resolve the tension between Articles 335 and 319? Would it be sufficient, if we were to say, well let us have a joint vote on the Commission where every institution is included and then continue with individual discharge for every single institution? I think discharge should be granted separately to each
agency, to each body. You know we have got a big zoo to take account of, a lot of animals, so we could fight in a joint approach and also with the various different species. All under the aegis of the Commission?

Of course we would be affected by this. We would not have to have extra votes, but should we just decide on discharge to the entire European Union. If we were to refuse discharge to the European Union, I can tell you, all hell would break loose; so that is one possibility. Maybe that is what will happen, because obviously when it comes to cutting red tape and improving bureaucracy, nothing is going to happen.

This is a cumbersome, bureaucratic procedure which, as you can imagine, could be simplified with everything under Commission's accounts. What happens if we were to get rid of all other accounts and put them all together under the Commission's responsibility? Of course, the Commission would have a good 15000 new staff and we would have resolved this problem. Well that is a possibility, is it not? Maybe in legal terms that is the cleanest way of doing things and that would have been quite a nice split of responsibilities and would, no doubt, give rise to massive amounts of chaos, but faced with big problems you have to take bold solutions.

You, Mr Antpöhler, did mention that we are allowed to express ourselves on the legality of the Council’s expenditure. Well, we have had cases of a control of the legality. Even this did not work with Council and was not enough. Because legality means, if the rules were not violated you can finance all sorts of nonsense and yet legitimise it. Is that what you really mean, things like efficiency, proportionality, appropriateness? These are all terms that legal experts are happy juggling with, but it is not enough to say, as the accounting officer always tells me, I have ticked all the boxes of my checklist. I think that is a legality check, a regularity audit; you tick those boxes and everything is meant to be ok. Thank you.

**Michael Theurer, Chair:**

Well, we did not know that stroking and petting should be part of our discharge procedure with all these animals in the zoo, but of course there are all sorts of readings you could read in to the Treaty. That is not a question I wanted to put in to the experts, but I just wanted to throw in a bit of humour!

After all these questions, maybe we could take the experts in reverse order to answer. We are under a bit of pressure with the time. If you could just take between 5 and 7 minutes each to try and focus on the most important aspects of the questions, so that we can also hear from the Legal Services of the Parliament. So, go ahead Sir.

**Carlino Antpöhler:**

Thank you very much I'll be brief and try to bundle together the questions, in order to respect the 5 to 7 minutes' speaking time. There were many questions about rights to information especially from Mr Søndergaard, Mr Mulder and Mr Geier.

If you look at the Treaty you have to distinguish between two sorts of right to information; there is 319 paragraph 1 which refers to specific documents and then 319 paragraph 2 which covers all documents.

319(2) is particularly interesting for us. It its realm the Treaty and the Financial Regulation only require the Commission to provide information. I would extend that though and, I think the other
speakers share my view on that point. I would say that the duty of sincere cooperation leads to an extension meaning in effect that the other institutions have to supply the information. Otherwise, the right to information under 319(2) could be undermined as far as the other institutions are concerned. That might also answer the question on chances of success in a case before the Court of Justice regarding specific documents. As the right to information under 319(2) is concerned, I think it extends to other institutions and that the chances of success before the Court of Justice are thus good. I think the right to information is quite clearly expressed there and the workshop today has shown how the experts all agreed on that point. My recommendation would thus be to go to the Court of Justice over the right to information if the Committee deems it to be necessary and appropriate.

On Mr Geier's question about consequences for the Council if discharge is refused - A motion of censure obviously cannot be directed against the Council. But there are consequences laid out in the Treaties. It is not that there are no consequences at all. 319 paragraph 3 TFEU states explicitly that "the appropriate steps must be taken". While in primary law that concerns only the Commission, secondary law, the Financial Regulation, extends the obligation beyond the Commission, to all institutions. They have to take the appropriate steps and the failure to do so can be challenged in the Court of Justice. I think the Court of Justice would give a certain amount of leeway to the institutions to determine the appropriateness, but I do think it is a matter the Court of Justice could usefully rule on. Furthermore, there are also all sorts of political possibilities, some of which have already been raised and in forthcoming negotiations on the budget the discharge can be used in order to obtain certain concessions.

Then to Ms Ayala Sender's question on the 1973 note by Council - that is a difficult one in terms of the legal effect. The note concerns Parliament's right to information in general. It does not specifically address the budget sphere but is wider. I would need to take closer look at this which I will do in my final paper. The document is not unambiguous. On the one hand you have gentlemen's agreements which generally in international law are not binding. This is more than a gentlemen's agreement. It is a communication, in the English version, and it seems like the Council does indicate what it wants to bind itself to. Preliminary one could thus say that it has some kind of legal effect. But the question then would be: "what is the scope of the Agreement?" Yes, written and oral questions are encompassed, but does that apply only to the European Parliament sitting in plenary or also its standing Committees? I have to look further into it.

On the limitation for review to lawfulness, that should not be a box ticking exercise. I have talked about the principles of the Financial Regulation which are also covered by the scope of the Parliament's review. In other words, it is also a political performance evaluation on legal issue which, I think, is worth looking into for the Committee. Thank you.

**Florence Chaltiel:**

I will respond to the questions in the order they were asked.

Could the Committee win a case if it took it to the Court? This is a very sensitive issue; I would not like to say either way but just a couple of comments on this point. Someone said this is a political issue, obviously, yes it is political. Whenever there is an ambiguous interpretation of the Treaties there is obviously political consideration behind that.

So, what I would say is that it all depends on the legal politics of the Court, and you can see cycles in Court rulings. Sometimes, they have been very forward-looking; in the past they tended to be ahead of their time but since the 90’s and the year 2000 they have been slightly more cautious. If you look at the mid 1990’s, where state deficits started to take off; the Commission took a position
were it would try to overcome Council’s soft stance on states and the Court in its judgment tried to please everyone. They said that the Council was not obliged to follow the Commission’s recommendations but that the Commission had the right to make recommendations. There you can see that the Court was trying to maintain a certain balance between the institutions, so if we were take this case to Court, I do not want to commit either way. I would, however, think that when it comes to providing information, then Parliament is correct and the Court would rule in favour of the Parliament. If you look at the right of discharge and information, I think the information would be part of the institutional balance that the Court tries to find. But it's very difficult to say whether they would rule in favour of the Parliament on the discharge, despite all the arguments that you can make in favour.

Somebody asked the question on whether the Commission is responsible. Well, that is not entirely clear because there is a gap between the wording of the Treaty which, in itself is not clear, and the subsequent practice. I would say that we cannot clearly state that the Commission is responsible for budget implementation.

As the "legal value of common practice" is concerned, well this international law, but it is usually looked at if there is a Treaty to respect, so obviously it is important but international courts have tended to look at what happens in practice in order to rule on international law. The Court of Justice has been quite reluctant to use customary international law in the past. It has used international practice and it has recognised national practice, and it uses the general principles of law if there is no clear obvious law to apply. It would look at it based on practice, but first it would examine European law. What would happen then if the Council still refused to send the documents after the judgment? Sadly, there would not be any consequences. If you think of how you explain this to your students, if you say well the law says something, and then the judge rules against a state, what can be done? When you're at state level or at the level of the European Council, if they do nothing you can issue judgments, you can try to use public opinion which is currently forming, use the press, but otherwise, there is nothing you can do. You cannot exert force to make the Council deliver those documents. I think that is how I would respond to the questions asked. Thank you.

Matthias Rossi:

Thank you for not sending me out of the room for what I said.

If you actually look closely of what has been said, we are all very much agreeing. The central issue is the Parliament's right to information and there, I think, we have agreed. The Danish Member (Mr Søndergaard) talked about the chances of success before the Court of Justice. Well your chances are higher if you take the Commission to Court. You will fail if you take the Council to Court. With the Commission, I am not so sure, what you need to think about though is, do you want that? For less than 1% of the budget, I am not sure if you want that kind of fight. After all, there is reciprocity and there have been some suggestions about MEPs' travel which Council might want to look into, and they would be entitled to information and documents about that.

I am not absolutely sure that primary law needs to be re-interpreted in the context of socio-economic change. But the 1973 communication was adopted at the time because Parliament had fewer powers. So my view is the opposite one, I do not think the '73 communication is binding, I think it is no longer relevant because now through the Treaties, the Parliament has acquired so many rights that the communication is redundant.

Then the legal consequences, well there are no legal consequences, quite deliberately, and you can possibly understand that, with no question of resignation or anything like that. Your direct
influence is over the Commission, not a Member of Council. That is why I think it is deliberately staggered in the discharge procedure. You can grant discharge, you can give your remarks on certain items and, through the Commission, you are entitled to obtain answers; if implementation of the budget has been so bad that not only do you not want to grant discharge, you want to go further, then it is a vote of censure; but the vote of censure is against the Commission not the Council, so unlike the other panellists - with all due respect to them and to you - I would stress that the European Union is still built upon two pillars. The Council of the European Union does have democratic legitimacy according to Article 10, paragraph 2, and there is no point in the two pillars undermining one another, I think you have to accept that. I do not think it's appropriate to get carried away. I understand what Mr Geier is getting at in obtaining political mileage out of certain things, but I do not think he should take things too far.

The other question regarding Article 335 TFEU: I have to look into that. The provision is directly more about external representation. It is an expression of a more general principle that I and Mr Antpöhler mentioned, which is the organisational autonomy of the individual bodies and institutions which is part of the inter-institutional balance, but I do not want to say any more about that before looking into it in detail. In the next fortnight, you will get my definitive written report in which I will cover that point. I have learned a great deal, I will look into what I have done, review some of my arguments and look forward to an interesting legal discussion; and I am grateful for the one that we have had today.

Michael Theurer, Chair:

Thank you. Well Professor Rossi, us not sending you packing, does not have anything to do with being polite; we did want to have a variety of views. Council being absent today is not a result of yesterday's vote. Council had decided earlier not to come. Now we also have the opinion of the Legal Services of the European Parliament and could I ask Ricardo Passos to present that, and then we will have another round of contributions from the Members of the Committee.

Ricardo Passos:

Thank you very much, Chairman. You have heard a lot of legal arguments; it is obvious that when you invite four lawyers you have many chances to have different legal opinions.

You have been aware of my opinion on this issue for a very long time and you will not be astonished if I tell you that I am more in favour of what has happened up to now from the side of the Parliament; that is obvious because that is also the result of the advice that we have been giving you for some time. But it was very useful, I am sure, for you also to hear arguments from legal experts; I also have learned and listened with a lot of interest.

It is not necessary to go back over the background which you already know. The crisis - if the word crisis was mentioned before and I do not know if it is a crisis - but this dispute since 2009 and, possibly, since the Treaty of Lisbon, maybe is more visible from the Council side because there is also the European Council as an institution which did not exist before. That may have made things more complicated and more complex.

The issue is certainly about the legitimacy of the European Parliament on discharge. Since there were arguments in favour and against, whether Parliament has the power to decide separately on discharge to the Council or not, I will only enumerate three arguments.
Before, however, it is important to mention that the role of the Parliament has changed. As someone said at the beginning, first it was only the Council that could give discharge then, from 1970, it was the Council and the Parliament and now, after the 1975 Treaty of Brussels, it is only the Parliament that gives discharge. This, of course, must have some “effet utile” (useful effect); this means that there was an evolution in the role of the Parliament concerning discharge.

Now the three arguments that I wanted to put forward are, of course, in favour of the discharge to the Council. The first argument is about an analysis of Article 319; not taken alone, but in conjunction with Article 317. The second argument is about the separate secondary legislation giving a legal basis for separate discharges and the third argument is a more fundamental one about discharge as part of primary law, representative of democracy, transparency and good governance.

On my first argument, concerning Article 319, what I would criticise in the presentations that were made, with respect, especially to Professor Rossi, is that you cannot base yourself on a very, and exclusively, literal interpretation of Article 319. It is true that Article 319 mentions explicitly that “the European Parliament shall give a discharge to the Commission”. Yes, but we have to read the whole sentence which reads as follows: “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”. Also the part of the sentence “in respect of the implementation of the budget” is important, because the implementation of the budget has evolved, and I think that we should not only focus on the word “Commission” here. In this respect, if we think about the implementation of the budget, we have to say that only 10% of the budget is now implemented by the Commission directly, which means that the situation, as Ms Grässle was saying, is different from the very beginning. The Commission is only directly responsible for 10% of the budget.

80% of the budget is implemented by third parties or other institutions; so this provision, Article 319, even though it is clear for some, cannot be interpreted only on a literal basis. It has also to be interpreted because it refers to the implementation of the budget and secondly it has to be interpreted in conjunction with Article 317 paragraph 2 which says that “regulations ...” that is the Financial Regulation “...shall lay down the responsibilities and detailed rules for each institution concerning its part in effecting its own expenditure”. That means that the Financial Regulation, which is explicit, and that is the second part of my argument, explicit in favour of separate discharges.

Then there is Article 50 of the Financial Regulation which explicitly says that the Commission shall confer on the other institutions the powers for the implementation of the section of the budget relating to them.

There is Article 146, paragraph 2, which explicitly mentions that the European Parliament, with a view to granting of discharge, shall examine the annual report prepared by the Court of Auditors, together with the replies from the institutions.

There is Article 147 which says that the Commission and the other institutions shall take appropriate steps to act on the observation accompanying the Parliament’s discharge. All these provisions, taken together, give the Parliament a solid basis to continue with this practice of having separate discharges.

And my third, and last, argument is a more fundamental one which has not yet been explored in depth. It also has to do with the Treaty of Lisbon and its the new provisions which were mentioned by the legal experts as well. Parliament’s position has been different under the Treaty of Lisbon. We live in a "communauté de droit", a Community of law, which is based on the principle of representative democracy where decisions shall be taken as openly and as closely as possible to the citizen, as laid down in Article 10 paragraph 3, which was mentioned before. Linked to this
principle there is another Article in the Treaty on the Functioning of the European Union which is
the principle of good governance. Article 15 paragraph 1, requires that, in order to promote good
governance, the Union’s institutions shall conduct their work as openly as possible.

Then, in budgetary implementation matters, there is the principle of transparency enshrined in the
Financial Regulation; Article 29, which will now be Article 31, provides that the budget shall be
implemented in compliance with this principle.

Now, if you bring these fundamental principles of the Treaty of European Union and the Treaty on
the Functioning of the European Union with the Financial Regulation together, that throws a new
light on the interpretation of Article 319 and of the role of the Parliament in discharge.

It is important to mention too that, in this context of public money, the Court of Justice has been
particularly strict and the Court has recognised that, in a democratic society, tax payers have the
right to be kept informed on the use of public funds. They are entitled to have a control on how
the budget is implemented; and this control can only be made, and here I agree with
Professor Chaltiel, it can only be made by the European Parliament, which is the only institution
elected directly by the citizens.

So I think that I can come to an end, I think we have enough arguments to justify the position of
the Parliament, and enough arguments de lege lata and not necessarily de lege ferenda.

I will finish here, Chair. I would think that, for the information of the legal experts who are maybe
not aware of it, but this practice of the Parliament and this position of Parliament on separate
discharges has been accepted by all the institutions, except in the Council. The Chairman of this
Committee has sent a letter to the Commissioner responsible and asked what the Commission’s
position was on this. Commissioner Šemeta, not all that long ago - in November 2011 - replied that
the Commission is aware that Parliament has been giving discharge to the other institutions for
many years. This way of proceeding has never been challenged by the Commission which
considers it desirable that it be pursued in future, particularly in view of the fact that it should not
be expected that the Commission oversees implementation of their budgets by the other
institutions.

I make this quotation also to answer the arguments which were put by some saying that
everything should go through the Commission. The Commission is limited in its responsibility as to
the implementation of the budget.

Chairman, I will conclude by responding very quickly to the 3 or 4 questions which were put to the
experts.

As you will certainly understand, I cannot say whether or not an appeal should be introduced by
the Parliament; you will understand my reservations in that regard. This is a subject which we have
to discuss, but not in this hearing. For the other questions I will be very brief.

First about whether or not there is "coutume" - custom; I am afraid I cannot agree with
Professor Chaltiel on that, I think you go too far. We cannot speak of custom ("coutume") here in
this particular case of discharge. Custom ("coutume") is a very strong concept in international
public law, which does not have a place here in this debate.

Regarding whether or not the Gentlemen’s Agreement between the Council and the Parliament is
legally binding, I also believe that it is not a question to be answered in this context for one simple
reason: the Gentlemen’s Agreement which was referred to does not apply to the implementation
of the budget at all; it only applies to the establishment of the budget. So whether it is legally
binding or not, and I tend to agree that, in legal terms, gentlemen's agreements are legally binding if that is the intention of the parties; maybe it is legally binding, but not for this debate about discharge.

The last question about the consequences of discharge; I entirely agree with all the opinions you gave where you said that there were no legal consequences. There are no legal consequences in refusing the discharge; the consequences are obviously political.

Thank you, Chairman; I am sorry if I took some time.

*Michael Theurer, Chair:*

Thank you very much Mr Passos for this very important contribution. I now open the floor for a general debate or more remarks and questions to our experts. According to the time left available, I will then decide whether there is the opportunity for short answers if there are more questions.

First of all our Rapporteur, Ines Ayala Sender, wanted to take the floor again.

*Ines Ayala Sender, Rapporteur:*

Thank you, Chair. There was a very brief comment from Professor Rossi about the report he has promised to send us. All of the documents I have referred to in my report are on the Budgetary Control Committee’s website.

*Inge Grässle:*

Yes, I have a question for Professor Rossi on reciprocity. We refuse reciprocity because we do not believe we are on an equal footing because the Council gives a recommendation; well, what is a recommendation? A recommendation in the framework of the discharge procedure is the same sort of recommendation we give to the Council on a Council regulation; and they say, well, listen, like it or lump it. Can we equate those two, and what is a recommendation from Council, our experience is that recommendations are recommendations, just that, full stop. If you could not tell us at this particular juncture, it would be important to know later on.

We have drawn up a table here, with different amendments on the issue of discharge, to try and clarify how the legal situation has developed. We have amendments from the Parliament, amendments from the Council and amendments from the Commission; because we could not reach an agreement you just stick to the old text. I am happy to send this to you because I think it would be useful for us to make headway on this issue. I would ask that all of you include this in the legal work that you do. There are two German professors here and, given that, maybe I can abuse my position to say that German jurisprudence is causing all sorts of havoc with European law. There seems to be too little advice on how to act, too little guidance on the work of detail that we have to carry out. I was very happy to listen to you, but it would be important for us that law really takes into consideration what is going on at the European level and the Council as well.

*Michael Theurer, Chair:*

Thank you very much. I have a question too but I would ask if anybody else from the room would like to take the floor.
Professor Rossi, you were talking about Germany as a federal State and there is a difference between the Bundestag and the Bundesrat. As far as I am informed, the budget of the Bundesrat is part of the federal budget. There is a degree of autonomy; however, when it comes to establishment, implementation and control, the Bundestag has powers to look at the Bundesrat’s implementation of the budget and does have to exercise control over that; that is exactly the situation we find ourselves in here. That is the right we have been given but can it actually be exploited? Can you actually use that right? So I would like to hear what you think about that and as to how far that is analogous because if you turn things round, Mr Antpöhler did make an important point; and that was on scrutiny by the national parliaments over the Council as an EU institution.

Talking to the Chairs of the Audit and Budget Committees in the German Parliament, both of those individuals have unanimously said that for the budgetary control of the Council they see no legal possibilities. That is just by way of an example; there is a national parliament, they need to sort that out with being one of the 27.

Do you not see any possibility for democratic scrutiny then if we discuss a practical example, in hypothetical terms? If, in a Member state, a new airport were to be built, just hypothetically, and there are added costs because of delays; then a national parliament can exercise its power of control and get involved. Theoretically, if the Council were to build a new building and there are delays in implementation, building, construction, and there are costs rising from that, who is responsible? Well, you cannot say there is a legal vacuum in that given situation. So maybe those two examples were not all that hypothetical, perhaps they were more hands on and maybe you, as a legal expert, could give us a little bit of advice there.

Anybody else? No. Which of our three experts would like to take the floor?

Matthias Rossi:

[Referring to MEP Ms Grässle] The second point you raise is very important. First of all, perhaps I could say that I am very interested in your table there: on the actual question regarding reciprocity, now I do not support you on that point. You are not bound by the recommendation from the Council, if the Council recommends granting discharge to the Commission, and you have good reasons, you do not need to do that but, of course, you have to deal with that situation.

On the contrary, however, if the Council were to give a recommendation not to grant discharge because, and this is what it is about, because the European Parliament has not kept to the rules, you are not bound by that either; the Council has to put itself in a position to make sure that it has the information it requires to reach that decision. So I think there is a worthwhile degree of reciprocity that should be entered into on the philosophical discussion of who is monitoring the monitors, who is supervising the supervisors and what impact these sorts of things have outside this institutional bubble. There are commonalities here because the European Court of Auditors also has this right of information. The Court of Auditors has the right to look into these things and the basis for their recommendations as well, so I do not see why there should not be any reciprocity on that.

On the relationship between European Parliament and Council, on the one hand, and the Bundestag and Bundesrat on the other, I have 3 or 4 reservations. I know everybody comes up and says they are not comparable; I understand the reservations, but I think we are all in agreement, if we say that there is a federal structure on a multilevel set-up which, regardless of the nuts and bolts of comparing them one to one, has its worth; that is the first comment. Secondly, I was not referring to the information basis, but referring to the question as to whether I can refuse granting
discharge, it is the question of whether the Bundestag can refuse granting discharge to the Bundesrat. In the German context and the European context, with all the differences mutatis mutandis, but that would not be admissible, the person or the body who stands responsible for discharge is the Commission, or the German Government.

There could be refusals of discharge saying that the Bundesrat has not implemented the budget properly. The Bundesrat, apart from any dogmatic and structural differences, is a poor example because it has no executive powers in that sense; whether the Council used to have those which have now been got rid of by Lisbon. I do not have any figures on the German budget; it is much smaller, but obviously the Bundestag has a right to get information on implementation of the budget as executed by the Bundesrat, and that is valid for the European Parliament as well.

The final point, Mr Antpöhler fleshed this out and you mentioned this in a more marginal fashion perhaps, indeed the national parliaments cannot really get involved in the discharge of the Council. I do not think you can really break it down in those terms, and so I would agree with Professor Chaltiel that the European Parliament would really be the place to start, but in the political ramifications do not expect too much. You cannot force a representative of the Council, i.e. a member of the government of a national Member State, to resign because in their sphere the Council has not implemented the budget properly or on an overall decision of the Council on a building, for example.

It is either completely political or you are talking about mere trifles. You can go to the press but you know the press has all sorts of topics that they want to deal with and whether they want to pick up on this sort of topic and keep it running for several weeks to force through the necessary political consequences; I have my doubts.

*Carlino Antpöhler:*

Thank you. Yes, a few remarks from me. On the table, I have dealt with it in my briefing paper, that is on page 84.

On reciprocity, it is right that you have to take into account a recommendation but there is no obligation to act in accordance with it. If you now consider the Treaty on the right to information, the Council's right is restricted to specific documents. Article 319 paragraph 1, refers expressly to the Council and Parliament, but the right under paragraph 2, i.e. the more general right to information explicitly only mentions the European Parliament and that it is also the way it is dealt with in the Financial Regulation. There is thus no reciprocity between Parliament and Council on the right to information; whether important information that Parliament gets under paragraph 2 has to be passed on to the Council under the duty of sincere cooperation is a different issue. There is no extensive right to information that the Council enjoys as the Parliament. It is thus misleading to speak of reciprocity.

*Michael Theurer, Chair:*

Thank you very much. Professor Chaltiel does not want to take the floor so, to conclude this discussion, maybe I can give the floor to the Rapporteur, Ms Ayala Sender.
Ines Ayala Sender, Rapporteur:

I would like to thank you for all the new ideas that we have heard, and also the new challenges that have come out of the conclusion to this seminar. I think it says a lot that the Council did not think it was a good idea to come and explain itself. It demonstrates in the European institutions, the fact that we are going to have to face public opinion and justify our actions.

As I said at the beginning, we are maturing in building our European project; democracy has matured but we still have a difference between what is happening at the national level and at the European level. Council's legitimacy, in democratic terms, is only in relation to its role with national parliaments but it is very difficult to justify why it will not give account of its expenditure. When it comes to the European budget and accountability decisions, it does have to give account to the only democratically elected institution which is the European Parliament. This debate goes beyond the purely academic side; it is important that we continue having this very political debate, it is something that we are going to see in the coming weeks, when we have the extraordinary European Council to decide upon the budget.

Council does have a responsibility to Parliament when it comes to discharge, and I think that we are a kind of collateral damage in a broader battle, which is very much a shame. We need to continue our work to ensure that the entire European budget is subject to accountability to this Parliament.

I remember, the Chair of the Environment Committee back in 1997, Mr Ken Collins, when I was elected for the first time. An administrator went to him and said that what you are asking for is not written anywhere. He said even if it is not written, of course it is not written in the law, I think we can still try to do something about it, and I think this is what we have to do. The Council has to come to us for discharge, the Court of Auditors has made its comments, Council has contested its recommendations but now admits that it is subject to discharge scrutiny and I think that shows that we are legitimate in our arguments.

We have to continue working for this and, hopefully, one day the Council will, as Professor Chaltiel suggested, submit to media, public opinion, and citizens' criticism and recognise our legitimacy on this. It is correct that the Council should agree to subject itself to scrutiny, and we will have to see what we can do to make this happen; obviously Plenary will have to grant final approval, we will continue working to get the Council to explain its position - it has not done so today - I am sure we will invite it to Plenary when the budget is finally subject to approval, and hopefully we will achieve better results then. Thank you.

Michael Theurer, Chair:

Thank you very much to our Rapporteur, Ms Ines Ayala Sender, for those comprehensive remarks. Indeed this is an issue we will be following in this Committee; we are looking for a constructive solution. Something I would like to underscore once again, and listening to you, Professor Rossi, is that the Council, in terms of it recommendation, might require information from the Parliament; I think there is a predominant view here in this Committee, that there is absolutely no problem with that because we always make sure that the documents of Parliament enjoy the greatest amount of transparency and are made available on the internet. It is in our interests in this Committee to make sure that there is the greatest amount of transparency on the use of taxpayers' money; we see no insuperable obstacles there. At the same time, we are well aware that the right of discharge is the right of the Parliament as a whole, not just of this Committee - we have the preparatory discussions and do the preparatory work - that remains the sole right of Plenary.
All that remains for me to do is to thank those legal experts who have come here today and given us the benefit of their thoughts and given us a deeper insight into the Treaties, Mr Antpöhler, Professor Rossi, Professor Chaltiel, and Mr Passos from the Parliaments’ Legal Service, thank you for coming here.

With this seminar today, we have provided a further important contribution to the legal interpretation and application of our practical work on what’s going on here. The objective that we are pursuing is a very important one; we want to have the highest level of democratic scrutiny in place. That is our common interest.

Thanks also to the Secretariat; thank you to the Policy Department - Mr Fischer especially - for all the work that has been put in to prepare this workshop. There is always a lot of work involved in setting up this sort of thing, and to conclude I would like to thank our external guests. I have a little token here, a gift of “50 years of the European Parliament” so that you can remember your day here in Parliament. That concludes this public meeting of our Committee.
The Power of Discharge of the European Parliament

by Matthias Rossi

BRIEFING NOTE

Abstract

Based on the practice of the European Parliament to also examine the budgetary implementation by the Council of the EU as part of its discharge exercise, this document also considers the legal basis for such a procedure. It reaches the conclusion that, according to present law, the Commission is solely responsible for the implementation of the budget, so that Parliament can only refuse to discharge it. The Council, on the other hand, is not subject to discharge, but, on the contrary, it is rather the discharge authority. A discharge decision by the European Parliament addressed to the Council is thus inadmissible and certainly legally irrelevant. Insofar as the European Parliament wishes to examine the implementation of the budget by the Council, it must request the relevant information from the Commission.
This document was requested by the European Parliament's Committee on Budgetary Control.

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EXECUTIVE SUMMARY

I. Introduction

1. The question whether the European Parliament is *de lege lata* authorised to grant or refuse discharge to the Council in respect of the implementation of the Council budget must be strictly separated from the question whether it should be authorised to do so *de lege feranda*.

2. Even under the existing legal framework, the question whether the European Parliament is authorised to decide on the discharge of the Council must be separated from the issue as to what information the European Parliament requires, and must receive by law, as a basis for granting of discharge to the Commission.

II. The European Parliament’s power of discharge with respect to the Council

1. According to the role allocation of the European Institutions, the Parliament and the Council jointly act as the ‘budgetary authority’. Both are involved in the drawing-up and the adoption of the annual budget in accordance with Article 314 TFEU, as well as in the procedure for granting of discharge to the Commission under Article 319 TFEU. Hence the Council is a responsible discharge authority and not, itself, subject to discharge. Under Article 319 TFEU, the only institution subject to discharge is the Commission.

2. Secondary legislation cannot alter the division of powers between the institutions regulated in primary law. The internal conferral by the Commission of the power to each institution to implement the sections of the budget, does not release the Commission from the overall responsibility for budgetary implementation.

3. The principle of overall responsibility of the Commission for the execution of the budget is not only prevailing primary law but, at the same time, is also factually justified. Firstly, it safeguards the division of powers between drawing-up and implementing the budget. Secondly, it thereby reflects the institutional division of powers between the institutions. Thirdly, differentiating between a subdivided conferral of responsibility in the internal area and their joint exercise in public can, therefore, also be understood as a manifestation of the principle of loyal cooperation between the institutions. Fourthly, the principle of overall responsibility contributes towards creating political stability within the Union as legal and political consequences only occur in the case of severe violations of budgetary provisions, whereas smaller infringements are left to the internal clarification and relief process of the respective institutions.

4. A discharge power of the European Parliament against the Council cannot be based on the institutional balance between the institutions but would, on the contrary, disrupt this balance; for the European Union is equally based on the Parliament, as the representative of the Union’s citizens, as well as the Council, as the representative of the Member States.

5. Because of its parallel role in providing legitimacy, the Council has no fundamental accountability to Parliament. Parliament’s right to question the Council in accordance with Article 230 TFEU, in conjunction with Article 115 et seq. of the EP Rules of Procedure, and for the area of the CFSP in accordance with Article 36(2) TFEU, shall not establish a general responsibility on the Council’s part in relation to Parliament, but rather standardise derogations.
6. Given these findings derived from primary law, the European Parliament's refusal of discharge to the Council may be politically significant (depending on the amount of media coverage), however, it has no legal consequences.

III. Basis of Parliament’s decision on the discharge

1. The Parliament has a right to all information which, from its point of view, is necessary for the granting of discharge to the Commission. According to the overall responsibility of the Commission towards the Parliament, in principle it is the sole body subject to the obligation to inform. Hence, a direct right of Parliament to information from the Council does not exist.

2. The (recommending) decision of the Council on the granting of discharge to the Commission is autonomous and independent from the final decision of Parliament. The autonomy and independence does not only cover the (political) assessment, but also the choice of the relevant information. Article 319(1) TFEU solely states which information has to be available for the Council and the Parliament as a minimum basis for their respective discharge decisions. However, it cannot be understood to mean that the same information has to be available to Parliament and the Council.

3. Since the overall responsibility of the Commission for the budget implementation towards the Parliament also covers the budget implementation of the Council, the Commission is obliged to grant access to all information on its budget implementation upon request.
I. INTRODUCTION

In a decision dated 26 September 2012, the European Parliament’s Committee on Budgetary Control recommended to the plenary assembly that it should refuse to grant the Council discharge for the implementation of the budget in 2010. To explain this decision, it stated that the Council refused to cooperate with the Committee on Budgetary Control in any way.\(^1\)

This marked the continuation of a conflict that had been simmering for several years. Parliament delayed granting the Council discharge for the 2007 financial year\(^2\) because it refused to provide Parliament with information about the implementation of its administrative budget. It was only through the mediation of the Swedish Presidency of the Council that a decision granting discharge was obtained from the European Parliament in November 2009.\(^3\) Difficulties were also encountered with the grant of discharge to the Council for the 2008 financial year. Following extensive negotiations, the European Parliament granted the Council discharge in May 2010 but refused to grant discharge to the European Police College, CEPOL.\(^4\) The opposite situation arose with the discharge procedure in relation to the 2009 financial year. In this case, the discharge was first delayed by the European Parliament in a decision dated 10 May 2011, which made reference to the Council’s unwillingness to cooperate,\(^5\) also delaying the grant of discharge to the European Police College and the European Medicines Agency. In a decision dated 25 October 2011, the European Police College and the European Medicines Agency were finally discharged, but not the Council.\(^6\)

Irrespective of whether and for what reasons the European Parliament’s plenary assembly follows the recommendation of its Committee on Budgetary Control, a sober analysis of the legal basis should clarify whether the dispute between institutions is a serious inter-institutional conflict or just a wrangle over political power. The question of whether the European Parliament is de lege lata authorised to grant or refuse discharge to the Council in respect of the implementation of the Council budget must be strictly separated from the question whether it should be authorised to do so de lege feranda (III). However, even under the existing legal framework the question of whether the European Parliament is authorised to decide on the discharge of the Council must be differentiated from the issue as to what information the European Parliament requires and must receive by law as a basis for its decision on the granting of discharge to the Commission (IV). However, we should first remind ourselves of the significance of the discharge decision (II.).

II. THE SIGNIFICANCE OF THE DISCHARGE DECISION

The discharge by the European Parliament concludes the external control of budgetary management by the European Court of Auditors and with it the budgetary cycle in the European Union. It is a particular expression of Parliament’s control over the European Commission.\(^7\) It serves two purposes:

From an accounting perspective it confirms the ‘lawfulness, compliance and effectiveness’ of the revenue and expenditure account for the relevant financial year,\(^8\) while at the same time providing

\(^1\) The English press release from 26.09.2012 read: ‘... following the Council’s complete lack of cooperation with the committee’.
\(^5\) P7_TA(2011)0196.
\(^6\) P7_TA(2011)0450.
\(^8\) Kannengießer, DÖV 1995, 55 (56).
the basis for the final accounts in subsequent years. In terms of this accounting function, Parliament’s discharge decision has legal effect insofar as it concludes the accounts. No further budgetary operations can be booked for this year and invoices cannot be changed. It also provides proof for the presumption of orderly financial management on the part of the Commission and the other participating institutions.

In addition, the discharge also serves a significant political function because it enables the Commission’s financial management to be assessed. The European Parliament has significant discretionary freedom in this context. The discharge releases the Commission of its responsibility to the European Parliament under Article 319 TFEU for the relevant financial year. Legal consequences shall not be deemed to arise in this context. In particular, refusal to grant discharge because of divergences in procedural regulations cannot be interpreted as a motion of censure under Article 234 TFEU. Instead, the decision granting discharge is solely of political significance, although this can certainly be far-reaching and can even lead to the resignation of the entire Commission. Accordingly, the political significance of the decision to grant discharge may outweigh the accounting function.

III. DISCHARGING THE COUNCIL

There is no denying the special significance, including the political significance, of the decision to grant or refuse the Commission discharge. In the past, Parliament used the instrument more frequently in order to demonstrate its increased importance as a result of the direct elections introduced in 1979, and to increase its influence on the Commission’s budgetary management. Thus, it postponed discharging the Commission for the 1980, 1982 and 1985 financial years and refused discharge for the 1982 financial year, although, admittedly, this was of no consequence. In contrast, there were far more consequences when Parliament refused to grant discharge for the 1996 financial year, first postponing it because of numerous ‘irregularities’. This led to the resignation of the entire Commission under President Santer on 16 March 1999.

However, the current dispute has nothing to do with the relationship between the European Parliament and the Commission, but rather between the European Parliament and the Council. This is because, since 2002, Parliament not only grants discharge for the implementation of the relevant budget to the Commission, but also to the other organs and agencies – including itself – even though it does not have the support of an explicit legal basis here.

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18 The Commission under its President, Gaston Thorn, remained in office. Parliament decided against a motion of censure because there were only two months left in the period of office of the Commission (according to Theato/Graf, Das Europäische Parlament und der Haushalt der Europäischen Gemeinschaft, 1994, p. 133) and/or because the qualified majority required under Article 144 TEEC o.v. could not be obtained (according to Strasser, Die Finanzen Europas, 7th edition 1991, p. 307). Four months later, the Commission under Jaques Delors was discharged for the 1982 financial year.
21 Blomeyer/Sanz, How do national parliaments supervise and control their own budgets? Practice and experience from selected Member States, p. 21.
1. RELEVANT LEGAL BASIS

The discharge of Article 319 TFEU is regulated in primary law. Paragraph 1, sentence 1 states the following: ‘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.’ This specification is repeated by Article 145 of the current Financial Regulation, which relates to a few details of the discharge process in its two subsequent provisions, which, for their part, also largely simply repeat the provisions under primary law of the other paragraphs of Article 319 TFEU. The draft of the new financial regulation to be adopted on the basis of Article 322 TFEU left these specifications under secondary law unchanged, so that, in this regard, there is no change to the legal position as it applied prior to the Treaty of Lisbon entering into force. The Interinstitutional Agreement between Parliament, the Council and the Commission on budgetary discipline and sound financial management dated 14 May 2006 contains no provisions on discharge or the discharge procedure, so there is no need to define the legal nature of the agreement and its effects at this point. The draft for a new interinstitutional agreement dated 3 March 2010 makes no reference to discharge and the associated procedure. On the other hand, the procedure is organised within Parliament in its Rules of Procedure, and, as a purely internal right, cannot derogate the specifications under primary law. Accordingly, Article 77 of the EP Rules of Procedure, which relates to procedures for discharging ‘other bodies and institutions’ of the European Union, does not establish corresponding powers for the European Parliament, but simply expresses Parliament’s understanding of its role, which must be measured against the ‘constitutional’ requirements under primary law.

2. DISCRETION?

These requirements under primary law seem so clear that it not only seems hard to understand how it could have become parliamentary practice from a legal/political perspective, but is also open to question in a legal/methodological context whether primary law allows any discretion for an interpretation that goes beyond the text itself.

a) Final regulation

We should remind ourselves of the wording: ‘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.’

This provision clearly indicates that only the Commission is subject to the discharge decision, while the Council and Parliament are discharge authorities. In the literature, including even the more extensive works, the possibility that there might be other bodies subject to discharge as well as the Commission is largely ignored. If Parliament’s practice of discharging other bodies in addition to the
Commission is recognised at all, it is pointed out that the legal consequences arising from discharge cannot be established. These findings are not only recorded in the German literature, but can also be observed in French works, for example.

In addition to the wording of Article 319(1) TFEU, it is decisive for the authors that the distribution of roles in the discharge procedure corresponds to the assignment of tasks and responsibilities to the three bodies in the entire budgetary procedure. While Parliament and Council collaborate to produce the annual budget under Article 314 TFEU and thus operate as a ‘joint budgetary committee’, under Article 317(1) TFEU the Commission is equally responsible for the implementation of the budget. It is solely responsible for this, despite the fact that much of the budget of the European Union is implemented in and by the Member States, which are, therefore, also mentioned in Article 317(1) TFEU. In the final analysis it should not be forgotten that the Council is included in the discharge procedure on the discharging parties, even though it ‘only’ has the power to make recommendations. Hence the Council is a responsible discharge authority and not itself subject to discharge. Under Article 319 TFEU, the only institution subject to discharge is the Commission.

The Legal Service of the European Parliament casts doubt on the latter. The standard simply indicates that the Commission is one body subject to discharge, but not necessarily the only one.

This interpretation is not convincing. Article 319(1) TFEU actually standardises the bodies subject to discharge in a positive way without negatively excluding all other bodies subject to discharge. However, this is neither necessary nor possible from a legislative perspective. The simple nomination of a single body subject to discharge should not be interpreted to mean that other bodies may not also be subject to discharge. Rather, it is also applied to the founding Treaties that a supplementary interpretation of a contractual provision presumes a loophole. Such an interpretation cannot be determined in Article 319(1) TFEU. In accordance with the areas of responsibility of the Commission pursuant to Article 317(1) TFEU, Article 319(1) TFEU names it as the body subject to the discharge decision. In addition, the Council does not need to be excluded as a possible body subject to discharge because, on the contrary, it is included in the discharge procedure as a discharge body. The standard is clear and unambiguous without negatively excluding the Council, other institutions and Member States. If the standard is – incorrectly – interpreted as being open for other bodies subject to discharge, then it would be much more practical to focus on the Member States, as they are responsible for, by far, the largest part of the implementation of the European budget. However, this would expose the absurdity of the broad interpretation, considering the legal and political consequences if Parliament were to refuse to discharge a Member State.

Thus, from a regulatory perspective, there are good reasons to state that primary law leaves no room for discretion and not only the Parliament’s refusal to discharge the Council, but also any discharge decision by Parliament in relation to the Council, whatever its substance, infringes primary law.

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30 The current work by Delon-Desmoulin, Droit budgétaire de l’Union européenne, 2011, states on p. 229 that Parliament, as the primary addressee of the Court of Auditors reports, can claim its budgetary powers in relation to the Commission and Council, but subsequently only refers to granting of discharge to the Commission (with the regulations under primary law). Brehon, Le budget de l’Europe, 1997, also assumed that Parliament is only entitled to powers of discharge in relation to the Commission (p. 38). In relation to the information available to the European Parliament, he discusses the problem that the Commission has no influence on the Council, so that the Commission is once again the only body subject to discharge (p. 45).
b) The Commission’s overall responsibility

Naturally one should not overlook the fact that only 20% of the European Union’s budget is implemented by the Commission while, by far, the largest part is implemented by the Member States. That is why Article 317(1) TFEU refers to the fact that the Commission implements the budget ‘jointly with the Member States’. Similarly, Article 48(2) of the current Financial Regulation obliges the Member States to cooperate with the Commission, just as provided for by the unchanged Article 50 of the new draft Financial Regulation. In addition, Article 50 of the current Financial Regulation and Article 52 of the future Financial Regulation allow the other bodies – out of respect for their contractually guaranteed administrative autonomy – the right to implement (independently) the individual plans that relate to them.

The European Parliament’s desire for control is linked to this authority. Although it does not yet have the Member States in its sights, it has begun to focus on the other institutions, in particular the agencies, since some of them took over tasks in the area of the 2nd and 3rd pillars in line with the pillar model and were thus largely classified as belonging to the intergovernmental part of the EU in which Parliament has far fewer powers in comparison with the ‘community’ part of the first pillar. Admittedly, these differences have largely been removed with the Treaty of Lisbon and even prior to this, expenditure in these policy areas fell primarily under the budget of the EU. However, Parliament seems to have found pleasure in granting, threatening to refuse, or actually refusing discharge to the other institutions and agencies with its individual decisions. It is possible in this way to differentiate at the last moment, thus potentially influencing future spending.

In contrast to this practice, primary law pre-supposes the principle of the overall responsibility of the Commission. The Commission has sole external responsibility for the implementation of the budget, as stated in Article 317(1) TFEU and even more clearly in Article 48 of the prevailing Financial Regulation. It alone is answerable to the European Parliament and it alone must explain any irregularities in implementing the budget, even if this implementation is a matter for the Member States, the other organs or agencies.

This principle of overall responsibility of the Commission for the implementation of the budget is not only prevailing primary law but is also factually justified. Firstly, it safeguards the division of powers between the drawing up of the budget by Parliament and the Council and its implementation by the Commission. Secondly, it thereby reflects the institutional division of powers between the institutions, which is also functional in its basis. Thirdly, differentiating between a subdivided conferral of responsibility in the internal area and their joint exercise in public can, therefore, also be understood as a manifestation of the principle of loyal cooperation between the institutions. Fourthly, the principle of overall responsibility contributes to creating political stability within the Union as legal and political consequences only occur in case of severe violations of budgetary provisions, whereas smaller infringements are left to the internal clarification and relief process of the respective institutions.

This principle of overall responsibility is negated by Parliament not just because it makes different discharge decisions for the individual institutions, but also because it differentiates in the discharges it grants. In line with the principle of the overall responsibility of the Commission, Parliament can only

33 For example the European Defence Agency (EDA) in Brussels, the European Union Institute for Security Studies (ISS) in Paris, the European Union Satellite Centre (EUSC) in Torrejon de Ardoz or the EU Unit for Judicial Cooperation (Eurojust) in the Hague, the European Police College (CEPOL) in Bramshill and the European Police Office (Europol) in the Hague. 
34 For a critical response see Rossi, Entwicklung und Struktur der Europäischen Union, ZJS 2010, 49 et seq. 
35 Cf. Article 28 and/or Article 41 TEC o.v. 
36 The sense whereby objectives determine reality seems to have been lost in Parliament, when a comment on the principle of the overall responsibility of the Commission simply states: ‘There seems to exist an irreconcilable difference between a legal text and the reality.’
either discharge the Commission or refuse to do so. There is no scope for differentiated intermediate
tones in the tenor of the discharge decision. Instead, an instrument is available whereby comments
may be added, giving the European Parliament much more influence because it can not only pass
judgement on the past retrospectively by refusing discharge, but also oblige the Commission to take
particular steps in the future, in accordance with Article 319(3) TFEU.

3. POSSIBLE DYNAMIC INTERPRETATIONS

Contrary to the learned opinion expressed here that Article 319(1) TFEU is not open to interpretation
with reference to the bodies subject to the discharge decision, the Legal Service of the European
Parliament expresses the opinion that Article 319(1) TFEU is open to a dynamic interpretation,
holding that the provision was open to interpretation and, for several reasons, was also to be
interpreted to mean that Parliament was permitted to decide on the discharge of its administrative
budget, including with regard to the Council.

The starting point for the Parliament’s deliberations seems to be the fact that there should be no
areas of budgetary implementation that are not subject to parliamentary control. Irrespective of how
big or small the volume of the Council’s individual plan may be in the context of the EU budget,
Parliament claims the right to audit the Council’s spending and to evaluate this in a separate
discharge decision. Historical and teleological arguments are used, based on the required control of
all expenditure by Parliament and the public.

a) Historical background to the power of discharge

Presupposing a (supposed) openness to interpretation, in an historical analysis Antpöhler refers to an
interpretation according to which the provision needed to be, and could be, adapted to the changes
in institutional conditions. Since coming into force in 1977, the institutional structure of the European
Union has undergone significant changes, he argues. On the one hand, the role of the European
Parliament had changed radically (specifically, the discharge procedure was introduced prior to the
first direct elections to Parliament in 1979). On the other hand, the executive functions of the Council
have increased continuously in recent decades, giving rise to a greater need for democratic control.
Because the Council’s budget also encompasses the expenditure of the European Council, the way in
which this had developed also needed to be taken into account. The Council and the European
Council exercised executive functions within the common foreign affairs and security policies; the
same applied to the Council in relation to the Economic and Monetary union. Accordingly, a dynamic
interpretation of Article 319 TFEU was appropriate, supporting the right of discharge of the European
Parliament in relation to the Council.37

This argument may be convincing from a political perspective, but not from a legal one. This is firstly
because it overlooks the fact that the discharge procedure was indeed adapted to the changes in the
institutional framework, specifically through the changes to the Treaty in 1975 and in the context of
the Treaty of Maastricht. To this extent, we should remember the development of the discharge
procedure, which I summarised in my dissertation as follows.38

According to the Treaties of Rome, the power to grant discharge originally lay with the Council. Both
Article 206(4) TEEC) o.v. and Article 180(4) TEAEC stated: ‘The Council shall give a discharge to the
Commission with a qualified majority in respect of the implementation of the budget. It shall inform
the European Parliament of its decision.’ Because Parliament’s only right was the right to information,

37 Report Antpöhler, p. 114 et seq.
38 The following extracts from Rossi, Europäisches Parlament und Haushaltsverfassungsrecht, 1997, p. 151 et seq.
there was no democratic control over finances at European level\textsuperscript{39}. However, until 1970, the European Communities financed themselves through contributions which, like all other expenditure by the relevant Member States, were audited by the national comptrollers and assessed at a political level as part of national budgetary scrutiny. Thus, the democratic control of the implementation of the budget was through the national parliaments, even though firstly only indirectly through the contributions and secondly only with regard to the amount and not the type of use.

This control became insufficient as soon as the Community was provided with financial resources of its own, which were not subject to the controls of the national comptrollers and democratic checks by the national parliaments\textsuperscript{40}. Accordingly, Parliament first secured a say in relation to discharge through the Treaty of Luxembourg of 1970: ‘The Council and the Assembly shall give a discharge to the Commission in respect of the implementation of the budget. To this end, first the Council, which acts by a qualified majority, then the Assembly, shall audit the report of the Control Committee. The Commission shall only be discharged when the Council and Assembly have reached a decision\textsuperscript{41}.’

Parliament was given power of decision on the granting of discharge to the Commission in the Treaties of Brussels of 1975, which came into force in 1977. The first paragraph of Article 206(b) TEAEC o.v. corresponds to the current Article 319(1) TFEU.

The Maastricht Treaty made no changes to Parliament’s powers of discharge; however, it did invest Parliament with far-reaching powers to seek information in the context of its budgetary control function. Under Article 206(2) TEC, the Commission must submit any necessary information to the European Parliament at any time at the latter’s request. In addition, Article 206(3) TEC reinforced the importance of observations made by Parliament in its discharge decisions in relation to budgetary implementation. The Commission is immediately obliged to take all appropriate steps to act on the observations accompanying the European Parliament’s discharge decision (also including the explanations the Council may add to its recommendations). On request, the Commission must report to Parliament on the steps it has taken in this regard.

The provisions set down in Article 319(2) and (3) TFEU continue to apply.

If primary law has not modified the provisions in relation to discharge over and above these changes, then this is a conscious decision. Accordingly, there is no loophole to be closed through interpretation, not even in such a sensitive area as interinstitutional relations, in which the allocation of responsibilities also entails the assignment of powers.

Also unconvincing is the opinion that Parliament has gained so much in importance since the approval of the sole power of discharge in 1977 in comparison with the other institutions, namely the Council, that its power of discharge now also needed to be extended to the other institutions.

The sole fact in this regard is that Parliament has naturally gained greater importance over time; it has been directly elected since 1979, making it directly democratically elected, and it has succeeded in continuously expanding its legislative powers through the Single European Act and subsequently above all through the Maastricht Treaty, as well as the Treaty of Amsterdam. Last but not least, the Treaty of Lisbon has also further extended the powers of Parliament. The co-decision procedure has become an ordinary legislative procedure in which Parliament – together with the Council – decides on legislation; Parliament’s approval is now always required in relation to international agreements and trade policies, while the influence of Parliament has also increased in terms of the introduction of enhanced cooperation between some Member States and in the procedures for revising the Treaties.

\textsuperscript{39} Theato/Graf, Das Europäische Parlament und der Haushalt der Europäischen Gemeinschaft, 1994, p. 107.

\textsuperscript{40} Theato/Graf, Das Europäische Parlament und der Haushalt der Europäischen Gemeinschaft, 1994, p. 107.

However, it must be emphasised above all that the Maastricht Treaty – as explained – implemented changes to discharge procedure without affecting the bodies subject to discharge. Accordingly, the argument that the provision of Article 319(1) TFEU can be traced back to the institutional conditions that applied in 1977 and thus does not consider direct elections to Parliament does not hold. After all, changes to budgetary law and the right of discharge could have been taken into consideration in the treaty changes of the Maastricht Treaty if this has been the will of the contracting partners.

The same applies to a greater extent to the Treaty of Lisbon. After all, the Treaty of Lisbon did indeed change the weighting of budgetary powers between Parliament, the Council and the Commission.

The Commission’s role has become more important in comparison with the provisions of Article 272 TEC. It should first be emphasised that, under Article 314, the Commission not only draws up a preliminary draft, but also the draft budget, the adoption of which is the responsibility of the Council, according to 272 TEC. Above all, however, the Commission gains additional influence through its participation in the Conciliation Committee in an informative and mediative capacity; despite the fact that it is not formally entitled to this influence, under Article 272 TEC, it has acquired it in real terms through the conciliation procedure and trilogues provided for in the Interinstitutional Agreement.

The Council has lost some of its decision-making powers in relation to compulsory expenditure, but has gained a say over non-compulsory expenditure. In addition, in its negotiations in relation to the budget, it no longer needs to fear that Parliament will reject the budget wholesale and can thus take a more pro-active approach. The possibility of influencing the Commission to present a modified draft budget may also strengthen the political position of the Council.

In the final analysis, Parliament can also decide on compulsory expenditure, but has lost the last word on non-compulsory expenditure. Something more serious when conducting political negotiations is the loss of their monopoly in coercing the Commission to present a new draft budget by rejecting the budget for important reasons in accordance with Article 272(8) TEC. This loss is certainly partly balanced by the possibility of using the budget majority to push through one’s own political ideals.

These budgetary powers will not be assessed in detail here. The key point in this context is that an extensive readjustment of powers took place that also takes account of the intervening changes in institutional equilibrium. If there were no changes to the discharge process or to the body subject to discharge, then it is not permissible to extend the provisions of Article 319(1) TFEU through interpretation while ignoring the will of the parties to the agreement.

This is particularly the case because the identification of the Commission as the (sole) body subject to discharge in the Treaty of Lisbon seems more plausible than before. It is not only because, on the one hand, this provision corresponds to the responsibility of the Commission for implementing the budget under Article 317(1) TFEU; and, on the other hand, to the option open to Parliament of passing a motion of censure on the Commission under Article 234 TFEU. It is also because, under Article 17(7) sentence 2 TEC, Parliament also has the right to elect the President of the Commission. The parliamentary responsibilities of the Commission are clearly in evidence here, while the Council has no such responsibilities.

In summary it must be stated that no powers can be derived from any change in institutional conditions that allow Article 319(1) TFEU to be extended beyond the will of the parties to the agreement as reflected in the wording. The contrary opinion overlooks the fact that the distribution of budgetary powers plays a key role in determining the architecture of the institutional framework, rather than conversely being determined by it. All other interpretations would give rise to a spiralling
argument that would divorce the institutional framework from the will of the Member States as expressed in the treaties.

b) Insufficient indirect responsibility of the Council?

Another argument put forward for the need to expand Article 319(1) TFEU is the organisational powers of the individual institutions. This argument primarily targets the overall responsibility of the Commission under Article 317(1) TFEU and the flow of information between the institutions, which will be explained in further detail below. The independence of the Council with regard to its internal organisation, so the argument goes, is in conflict with the responsibility of the Commission for the budget.42 Direct parliamentary responsibility on the part of the Council is essential – also in the interests of the Council’s organisational powers.

aa) No impairment of organisational powers

This argument is unconvincing, even in abstract terms. Apart from the fact that the principle of the Commission’s sole responsibility for the implementation of the budget is specifically warranted (and is also the sole parliamentary responsibility of the government in all the Member States), it is not apparent why the organisational powers that are undoubtedly due to all institutions should be more or less impaired when the Council has direct parliamentary responsibility than when the Commission is responsible for implementing the Council’s section of the budget. When studied closely, organisational powers are not affected at all, but rather, at most, only give rise to an obligation to inform in regard to the implementation of the relevant budget that may be understood in terms of accountability. The question of whether this obligation applies to the Commission or to Parliament makes no difference to the organisational powers.

bb) Sufficient control even when overall responsibility lies with the Commission

The relevant question is to what extent the legal responsibility of the Commission corresponds to its actual competence, or, to put it another way, to what extent the other institutions have discretion within their sections of the budget that cannot be controlled by the Commission. Article 50 Financial Regulation 2007 states that the individual institutions shall be allowed the ‘requisite powers for the implementation of the sections of the budget relating to them.’

Parliament invokes this standard in order to establish that the institutions listed in Article 316 TFEU have an autonomy with regard to expenditure that requires parliamentary control43. This is because, according to isolated opinions, the Commission also ceded ultimate responsibility together with these powers.44 On the other hand, the majority opinion is that the participation of the other institutions changes nothing in terms of the ultimate responsibility of the Commission45.

To begin with it seems logical that, when they are granted powers, the other organs also bear responsibility to this extent and must justify the exercise of these powers. On the other hand, Article 50 of the 2007 Financial Regulation states that the powers of the individual organs can only be derived from the Commission. The organs involved in implementing the budget may only exercise

42 Resolution of the European Parliament dated 10.05.11, P7_TA(2011)0197, point 2.
the powers vested in them within the strict parameters of the 2007 Financial Regulation and the relevant implementation provisions approved by the Commission\(^{46}\). Thus, Article 54(1) of the 2007 Financial Regulation states that the Commission is not entitled to delegate executive powers to third parties where they involve ‘a large measure of discretion implying political choices.’ Furthermore, the same standard states that the Commission must precisely define the extent of the implementing tasks and fully supervise the use made of them. In the context of this assessment, it is logical that the 2007 Financial Regulation itself expressly assumes the responsibility of the Commission for the overall budget. The powers invested in the institutions still only relate to the internal aspects of the relations between the organs and institutions involved in implementing the budget. On the basis of the controlling powers of the Commission laid down in the 2007 Financial Regulation, the Commission retains ultimate responsibility for implementing the budget\(^{47}\). Accordingly, effective parliamentary control does not require the discharge of each individual participating organ.

It would be accurate to say that Articles 146 and 147 of the 2007 Financial Regulation also impose reporting and information obligations on the other organs in relation to the budgetary discharge\(^{48}\). On the other hand, the Council itself is listed in these standards as a legitimate body alongside Parliament. Furthermore, the obligation to participate in the flow of information does not follow on from the fact that political responsibilities exist that require discharge. The reporting requirements relating to the other bodies can also be understood simply as internal obligations that make it easier for the European Parliament to access information. Thus, the obligations of the other organs also relate to special information, such as replies to the Court of Auditors (Article 146(2) of the 2007 Financial Regulation) and transpositions or observations contained in the discharge report (Article 147(2) of the 2007 Financial Regulation). Like Article 319(2) TFEU, Article 146(3) of the 2007 Financial Regulation provides for an extensive obligation on the Commission to inform. Thus, the European Parliament can require the Commission to supply all the information relating to the discharge, once again underlining that ultimate responsibility lies with the Commission. Even the reference to the EU’s External Action Service, which is subject to discharge under Article 147a of the 2007 Financial Regulation, is unhelpful because an express regulation exists for this new institution\(^{49}\), while there was no regulation for the Council even as part of the Treaty of Lisbon, despite the fact that this strengthened the rights of Parliament in many respects.

Secondary legislation cannot alter the division of powers between the organs regulated in primary law. The internal conferral of the power to implement the sections of the budget by the Commission to each institution does not release the Commission from the overall responsibility for budgetary implementation.

In this context it is simply noted that Article 335, sentence 3 TFEU changes nothing in relation to the overall responsibility of the Commission towards Parliament. Although still subject to primary law, this provision confirms the administrative autonomy of the individual organs, which is otherwise not covered by the treaties, but is simply a prerequisite. However, limitations on the overall responsibility of the Commission and the establishment of the individual parliamentary responsibility of the other organs cannot be derived from this provision. Even the systematic description in the seventh part, which contains the ‘General and final provisions’ and is, therefore, outside the sixth part, which describes the ‘Institutional and financial provisions’ indicates that the regulation influences neither the general relationship nor the budgetary relationship between the organs. This is even more apparent from the contents; the provision regulates the authority of the organs to act in external relations with the Member States, which, under Article 335, sentence 2 TFEU, always lies with the


\(^{48}\) Legal Service Parliament, 20.09.2011, p. 11.

\(^{49}\) Also Legal Service Parliament, 20.09.2011, p. 12.
Commission, and, according to sentence 3 TFEU, only lies with the relevant organs in exceptional cases. The regulation ensures that the European Parliament and, of course, the Council can conclude agreements regarding building and personnel management directly with the Member States – particularly France and Belgium – without the Commission having to mediate. Article 335, sentence 3 TFEU is limited to this statement without modifying or even touching on the overall parliamentary responsibility of the Commission for implementing the relevant sections of the budget by Parliament and the Council.

c) **Direct parliamentary responsibility?**

As an argument for the need to extend parliamentary discharge rights to the Council, it is further noted that spending by the Council needs to be controlled by a directly democratic institution\(^{50}\).

However, this argument is to be refuted both in terms of its findings and in relation to its claim.

The findings are also inapplicable because they assume that the Council’s spending is not subject to the control of ‘a direct democratic institution’. The only correct fact here is that there is no direct control by such an institution – neither the European Parliament nor the relevant national parliaments. Nonetheless, the implementation of the budget by the Council is directly determined by Parliament in many respects: parliamentary control already takes place prospectively through the commitment to the specific budget, as defined by Parliament and the Council in the procedure set down in Article 314 TFEU. This commitment is reinforced by the abstract budgetary principles, some of which are set down in the TFEU, and some in the Financial Regulation\(^{51}\). In addition, there is also a retrospective parliamentary control, whereby the Council is also subject to retrospective external controls by the European Court of Auditors, which presents its reports to Parliament under Article 287(2) TFEU. In addition, under Article 317(1) TFEU, the Commission is responsible to Parliament for the implementation of the entire budget, in other words also for the implementation by the Council of its particular section. In the final analysis it is not beyond possibility that the Council’s budget management may also be of interest to a national parliament, despite the fact that a problem exists with the attribution of the actions of the Council as a whole to a particular Member State.

The demand that the Council must accept its direct responsibility to Parliament for the implementation of its section of the budget is only understandable given Parliament’s view of itself, but not from the perspective of constitutional law.

Such direct responsibility on the part of the Council to Parliament is not set down in the Treaties and does not reflect the relationship between the institutions.

aa) **Democratic legitimacy of the EU**

Even if an abstract view is taken, this overlooks the fact that Parliament and the Council stand side-by-side in lending democratic legitimacy to the Commission and to the actions of the EU as a whole. This is made clear from the organisation of the principle of representative democracy by Article 10 TEC. While paragraph 1 states this in concrete terms, whilst also recognising the need for further specifics, paragraph 2 formulates the two lines of legitimacy, by means of which the two legislative bodies are linked with the legitimacy subjects. The European Parliament is directly democratically legitimised by

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\(^{50}\) Legal Service Parliament, 20.09.2011, p. 15.

its citizens, the European Council and the Council of the European Union are directly democratically legitimised by the Heads of State or Government represented in them and the relevant government representatives\textsuperscript{52}.

Three aspects should be highlighted briefly in this context:

Firstly, it should be remembered that the democratic legitimacy of the European Union and the European Communities originally derived mainly from the Council. This made sense insofar as this was the only body with binding legislative competences. Only as the powers of the European Parliament increased, so also grew the need for its greater democratic legitimacy. The introduction of direct elections to the European Parliament and the continuously increasing ways in which Parliament can influence legislation and the EU budget have led to a spiralling interrelationship: the increasing powers of the European Parliament require greater legitimacy, which, in turn, requires greater powers. In this context, it is also the demand for greater powers for the European Parliament, articulated under the banner of the democratic principle, bringing the European Union closer to statehood, something that is not actually desired in the final analysis.

This development must be emphasised because it is no longer apparent in the system described in Article 10(2) TFEU; because of the (supposed) greater significance of the direct legitimacy of the European Parliament, this line takes primary place, while the legitimacy provided by the European Council and Council of the European Union plays a more secondary role. The focus on the European Parliament is also increased by the fact that the ‘people of the Member States’ are no longer mentioned as legitimacy subjects, but rather ‘the citizens’. Thus, a direct link is to be made with the citizens of the Union, irrespective of national divisions, which remains contradictory on at least two counts: firstly, citizenship of the Union is strictly incidentally derived from citizenship of a Member State, and, second - and most importantly - the electoral franchise in relation to the European Parliament is still organised along national lines. In this context and in view of the quantitative restrictions on the European Parliament seats allocated to Member States, it is not possible to guarantee the equality of the vote throughout the Union, a fact that primary law takes into consideration by not requiring equality as a principle in electoral law. Logically, Article 10(2) TEC and Article 14(2) TEC avoid referring to the Members of the European Parliament as representatives of the people of Europe as a single entity.

The (theory-based) problems with the definition of the legitimacy subject(s) of the European Union in general and of the European Parliament in particular become largely irrelevant if one considers the hybrid nature of the European Union under Article 10(2) subsection 2 TEC: it is a grouping of the citizens of the Member States who wish, in their totality, to be referred to as citizens of the Union and, at the same time, a grouping of the Member States themselves. The focus of this original architecture of the European Union also helps to avoid the – redundant – discussion of the question of the finality of the European Union at political theory level. The European Union was always intended as a model unto itself and continues to be so. This is also why it can be democratically legitimised in a special way.

bb) the relationship between Parliament and the Council

The call for direct control by a directly democratically legitimised institution, in other words the European Parliament, seems even harder to understand if one considers the actual relationship between Parliament and the Council.

\textsuperscript{52} Calliess, ZG 2010, 1, 5; Baach, Parlamentarische Mitwirkung in Angelegenheiten der Europäischen Union, 2008, p. 6.
The European Parliament, as a representative organ of the peoples of the European Union, is the only organ with direct democratic legitimacy (see also 2.) and, as a consequence, also performs classic parliamentary control functions, not just within the framework of the implementation of the budget. However, these control functions are completely related to the Commission, but not the Council. Only three specific rights of Parliament in relation to the Council can be named, one of which is admittedly disputed, while another is only based in secondary law.

There is a dispute whether the right of the European Parliament under Article 226 TFEU to appoint temporary committees of inquiry allows it to examine actions by the Commission only or also actions by the Council.

A general right of inquiry on the part of Parliament in relation to the Council is only based in secondary law. Article 230(3) TFEU simply states that ‘the European Council and the Council shall be heard by the European Parliament in accordance with the conditions laid down in the Rules of Procedure of the European Council and those of the Council.’ However, the Rules of Procedure of the European Council or those of the Council do not add precision to this provision, but rather those of the European Parliament, which entail a general right of inquiry, including in relation to the Council.

Transposition of an interinstitutional agreement, Article 115 of the EP Rules of Procedure relates to the prerequisites under which Parliament can direct inquiries to the Commission and Council. While the Council may regard this right as binding on it because of the Interinstitutional Agreement, it is nonetheless unsuitable for modifying the architecture of the institutional relationship under primary law. Accordingly, it should instead be noted that the Council is not dependent on the European Parliament neither in its composition nor in any other way, but gains its democratic legitimacy quite consciously from the governments of the Member States rather than from the European Parliament. Under the principle of democratic legitimacy, the Council is directly responsible to the government and parliaments of the Member States, but not to the European Parliament. Primary law, which, in Article 230 TFEU, expresses a right of inquiry on the part of Parliament in relation to the European Commission only, reflects these relationships.

The only right of inquiry in relation to the Council anchored in primary law is also provided by Article 36(2) TFEU with regard to relation to CFSP questions. However, whether taken in isolation or in conjunction with a broad interpretation of the right of inquiry under Article 226 TFEU or the specifics under secondary law contained in Article 230(3) TFEU, this cannot establish a general responsibility of the Council to Parliament that could determine the interpretation of Article 319(1) TFEU.

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**d) Responsibility to the public**

The same applies to the argument that only a separate discharge decision by Parliament in relation to the Council takes due cognisance of the Council’s responsibility to the public.

To begin with, the argument seems plausible, as it recognises a need for a separate discharge for all organs and institutions involved in the implementation of the budget in the interests of transparency and, in the final analysis, in the interests of responsibility to the public. Fundamentally, the public has a considerable legal interest in the use of the financial resources of the Union in order to ensure

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54 Rejected by Huber, in: Streinz (ed.), EUV/EGV, 2003, Article 193 EGV, paragraph 7 et seq.
56 Huber, in: Streinz, AEUV/EUV, Article 230 TFEU, paragraph 8; Kaufmann-Bühler, in: Lenz/Borchardt, AEUV/EUV, Article 230 TFEU, paragraph 3.
that taxes are spent appropriately and correctly\textsuperscript{58}. In very general terms, it is always assumed in this context, that such transparency also strengthened the confidence of citizens in the European Union and its organs\textsuperscript{59}.

In order to ensure such transparency in budgetary controls, effective and plausible checks by the European Parliament are needed, as the representative body of the peoples of the European Union. The fact that such transparency is also established by a discharge decision in relation to the Commission is not sufficient. Instead, a separate discharge makes it easier to determine which of the organs involved in implementing the budget have performed their duties in an orderly manner, and which have not. For example, if Parliament refuses to discharge the Council, only then it is obvious to the public that the Council has been remiss in implementing its section of the budget and that none of the other organs involved in implementing the budget have made mistakes. In particular, in view of the fact that the permissibility of only a partial discharge of the Commission is disputed and has not yet been established in law\textsuperscript{60}, the advantages of a separate discharge in terms of transparency would be obvious. Even if Parliament can highlight individual sections of the budget in its discharge observations\textsuperscript{61}, thereby making it clear to what extent the implementation of the budget is problematic and which organ was involved, this degree of transparency cannot be compared with what could be achieved through a separate discharge.

Such arguments may be convincing on a political level, but not from a legal perspective. After all, transparent controls can also be assured by discharging only the European Commission, provided that the whole budget is the object of the parliamentary examination. However, the latter ensures the responsibility of the Commission for the entire budget and the aforementioned comprehensive information obligations. Article 319(2) TFEU and Article 146(3) of the Financial Regulation establish an extensive information obligation in relation to the European Parliament on the part of the Commission only, and thus assume that the body subject to information obligations and discharge is one and the same. Extending the bodies subject to discharge to include the Council imposes external responsibilities on it, although, according to the concept outlined in Article 317(1) TFEU, such responsibility lies solely with the Commission. Accordingly, the decisive issue is transparency of control over the Commission, which is sufficiently assured by the prevailing discharge procedure described in Article 319 TFEU.

Above all, it should be pointed out in this context that the general principle of transparency, which should determine all activities of the European Union under Article 15 TFEU, is too general to modify the contents of the special provisions of budgetary law, specifically the special provision in Article 319(1) TFEU.

e) The effectiveness and efficiency of budget implementation.

Aspects of the effectiveness and efficiency of budget implementation cannot change current primary law. It may be considered de lege ferenda whether efficient budgetary management might be promoted by making each organ responsible for a separate budget. The advantage here would be the possibility of greater familiarity with the subject. If the various organs also had external responsibility to Parliament for the implementation of their section of the budget, this might contribute to greater care in implementing the budget. The assignment of responsibilities to more than one organ could also prevent the Commission from becoming overburdened.

\textsuperscript{58} Theato/Graf, Das Europäische Parlament und der Haushalt der Europäischen Gemeinschaft, 1994, p. 116.
\textsuperscript{59} Blomeyer/Sanz, How do national parliaments supervise and control their own budgets? Practice and experience from selected Member States, p. 17.
According to prevailing law, efficiency in budgetary management is achieved by the Commission delegating spending powers to the individual organs, thereby enabling the organs to fulfil their own tasks or to use resources for their own staff, offices or other equipment. However, this does not involve delegating ultimate responsibility to external bodies.

Once more it must be conceded that the prevailing law is specifically warranted. After all, at least three arguments in the conclusion oppose the ultimate responsibility of the other organs, and even possibly the Member States, for the implementation of the budget. Firstly, it is not apparent to what extent making the individual organs and the Member States not only indirectly, but also directly responsible to Parliament will make budgetary management more efficient. Secondly, it is open to question whether Parliament’s control over the implementation of the budget would be impaired by the fact that it would have to interact with several bodies subject to discharge. Thirdly and most importantly, this perspective reduces parliamentary responsibility to questions relating to effective budget implementation and ignores or even negates the much more decisive aspect, whereby political responsibility also requires corresponding political dependencies. Such dependencies do not exist between the Council and Parliament, however, and certainly not between the Member States and the European Parliament. Accordingly, these arguments will not prevail, even if the Treaties are revised – and can certainly not influence the interpretation of prevailing law.

f) Intermediate conclusion

If one were to summarise the proposals for a dynamic interpretation of Article 319(1) TFEU for the inclusion of the Council in the bodies subject to discharge, as well as their legal evaluation, then it is evident that none of the arguments is convincing. Even if the matter involved a discussion of a pouvoir constitutent that aimed to establish the organisational rights of the European Union, no arguments would clearly support the direct responsibility of the Council of the European Union to Parliament.

The arguments can certainly not prevail on the basis of current law. In addition to the already outlined considerations, there is reason to doubt the need for direct parliamentary responsibility with regard to budget management. This is because the argumentation focusing solely on European Parliament’s controls completely ignores the fact that the effectiveness of budgetary controls, as well as their effectiveness and transparency, depends not on a single control instrument, in this case subsequent discharge, but on a sufficient degree of control.

Accordingly, it should be emphasised that the discharge procedure is only one element in the budgetary control procedure - an element, by the way, that is intentionally restricted to ex-post control and that cannot be transformed into a pro-active control, even on a gradual basis, as is admittedly deemed to arise through Article 319(3) TFEU.

The other control instruments should also be highlighted, from the internal budgetary controls and their principles as set down in the Financial Regulation, to the external controls by the European Court of Auditors. Finally, and this may be a decisive argument, it should not be forgotten that, under Article 319(1) TFEU, the Council itself can also act as a discharge or control organ and thus cannot also be a body subject to discharge.
4. THE CONSEQUENCES OF THE DEVELOPMENT OF PARLIAMENT'S POWER OF DISCHARGE

If the arguments in favour of the extension of the power of discharge of the European Parliament to the Council fail to convince, then the consequences on the other side need to be considered, as these would entail a development of Parliament’s power of discharge through interpretation. They would modify institutional balances (a.), lead to a repeal of responsibilities (b.), avoid the formal procedures for treaty change (c.) and, as a result, disregard prevailing contract law (d.).

a) Institutional balance

A discharge power of the European Parliament against the Council cannot be based on the institutional balance between the institutions but would, conversely, round disrupt this balance; for the European Union is equally based on the Parliament, as representative of the Union's citizens, as well as the Council, as representative of the Member States, as unequivocally expressed in Article 10 TFEU.

Because of its parallel role in providing legitimacy, the Council has no fundamental accountability to Parliament. Parliament’s right to question the Council in accordance with Article 230 TFEU in conjunction with Article 115 et seq. of the EP Rules of Procedure and for the area of the CFSP in accordance with Article 36(2) TFEU shall not establish a general responsibility on the Council’s part in relation to Parliament, but rather standardise derogations. Instead, Parliament and the Council act in a concerted manner. In some areas the Council also has sole decision-making powers, and this decision-making competence assigned in the Treaties may not be undermined by a responsibility for the implementation of the budget in these areas.

Otherwise, the distribution of roles in budgetary law runs counter to Parliament's powers of discharge in relation to the Council. This is not just because the Council has historically been a discharging organ rather than a body subject to discharge, but is also currently positioned on the side of Parliament in relation to the granting of discharge to the Commission, e.g. in Article 147(2) of the Financial Regulation; instead both organs are identified to varying degrees by Article 319 TFEU as the organs that control the European Commission in matters relating to budget implementation. The same also becomes clear when analysing budgetary procedures under Article 314 TFEU, where Parliament and Council operate equally as a ‘joint budgetary authority’.

The convincing argumentation used by the Council based on the principle of institutional balance should be quoted here: On the one hand, under Article 317(1) TFEU, the Commission may implement on an autonomous basis. The power of discharge of Parliament and the right of the Council to issue recommendations under Article 319(1) TFEU establish the necessary counterbalance. Thus, for reasons of institutional balance alone, the expansion of discharge to include the Council should be rejected.

Institutional relations would also be imbalanced in relation to the Commission. This is because a separate discharge of the Council would call into question whether the Commission also needs to be discharged for the section of the budget relating to the Council. On the one hand it seems contradictory to grant discharge to other organs such as the Council, making reference to its autonomous responsibility for its section of the budget, and also discharging the Commission, despite the fact that, according to the argumentation, it is no longer responsible for the relevant

section of the budget. However, if the discharge of the Council were to replace the discharge of the Commission, this practice would be in conflict with the wording of Article 319(1) and Article 317(1), sentence 1 TFEU.

Parliament’s invoking of Article 314(10) TFEU when discharging the Council also seems dubious. The standard requires that all organs should comply with the provisions of European Union law within the budgetary procedure. Accordingly it has the character of a declaration and reminder, but does not contain any basis for parliamentary control of any actions. Instead, parliamentary control is specifically regulated in Article 319(1) TFEU. Article 314 TFEU indicates a contractual institutional relationship that positions the Council and Parliament as organs of equal standing, and thus already excludes any responsibility of one organ to the other.

In the final analysis, any parliamentary responsibility on the part of the Council to Parliament – even if restricted to the implementation of the budget – would be based on the false assumption that the institutional relationship in the legislative procedure would not be violated by a right of discharge. In this case, the Council and Parliament act as co-legislators. Their relationship to one another is characterised by the principle that no mutual control rights exist between them. A parliamentary right of discharge in relation to the Council could disrupt the institutional balance and the independence of the Council in the legislative procedure. There would be a danger that Parliament would influence the internal organisation of the Council in the legislative procedure (e.g. it could recommend that the Council should cut jobs in unpopular departments). In general, Parliament could exert pressure on the Council within the legislative procedure.

b) Repeal of responsibilities

If the dispute is taken to a higher level of abstraction, another argument is highlighted against the inclusion of the Council in the bodies subject to the discharge decision of Parliament. This is because a separate discharge for the Council no longer distinguishes discharging organs from bodies subject to discharge. Instead, when separate discharging takes place, the Council is active on both sides, which can detract from an objective and transparent examination. After all, responsibility in structural terms is characterised by a responsible party that has responsibility for a particular object to a body that is subject to responsibility. If both the controlling and controlled entities are identical, then it is not possible to guarantee effective controls.

This abstract, theoretical analysis notwithstanding, in political reality, any responsibility on the part of the Council to Parliament would certainly simply mean that, as a corollary, the Council would focus more on the spending of the European Parliament in the recommendations contained in its discharge decision. The actual body subject to discharge and control, the Commission, would then, if anything, find itself out of the firing line.

c) Undermining of the formal procedures for revising treaties

If there is no question that Article 319(1) TFEU can be extended through interpretation, any such practice by the European Parliament can be understood as undermining the formal procedures for revising treaties under Article 48 TFEU. This is all the more serious because the key question relates not just to a detail of the discharge procedure, but to the relations between the institutions.

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67 Briefing Note Antpöhler, p. 125 et seq.
d) Disregard for commitments arising from treaties

In the final analysis, this practice by the European Parliament reflected a disregard for treaty commitments. It violated Article 13(2) Sentence 1 TFEU in general and Article 319(1) TFEU in particular.

5. THE CONSEQUENCES OF REFUSING TO GRANT DISCHARGE TO THE COUNCIL

a) Consequences for the Council

If the European Parliament is not entitled to refuse to grant the Council discharge for the implementation of its budget, then such a decision will always be without legal consequences for the Council.

However, the provisions under European Union law have nothing to say in this regard. Nonetheless, according to the general opinion in the literature with regard to the Commission, refusal to grant discharge has no legal consequences and can only be regarded as a motion of censure by the European Parliament in relation to the Commission\(^{68}\). By refusing to grant discharge, Parliament expresses the fact that, in its opinion, the Commission has failed in one of its most important functions, budgetary management. Even through such a refusal has, in fact, caused Commissions to fall in the past, this was not mandatory in law.

Accordingly, a refusal to grant discharge to the Council, if considered admissible, cannot have any legal consequences. Because there is no provision for discharging the Council, there are likewise no legal consequences for refusal to grant discharge. While Parliament has a creative function in relation to the Commission\(^{69}\), because, under Article 17(7) paragraph 2 TEC, it elects its President on the recommendation of the Council and, under Article 234 TFEU it can also table a motion of censure on the Commission, the Council is not legitimised by the European Parliament, but rather by the governments of the Member States. For this reason, the Council, unlike the Commission, is not generally answerable to Parliament.

It thus follows that not only are there no legal consequences for a refusal to grant discharge to the Council, but that the political consequences are also quite negligible. If the Council is not legitimised by the European Parliament, the motion of censure expressed by a refusal to grant discharge in fact has little bearing on the political legitimacy of the Council. The fact that the Council comprises members of the governments of the Member States makes it even less likely that a refusal to grant discharge will have any political repercussions. There is no reason to expect that a refusal to grant discharge to the Council will generate enough political pressure to cause the 27 governments of the Member States to resign, something that would not be desirable from a perspective of political stability and continuity. Irrespective of the ultimate political consequences of such resignations, the institutional independence of the Council and Parliament means that Parliament can exert far less pressure on the Council than on the Commission. The same applies to the European Council and its President, who, under Article 15 TEC is elected by the Council of the European Union.


\(^{69}\) Herdegen, Europarecht, 2011, section 8 paragraph 80.
In essence, these aspects of the consequences of refusing discharge simply underline once again that effective budgetary controls can only be achieved by the granting of discharge to the Commission and that the Commission is the only correct body subject to discharge from the perspective of the political pressure that Parliament can exert by its refusal to grant discharge. The lack of legal and political consequences arising from a refusal to grant discharge are an argument against allowing Parliament a right of discharge in relation to the Council.

**b) The consequences for Parliament**

The consequences would certainly be devastating for Parliament, because it defies the treaty commitments laid down in Article 13(2) TFEU. This could be asserted by the Council with an application for the annulment of a decision under Article 263 TFEU, insofar as the legal consequences of a separate decision on discharge are in dispute.

**c) The consequences for the EU**

The institutional wrangle over political power by the European Parliament could escalate into a ‘constitutional crisis’ for the European Union as a whole, because the stakes being played for in the context of the European Union’s legal community involve not least Parliament’s compliance with the treaties, but also Parliament’s ‘commitment to the constitution’.

**d) Preventing the consequences**

Whipping up such a constitutional crisis would seem a redundant exercise. After all, according to prevailing law, Parliament has the instrument to make remarks at its disposal to enable it to make differentiated evaluations in relation to the decision to grant discharge to the Commission.

In contrast, the remarks by Parliament included in the resolution are associated with separate legal consequences that arise from Article 319(3) TFEU and Article 318(2) TFEU. Under Article 319(3), the Commission must act on these comments by taking all the appropriate steps. Article 147(1) of the 2002 Financial Regulation also extends this legal obligation to the other organs involved in implementing the budget. Those measures must be described in the next evaluation report under Article 318(2) TFEU. In its observations directed at the Council, Parliament can differentiate according to the severity of the deficiency found and can thus distinguish between requirements that are always to be met, recommendations that should generally be followed and suggestions that simply need to be examined\(^70\). It thus has a mechanism available to it that enables it to control the implementation of the budget not only on an ex-post basis, but also to influence it pro futura. Parliament should remember this instrument.

### 6. COMPARATIVE LEGAL INFORMATION

Because of the difficulties in comparing the European Union on the one hand and the Member States on the other, suffice it to say that initial research would indicate that no federalist state yields a separate power of discharge to its parliament in relation to the ‘second chamber’. This is the case, for example, in the relationship between the upper and lower houses in Germany and Austria. The

\(^70\) Details in Theato/Graf, Das Europäische Parlament und der Haushalt der Europäischen Gemeinschaft, 1994, p. 130 et seq.
practical reason for this is the same as for the relationship between the European Parliament and the Council of the European Union: the various organs gain legitimacy from different sources, are always involved in both material legislation and budgetary legislation and each, in their way, contribute legitimacy to the activities of the central level. This is already the reason why these are always independent of one another. Neither organ is answerable to the other, but rather their commonality solely consists of their responsibilities in the context of commitment to the constitution and the treaties.

**IV. BASIC INFORMATION USED BY THE EUROPEAN PARLIAMENT**

The question of whether Parliament may discharge the Council is to be differentiated from the question whether, and under what circumstances, it can obtain information about the Council’s implementation of the budget. The availability of information plays a key role in the discharge procedure, which is handled by the Committee on Budgetary Control. Also in terms of the information base, Article 319 TFEU is the determinate basis in primary law which, for its part, refers to substantive information under Article 318 TFEU and Article 287 TFEU. It is important that Article 319 TFEU differentiates between the obligatory basic information on which both the recommending discharge decision of the Council and the binding discharge decision of Parliament must be based, contained in Paragraph 1, and other information to be requested by Parliament on an optional basis according to Paragraph 2.

### 7. OBLIGATORY INFORMATION

The basic obligatory information is identified by Article 319(1) TFEU as the calculation, the overview and the evaluation report under Article 318 TFEU, the annual report of the Court of Auditors under Article 287(4) TFEU and replies by the controlled organs to its observations. In addition, there are the statement of assurance of Article 287(1) Subparagraph (2) TFEU and special reports of the European Court of Auditors.

The revenue and expenditure account and the balance sheet presented by the Commission under Article 318 Subparagraph 1 TFEU are of relevance to Parliament’s decision. In addition, in order to speed up the discharge procedure, the Treaty of Lisbon used the provision in Article 318 Subparagraph 2 TFEU to introduce an obligation on the Commission to present an evaluatory report on the finances of the Union based on parameters laid down by the European Parliament and the Council in the last discharge procedure. These information obligations cause the discharge decisions of the Council and Parliament to lose their retrospective character to a certain extent and can – once again within certain limits – have prospective controlling effects on the implementation of future budgets.

Four things should be highlighted in the context of this investigation:

Firstly, it is evident that a large and important part of the obligatory information derives from the European Court of Auditors. This is appropriate insofar as the European Court of Auditors, because of its expertise and independence, can guarantee that the implementation of the budget by the

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71 The precise procedure for handling the session documents in the discharge procedure is regulated in Article 1, Appendix VI, EP Rules of Procedure.
Commission, the organs and the Member States will be analysed correctly and free of political interests.

Secondly, it is to be emphasised that the Council and Parliament have equal rights to this obligatory information, not only under Article 319(1) TFEU, but also in relation to the information specified in Article 318(1) and 2 TFEU.

Thirdly, the anchoring of the obligatory information specified in Article 319(1) TFEU in primary law indicates that the Council and Parliament are not only entitled to receive this information, but are also obliged to take it into account in their discharge decisions.

Fourthly, the chronological sequence of the audit and the relationship between the discharge decisions of Parliament and Council must be considered. Parliament analyses the information ‘after the Council’. This chronological sequence is not an indicator that the Council has priority. Instead, the chronological sequence corresponds to the distribution of powers in the discharge procedure. In its binding discharge decision, Parliament should be in a position to note and consider the decision recommended by the Council. Conversely, this should not be interpreted to mean that Parliament has a priority position. Instead the – recommending – decision of the Council on the granting of discharge to the Commission is autonomous and independent in regard to the final decision of the Parliament. The autonomy and independence does not only cover the (political) assessment, but also the choice of the relevant information. Article 319(1) TFEU solely states which information has to be available for the Council and the Parliament as a minimum basis for their respective discharge decisions. However, the way in which they give weight to this information is left to their compliance with the budgetary requirements according to their political assessment.

8. VOLUNTARY INFORMATION

Matters are different in respect of voluntary information under Article 319(2) TFEU. This information solely relates to the relationship between Parliament, as the organ entitled to make the claim, and the Commission as the organ required to respond to the claim. The Council is not mentioned in this provision – it is neither entitled to make a claim nor required to respond to a claim. Rather, within the framework of this ‘supervisory budgetary control’\(^\text{74}\), only the Commission is obliged to provide the European Parliament with information about the implementation of expenditure or the modus operandi or the financial control systems. This sole obligation on the part of the Commission once again reflects its sole responsibility for implementing the budget under Article 317(1) TFEU and thus also corresponds to its capacity as the sole body subject to discharge under Article 319(1) TFEU. The standard provides the basis for ‘Parliament’s extensive right to information from the Commission’\(^\text{75}\). The reports drawn up by the Commission as part of its obligation to provide information can also be incorporated in the discharge procedure\(^\text{76}\).

These information obligations under primary law are specified in the Financial Regulation. Under Article 130 et seq. of the Financial Regulation, the Commission is already obliged to supply information to the European Parliament while implementing the budget to enable the latter to prepare the discharge procedure\(^\text{77}\). The Financial Regulation also only imposes obligations on the Commission in relation to the Parliament, but not on the Council, the other organs or the Member States.


In the context of this analysis, it should be emphasised that the right to information under Article 319(2) TFEU is restricted, depending on the purpose. It is only focused on ‘information about the implementation of expenditure or the modus operandi or the financial control systems.’ It does not set down the standard for a general obligation to provide information on the part of Parliament, which is the point of Article 230(2) TFEU, but restricts itself to information relating to the implementation of the budget.

The provision does not entail any personal restriction in addition to this functional restriction. The fact that only the Commission, but not the other organs, the Member States or, above all, the Council, is obliged to make a response to a claim, should not allow the conclusion to be drawn that the Commission is only obliged to supply information arising from its own implementation of the budget. Rather, the central provision of Article 317(1) TFEU comes into force again, imposing sole responsibility for the implementation of the budget on the Commission. Accordingly, it is the sole contact for Parliament in matters relating to the implementation of the budget. However, it is also part of its overall external responsibilities, that it must, at Parliament’s request, supply all information about financial management, including the information resulting from the implementation of the budget by the Council. It must obtain this information from the Council by internal channels and then forward it to Parliament.

V. SUMMARY AND OUTLOOK

Parliament has no authority to grant the Council separate powers of discharge. On the other hand, it is entitled to obtain information on the implementation of the budget by the Council. However, this entitlement relates to the Commission, which, for its part, must request the relevant information from the Council.

Overall, the need for mutual control of the implementation of the relevant section of the budget by Parliament and the Council does not seem particularly urgent in view of the autonomy of the organs on the one hand, and the small volume of the specific sections on the other. Self-monitoring and external controls of the European Court of Auditors are much more effective. This is because they do not entail the intrinsic risk that a dispute over the control of the other budget implementation could become a political hostage that could possibly influence other disagreements. This is why both Parliament and the Council are well advised to minimise the conflict to prevent it escalating into an interinstitutional crisis.
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Scrutiny of Budget Implementation by the European Parliament

by Florence Chaltiel

BRIEFING NOTE

Abstract

The European Parliament is responsible for scrutiny of the budget and grants discharge for implementation of the budget. The EP and the Council have been in dispute for several years because the Council has not fully cooperated with the EP in optimum scrutiny of the use of European public funds. This paper sets out the available legal information and the points of conflict and suggests approaches that may improve matters.
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LIST OF ABBREVIATIONS

IIA  Interinstitutional Agreement on budgetary discipline and sound financial management
ECHR  European Court of Human Rights
CJEU  Court of Justice of the European Union
MEP  Member of the European Parliament
EP  European Parliament
FR  Financial Regulation
TEU  Treaty on European Union
TFEU  Treaty on the Functioning of the European Union
CONTEXT

General philosophy behind the views developed in the consultancy paper

The European Parliament (EP) has steadily gained power over the progress of European integration. The situation can be summed up by saying that it has grown from ‘almost nothing to almost everything’ (F. Chaltiel, Le processus décisionnel européen après le traité de Lisbonne, second edition, La Documentation Française 2010).

In the legislative field, Parliament has become the European Union’s co-legislator with the Council. In the budgetary control field, it is claiming more effective scrutiny of the implementation of the budget.

There was a dispute in 2011 when the EP refused to grant discharge to the Council for the 2009 accounts. It had already postponed discharge for the 2007 financial year in 2009, on the grounds of lack of transparency and the Council’s refusal to open a dialogue with it on expenditure. Again in 2012, Parliament postponed the discharge, on the basis of persistent disagreement with the Council over Parliament’s budget role.

Parliament is responsible for granting the budget discharge under the Treaties. There have been occasions when it has postponed discharge or even refused to grant discharge. The key issue, which has been building up for several years, is Parliament’s wish to examine the accounts of all the institutions, not just the Commission. The Council, however, considers that the discharge given to the Commission is valid for all the institutions and has shown considerable reticence about cooperating with Parliament, as institutional balance requires, on following up scrutiny of its own expenditure.

Objective and method

This paper analyses how the discharge must be dependent on greater diligence by the Council in the name of institutional balance, European democracy and economic efficiency. It comprises three points: the texts available, analysis of the dispute and proposals for improvements in accordance with greater respect for institutional balance, greater democracy and an economically better managed budget.

The method is the following: consideration of the legal texts in force, in the light of the disputes between the EP and the Council, and finally proposals for approaches to improve the situation. Emphasis is laid on the legal point of view so as to offer solid arguments for better cooperation between the two institutions on scrutiny of the implementation of the budget. The analysis also sets out more generally an overview of the concept of European democracy and the developments implied in terms of increased prerogatives for the European Parliament.
CHAPTER 1: PRACTICE AND THE RELEVANT TEXTS

KEY WORDS

- The Treaties set out the division of powers between the European Union institutions
- The institutional balance is defined on the basis of the Commission’s power of initiative and implementation, the Council and the EP’s power of decision-making and the democratic scrutiny exercised by the EP
- The powers of budgetary control devolved to the EP are determined by the Treaties and secondary law
- The basic idea in the Treaties and secondary law is that the Commission is the institution primarily responsible for implementation of the budget
- In practice the Council is a major authority in implementation of the EU budget

PRACTICE AND RELEVANT ARTICLES IN THE TREATY

Practice:

Parliament has been examining the accounts of each institution and giving discharge individually since 2001.

This practice may be considered to have created a custom within the meaning of the rules of international law.

Since the treaties of 1970 and 1975, Parliament’s role in the budget procedure has been gradually enhanced. The Lisbon Treaty provided for Parliament and the Council to be on an equal footing in adoption of the whole European Union budget

The Treaty articles:

Article 319 of the TFEU provides the legal basis for parliamentary scrutiny of the implementation of the budget.

Article 319 of the TFEU lays down that the European Parliament, acting on a recommendation from the Council, shall give a discharge to the Commission in respect of implementation of the EU budget. The article also states that, to this end, the Council and Parliament shall examine the accounts, the financial statement and the evaluation report referred to in Article 318 of the TFEU, the annual report by the Court of Auditors together with the replies of the institutions to the observations of the Court of Auditors, the statement of assurance on the reliability of the accounts and the legality and regularity of the underlying transactions referred to in Article 287 of the TFEU.
SECONDARY LAW

The Financial Regulation (FR):

Article 50 states that the Commission shall confer on the other institutions the requisite powers for the implementation of the sections of the budget relating to them. It also states that each institution shall exercise these powers within the limits of the delegation and the rules applicable. Consequently it is important that direct scrutiny can be carried out on compliance, hence the following conclusions on secondary law and primary law:

Interinstitutional Agreement:

The Interinstitutional Agreement on budgetary discipline and sound financial management, concluded between the European Parliament, the Council and the Commission on 17 May 2006, sets out the financial framework for 2007-2013 and aims to implement budgetary discipline. It also aims to improve the functioning of the annual budgetary procedure and cooperation between the institutions in budgetary matters.

ACT:

Interinstitutional Agreement between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management

The Agreement on budgetary discipline and sound financial management (IIA) was concluded between the European Parliament, the Council and the Commission. It concerns the drafting and implementation of the European Union (EU) budget. The European institutions have decided to organise their cooperation by means of this agreement, in order to improve the way the budgetary procedure works and to ensure sound financial management of European finances.

The IIA comprises three sections:

- Part I establishes the financial framework for the 2007-2013 period, specifically the amounts of expenditure for each policy area;
- Part II organises the cooperation between the Parliament, the Council and the Commission during the budgetary procedure;
- Part III establishes the rules aimed at ensuring sound financial management of EU funds.

CONCLUSIONS

On the basis of consideration of the relevant texts and with regard to institutional balance:

1. From the Treaty articles and secondary law, it appears that the Commission is the authority for implementation of the budget and consequently discharge must be granted to the Commission alone.

Parliament and the Council are the legislative and budgetary authorities.
Conclusion as regards the requirements of democracy

2. A paradox emerges when the Treaty provisions and the reality of EU law are considered together. The Commission does not implement the budget on its own. As part of the general trend of renewed power of Member States, it appears that the Council is itself an authority for implementing the budget.

Contrary to the popular belief that the EU is centralised, it is in fact very decentralised, which means that only 10% of the budget is directly implemented by the Commission. The Member States and the other institutions implement the budget as well.

Secondary law permits this, in particular Articles 50, 53b, c and d of the Financial Regulation.

This poses a problem of transparency and accountability.

KEY WORDS

- Disputes between the EP and the Council
- Refusal to grant discharge
- Postponement of discharge
- Situation in 2012

TERMS OF THE DEBATE

In the democratic exercise of its duty of scrutiny over the implementation of the budget, the EP has asked for the details of the Council’s accounts. This is a question both of principle and specific scrutiny. It has emerged that transfers of appropriations are not sufficiently justified and that the bases of property transactions are insufficiently clear, as the Court of Auditors has pointed out. It is against this background that the EP is asking both for more transparency on the Council’s accounts and more regular dialogue with the Council on this subject.

The Council has a different position, based on a strict reading of the letter of the Treaty. The Treaty mentions the budget discharge as a whole and not institution by institution. The Council therefore refuses to present all the documents asked for by the EP, on the grounds that the expenditure concerned is administrative. This is contested by the EP, particularly in the field of foreign affairs.

Consequently the EP has been unable to get the Council to:

- consent to hand over the documents and explanations needed so that scrutiny of implementation of the budget is as rigorous as it should be;
- agree to engage in dialogue with the members of the Committee on Budgetary Control;
- accept the principle whereby the EP must give individual discharge to the Council.

Consequently approaches have to be found for improvements for the benefit of democracy, efficiency and good governance.

EVENTS IN THE PERIOD 2007-2012 CONCERNING THE DISCHARGE

The Council considers that the discharge is valid for all institutions even if, depending on the section, a more detailed account can be requested.

The EP has tried to obtain documents and explanations, which it has not received. It has often repeated the Court of Auditors’ criticisms.

In 2009 discharge for the Council’s budget for 2007 was postponed because of a lack of clarity in the details communicated by the Council.
There was a broad majority, at the European Parliament’s plenary sitting on 23 April in Strasbourg, to postpone the grant of discharge to the Council for the 2007 budget. MEPs gave it six months to provide the information requested, including on the extra-budgetary accounts that had allegedly been used for travel and mission expenses abroad. Parliament gave all the other institutions a positive verdict, apart from the European Police College.

The European Parliament adopted, by 571 to 41, with 21 abstentions, a report by Søren Bo Søndergaard (GUE-NGL, Denmark) on the Council’s discharge for its 2007 budget. The Plenary followed the recommendation of the Committee on Budgetary Control, which called for postponement with its vote on 16 March (see Europolitics 3737). According to the Rapporteur, Parliament ‘has no answer from the Council on all the questions related to its accounts’. The Council was increasingly making use of part of its administrative budget for operational expenditure, particularly in the area of foreign affairs and security policy.

COUNCIL DENIES ACCUSATIONS

As the discharge authority, Parliament wanted to keep an eye on such expenditure. In doing so, it brought into question the 1970 gentlemen’s agreement, whereby Parliament and the Council do not meddle in each other’s accounts. The EP asked the Council to submit an annual activity report, as do the other institutions. It should be emphasised that this text does not constitute binding secondary law. Thus it could not be invoked before the CJEU. Members also sought clarifications on its extra-budgetary accounts. Around €12 million were allegedly transferred in 2006 from the heading for interpretation expenses to travel expenses in the fields of foreign affairs, security and defence policy. The EP wanted to see these budget headings for 2007.

In November 2009, Parliament finally granted discharge to the Council, after its earlier refusal. It voted to do so by 587 votes, considering that it had received satisfactory replies and the publication on the Council website of relevant documents on the implementation of the budget by the Council was satisfactory.

Between 2009 and 2012 the two institutions were frequently in dispute with each other on the subject.

In 2011 Parliament’s Committee on Budgetary Control proposed rejection of the discharge:

Commenting on the Budgetary Control Committee’s rejection of the Council discharge today in the European Parliament, Crescenzo Rivellini MEP, Rapporteur of the proposal, said: ‘The Budgetary Control Committee today voted to reject the discharge of the Council, due to the inability to obtain the necessary documentation, the lack of cooperation shown by the Council to Parliament and the choice of not wanting to recognise the legitimacy of the latter as a discharge authority are the main reasons which justify the strong negative opinion on the actions of Council spending.’

1 ‘In view of the increasingly operational nature of expenditure, financed under the Council’s administrative budget, in the fields of foreign affairs, security and defence policy, and justice and home affairs’, in future ‘the scope of this arrangement should be clarified with a view to distinguishing traditional administrative expenditure from operations in these new policy areas’. Parliament was thus calling for a revision of the gentlemen’s agreement, which is not a binding document and is interpreted too broadly by the Council. The negotiations on this revision could be incorporated into the examination of the Financial Regulation, with a view to putting it in place at the beginning of the post-2013 multiannual framework. It also asked that in future Council expenditure should be scrutinised in the same way as that of the other institutions in the framework of the discharge procedure. This scrutiny should be based on the written documents such as accounts of the preceding financial year relating to the implementation of the budget, a financial statement of the assets and liabilities, an annual activity report on their budget and financial management, the internal auditor’s annual report and an oral presentation given in the meeting of the Committee responsible for the discharge procedure.

A setback, then, for the institution that brings together the Heads of State and Government of the twenty-seven Member States, which, as expected and confirmed by the next plenary, will mark a precedent that could lead to an Institutional review by the Court of Justice. Parliament, in accordance with the Treaties, has the right and duty to verify the expenditure by the EU institutions to ensure the legitimacy and control on behalf of the citizens. If the Council does not want to undergo this scrutiny, Parliament may refer to the Court of Justice for failure to appeal in accordance with Art. 265 of the TFEU.

‘As Rapporteur, I can only rejoice at the great exercise in democracy shown by the Parliament, the unconditional support of all my colleagues who decided to defend the rights of citizens to control, through their representatives, budgets and expenses of the European Institutions. This finally recognises Parliament’s role of as a representative of democracy’, concluded Rivellini.

The decision to refuse discharge was based on lack of transparency, lack of cooperation by the Council and lack of information provided.

THE SITUATION IN 2012

In 2012 the EP again refused to vote the discharge:


The stalemate between the European Parliament and the Council over the latter institution’s discharge drags on. On 27 March, members of the European Parliament’s Committee on Budgetary Control (CONT) decided to postpone okaying the Council’s 2010 accounts, although they noted that payments were free from material error. MEPs say the purpose of the postponement is to reach an agreement with the Danish EU Presidency on the key aspects of the procedure. A repeat of last year’s fiasco appears, however, likely.

In October 2011, a large majority of deputies voted against granting the Council’s 2009 discharge. Arguing that the plenary can only grant one discharge, not individual ones, according to the treaty, the Council considers its accounts were cleared at the same time as the Commission’s ones, in May 2011. Parliament – with the support of the Commission – disputes this and says the Council’s interpretation runs against a practice dating back to 1995. No further steps have been taken, however, despite a threat by Crescenzio Rivellini (EPP, Italy), rapporteur on the Council’s 2009 discharge to drag the Council to court.

This year round, if the plenary follows the CONT committee’s lead and grants the Commission discharge in May, then the Council is bound to argue its accounts are thus cleared too, says an EU source.

Much like the Hungarian EU Presidency, Copenhagen claims to want to reach an agreement with Parliament on a long-term method based on ‘mutual transparency and accountability’ to deal with the discharge procedure and calls for an end to the gentlemen’s agreement, dating back to 1970, which foresees that EP and Council do not scrutinise each other’s budget sections. So far the Parliament, with whom the mutual transparency requirement does not sit well, has not nominated a negotiating team and talks are at a standstill.

EXAMPLE OF DIFFICULTIES IN EXERCISING SCRUTINY

It might be helpful to provide an example of the difficulties encountered: in its 2010 annual report the Court of Auditors criticised the financing of the Residence Palace building project because of the advance payments (paragraph 7.19); Parliament noted that the Court of Auditors made the observation that during the period 2008-2010 advance payments made by the Council totalled...
€235 000 000; noted that the amounts paid came from under-utilised budget lines; pointed out that ‘under-utilised’ is the politically correct term for ‘over-budgeted’; and pointed out that in 2010 the Council increased the budget line for ‘Acquisition of immovable property’ by €40 000 000.

According to the Council, the appropriations were made available by budget transfers authorised by the budget authority in accordance with the procedures provided for under Articles 22 and 24 of the Financial Regulation.

According to the Court of Auditors, such a procedure does not comply with the principle of budget accuracy, despite the savings made in paying rent.

CONCLUSIONS

Chapters 1 and 2 on the consideration of relevant texts and the dispute from the point of view of institutional balance.

Is the EP legally entitled to receive the documents requested from the Council?

If this is necessary for efficient and effective scrutiny, the answer is yes. It goes without saying that the EP needs the documents requested for effective scrutiny. It is up to the EP to decide on the usefulness of the content of each document. Unless the document is top secret, there is no reason to refuse.

This is what was done in 2009 for example, when Parliament postponed the discharge. It asked for the documents on the content of the expenditure and considered that it had obtained them, which is why it finally granted discharge to the Council.

The same requirement confirmed in the economic field

Scrubtinity is essential for economic efficiency and management of the EU budget. For example, when the Court of Auditors criticises budget transfers to headings concerning buildings, the EP has to be able to exercise scrutiny by hearing members of the Council and obtaining access to the relevant documents.

From the point of view of economic efficiency and good and sound management, it is relevant that each institution should be able to manage its budget and human resources without automatically referring to the Commission. Consequently, it would seem logical for the Parliament to be able to scrutinise directly what is administered autonomously, as the Commission’s responsibility in this context is largely artificial seeing that the Commission does not implement or manage the budget. Consequently, the EP must have access to all the necessary information.
CHAPTER 3: PROPOSALS FOR IMPROVEMENTS

KEY WORDS

- Court of Justice rulings
- European constitutional court rulings
- Proposals and arguments relating to the EU’s democratic principles

COURT OF JUSTICE RULINGS

On institutional balance:

The CJEU has affirmed that the EP is a fully-fledged institutional actor. The Court has played a major role in active legitimation, passive legitimation and promoting institutional balance.

A 1983 judgment (Case 230/81, 10 February 1983) is interesting, if it is read in the light of the powers acquired by the European Parliament since then. According to the Court, the institutions’ power of internal organisation must not prejudice institutional balance or the division of powers between the EU and the Member States. It can be interpreted as having the effect that the delegation of implementation from the Commission to the Council requires increased and particular scrutiny by Parliament of the sections of the budget where implementation is objectively the responsibility of the Council. The general logic of successive transfers of powers to the EP serves to reinforce this idea.

It is also important to recall that the CJEU has already had occasion to check respect by the Council of Parliament’s prerogatives, by imposing a reconsultation when the decision eventually taken by the Council diverged too much from the proposal initially submitted to Parliament. This goes back to the time when the Parliament’s legislative powers were almost non-existent.

It should not be forgotten that the Court of Justice sets great store by the principle of institutional balance. The CJEU derived the principle of the balance of powers that characterises the European Community’s institutional structure from Article 3 of the ECSC Treaty (Judgment of the Court of 13 June 1958, Meroni, Case 9/56, English special edition p. 133, and Judgment of the Court of 29 October 1980, Roquette, Case 138/79, p. 3333).

More recently the 1990 decision in European Parliament v Council of the European Communities (Case C-70/88) stated that under the Treaties the Court has the task of ensuring that in the interpretation and application of the Treaties the law is observed and must therefore be able to maintain the institutional balance. This decision could be used in support of action concerning the discharge.

Along the same lines, in the 1995 decision in European Parliament v Council of the European Union (Case C-65/93, I p. 643, 30 March 1995), the principle of loyal cooperation between the institutions and the European Parliament is incorporated in the dialogue between institutions.

On the basis of these decisions, one could invoke the principle of effectiveness to require the Council to forward the documents requested and more generally to account for its budget. The principle of effectiveness is widely used by the CJEU when establishing the major European principles.
RECENT DECISIONS BY NATIONAL CONSTITUTIONAL COURTS

The first example to be considered is the German constitutional court, matching a recent decision by the French constitutional council.

The German constitutional court has found on several occasions that the Treaties do not sufficiently meet democratic requirements.

The so lange jurisprudence of the end of the 1960s and beginning of the 1970s may be mentioned here. The court found that respect for the principle of primacy was dependent on effective protection of fundamental rights. In the end it informed the Court of Justice that it was satisfied in 2000.

More recently and with a direct link to the democratic requirement, the Court found that the Lisbon Treaty did not provide a sufficient guarantee for the rights of the national parliament.

The immediate concern relates to the budget treaty and the forthcoming decision on 12 September. In parallel, mention may be made of the French constitutional council's decision of 9 August 2012, which ratifies the TSCG after a very minimalist reading of the treaty.

The lesson to be drawn is as simple as obvious: constitutional jurisdictions are looking for a strengthening of the democratic principle and its application at European supranational level. If the European Parliament does not have all the means of effective democratic scrutiny, respect for democracy will still be seen as falling within the remit of the national parliaments.

PROPOSALS

Institutional architecture and its balance:

The European Parliament has often paved the way for respect of the institutional balance by claims and actions, not necessarily on the basis of the Treaties. It should do the same today on the question of the budget discharge.

We may recall the areas where Parliament has taken up the challenge and achieved success in that the outcome has subsequently been legalised.

Examples:
- Taking the name European Parliament instead of Assembly.
- Passive and active legitimation before the Court of Justice.
- The claims to be involved in the legislative process. On this last point, it has put more time into achieving the status of legislator and it is still not on an equal footing with the Council in all areas. However, these claims have often been acknowledged and enshrined in the Treaties.

On the specific question of the Council discharge, it can be justified by institutional balance and a principle that could be developed in terms of parallelism of actions and scrutiny. In principle it is the Commission, which is responsible for the implementation of the budget and thus accountable to Parliament. But, in the logic of the Council’s taking back of powers on implementation of the budget, institutional balance requires that the Council should also be subject to parliamentary scrutiny in the use of public funds.

This requirement is strengthened by the democratic principle.
The democratic requirement and parliamentary scrutiny:

The European Parliament should not be hesitant in moving forward on grounds of European democracy. The concept of a democratic deficit may be somewhat crude and exaggerated but it is not invalid. In democratic states, it is the parliament’s responsibility to scrutinise the use of public funds. The same should apply at EU level, where European taxpayers are represented by their European parliamentary representatives. No taxation without representation. By paying their taxes to the Member States, EU citizens pay into the EU budget.

Parliament is the institution par excellence giving expression to European democracy. The conclusion is that efforts against the democratic deficit should be channelled through increased scrutiny of the accounts by Parliament.

Important: note that the Lisbon Treaty devotes a whole chapter to the democratic principle.

**BASIC ARGUMENT**

The European Union is based on the democratic principle; it has a European Parliament directly elected by the people. The principle of parliamentary democracy is no taxation without representation. This principle is reinforced in texts such as the Declaration of the Rights of Man and of the Citizen in France, which lays down that citizens should be able to follow the way in which public taxes are used. If the EU is a democracy, citizens should, via their European representatives, be able to keep strict watch over the use of public funds.

The Lisbon Treaty strengthens democratic requirements:

**TITLE II – PROVISIONS ON DEMOCRATIC PRINCIPLES**

**Article 9**

*In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*

**Article 10**

1. *The functioning of the Union shall be founded on representative democracy.*

2. *Citizens are directly represented at Union level in the European Parliament.*

*Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.*

3. *Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.*

4. *Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.*
Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.

4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens’ initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

Article 12

National Parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

Source: TFEU
APPRAOCHES TO CONSIDER

To sum up, on the basis of these two points, the following approaches should be considered.

Contradicting the premise (based on Article 146 of the Financial Regulation) that implementation of the budget is a closed system where the Commission is solely responsible, despite delegation of the implementation of the budget. On the contrary, the presumption on the grounds of institutional balance is that Council should be accountable to Parliament since the Council is one of the main actors in the implementation of the budget.

Using Article 312 of the TFEU, introduced by the Lisbon Treaty, whereby the multiannual financial framework must be adopted by Council regulation after Parliament has given its consent. Parliament must thus be able to monitor compliance with this rule.

Calling for a detailed study on parliamentary scrutiny of the use of EU public funds by the Council, particularly with regard to external relations.

Proposing a code of good conduct in several areas:
   - the concept of extra-budgetary accounts: defining a maximum number and limiting their use
   - reasons must be given for transfers of funds
   - assistance to associations.

Showing that the 1970 agreement, which the Council invoked, whereby the European Parliament and the Council do not mutually scrutinise their administrative expenditure, does not have any legal value as regards the development of primary law and secondary law and does not correspond to reality, given that the Council’s implementing powers go well beyond mere administrative expenditure, as the work of Parliament and the Court of Auditors has shown.

Putting pressure on the Commission and/or trying to enter into alliances with it.

Bringing an action before the Court of Justice.

Publicising in the media a resolution entitled ‘Democracy and the European budget: how is the European taxpayers’ money spent?’ Incorporating points included in the EP resolutions of 10 May 2011 and 25 October 2011, setting them against criticisms made every year by the Court of Auditors.
CHAPTER 4: MEANS OF ACTION APART FROM REFUSING DISCHARGE

KEY WORDS

- Media action
- Alliances
- Pre-judicial action
- Judicial action

The following points show strategies how Parliament can forward their position which was laid out in earlier chapters.

HOW MIGHT IT HAVE USED THEM?

THE PRESS

First approach: the press

Publication of a press release in each of the large national media in the 27 Member States, publicising the refusal to grant discharge.

With three possible hypotheses:

- Either a short press release, which would bring this disagreement to the knowledge of European public opinion;
- Or, preferably, a text signed by several MEPs, explaining that the role of the European Parliament is to scrutinise the use of European public funds and that by paying their taxes the citizens of each Member State contribute indirectly to the European budget, and concluding by explaining there has been no discharge vote by Parliament because of a lack of transparency on the use of public funds;
- Or publication of a proposal for a bilateral agreement whereby the Council would undertake to provide the documents requested.

ALLIANCE WITH THE COMMISSION

Second approach: alliance with the Commission

Putting pressure on the Council by highlighting the contrast between the general European interest and the Council’s reticence to move European democracy forward.

CONFRONTATION WITH THE COMMISSION

Third approach: if the Commission will not cooperate, put further pressure on it

It may be recalled that in March 1999, when the European Parliament was preparing to vote on a motion of censure against the Commission, the Commission preferred to resign.
In that light, the European Parliament should ask the Commission, as guardian of the Treaties, to demand that the Council responds to Parliament’s requests, not only requests for hearings but also for explanations on the precise use of the expenditure.

JUDICIAL ROUTE

Fourth approach: judicial route

The European Parliament has already suggested referring the matter to the Court of Justice with a view to obtaining respect for its prerogatives.

Timetable and possible arguments:

- timetable: if the Council continues to refuse to forward the documents requested, to provide explanations in reply to questions asked and to take part in meetings to which it is invited, inform it that legal proceedings cannot be avoided. In the absence of cooperation, refer the matter afterwards to the Court;
- arguments: those developed in point 1 on the balance of powers, institutional balance and democracy.

SUBSIDIARY APPROACHES

In the context of relations with the national parliaments, send each national parliament a summary of the disagreements and points that the European Parliament thinks raise questions about good management.

Hold a parliamentary meeting on budget democracy with the representatives of each national parliament and the European Parliament. Make the budget vote dependent on the transmission of data on the implementation of the budget.
REFERENCES


1. **EP prerogatives that could be used for more effective scrutiny**

Parliament has several instruments for scrutiny.

- **Investiture of the Commission**
  Parliament was informally responsible for the investiture of the Commission from 1981. But it had to wait until the Maastricht Treaty (1992) for the nominations by the Member States of the President and Members of the Commission as a college to be subject to its approval. The Treaty of Amsterdam went further by making the appointment of the President of the Commission subject to the approval of Parliament before the other Members of the college were appointed. Parliament also introduced hearings of Commissioners-designate in 1994. Under the Lisbon Treaty, the choice of candidate for the post of President of the Commission must take account of the results of the European elections.

- **Motion of censure**
  The motion of censure against the Commission (Article 234 of the TFEU) has been in existence since the Treaty of Rome. It requires a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament. It requires the Commission to resign as a body. Eight motions of censure have been put to the vote since the beginning, none of which has been adopted, but the number of votes in favour of censure has regularly increased. However, the last motion of censure (vote on 8 June 2005) obtained only 35 votes for, with 589 against and 35 abstentions.

- **Parliamentary questions**
  These comprise written and oral questions with or without debate (Article 230 of the TFEU) and questions for Question Time. The Commission and Council are obliged to reply.

- **Committees of inquiry**
  Parliament can set up temporary committees of inquiry to consider alleged contraventions or maladministration in the implementation of EU law (Article 226 of the TFEU).

- **Scrutiny of foreign policy, common security policy and police and judicial cooperation**
  Parliament is entitled to receive regular information in these areas and may address questions or make recommendations to the Council. It is consulted on the main aspects and basic choices of the CFSP and on any measure envisaged, with the exception of the common positions on political and judicial cooperation (Article 36 of the TEU). The Interinstitutional Agreement on budgetary discipline and sound financial management (2006/C 139/01) has also helped improve consultation procedures on the CFSP.
Since the Lisbon Treaty came into force, almost all aspects of police and judicial cooperation and other areas within the scope of the area of freedom, justice and security have been subject to the general legislative procedure (codecision). In the field of foreign policy, the creation of the office of High Representative of the Union for foreign affairs and security policy will make it possible to increase Parliament’s influence in foreign affairs and security policy as the person appointed to this post is also Vice-President of the Commission.

- **Proceedings before the Court of Justice of the European Union**

Parliament has the power to bring cases before the Court of Justice in the event of breach of the Treaty by another institution.

It has the right of intervention, which means that it can associate itself with another party to a case. This right was exercised in the Isoglucose case (judgment of 29 October 1980, in Cases 138 and 139/79). In this case the Court cancelled a Council regulation for breach of the obligation to consult Parliament.

In the event of proceedings for failure to act (Article 265 of the TFEU), it may bring a case against an institution for infringement of the Treaty, as in Case 13/83, where the Court found against the Council for having failed to take measures on the common transport policy.

Under the Treaty of Amsterdam, Parliament could bring proceedings for annulment only to protect its prerogatives. The Treaty of Nice amended Article 203 of the EC Treaty: Parliament is not obliged to put forward a particular concern; it is now in a position to enter into proceedings in the same way as the Council, the Commission and the Member States. Parliament may be a defendant in proceedings against an act adopted under the codecision procedure or when one of its acts has legal consequences for third parties. Article 263 of the TFEU thus upholds the Court’s jurisprudence in Cases 320/81, 294/83 and 70/88. Finally, it is possible to obtain the Court of Justice’s opinion on whether an interinstitutional agreement is compatible with the Treaty (Article 218 of the TFEU).

- **Petitions**

Citizens of the Union exercise their right of petition by addressing their petitions to the President of Parliament (Article 227 of the TFEU).
2. EXTRACT FROM THE LIBERALS AND DEMOCRATS WEBSITE, 25 NOVEMBER 2011

The Council cannot escape parliamentary scrutiny for the proper management of its budget

Liberals and Democrats supported the refusal to discharge the Council for the implementation of its budget in 2009 as decided in today’s European Parliament plenary session in Strasbourg. The Committee on Budgetary Control (CONT) recommended by a large majority to vote against the discharge for the Council, arguing that the Treaty and practice confer exclusive jurisdiction for discharges to Parliament, a jurisdiction disputed by the Council which refuses complete transparency in the publication and justification of expenditures.

Theodoros SKYLAKAKIS (Democratic Alliance, Greece), ALDE shadow Rapporteur for the 2009 discharge, said during the debate: The European Parliament is the only institution to be elected by universal suffrage and has sole authority to grant discharge to the other institutions. The Council must comply with this rule. By refusing to speak before our committee, the Council declines to inform our citizens on how it manages the money entrusted to them by the European taxpayer. To overcome this impasse, there remains recourse to the European Court of Justice and Parliament is not afraid of this test to decide once and for all on its rights.

Jan MULDER (VVD, Netherlands), Chair of the Committee on Budgetary Control, added: ‘According to the Treaty the European Parliament is the ultimate discharge authority and therefore the Council has to provide all information that the Parliament deems fit to ask. It is deplorable that the Council refuses to do this’.

Jorgo CHATZIMARKAKIS (FDP, Germany), ALDE coordinator for the Committee on Budgetary Control, concluded: ‘The Council now urgently has to adjust to European law and abandon its absolutist position. As Committee on Budgetary Control, we do not mean to pillory the Council. But to discharge any institution, we need insights into its accounts. We have repeatedly asked the Council to provide us with this necessary information. As long as the Council refuses to answer the questions the Committee, and thus the European Parliament as the only responsible discharge authority according to the Treaty of Lisbon, is asking, we just cannot give discharge. It might be that Parliament and Council find themselves in front of the European Court of Justice.’

Source:
3. **EXTRACTS FROM THE JURISPRUDENCE OF THE ECHR**

**ECHR**

**MATTHEWS v. UNITED KINGDOM**

(Application no. 24833/94)

Extracts from the judgment

52. As to the context in which the European Parliament operates, the Court is of the view that the European Parliament represents the principal form of democratic, political accountability in the Community system. The Court considers that whatever its limitations, the European Parliament, which derives democratic legitimation from the direct elections by universal suffrage, must be seen as that part of the European Community structure which best reflects concerns as to 'effective political democracy'.

53. Even when due allowance is made for the fact that Gibraltar is excluded from certain areas of Community activity (see paragraph 12 above), there remain significant areas where Community activity has a direct impact in Gibraltar. Further, as the applicant points out, measures taken under Article 189b of the EC Treaty and which affect Gibraltar relate to important matters such as road safety, unfair contract terms and air pollution by emissions from motor vehicles and to all measures in relation to the completion of the internal market.

54. The Court thus finds that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation under Articles 189b and 189c of the EC Treaty, and is sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the 'legislature' of Gibraltar for the purposes of Article 3 of Protocol No. 1.

Approach to investigate: Theory of appearances or the appearance of a budget implementation without scrutiny.
4. RELEVANT EXTRACTS FROM NATIONAL JURISPRUDENCE

Constitutional council of the French Republic

Extract from the decision of 20 December 2007 on the Lisbon Treaty, concerning the importance of the exercise of democracy by the national parliament

* – WITH RESPECT TO THE NEW POWERS VESTED IN NATIONAL PARLIAMENTS IN THE FRAMEWORK OF THE UNION:

28. The Treaty submitted to the Constitutional Council increases the participation of national Parliaments in the activities of the European Union. 12) of Article 1 of said Treaty sets out in Article 12 of the Treaty on European Union the list of prerogatives recognised as vested in such Parliaments for this purpose. It is necessary to decide whether such prerogatives may be exercised within the framework of the current provisions of the Constitution;

29. 7 of Article 48 of the Treaty on European Union, as worded pursuant to 56) of Article 1 of the Treaty of Lisbon, recognises that the French Parliament is entitled to oppose the implementation of a procedure of simplified revision of the Treaties, and reiterates the provisions of Article IV-444 of the Treaty establishing a Constitution for Europe. It requires a revision of the Constitution for the same reasons as those set forth in the decision of November 19th 2004 referred to above. The same applies to Articles 6, 7 paragraphs 1 and 2, and 8 of the Protocol on the application of the principles of subsidiarity and proportionality to which the Treaty of Lisbon refers and which reiterate the provisions of Article 6 to 8 of the Protocol n°2 of the Treaty establishing a Constitution for Europe, while extending the timeframe within which the French Parliament may, if need be under procedures proper to each of its Houses, formulate a reasoned opinion;

30. Furthermore, 3 of Article 81 of the Treaty on the Functioning of the European Union, as worded pursuant to 66) of Article 1 of the Treaty of Lisbon, recognises the right of a national Parliament to make its opposition known within six months to a decision subjecting certain aspects of family law with cross-border implications not to a special legislative procedure requiring the unanimous agreement of the Council after consultation with Parliament but to the ordinary legislative procedure;

31. 3 of Article 7 of the abovementioned Protocol on the application of the principles of subsidiarity and proportionality confers on national Parliaments, within the framework of ordinary legislative procedure, new means, in comparison with the Treaty establishing a Constitution for Europe, of ensuring compliance with the principle of subsidiarity. Under this provision, when the Commission decides to maintain a proposal which has been criticised by a majority of votes allocated to national Parliaments or, if need be, to each House thereof, each national Parliament having two votes and each House of a bicameral Parliamentary system having one vote, on the grounds of non-compliance with the principle of subsidiarity, the reasoned opinion of the Commission and those of the national Parliaments shall be submitted to the Council and the European Parliament. If, by a majority of 55% the members of the Council or a majority of votes cast in the European Parliament, the Union legislator is of the opinion that the proposal of the Commission is not compatible with the principle of subsidiarity, such proposal shall not be given further consideration;

32. The recognised right of the French Parliament to oppose the subjecting to ordinary legislative procedure of certain aspects of family law requires a revision of the Constitution in order to allow for the excising of this prerogative. The same holds good for the new means conferred upon Parliament, if need be according to procedures specific to each of its two Houses, to ensure compliance with the principle of subsidiarity in the framework of ordinary legislative procedure. (…)
German Federal Constitutional Court

Translation of an extract from the website Lemonde.fr on the Court’s decision of June 2012

On 19 June the German constitutional court found that the parliament should lay a greater role in future decisions strengthening European integration, but the decision has no impact on the current establishment of the European Stability Mechanism (ESM).

While the Chancellor, Angela Merkel, has become the apostle of closer European integration, Tuesday’s decision sounds a warning: more Europe will come about with advance participation by the people’s representatives, not only with their subsequent participation. The judges in Karlsruhe argued that there should be greater participation by Parliament in exchange for the transfer of more powers to the European Union.

The Greens’ parliamentary group, the smallest in the Bundestag, brought a case before the constitutional court in Karlsruhe last year, against the procedure for adopting the European Stability Mechanism (ESM).

This loans and guarantees mechanism put in place by the euro zone countries to assist the most fragile in the event of a crisis is in the process of ratification and must come into force at the beginning of July. The Karlsruhe verdict has no impact on this process. The Members of the Bundestag must deliver their opinion on 29 June.

STRENGTHENING THE PARLIAMENT’S PREROGATIVES

According to the Greens, in view of the sums of money involved – this year alone Germany will have to pay almost €9 billion towards its capital – Members ought to have been consulted beforehand and to have had an influence on the drafting of the text and not simply to have been asked to ratify it. The government defended itself by arguing that Germany, as a sovereign state, had reached agreement on the ESM with its partners under rules of international law.

At the end of the public hearing in November, the President of the Court, Andreas Vosskuhle, had let it be understood that the verdict would go in the direction of strengthening the Parliament’s prerogatives. This is the direction already taken by previous judgments on rescuing the euro zone, a subject that the Court has had to rule on several times over the last two years. Its most recent decision on the subject, in February, prohibited aid under the rescue fund, the EFSF, being decided in Germany by only a small committee of nine Members; it ruled that the 620 Members of the Bundestag should be consulted.

Federal Constitutional Court – Press office

Press release No 42/2012 of 19 June 2012

Judgment of 19 June 2012
2 BvE 4/11

Successful applications in Organstreit proceedings regarding the ‘ESM/Euro Plus Pact’

In its judgment pronounced today, the Federal Constitutional Court considered well-founded the applications made by the Alliance 90/The Greens parliamentary group with which the applicant asserts that the German Bundestag’s rights to be informed by the Federal Government have been infringed in connection with the European Stability Mechanism (ESM) and the Euro Plus Pact.
Legal background:

According to Article 23.2 sentence 2 of the Basic Law (Grundgesetz – GG), the Federal Government shall keep the German Bundestag informed, comprehensively and at the earliest possible time, ‘in matters concerning the European Union’.

The first application is aimed at what is known as the European Stability Mechanism (ESM). The European Stability Mechanism is an intergovernmental instrument of the euro area Member States to combat the sovereign debt crisis in the area of the European Monetary Union. The applicant applies for a declaration that the Federal Government infringed the German Bundestag’s rights to be informed under Article 23.2 GG by omitting to inform immediately before and after the European Council meeting of 4 February 2011 comprehensively, at the earliest possible time and continuously, about the configuration of the ESM, and that it in particular omitted to send the Draft Treaty establishing the ESM to the German Bundestag on 6 April 2011 at the latest.

The second application concerns what is known as the Euro Plus Pact, which was presented to the public for the first time at the European Council meeting of 4 February 2011. This agreement which was initially discussed in Germany under the name ‘Pakt für Wettbewerbsfähigkeit’ (Competitiveness Pact), is intended in particular to structurally reduce the risk of currency crises in the euro area. To achieve this, the Euro Plus Pact intends, among other things, to strengthen the economic pillar of the monetary union and to achieve ‘a new quality of economic coordination’. In this context, the applicant applies for a declaration that the Federal Government infringed the German Bundestag’s rights under Article 23.2 GG by omitting to inform the Bundestag before the European Council meeting on 4 February 2011 about the Federal Chancellor’s initiative for an enhanced economic coordination of the euro area Member States and by omitting until 11 March 2011 to inform it comprehensively and at the earliest possible time about the Euro Plus Pact after the meeting.

Against this backdrop, the Organstreit proceedings (proceedings relating to a dispute between supreme federal bodies) have to clarify whether the rights of participation and the rights to be informed which are due to the Bundestag according to Article 23.2 GG can also apply to intergovernmental instruments of the nature described which are dealt with by the Federal Government in the context of European integration and which are related to the European Union.

The Second Senate of the Federal Constitutional Court ruled that the Federal Government infringed the German Bundestag’s rights to be informed under Article 23.2 sentence 2 GG with regard to the European Stability Mechanism and with regard to the agreement on the Euro Plus Pact.

In essence, the decision is based on the following considerations:

I. Standard of review

1. Article 23 GG confers on the German Bundestag far-reaching rights of participation and rights to be informed in matters concerning the European Union. The stronger involvement of Parliament in the process of European integration serves to compensate the competence shifts in favour of the Member States’ governments in the national structure of powers that result from Europeanisation. Matters concerning the European Union include Treaty amendments and corresponding changes at primary-law level (Article 23.1 GG) as well as legislative acts of the European Union (Article 23.3 GG). International treaties that complement European Union law or otherwise show particular proximity to European Union law are also matters concerning the European Union. There is no single characteristic that is at the same time final and clearly delimited according to which it can be ascertained whether such proximity exists. What is important instead is an overall consideration of the circumstances, including planned contents, objectives and effects of legislation, which, depending on their weight, can prove decisive individually or in their combination.
2. The Federal Government’s duty, laid down in Article 23.2 sentence 2 GG, to keep the German Bundestag informed comprehensively and at the earliest possible time intends to make it possible for the German Bundestag to exercise its rights, anchored in Article 23.2 sentence 1 GG, to participate in matters concerning the European Union. The information must make it possible for the Bundestag to influence the Federal Government’s opinion-forming early and effectively; information must be provided in such a way that Parliament’s role is not reduced to merely exercising indirect influence. Apart from this, the interpretation and application of Article 23.2 GG must take into account that the provision also serves the publicity of parliamentary work, a requirement which is derived from the democratic principle laid down in Article 20.2 GG.

(a) In accordance with its function, the requirement of comprehensive information is to be construed in such a way that the more complex a matter is, the deeper it intervenes in the legislative’s area of competences and the closer it gets to formal decision-making or to a formal agreement, the more intensive the required information will be. From this, requirements result with regard to the quality, quantity and timeliness of the information. Thus, the duty to comprehensively inform encompasses not only initiatives and positions taken by the Federal Government itself and the subject-matter, the course and the result of the meetings and deliberations of organs and bodies of the European Union in which the Federal Government is represented. The duty to inform also entails an obligation to make available official materials and documents of the organs, bodies and authorities of the European Union and of other Member States.

(b) To inform in time is as important as the quantity of the information. The indication ‘at the earliest possible time’ in Article 23.2 sentence 2 GG means that the Bundestag must receive the Federal Government’s information at the latest at a point in time that enables it to deal with the matter in a substantiated manner and to prepare a statement before the Federal Government makes declarations which have an effect on third parties, in particular binding declarations concerning legislative acts of the European Union and intergovernmental agreements.

(c) With a view to the requirements placed on its clarity, continuity and reproducibility, the information must, in principle, be provided in a written form. Exception are only admissible within narrow limits; they may, however, be required if the Federal Government can ensure comprehensive information at the earliest possible time only if the information is provided orally.

(d) Boundaries of the duty to inform result from the principle of the separation of powers. Within the Basic Law’s system of functions, a core area of the government’s own executive responsibility exists that includes an area of initiative, deliberation and action which in principle has to be respected. As long as the Federal Government’s internal formation of opinion has not come to an end, Parliament has no right to be informed. If, however, the Federal Government’s opinion-forming has evolved in such a specific direction that the Federal Government can communicate interim or partial results to the public or would like to set out on a process of concertation with third parties with a position of its own, a project no longer falls within the core area of the Federal Government’s own executive responsibility that is shielded from the Bundestag.

Source: German constitutional court website
The Parliament is still waiting for the reply of the Council on the actions and request for documents set out in the two above mentioned resolutions; [it] calls on the Secretary-General of the Council to provide Parliament’s committee responsible for the discharge procedure with comprehensive written answers to the following questions:

(a) with regard to previous Council discharge debates in Parliament’s committee responsible for the discharge procedure, the Council did not attend these meetings regularly, however, it is considered of utmost importance that the Council attends in order to reply to committee members’ questions referring to the Council discharge. Does the Council agree to attend future debates on the Council discharge in Parliament’s committee responsible for the discharge procedure?

(b) why does the Council change the presentation/format of the internal audit every year? Why is the internal audit so short, generic and unclear every year? Will the Council for the 2010 discharge onwards please present the internal audit in (a) language(s) other than French?

(c) has an external audit been carried out? If so, may Parliament’s committee responsible for the discharge procedure see it? If an external audit does not exist, why has the Council chosen not to make one?

(d) until now, the activity of the Council implied co-financing with the Commission, which has experienced an increase after the entry into force of the Treaty of Lisbon. What audit and control systems have been put in place to ensure full transparency? Given that the Treaty of Lisbon increased the co-financing with the Commission, what is the Council’s understanding of ‘respond to the appropriate enquiries’?

(e) the Court of Auditors, in its annual report 2009, found that in two out of six procurement procedures audited, the Council did not respect the rules of the Financial Regulation for the publication of the outcome of the procedure. Has the Council scrutinised more samples of similar procurements? Has the internal procedure been streamlined in order to avoid similar cases in the future?

(f) staff of European Union Special Representatives (EUSRs): Please indicate the staff (all staff, establishment plan and others) number of posts, grade for the EUSRs in the Council for 2009. In which way and when will the EUSRs-staff posts be allocated between the Council and the European External Action Service (EEAS)? What was the travel budget for each of the EUSRs? How many of the EUSRs’ staff were transferred on 1 January 2011 to the EEAS? How many will remain with the Council and why?

(g) the Council highlights budgetary questions concerning the consequences of the Treaty of Lisbon in point 2.2 in the financial activity report (11327/2010, FIN 278). Has the Council solved the problems concerning Mr Solana’s expenditures? What part of the expenditures falls under the Council budget and what part falls under the Commission budget?

(h) what were the operational expenditures, administrative expenditures, staff, buildings, etc. envisaged by the Council for 2009 in order to set up the High Representative/Vice President of the Commission (HR/VP)?

(i) the HR/VP came into office of 1 December 2009. How was the cost distributed between the Council and the Commission (for staff, travel, etc.)? How did the Council prepare the budget for the HR/VP for 2010? Which budget lines and sums were reserved for her activities?

(j) how will office space released in the process of staff transfer to the EEAS influence Council’s plans on buildings? Have arrangements been made for the subsequent use of such office space? What is the anticipated cost for the removals? When were calls for tenders for the removals (if any) published?

(k) what was the administrative and operational expenditure related to the Common Foreign and Security Policy (CFSP)/Common Security and Defence Policy (CSDP) tasks, which were at least part-financed from the Union budget in 2009? What was the total amount of CFSP expenditure in 2009? Could the Council identify at least the main missions and their cost in 2009?

(l) what was the cost of meetings for Council working groups on CFSP/CSDP in Brussels and elsewhere and where did these meetings take place?
(m) what was the administrative expenditure relating to the implementation of the European Security and Defence Policy (ESDP)/CSDP military operations? What share of the total amount of expenditures arising from military operations has been charged to the Union budget?

(n) what was the administrative expenditure implemented for the operation of the ‘ATHENA’ mechanism, how many posts were needed for that mechanism, will any of the posts in question be transferred to the EEAS? To whom will the postholders report?

(o) there is a low occupation rate of posts in the Council’s establishment plan (91% in 2009, 90% in 2008). Does this consistently low rate cause any repercussions on how the Council's General Secretariat (CGS) functions? Can the CGS perform all its functions with the current occupation rate? Are lower occupation rates specific to any particular services? What are the reasons for the persistent discrepancy?

(p) what is the total number of posts assigned to the task of ‘policy coordination’ and administrative support (as defined in the Commission’s annual staff screening reports)? What percentage of the overall number of posts do these represent?

(q) to achieve the administrative objectives in 2009 the Council added teleworking to its working procedures. How does the Council prove the efficiency of this working procedure? In addition, the Council is asked to report on further measures taken in this respect and in particular those to improve the quality of financial management as well as their impact;

(r) the Council increased its posts by 15 (8 AD and 7 AST) to cover the staffing requirements of the Irish language unit. How many staff members deal with other languages (staff per language)? Are there already staff employed for and from the applicant countries? If the answer is in the affirmative how many posts are concerned (separated per country and language)?

(s) the ‘Reflection Group’ was established on 14 December 2007, and its members appointed on 15-16 October 2008. What were the reasons why the necessary financing could not have been envisaged and included in Budget 2009? Is a transfer in Budget 2009 from the contingency reserve to a budget position financing a structure conceived in 2007 strictly budget neutral? The Council earmarked €1 060 000 for the ‘Reflection Group’. How many posts can be allocated to this group?

(t) the expenditures concerning travel delegations still seem to be problematic (cf. Council note 15 June 2010, SGS10 8254, II bullet, page 4). Why do these expenditures appear in so many different budget lines?

(u) why does the internal audit still find it necessary to add ‘les frais de voyage des délégués et les frais d’interprétation’ (delegates’ travelling expenses and interpretation expenses) after strong criticism in the last two resolutions from Parliament on the Council discharge?

(v) the Council again has used underspending on interpretation to provide extra financing for delegations’ travel expenses; as a result, actual 2009 commitments for travel expenses amounted to considerably less than the initial budget, and less than half of the amount available after the transfer (€36 100 000 initial and €48 100 000 available after transfer against €22 700 000 committed). Why were the reasons for this €1 000 000 transfer (cf. the financial activity report 11327/2010, FIN 278 –point 3.3.2-VI bullet)? Why is the transfer from interpretation to delegates’ travelling expenses estimated at €12 000 000 by the Council at page 12 and at €10 558 362 at page 13? What has the remaining amount transferred from interpretation been spent on (the total amount transferred from interpretation is €17 798 362)? In addition, the Council is asked to explain the large amount of recovery orders made before 2009 and carried over to 2009 (€12 300 000) as well as recoveries made from declarations relating to 2007 (€6 300 000);

(w) in 2009 the Council, as it did in 2008, reallocated a considerable amount of its budget to buildings, in particular, more than doubling the initial allocations to the acquisition of the Residence Palace (reallocated €17 800 000 in addition to €15 000 000 earmarked in Budget 2009). What are the reasons for this? Can the CGS provide concrete figures of the savings achieved as a result of this? What was the initially projected cost of the Residence Palace Building? Does the Council think the initially projected cost will be accurate or could the cost be higher than estimated? What steps are envisaged to finance the building?

(x) implementation of the Council budget appropriations carried over: Could the Council present the estimated amount and subject of the invoices which were not received by June 2010 for the year 2009 and therefore carried over?

(y) the carry-over to 2010 of the appropriations of assigned revenues accrued in 2009 amounted to €31 800 000. This is about 70% of the assigned revenue for 2009. What are the reasons for this high carry-over ratio? What will happen/has happened to this revenue in 2010?

(z) what does ‘technical provision of €25 000 000 for the launch of the European Council 2010’ mean? (cf. the
financial activity report 11327/2010, FIN 278 point 3.1, IV bullet); (aa) what is the level of confidentiality of the Council budget specified by the different budget lines?

(ab) can the Council point out the specific measures taken to improve the quality of the Council’s financial management, in particular as regards the points raised in paragraph 5 of Parliament’s resolution of 25 November 2009(10) accompanying its decision on discharge to the Council for the financial year 2007?

(ac) Calls on the Secretary-General of the Council to provide Parliament’s Committee responsible for the discharge procedure with the following documents:

– the full list of budgetary transfers concerning the 2009 Council budget;
– a written statement on the Council’s mission expenses as carried out by the EUSRs;
– the Members States’ declaration for 2007 (cf. the financial activity report 11327/2010, FIN 278 point 3.2.2, II bullet); and
– the report of the ‘Reflection Group’ in order to understand why such a report costs €1 060 000 (cf. the financial activity report 11327/2010, FIN 278 point 2;

15. Notes the Commission’s reply of 25 November 2011 to the letter from the Chair of the Committee on Budgetary Control, in which the Commission says it is desirable for Parliament to continue to give, postpone or refuse discharge to the other institutions as has been the case up until now;

16. Points out that on 31 January 2012 the Chair of the Committee on Budgetary Control sent a letter to the Presidency-in-Office of the Council, stating his wish to establish political dialogue and forwarding supplementary questions from the Committee on Budgetary Control on the discharge to the Council; hopes therefore that the Council will provide to the competent committee for the discharge procedure a reply to the questionnaire – attached to the Chair’s letter – before the plenary debate;

17. Regrets, however, that the Council refused to attend any official meeting of the Committee on Budgetary Control related to its discharge.

The underlining was added by the author of this paper.
The European Parliament’s Right to Discharge the Council

by Carlino Antpöhler

BRIEFING NOTE

Abstract

This briefing paper examines whether the European Parliament has the right to discharge the Council. An analysis of Union provisions and principles yields the result that better reasons mitigate for a right to discharge. Additionally, the paper evaluates the consequences of the refusal to grant discharge as well as rights to information possibly arising from the right to discharge.
This document was requested by the European Parliament's Committee on Budgetary Control.

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EXECUTIVE SUMMARY

Through a thorough analysis of European law, this briefing paper comes to the conclusion that Parliament has the right to discharge the Council. The provision which deals with the discharge of the Commission can be interpreted in two different ways. At a first glance, the wording seems to militate in favour of a closed system in which discharge can only be granted to the Commission. However, considerations on an evolutionary approach to historical interpretation show that the provision can be read as leaving room for a separate discharge decision vis-à-vis the Council. To assess whether the system is indeed closed or leaves room to discharge the Council, a teleological interpretation is applied using principles of European constitutional law. While considerations of democratic accountability would support a right of Parliament to discharge the Council, a violation of the institutional balance could preclude such a right. A thorough assessment of both principles yields the result that better reasons can be brought forward in support of Parliament’s right to discharge the Council.

In more detail:
An analysis of European law shows that the provisions can be interpreted in two different ways. Art. 319 TFEU merely deals with the discharge of the Commission for the entire budget. The provision in its original state rather points in the direction of allowing only for one unified discharge decision on the Commission’s budget. However, this understanding is questionable.

Since the insertion of the discharge regime into the Treaty in 1977 the institutions have changed immensely. The Council has increasingly turned into an executive, which needs to be controlled closely due to democratic reasons. Furthermore, the Parliament has become an important player in providing democratic legitimacy. These changes in the institutional structure call for an evolutionary approach in the historical interpretation. As the wording of art. 319 TFEU is thus ambiguous, an interpretation which gives room to complementing discharge decisions by the Parliament on the other institutions is feasible.

A teleological interpretation is employed to overcome the ambiguity regarding discharge. To find out whether Union law indeed provides for a closed system forbidding a separate discharge decision vis-à-vis the Council, arguments developed from European constitutional law principles are brought forward. Democratic accountability militates in favour of a right of Parliament to discharge the Council. On the other hand, the institutional balance with its strong focus on the independence of the Council as a co-legislative institution would deny Parliament the right to take a separate discharge decision.

Democratic ex-post-control of the Council’s budget is very weak at the moment. Neither the national parliaments nor strongly democratically legitimized Union institutions are supervising the Council’s budget. This is particularly alarming as the Council is increasingly exercising executive functions. Public discourse on the Council’s budget is hardly possible in the current framework. The solution could be to grant the right to thoroughly control the Council’s budget either to the Commission or to the Parliament. The latter option is more convincing, as it does not blur responsibilities.

The Council’s independence is a principle of European constitutional law: Parliament has no direct control over the Council as a matter of primary Union law. As the Council is the co-legislator, there are strong reasons to protect that independence. However, independence of the Council in budget
matters is already limited by the Treaty, as it foresees a budget discharge via the Commission. Bearing in mind this already existent restriction, parliamentary control of the Council would not interfere with the institutional balance.

This rather narrow reading of the institutional balance is adopted for democratic reasons. If the Council was not controlled, a central part of the Union’s executive would remain unchecked which causes great concerns in view of democracy. Decisive is not whether the Council’s expenditure is operative but the partially executive character of the Council as such which requires democratic control.

The right to discharge cannot be limited to the executive action of the Council, as the expenditure is inseparable. It is, however, limited to a control of the lawfulness of the budget. This includes supervision whether expenditure does not violate the principles of economy, efficiency and effectiveness in a sufficiently serious way.

Teleological arguments hence tilt the balance towards an open interpretation according to which a separate discharge decision by Parliament vis-à-vis the Council is allowed. The ambiguous provision on the discharge of the Commission needs to be interpreted in a way which leaves ample room for a separate complementing discharge decision by Parliament. Parliament thus has an implicit right to discharge the Council in addition to its explicit right to grant discharge to the Commission.

Parliament has a broad right to information vis-à-vis the Council via the Commission according to primary and secondary law. Additionally, Parliament’s right to take a separate discharge decision entails an obligation by the Council to deliver the requested documents formally. A duty of Council representatives to attend meetings and respond to oral questions could only be inferred from general provisions which extend beyond budgetary control. A Note by the Council of 1973 gives no such broad right. It might, however, be established from customary law in line with the Rules of Procedure of Parliament. Whether the obligation forms indeed part of customary institutional law, is a very broad question which would entail a review of the Council’s general conduct and its intention beyond budgetary questions. Such a study would extend beyond the ambit of this paper.

The Council has certain limited rights to obtain those documents which are listed in the Treaty. It is thus not convincing to speak of reciprocity in comparing Parliament’s and Council’s rights. The broader right to information of the Parliament vis-à-vis the Commission does not apply to the Council. However, the duty of sincere cooperation requires Parliament to forward sufficiently important documents to the Council in order to ensure that the Council can effectively exercise its right of proposal.

Parliament cannot refer the question whether it indeed has the right to discharge the Council’s budget in the abstract to the ECJ. An action for annulment would fail for lack of an act of the Council with sufficient legal effect. Parliament could, however, bring an action for failure to act before the ECJ if the Council did not comply with Parliament’s right to information or with the obligation to take appropriate steps recommended in the observations accompanying the separate discharge decision.

The outcome of such a case before the ECJ is uncertain. While the author of this briefing paper is of the opinion that a teleological interpretation militates in favour of a separate right to discharge of the Parliament vis-à-vis the Council, the ECJ may take the opposite stance. A lawsuit for failure to act in spite of Parliament’s right to information might yield better chances.
INTRODUCTION AND FACTUAL BACKGROUND

The budget discharge procedures in the European Parliament (hereinafter: Parliament) have resulted in recurring institutional conflict between the Parliament and the Council. The discharge of the Council’s budget of 2007 and 2008 was delayed by the Parliament. Concerning the 2007 budget, the Parliament’s Plenary decided to postpone its discharge decision in April 2009, finally granting it not until November 2009. In 2010 it took intensive discussion until the Plenary granted discharge to the Council of 2008 in May/June 2010. The conflict took a sharper turn in 2011. It worsened with the Plenary’s refusal to grant discharge to the Council in November 2011. Preceding the decision there had been an exchange of different legal views as to whether the Parliament was indeed entitled to decide on the discharge vis-à-vis the Council. The conflict continued within the current discharge procedure for the budget of 2010. In May 2012 the Plenary again decided to postpone the decision on discharge. At the time of writing, the Parliament’s Committee on Budgetary Control (CONT) has again recommended to the Plenary to refuse discharge. The decision in the Plenary is still pending. Within this year’s procedure CONT has decided to convene a workshop to “receive external expertise by academic and independent experts”. The following questions were given to the experts:

1. **Is the European Parliament entitled to grant discharge to the Council?**
   - from the view of the institutional architecture and its equilibrium
   - from the view of democratic scrutiny and parliamentary control
   - from the view of transparency and public accountability
   - from the view of economy, effectiveness, and efficiency as well as sound financial management

2. **Is the European Parliament, represented by its Committee for Budgetary Control (CONT), entitled to receive the documents considered to be necessary on the budgetary implementation of the Council?**

3. **Is the Council obliged to deliver the documents requested in a formal way, to officially attend meetings with the CONT committee and to respond to oral questions on the budgetary implementation in the framework of discharge?**

4. **According to art. 319 TFEU the Council gives a recommendation to the Parliament which gives discharge. Do both institutions need the same documentary basis for setting up their respective decisions?**

5. **The refusal by the Parliament to grant discharge to the Council for its 2009 budgetary implementation did not result in any legal and/or political consequences. What (other) options should the Parliament consider for future decision-making on discharge?**

This briefing paper will focus on the first question posed by the workshop outline (Part A). After laying out the regulatory framework (1.), it will show that European Union law is ambiguous on the question

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whether Parliament can take a separate discharge decision vis-à-vis the Council (2.). The Treaties and
the Financial Regulation (FR) could be read as a closed system allowing only one single unified
discharge decision on the budget of the Commission. However, an interpretation which allows
separate discharge decisions on the budget of each institution is just as feasible (2.1.). This second
reading is supported by considerations on an evolutionary approach towards historical interpretation
of Union law (2.2.). To overcome the ambiguity, a thorough teleological interpretation is undertaken.
The paper takes guidance from principles of European law to test the different readings of art. 319
TFEU (3.). A focus in this part will be on the question whether democratic accountability or the
institutional balance command to follow a certain interpretation (3.1. – 3.4.). Afterwards two
additional parts address questions 2 – 5 of the workshop outline. Firstly, rights to information of both
institutions and other parliamentary rights are dealt with (Part B). Secondly, the consequences of a
decision refusing discharge are examined (Part C).
PART A – PARLIAMENT’S RIGHT TO DISCHARGE THE COUNCIL’S BUDGET

1. REGULATORY FRAMEWORK

The Treaties deal with discharge in art. 319 Treaty on the Functioning of the European Union (TFEU) which in its first paragraph explicitly gives the Parliament the right to discharge only vis-à-vis the Commission. This is reiterated in art. 145 (1) FR. The FR further specifies all matters concerning the budget of the European Union. Art. 146 (1) FR provides that “the discharge decision shall cover the accounts of all the Communities’ revenue and expenditure”, in so far transcending primary law. The discharge decision of the Commission hence includes the entire budget. For the case at hand this means that the Council’s budget is included in the discharge decision in respect of the Commission. This might seem unusual, especially since the budgets of the respective institutions are set out in separate parts of the budget according to art. 316 (3) TFEU. However, the discharge on the entire budget corresponds to the sole implementation of the budget by the Commission in art. 317 (1) TFEU “on its own responsibility”. As only minor parts of the budget are implemented directly by the Commission, the Treaties and secondary law provide for rules on how to delegate financial authority to Member States and the other European institutions. Art. 50 (1) FR which is of particular interest to the case at hand provides that the Commission “shall confer on the other institutions the requisite powers for the implementation of the sections of the budget relating to them”. The conferred powers are limited by art. 50 (2) FR which requires the institutions to act “in accordance with this Regulation and within the limits of the appropriations authorised”. Furthermore, art. 319 (3) TFEU and art. 147 (1) FR are of interest in the regulatory framework. Art. 319 (3) TFEU imposes a duty on the Commission to “take all appropriate steps to act on the observations in the decisions giving discharge”. This obligation is extended to all other European institutions in art. 147 (1) FR.

2. AMBIGUITY OF THE PROVISIONS

2.1. WORDING OF THE PROVISIONS AND SYSTEMATIC INTERPRETATION

The provisions concerning discharge are open to different interpretations.

The most obvious approach might be an argumentum e contrario: The Parliament has the right to discharge the Commission which means that it can only discharge the Commission. This line of thought can be supported by considerations on systematic interpretation. The Commission is responsible for the implementation of the entire budget. A single unified discharge decision makes sense in such a system. Additionally, the Treaty assigns the right of proposal to the Council. If further discharge decisions were foreseen originally, there would have been a provision on the question of who was in the position to propose those. For the discharge of the Council, this would mean that it was not foreseen as it would not make sense to leave the right to propose discharge to the discharged institution itself.

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7 See the Annex for the full text of all relevant provisions mentioned.
8 Art. 1(2) FR has a definition of « institution » which is not of further interest as it is clear that the Council is a European institution.
However, this reading of Union law might not be as imperative as it might seem at first glance. The law does not read, “The Parliament can only discharge the Commission”. It could, hence, be interpreted as allowing separate discharge decisions regarding every single institution, which are taken next to the all-encompassing decision concerning the Commission. The sole responsibility of the Commission would thus not be questioned but rather complemented by further discharge decisions.

Matthias Rossi argues that the wording is not ambiguous and leaves room only for a single unified discharge decision vis-à-vis the Council. Underlined is this argument by a review of the relevant literature. It is brought forward that no debate on the question of discharge of the Council in scholarship exists which in his view serves as proof for the clarity of the provision. Accordingly, Art. 319 TFEU is so clear that no scholar even doubts that there could be a different interpretation. Hence, no one deals with the question of the Council’s discharge. While the scarcity of literature dealing exactly with the issue is indeed striking, this cannot serve as a ground for excluding the ambiguity. Advocating against this line of argument is the point that indeed two authors deal with the issue. Matthias Rossi himself and Matthias Niedobitek both refer very shortly to the Parliament’s discharge to other institutions in their comments on the budget provisions. Neither argues that these are contrary to Union law. Instead it is merely stated that a discharge decision to other institutions cannot have the legal consequences of Art. 319 TFEU. There is thus no scholarly piece arguing for the unlawfulness of separate discharge decision. Instead all authors addressing the issue allow for separate decisions, while only limiting the consequences. Contrary to the view expressed partially in the workshop, the scarce comments by scholars thus further underline the ambiguity of the provision. It is, however, not convincing to exclude the legal consequences of Art. 319 TFEU in its entirety as will be shown later.

### 2.2. HISTORICAL INTERPRETATION

While the texts of the Treaty as well as the FR indeed do not command a single interpretation, they seem to point more towards an exclusive discharge decision on the budget of the Commission. Historically, it seems more natural to imagine that the wording was supposed to regulate only one single unified discharge decision. This understanding, however, might have changed in the course of time due to an evolutionary approach towards historical interpretation of Union law.

In general, Union law is static. It has to be changed through the treaty revision procedure of art. 48 Treaty on European Union (TEU) as far as primary law is concerned, or through the legislative procedures as provided for by the Treaties (art. 289 TFEU) as concerns secondary law. This strong emphasis on the law in force is not a mere formality but protects the vertical separation of powers between the Union and its Member States as well as the horizontal separation of powers between the EU institutions, more commonly referred to as institutional balance.

This feature of European law, however, does not require an absolute rigidity. In order to fulfil its function, the law has to adjust to changing circumstances to a certain extent in line with the legal

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12 Parts B and C.
order’s objectives. It seems inadequate to always understand Union law in the same manner as at the time when it came into force. The importance of a dynamic interpretation is thus widely recognized among European law scholars and judges. While changes in the socio-economic surroundings hence allow for a certain room of manoeuvre, this must not dispose of the difference between law-making and interpretation. Interpretation might change in the course of time as the context changes. As long as this remains in line with the text of the Treaties, it also complies with legal certainty.

These abstract considerations can be applied to the case at hand. The right to discharge the Commission’s budget was inserted into Union law by the Treaty of Brussels which came into force in 1977. The provision dealing with the discharge decision as such has not been changed ever since. There have only been amendments extending Parliament’s rights to information and concerning the obligation to act on the observations accompanying the discharge decisions (arts. 319 [2] and [3] TFEU). The development of secondary law proceeded similarly. Already in the 1977 Financial Regulation, art. 85 provided for the discharge of the Commission. No noteworthy changes were made to this rule until today. The regime which regulates the discharge procedure has thus remained unchanged for more than thirty years.

In contrast, the surroundings, particularly the institutional structure, have changed immensely. Democratic accountability is a major factor in discharge procedures as will be shown later. The European Parliament’s importance in legitimizing the Union democratically has largely increased since 1977. Art. 10 (2) TEU is the most visible sign of this evolution. The discharge regime was established even before the Parliament was directly elected for the first time. As the European Parliament has become a major factor in the Union’s democratic legitimacy its role in discharge proceedings may have changed accordingly. Less obvious but not less important for the case at hand are the changes regarding the function of the Council. As will be shown later on as well, there is a greater need for control over the Council budget when it acts as executive. While the Council always has exercised executive functions, these have largely increased in the last thirty years. While it is not easy to exactly attribute executive or non-executive character to every act within the Union, a few relevant examples show the enormous extent of the changes. The importance of the European Council has greatly increased. In the light of this paper’s focus, it is justified to treat the Council and European Council together, as the budget of the Council includes the European Council’s expenditure. The most obvious sign of the growing importance of the European Council is its inclusion among the institutions of the EU in the Lisbon Treaty (art. 13 [1] TEU). By giving the necessary impetus and steering the development of the EU (art. 15 [1] TEU), the European Council

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15 The ECJ has taken note of that need (See e.g. ECJ, Case 45/86, *Commission v. Council*, [1987] ECR 1439, para. 20).
17 For the history of the discharge procedure see Rossi, *Europäisches Parlament und Haushaltssverfassungsrecht* (Nosos, 1997), 151-152.
performs typical governmental functions. Furthermore, major policy areas in which the European Council and Council act are nowadays shaped by executive action. It suffices to point out the two most important of these areas. In the Common Foreign and Security Policy, the European Council and the Council are the main actors. Legislative action is expressly excluded in this area (art. 24 [1] TEU). In the field of economic policy within the Economic and Monetary Union, the Council recommends guidelines for a common economic policy and decides on the deficit procedure (arts. 121 [3] and e.g. 126 [6] TFEU). Both policy areas were only included in the Treaties by the Maastricht Treaty at the beginning of the 1990s.

This brief history of the institutional surroundings shows that the relevant institutional structure has immensely changed in the course of the last 35 years. This allows interpreting Union law more dynamically here. As the socio-economic surroundings have changed immensely, it is not adequate to interpret Union law in the same manner as 35 years ago.

One might rejoin that the legal framework has been confirmed repeatedly when the Treaties were changed or secondary law was reframed. The Treaties have undergone several comprehensive reforms in the last 35 years. The FR was newly adopted in 2002, replacing the former version of 1977. All these reforms, however, left the discharge provisions untouched. It might be argued that the legislative institutions and the Treaty reformers consciously chose to keep the discharge procedure as it was. In the legislative materials and the travaux-préparatoires to the Treaty amendments, there is no hint to a discussion on the discharge mechanism. The materials on the Convention leading to the Constitutional Treaty as well as the preamble to the 2002 FR do not contain evidence of any discussion on this question. Thus, the current regime, rather than having been conserved by a conscious decision, seems to be the result of a continuous transfer from the previous legislation or Treaty to the current one without further discussion. With the conscious decision taken back in 1975, there is therefore ample room for an evolutionary interpretation of the discharge regime.

A further argument against evolutionary interpretation might be the failed revision of the FR of 2012. The Parliament tried to include a right to discharge all institutions individually, but this was blocked by the Council and did not find its way into the eventual compromise. There is hence for the first time a discussion on whether to grant discharge to the Council’s budget. However, this cannot rule out an evolutionary interpretation of Union law either, because the two legislative bodies did not decide to settle the issue. Instead, the failed revision resulted in an agreement to disagree. Neither was an express provision included which ruled out Council discharge, nor was such discharge expressly provided for. As the institutions differ on the interpretation of existing Union law, neither institution can validly use the failed revision as an argument for their position. Furthermore, if the failed revision were to exclude an evolutionary interpretation of Union law, the Council would not only be able to decide on the future law but also on the interpretation of the current law. The Council could, by refusing reform of the FR, influence the interpretation of the current FR. This would turn the

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24 Weiler, supra note 22, 287.
25 The institutional structure in this area has changed recently with the so called Six Pack. For details see Antpöhler, "Emergenz der europäischen Wirtschaftsregierung - Das Six Pack als Zeichen supranationaler Leistungsfähigkeit", 2 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2012), 353-393. The Commission has acquired a more important role but the Council still performs executive tasks.
27 The text awaits first reading in the Parliament at the moment. The Parliament postponed the vote on the legislative resolution as there were numerous amendments (T/-0465/2011 of 26 Dec. 2011). The original proposal can be found at COM(2010)0815 from 22 Dec. 2010. The text of the reached compromise is on hold with the author by submission of the Parliament.
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attempt to specifically lay down the discharge of the Council into its opposite. By trying to include the right to discharge the Council, Parliament would have excluded the ability to take a discharge decision concerning the Council under the law in force. As this would contradict the Parliament’s efforts, the amendment tabled by the Parliament cannot hinder an evolutionary interpretation of the provisions going beyond the time they were drafted in.

2.3. PRELIMINARY RESULT: AMBIGUITY OF THE PROVISIONS

If this evolutionary interpretation is applied, the room which art. 319 TFEU leaves for interpretation, becomes more obvious. Back in 1977 the provision might have been understood as excluding all other discharge decisions. This understanding has changed. Nowadays, the provision can either be understood as permitting only a single comprehensive discharge decision vis-à-vis the Commission, or as only dealing with this part of the discharge proceedings but leaving ample room for discharge decisions concerning other institutions.

To come to a result in this state of ambiguity a teleological interpretation is applied. European legal principles are activated to find out whether the provisions indeed foresee a closed system with a single unified discharge decision or are open for separate complementing decisions.

3. TELEOLOGICAL INTERPRETATION: OVERCOMING THE AMBIGUITY WITH EUROPEAN PRINCIPLES

There are a number of principles of European law which can be mobilised for or against a separate discharge decision on the Council’s budget. This chapter will examine these principles in more detail, focussing on democratic accountability, sound financial management, autonomy in internal organization and institutional balance.

3.1. DEMOCRATIC ACCOUNTABILITY

Democracy lies at the very core of the European Union as expressed in art. 2 TEU. The accountability of EU institutions for every exercise of public authority is a central feature of this concept of democracy. More specifically, accountability in budget discharge procedures is of major importance, as it provides democratic legitimacy to the budget through ex-post-control. Furthermore, it is the basis for public discourse on the Union’s expenditure and hence constitutes a central element of the principle of transparency enshrined in art. 11 (2) TEU. How are these general principles implemented in the budget proceedings, and can they have an influence on the question whether to grant Parliament a right to discharge the Council?

Corresponding to the two ways Union law can be interpreted concerning the discharge of the Council, there are also two contrasting views on how accountability can be established concerning the Union’s budget.

Of course, the democratic legitimacy of the Union budget is not only based on the discharge decision. Let there be no doubt about the potential of the process of budget establishment and implementation itself to promote public discourse and enhance transparency. As this paper focuses

on the discharge procedure, however, it has to concentrate on the possible ways democratic legitimacy can be assured after the budget has already been implemented.

Without a discharge decision by the Parliament on the Council’s budget, accountability could be established as follows. Democracy in the Union rests on two strands: On the one hand citizens are represented via their Member States in the Council, and on the other hand Union citizens are directly represented in the European Parliament (art. 10 [2] TEU)29. To achieve strong democratic legitimacy, both strands should have a say in the ex-post-control of the Union budget. The Member States in the Council are accountable to their respective parliaments (art. 10 [2] TEU). Legitimating the discharge procedure via the national parliaments is difficult. There have been efforts within the EU in recent decades to strengthen this strand of legitimacy, the most visible sign of this being art. 12 TEU. However, this provision does not affect the ex-post-control of the Council’s budget. Participation rights of national parliaments focus mainly on legislative proceedings30. This might not just be due to a lack of European legislation but might instead be due to systemic limits to giving a role to national parliaments in the European discharge procedure31. In European law there is no role for national parliaments in budget discharge. National law can provide rights to information of national parliaments which could also affect the control of the Council’s budget. As expenditure, however, is not directly attributable to a single national government, national parliaments are less interested in control here than in legislative proceedings. In contrast to legislative actions, expenditure cannot be divided between the different governments in most cases, which makes the controlling power of each national government ineffective. For budget control to be effective, the Council in general has to come into the picture.

This leads to consideration on the second strand of legitimacy, via the European Parliament to the Union citizens. If art. 319 TFEU was conceived as a closed system allowing only a single unified discharge proceeding, and thus, the European Parliament could not control the Council’s budget directly, accountability would need to be established indirectly. While the Commission implements the budget “on its own responsibility” (art. 317 [1] TFEU) it transfers implementing powers to the Member States and to the other EU institutions (art. 50 [1] FR). The conferred powers are limited in art. 50 (2) FR as the institutions need to act “in accordance with this Regulation and within the limits of the appropriations authorised”. The institutions implementing the budget are thus bound to respect the law and the budget appropriations itself. This is an important expression of the rule of law which is capable of conveying democratic legitimacy to the Union. However, there are doubts about how effectively this provision can indeed be implemented. It provides for a prior commitment of the Council. In order to be effective, this commitment needs to be checked afterwards. The rule of law aspect needs to be complemented by accountability. As regards the Commission, accountability is established via the discharge procedure of art. 319 TFEU covering all expenditures including those of the Council. If the Commission had the right to control the Council’s budget, there would be a link from the Parliament to the Council via the Commission. The strand of legitimacy via the Union citizen would be represented in the ex-post-control of the Council’s budget. However, the FR does not deal with the Commission’s supervision of the Council’s budget. The control by the Member States is expressly dealt with in e.g. art. 53b (2) FR. Furthermore, there are moves towards an Integrated

29 See also Craig/de Búrca, EU Law, 5th ed. (Oxford Univ. Press, 2011), 155.
30 Dann, supra note 23, 235, 267-269.
31 The Chair of the CONT Michael Theurer confirmed at the workshop that members of national parliaments had stated their incapacity to control the Council’s budget (Theurer, Proceedings of the Workshop on the Discharge of the Council’s budget, 38).
Common Control Framework. If the budget is implemented by third countries, art. 53c (2) FR specifies why the Commission can assume financial responsibility. This is further underlined by the agreements the Commission has to enter into with third countries according to art. 166 FR. The scope of these treaties also encompasses provisions on sound financial management. No similar provisions exist with respect to the Council. There is hence no link between the Council and the Parliament regarding ex-post-control of the budget.

Even if such a link was established, doubts might remain as to its efficiency and the subsequent capacity of this strand of legitimacy to be sufficiently represented in the ex-post-control of the Council’s budget. Inherent to accountability and closely linked to transparency is the fact that the citizen has to know which institution is responsible for a certain act. That responsibility would be severely blurred if the Council was held accountable only via the Commission. For the Union’s citizens it would be hardly distinguishable whether the Council or the Commission was held responsible in a unified discharge decision. It might be argued that this is inherent to the system Union law provides. The Commission is responsible for all of the expenditure. Then, a certain blurring of responsibility cannot be avoided. While this line of argument carries some weight, it does not rule out separate discharge decisions, however. The discharge decision concerning the Commission should reach as far as the Commission exercises public authority. The Parliament can control whether the Commission sufficiently takes into account the Union’s interest in sound financial management when conferring budget implementing powers or when exercising control after the expenditure has been spent. Beyond this the Commission is not able to influence budget expenditure. To extend its responsibility beyond its ability to act would not seem justified. This is where separate discharge procedures would come into play. Those exercises of public authority which are beyond the Commission’s reach could be controlled in these separate discharge proceedings.

One of the most important institutions in budget audit has been left out so far. The European Court of Auditors has the task to “examine the accounts of all revenue and expenditure” and in particular controls “whether the financial management has been sound” (art. 287 [1] and [2] TFEU). Could the supervision by the Court of Auditors provide a substitute for democratic accountability? The role of the Court of Auditors in acquiring democratic legitimacy for the Union’s budget is only complementary. This can already be seen by the fact that Parliament still decides on the discharge of the Commission after the report of the auditors. Furthermore, Parliament’s rights to information according to art. 319 (2) TFEU are not limited to the Court of Auditors’ report. This allows drawing conclusions as to the more general role of the Court of Auditors. It complements accountability, but cannot replace it. This set-up is indeed convincing and can be applied beyond the scope of art. 319 TFEU. As the Court of Auditors is appointed by the Council in close cooperation with the Member States (art. 286 TFEU), the Court’s democratic legitimacy is far more indirect than that of the Parliament. Thus, one cannot place too high expectations on the Court of Auditors in providing democratic legitimacy. Parliamentary control has much more capacity to enable public discourse on Union matters. Additionally, the scope of the Court’s audit is very limited. In 2011 it tested 58 transactions for all European institutions. It also examined the efficiency of the system which the institutions use to ensure compliance with the FR. The Court of Auditors’ report is limited to the statement that those systems are indeed effective. The facts on the institutions’ budgets are hence limited in a manner which hinders a public discourse on the overall budget. While it is illusionary to

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expect Parliamentarians with a high workload to scrutinise all budget details more thoroughly, the different institutional character of Parliament might yield information the Court of Auditors does not receive.

To sum up, if the Council evaded a discharge decision of the Parliament, there would be severe problems with accountability in the ex-post-control of the Council’s budget. Neither the national parliaments nor the Commission are indeed able to effectively control the Council’s expenditure. As no strong democratically legitimized institution controlling the expenditure exists, there is indeed a severe problem of accountability. While a stronger control through the Commission would somewhat alleviate this problem, it would not vanish as this control would lead to a significant blurring of responsibilities. There would be fewer democratic problems if the Parliament indeed was able to discharge the Council’s budget. The accountability would be efficiently established. The strand of legitimacy via the Union citizens would be represented strongly. The second strand would, however, still be weak since the national parliaments would still only play a role if national law so provided. However, this is – at least partially – due to systemic problems which cannot be addressed adequately. Budget control is not attributable to a single national delegation but rather to the Council in general. If this strand of legitimacy remains weak, there is even more reason to strengthen legitimacy via the European Parliament. As interests of the EU as a whole are affected, the Parliament is the place where budgetary facts should be dealt with. In conclusion, a parliamentary right to discharge the Council offers strong advantages if assessed from the viewpoint of democracy.

### 3.2. SOUND FINANCIAL MANAGEMENT

An assessment of the two possible modes of interpretation in light of the principle of sound financial management does not yield strong results in support of either position. The principle of sound financial management is laid down in art. 310 (5) TFEU and is further spelled out in Part III of the Interinstitutional Agreement on budgetary discipline and sound financial management and in Chapter 7 of the FR. Sound financial management by the Council is guaranteed through an internal audit and an external audit by the Court of Auditors. Neither primary nor secondary law foresee further control by other institutions. This might be questioned in view of the principle of sound financial management. However, as already mentioned above, it seems questionable whether Parliament as a political rather than an administrative institution can indeed thoroughly check the Council’s expenditure. An additional check might offer advantages. But as these positive effects would come in terms of democratic benefits rather than contribute to sound financial management, the principle of sound financial management has no bearing on the question at hand.

### 3.3. AUTONOMY IN INTERNAL ORGANIZATION

Autonomy in internal organization is repeatedly mentioned in the discussion on the question whether the Parliament has the right to discharge the Council. It is used in different contexts. Parliament has used it to ascertain its right to decide on the discharge. It is argued that, as the Council is autonomous in its internal organization, the Commission cannot be held responsible for the Council’s budget since this would violate the Council’s autonomy. On the other hand, the principle of autonomy in internal organization can be used to forbid Parliament to decide on the discharge of

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34 Court of Auditors, Annual Report concerning the financial year 2010, OJ C 326, 10 Nov. 2011, 194.
the Council. According to this view, autonomy would entitle the Council alone to decide on the control of its own budget. Other institutions’ involvement would constitute a severe restriction of the Council’s autonomy.

The principle of autonomy in internal organization has been developed by the European Court of Justice (ECJ). Art. 335 TFEU partially codifies this principle concerning the representation of the EU within Member States. However, the principle goes beyond this field and is a principle of Union law which regulates all actions of EU institutions. The autonomy in internal organization is part of the more general principle of institutional balance and hence can be inferred from art. 13 (2) TEU which sets out that “[e]ach institution shall act within the limits of the powers conferred.” It is thus the basis for a horizontal division of powers. As to the principle’s content, the ECJ has recognized that the institutions may regulate their internal proceedings. This is “intended to ensure the proper functioning of the institution.” The autonomy of internal organization is nevertheless subject to the limits of Union law, in particular the powers conferred on the respective institution.

The principle of autonomy in internal organization cannot be used to argue for a right to discharge of the Parliament on the Council’s budget. It is argued that, as the Council is autonomous, it needs to take up responsibility for its own expenditure. While that might be true from other perspectives, it cannot be convincingly established from the principle of autonomy in internal organization. It is already doubtful whether the principle also implies obligations of the institutions and is not just limited to rights. Furthermore, the “own responsibility” of the Commission in budget implementation is foreseen by the Treaty. Granting discharge to the Commission also in view of the Council’s budget can hence not violate the principle of autonomy as it is foreseen by the Treaty.

But can the autonomy in internal organization rule out the right of Parliament to give discharge to the Council? The doubt stems from the type of expenditure the Council is undertaking. Most of its expenditure is spent on staff, buildings, equipment and other operating expenditure. Dealing with one’s own staff is central to an institution’s autonomy. While this indeed limits a right to discharge Council, it cannot rule out the possibility of control. The Council has to have the right to decide autonomously on the question whether staff or a building is necessary. However, the Council has this leeway only if the expenditure spent is indeed lawful. As art. 310 (5) TFEU and the Interinstitutional Agreement on budgetary discipline and sound financial management make clear, expenditure in violation of the law affects the financial interests of the Union as a whole. The public has an overriding interest in being informed of those violations. This is underlined by the fact that the institutions’ budgets are not only examined by an internal audit but also by an external one through the Court of Auditors. The institutions’ autonomy can hence not be used to rule out supervision of the lawfulness of expenditure. A parliamentary right to control the Council’s budget would, however, be limited to a control of unlawfulness.

This supervision, however, can still turn out to be very broad. The principles of the FR are of particular importance in this regard. The principle of sound financial management which is subdivided into the principles of economy, efficiency and effectiveness could easily be raised by the discharge authority.
In some cases, this might make it hard to distinguish questions of lawfulness from issues of necessity beyond the reach of supervision. To balance the interests of the Council and the budget authority, control should be limited to sufficiently serious violations. Whether Union law indeed is sufficiently seriously violated needs to be assessed based on all aspects of the individual case at hand. Most important would be the impact the violation has on the Union’s finances and the obviousness of the violation. Beyond the principle of sound financial management, it would have to be assessed whether the violation of a certain provision as such is sufficiently serious or whether a breach has to pass a certain threshold.

Lastly, a right of Parliament to discharge the Council would be limited in one further respect. The Parliament can only address the Council as an institution in its entirety. While expenditure is generally spent by the Council’s General Secretariat, the Parliament cannot address this organ within the Council. The Council as such is responsible. Addressing an administrative authority directly might influence this authority negatively as it lacks the political power to resist pressure the Council as such enjoys. The organization of who is in charge of dealing with discharge is part of the Council’s autonomy of internal organization.

The autonomy in internal organization does not rule out a separate discharge decision on the budget of the Council. However, it limits a possibly existing right to discharge to the extent that the Parliament would not be entitled to check whether an expenditure was necessary. Instead it would be restricted to controlling the lawfulness of the spending. Additionally, the violation would have to be sufficiently serious. Furthermore, Parliament would only be able to address the Council as such and could not distinguish between administrative authorities within the Council.

### 3.4. INSTITUTIONAL BALANCE

Beyond the particularities of the principle of autonomy in internal organization it might be questioned in more general terms whether the institutional balance would be upset by a right of the Parliament to decide on the discharge of the Council. The principle of institutional balance, which can be derived from art. 13 (2) TEU, is a principle of European constitutional law which has been developed by the ECJ. It reflects the division of powers between the institutions not implying a certain balanced role of the institutions, but ruling out changes that depart from the institutional structure as foreseen by the Treaties. A certain institutional practice as the right to discharge at hand may then not deprive another institution of their right provided for by the Treaties.

Applied to the discharge procedure, this means that Parliament cannot exercise a complementary discharge decision on the Council’s budget if this would deprive the Council of a prerogative explicitly or implicitly granted to it by the Treaties. There are two points of view from which a

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42 The criterion of “sufficiently serious” has a long history in Union law. It was established by the ECJ in the field of state liability (ECJ, Joined Cases C-46 & 48/93, Brasserie du Pêcheur and Factortame III, [1996] ECR I-1029).
46 ECJ, Case C-149/85, Wybot, [1986] ECR 2391, para. 23.
violation of the principle of institutional balance could be alleged. First, there are some precise concerns which will be addressed in a first part (3.4.1.). Afterwards it will be dealt with the abstract notion of the Council’s independence as the major challenge for the Parliament’s right to grant discharge separately (3.4.2.).

### 3.4.1. Overcoming Precise Concerns

There are three precise concerns in the realm of the institutional balance which need to be addressed. A right of Parliament to discharge also the Council’s budget could alter the institutional structure within the financial provisions of the Treaty itself. Furthermore, there are two precise points which raise doubts as to the influence Parliament could exert on the Council as a legislative institution via the discharge proceeding.

The first of these more precise concerns deals with the Council’s role in budget proceedings. It could be argued that the Treaty foresees only one single unified discharge decision on the entire budget granted to the Commission. Taking a discharge decision on the Council’s budget would then deprive the Council of its role as prescribed by the Treaty, which consists of not being controlled. However, this line of argument would be circular. It has been shown above that the wording of the Treaty is ambiguous. The teleological interpretation through the application of European principles aims at overcoming exactly that ambiguity. Art. 319 TFEU can hence not be used to argue that a discharge decision by the Parliament would upset the institutional balance. More generally, it might be argued that the Council has a leading role in all steps of the Union’s budget procedure and that the Parliament’s right to discharge the Council would alter this position. This argument fails to convince as well. The Treaty explicitly distinguishes between the establishment, the implementation and the discharge of the budget, so an analysis has to treat these issues separately as well. If the focus is only on budget discharge, there is no leading role of the Council. The Treaty foresees for the Parliament to be the decisive authority on discharge. This would not be altered by a parliamentary right to discharge the Council. Still, it might be questioned whether the Council would be deprived of its right to proposal according to art. 319 TFEU. A complementary right to discharge the Council and other institutions would, however, be independent of art. 319 TFEU. To grant the Council the right to propose discharge on its own budget seems to add no further advantage, as the Council will already have concluded its own internal audit and will have responded to the report of the Court of Auditors. It then seems rather far-fetched to grant the Council a right to propose discharge on its own budget. For the other institutions which the Parliaments grants discharge to, such a right could very well be argued for, but this is beyond the ambit of this study. The institutional balance as foreseen by the Treaty in the field of the Union budget would thus not be compromised by a right of Parliament to discharge the Council.

Of more concern is that the Parliament’s right to give discharge to the Council might upset the institutional balance between the Parliament and the Council in the legislative proceedings. According to arts. 289 (1) and 294 TFEU, Parliament and Council jointly adopt legislative acts in the ordinary legislative procedure. Implicit in these provisions is the idea that Council and Parliament should be on an equal footing as legislative proceedings are concerned.

The balance in legislative proceedings could be upset in two precise ways by granting the Parliament the right to decide on discharge of the Council’s budget. First, Parliament could use this right to exert influence over legislative proceedings via the discharge procedure. It could e.g. change the Council’s internal organization which is concerned with legislative proceedings. Second, Parliament could use
the discharge procedure as an instrument to exert pressure within legislative proceedings. Both risks can be minimized through contagion strategies. The remaining risks do not amount to an interference with the institutional balance if assessed in light of the principle of democracy.

The first concern is that Parliament could exert influence on the Council’s internal organization in legislative proceedings and thus indirectly increase its power. An administrative section of the Council which stands in the way of Parliament’s interests in legislative proceedings could, for example, be recommended to decrease its staff. This concern seems, however, to be more of a theoretical nature. It still remains for the Council to decide whether to follow the observations accompanying the Parliament’s discharge decision according to art. 147 FR as long as it takes appropriate steps. As will be seen later, Parliament has only a limited right to judicially enforce these observations. Furthermore, as already shown above in a more general context, Parliament has to keep interference with the Council’s internal organization to a minimum. There were limits to the Parliament’s control introduced. This would rule out arbitrary interventions by Parliament on the Council’s powers in legislative proceedings. The risk of interference with internal proceedings concerning legislation can thus be kept small.

The second concern which can be specified in detail is that Parliament could use the discharge procedure to exert influence on the Council. While it is generally not objectionable for Parliament to join different acts together for negotiation, this is different where discharge is concerned. Discharge differs from other parliamentary proceedings, as it is more of a legal proceeding than a political one. The purpose of granting Parliament the right to discharge the Council would be to achieve accountability by a thorough control of the Council’s budget. The intent would not be to politicize discharge proceedings beyond the legal questions. Parliament is always – and rightly so – a place for political public discourse. This is what the right do give discharge to the Council is intended to seize on. There might be different political positions on the expenditure of the Council. However, safeguards should be implemented to prevent considerations not at all connected to discharge from playing a role. It should be ensured that discharge indeed focuses on the expenditure of the Council. This could be done by explicitly ruling out the connection of discharge proceedings with legislative proceedings. The existence of a separate Committee on Budgetary Control within the Parliament might already be a helpful step in that direction. The danger of Parliament exerting influence on legislative proceedings via the discharge procedure can hence be limited.

3.4.2. The Abstract Notion of the Council’s Independence as a Co-Legislator – The Major Challenge for the Parliament’s Right

While the specified concerns outlined above can be minimized, there is a more abstract notion that Parliament and Council as co-legislators should always be on an equal footing. This should be ensured by entirely ruling out even the slightest possibility that one of the institutions could exert influence over the other, the argument goes. If this idea was to be followed, Parliament could not at all interfere with proceedings of the Council or vice versa. This notion is true for most of the Treaty. There is no field where one of the institutions can directly control and hence exert influence over the other. Their only points of contact are the legislative proceedings. Historically, this might have been the reason to exclude an explicit provision on discharge of the Council. This would also explain why the Treaty foresees the procedure via the Commission and provides no direct link from the Parliament to the Council. The independence of a legislative body from outside influence is an important aspect. The right of a legislative body is already in abstract a value worth protecting.

47 Lennaerts/van Nuffel, supra note 38, para. 13-010.
This abstract notion of keeping the institutions entirely separated is the strongest argument against a right of the Parliament to discharge the Council. While a thorough comparative investigation would exceed the scope of this paper, this notion might also be the reason why in federal states budgets between both chambers are thoroughly distinguished. However, in the EU this autonomy of the institutions is not absolute. In particular within the field of the Union’s finances, it is limited. It is beyond doubt that Parliament can give discharge to the Commission on all revenue and expenditure, including the Council’s expenditure (art. 146 FR). The Council is thus – independent of the answer to the question of this briefing paper – never entirely autonomous in budget proceedings. A further budgetary obligation of the Council to “take all appropriate steps to act on the observations accompanying the European Parliament’s discharge decision” is provided for in art. 147 (1) FR. The Council’s autonomy is thus severely restricted in the field of the Union’s budget which is unique in European law. If Union law did not provide for a control of all expenditure, it would be impossible to argue for a right of Parliament to decide on the discharge of the Council. However, the detrimental impact on the Council’s position is far more limited. The question is only whether Parliament would always need to proceed via the Commission or whether the direct route of control with its further implications could be taken.

The Council retains thus in budgetary proceedings only minor parts of its originally all-encompassing autonomy. The question at hand is then whether an interference with this rest would amount to a violation of the principle of institutional balance. This should be assessed in light of the principle of democracy. To reach an overarching teleological interpretation, the principles cannot be assessed entirely independent of one another.

The ECJ’s interpretation of the principle of institutional balance has remained very vague. If overriding interests of democracy so required, the principle of institutional balance could – without deviation from the ECJ’s case-law – be interpreted narrowly. The Treaties provide for a control of the Council’s budget. Whether that happens via the Commission could be seen as a procedural aspect which is not part of the institutional balance. The principle of institutional balance would then not even be affected. This narrow reading ought to be applied if important aspects of democracy favoured it.

Considerations of accountability strongly militate in favour of a right of Parliament to discharge the Council. It has been shown that the EU would gain immensely in terms of democratic legitimacy if the Council was subject to the Parliament’s review. Right now democratic accountability is missing, as the Council is not checked externally and directly by any strongly legitimized institution. While the independence of the legislative body is an important aspect, it must not be forgotten that the Council is increasingly acting as an executive power. The budget procedure is a central element of controlling an executive. The partially executive character of the Council as such requires democratic control. This is independent of the Council not undertaking operative expenditure. If Parliament were not given the power to decide on the discharge of the Council, there would be an enormous part of executive public authority which would escape accountability. Granting Parliament the right to discharge the Council is the best possibility to diminish this immense deficit. The detrimental effects to the independence of the Council as a legislator are rather small in comparison. The practical effect on the functioning of the Council will probably not be big.
3.4.3. Result: Parliament’s Right to Discharge the Council

It is thus more convincing to adopt a narrow reading of the principle of institutional balance. There is hence no interference with the Council’s right. Democratic concerns justify limiting the principle of institutional balance. The direct control of Parliament vis-à-vis the Council is therefore possible. The Commission does not have to act as a mediator in the separate discharge procedure which complements the discharge of the Commission. This briefing paper thus comes to the conclusion that it is convincing to give Parliament the right to decide on the discharge of the Council. However, as Union law is ambiguous, it can and might be read differently by the ECJ.

3.4.4. No Limitation to Executive Action

It could be argued that it would be best to limit the right of Parliament to decide on the discharge to executive actions only. A clue to such a solution is included in the Parliament’s Rules of Procedure. Rule 77 allows separate discharge decisions but includes the Council only “as regards its activity as executive”. Limiting the Parliament’s right like this would indeed have positive consequences. As argued above, the need for parliamentary control is particularly pressing with regard to executive action. Furthermore, the independence of the Council would be affected less strongly than if its legislative actions were supervised as well. Provisions which this distinguishing might rely on are arts. 16 (8) TEU and 289 (3) TFEU which provide that the Council has to convene publicly if acting in a legislative function. While this distinction is theoretically convincing, it would not work in practice. Not only is there no distinction between legislative and executive action in the Council’s budget, but also this differentiation simply cannot be made. The Council’s expenditure mainly comprises costs for staff and buildings. In particular, administrative tasks do not lend themselves to a categorization into executive and legislative tasks. The same applies to the expenditure for buildings. Neither can it be evaluated whether a certain appropriation within the budget has its focus on executive or legislative functions. Take the example of ECOFIN. Is ECOFIN mainly performing executive or legislative tasks? And does that assessment change, if one takes into account that the same room is used by other formations of the Council to convene? While a distinction between executive and legislative expenditure would hence theoretically be convincing, it is impossible in practice.

4. FURTHER POINTS

There are a few minor further points which came up in discussions and allegedly have an influence on the question whether Parliament is indeed entitled to grant discharge to the Council. All of these have no decisive influence on the outcome of the question. Parliament does not need an express provision in the Treaty to be able to grant discharge to the Council’s budget (4.1.). Furthermore, the Gentlemen’s Agreement of 1970 cannot exclude the Parliament’s right (4.2.). Lastly, the Parliament’s Rules of Procedure and the Parliament’s conduct in recent years have no bearing on the result of the question (4.3.).
4.1. NO EXPRESS PROVISION GRANTING THE RIGHT

It might be argued that the Parliament is not entitled to grant discharge already due to the fact that there is no express legal provision within the Treaties which allows it to do so. The Parliament continuously refers to art. 314 (10) TFEU in its discharge decisions. This norm, however, does not confer competences on the Parliament; it merely constitutes a duty of the institutions to exercise their existent competences in a certain manner. None of the further norms referred to (arts. 317, 318 and 319 TFEU) confer competences on the Parliament in respect of the discharge of the Council. This, however, does not preclude the Parliament’s right. The ECJ has explicitly held that for Parliament to take a decision it does not need an explicit power. Instead, it can adopt resolutions on any question. This parliamentary right is only limited by the respective powers of the other institutions. For the question at hand, it follows that the Parliament does not need an explicit competence to grant discharge. Instead it was shown above, that the decision by the Parliament does not encroach on the rights of the Council without sufficient justification.

4.2. GENTLEMEN’S AGREEMENT OF 1970

Another line of argument that seeks to exclude the Parliament’s right to discharge refers to a Gentlemen’s Agreement of 1970. The agreement provides the following:

*The Council undertakes to make no amendments to the estimate of expenditure of the European Parliament. This undertaking shall only be binding in so far as this estimate of expenditure does not conflict with Community provisions, in particular with regard to the Staff Regulations of Officials and Conditions of Employment of Other Servants and to the seat of the institutions.*

Speculation has it that a reciprocal duty not to control the Council was agreed upon by the Parliament. There are three reasons why this does not rule out a right of Parliament to discharge the Council. First of all, the provisions are explicitly described as a Gentlemen’s Agreement. While the ECJ only had to deal with the legal effects of Gentlemen’s agreements between individuals, their effect between public authorities can be deduced from international and municipal law. Both legal sources have in common that they regard gentleman’s agreements as non-binding. This is transferable to the regulation of the relationship between two public authorities. The Gentlemen’s Agreement has, hence, no legal effect. Secondly, there is no hint within the agreement that a reciprocal duty was agreed upon by the Parliament. To interpret the agreement in that manner would need at least some indication within the wording. Thirdly, the scope of the agreement is very limited. Already by its

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50 Ibid., para. 40.
51 The Gentlemen’s agreement can be found in the minutes of the Council meeting of 22 Apr. 1970.
52 In competition law, the ECJ gave legal effect to Gentlemen’s agreements (e.g. ECJ, Case 41/69, ACF Chemiefarma NV v. Commission, [1970] ECR 661, para. 107-116). This can, however, not be transferred to the case at hand, as the decision has to be interpreted in conformity with competition law’s intention to effectively control private actions.
wording, it refers merely to the “estimate of expenditure”. This term concerns a different state of the budget procedure. The Gentlemen’s Agreement excludes the control of the Parliament’s budget at the point of its establishment. The ex-post-control is thus not included in the scope of the Agreement. Furthermore, it only excludes the control of expenditure vis-à-vis “Community” provisions. As was shown above, the right to discharge concerns exactly such control. Parliamentary control is limited to examining whether the Council’s budget violates Union provisions. This legal evaluation is not dealt with in the Gentlemen’s Agreement. The Gentlemen’s agreement can, hence, clearly not forbid the Parliament to discharge the Council.

4.3. PARLIAMENT’S RULES OF PROCEDURE AND ITS CONDUCT

The Parliament’s right to discharge is explicitly granted in its own Rules of Procedure. The relevant Rule 77 reads as follows:

*The provisions governing the procedure for granting discharge to the Commission in respect of the implementation of the budget shall likewise apply to the procedure for granting discharge to:*

- the persons responsible for the implementation of the budgets of other institutions and bodies of the European Union such as the Council (as regards its activity as executive), the Court of Justice of the European Union, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;

This provision, however, cannot be used to argue in favour of Parliament’s right to discharge. While Parliament has the power to determine its own internal proceedings 54, this right is limited to purely internal matters 55. The autonomy of internal organization does not allow imposing duties on other institutions. Thus, the Parliament’s Rules of Procedure have no effect on the question whether the Parliament indeed has the right to discharge the Council. Conversely, this does not mean that a right to discharge is excluded.

It might be argued that the Parliament already has the right to discharge the Council, since such discharge has been institutional practice for a number of years. However, the ECJ has made clear that “a mere practice cannot override the provisions of the Treaty” 56. The Parliament’s practice can hence have no bearing on the question at hand.

55 This has not been held explicitly by the ECJ but seems to follow obviously from the power being an internal one. The ECJ has only dealt with limits to decisions which do not impose legal obligations on other institutions. Those are limited by the principle of sincere cooperation (ECJ, *Joined Cases C-213/88 & C-39/89, Luxembourg v. Parliament*, [1991] ECR I-5643, para. 34).
PART B – COMPLEMENTARY RIGHTS OF PARLIAMENT AND COUNCIL’S RIGHT TO INFORMATION

This part deals with question 2 – 4, all of which concern rights to information of both institutions and similar prerogatives possibly held by the Parliament.

1. RIGHTS OF PARLIAMENT COMPLEMENTING THE RIGHT TO DISCHARGE

The first and second question concern rights of the Parliament. It is asked whether Parliament is “entitled to receive the documents considered to be necessary on the budgetary implementation of the Council” and whether “the Council is obliged to deliver the documents requested in a formal way, to officially attend meetings with the CONT committee and to respond to oral questions on the budgetary implementation in the framework of discharge”.

Arts. 318 and 287 (1) and (4) TFEU provide for Parliament to obtain certain documents by the Commission and the Court of Auditors which form the basis of the discharge decision. Beyond this, art. 319 (2) TFEU grants Parliament an all-encompassing right to receive the information it deems necessary to exercise budget control vis-à-vis the Commission. This right is not limited to the time during which Parliament deals with discharge but instead comprises a complimentary expenditure control while and after the budget is being implemented.\(^{57}\) As the Commission’s responsibility in budget implementation includes the Council’s revenue and expenditure (art. 317 [1] TFEU and art. 146 [1] FR), the Parliament’s right to information extends to the Council’s budget. The Commission thus has an obligation to report thoroughly on the budget implementation by the Council. To fulfil this duty, the Commission depends on the assistance of the other institutions. Because of this, the Parliament’s right to information would be rendered meaningless if the other institutions could resist cooperation. Therefore, the duty of sincere cooperation (art. 13 [2] TEU) comes in, resulting in an obligation of the other institutions to provide the necessary information to the Commission. On the other hand, an obligation by the institutions to directly inform the Parliament cannot be inferred from the Treaty and the FR provisions. It might simplify the relations between the institutions, and they can still voluntarily choose to directly approach the Parliament, but this does not change the fact that the Treaty contains no such obligation.

However, a right of the Parliament to be directly informed follows from its unwritten right to decide on the Council’s discharge. The Parliament’s right to discharge would be rendered meaningless if it could not act on a sufficient basis of information. The principle of democracy which mandates the Parliament’s right to discharge must also enshrine a right to information to be effective. However, the restrictions established above for the right to discharge must apply here as well. Thus, Parliament’s right to information is limited to those documents which give information on the question whether the Council’s expenditure has been lawful. This might coincide with the findings of the Court of Auditors. However, as argued above, for Parliament’s right to be effective it cannot be limited to the Court’s report. This is underlined by the Treaty provision which gives the Parliament vis-à-vis the Commission a right to information beyond that source (Art. 319 [2] TFEU). While the provision cannot be applied to the Council directly, its idea can be transferred. Parliament thus has a right to information which comprises all documents relevant to the question whether the Council has acted lawfully. Parliament’s right to information corresponds to an obligation of the Council to deliver the documents in a formal way.

\(^{57}\) Rossi, supra note 10, para. 13.
Art. 319 (3) TFEU obliges the Commission to report to the Parliament and the Council on the measures taken in light of the observations contained in the discharge decision. Art. 147 (2) FR extends this duty to all institutions. Parliament can hence ask the Council for a report on the implementation of the observations.

It is further asked whether Council would, as a result of the Parliament’s right to information, have to attend the proceedings of the CONT committee and respond to oral questions. The Treaties do not provide for a general right of the Parliament to ask questions or oblige the Council to attend meetings. Art. 230 (3) TFEU just gives the Council the right to be heard. The right to ask questions in art. 230 (2) TFEU only applies to the Commission. It might be brought forward that the right to discharge to be effective needs to include the right to ask questions and to oblige the Council to attend the meetings in order to be efficient. The lack of provisions in the Treaty to this regard could be explained as a failure to foresee cases where Parliament can at least indirectly control the Council. While this might be argued, better reasons speak against an obligation to attend meetings from primary law or the unwritten right to discharge the Council. Parliament’s right to discharge interferes with important rights of the Council. The discharge procedure is the only place in the Treaties that contains an exception to the principle of the Council’s independence. To minimize these problems, the right to discharge has to be limited to the rights that are necessary for its efficient functioning. Parliament could not effectively exercise its right to discharge if it did not have the relevant documents. However, Parliament can exercise its right without the Council attending the meetings, since information can be requested in writing. Not having to attend meetings and answer questions orally protects the Council’s independence, because it is kept out of the political proceedings of the Parliament to a certain extent.

For Parliament to have the right to ask oral questions in Committee and to oblige the Council to attend the meetings, an express provision either in primary or secondary law would be needed. Such a provision might be included in a Note of 1973 by the Council to the Parliament or the Solemn Declaration on European Union of 1983. The acts would need to fulfil three criteria to give the Parliament indeed the requested rights. Firstly, they would need to have been binding at the time of their enactment. Secondly, the provisions would still need to be in force and legally binding. Furthermore, the aforementioned rights would need to extend not only to the Plenary but also to a committee of Parliament, the CONT in particular.

It raises doubts whether the Note of 1973 and the Declaration of 1983 are legally binding and thus extend beyond mere political commitments. Some scholars deny any judicial relevance to the acts. Without any differentiation they are referred to only as “political convention[s]”. Mainly German comments seem to be of a contrasting view by stating that the rights contained in the Note of 1973 form an “obligation of the Council”. As neither the form which the acts were enacted in nor
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scholarship provides a clear result on their legal effect, general criteria that were developed by the ECJ to determine whether unilateral acts are indeed binding need to be used. Decisive is according to jurisprudence the intention of the party to bind itself. The acts need to be thoroughly reviewed individually to find out whether the Council indeed intended to enter into a legally binding obligation. The question can be answered in the negative for the Declaration from 1983. It was chosen to take a measure in the form of a “Solemn Declaration”. This hints already towards a non-binding nature of the act. Furthermore, the explicit provision on the obligation to respond to questions is framed in a very broad manner. No details are included. The acts can thus be understood as a political commitment by the Council to respond to questions which cannot be invoked in Court.

The situation might, however, be different for the Note of 1973. Within the note there are a number of provisions which deal with the possible obligations that are under review. Concerning rights of Parliament to ask questions the note states that “the Council […] confirms its decision to reply to all written questions and expresses its desire to reply henceforth to all oral questions put to it”. The provision continues by spelling out more details of how responses to questions will be given. The Note provides partially for an obligation which is legally binding on the Council. Obvious is the legal effect of the duty to reply to written questions. Council itself refers to it as a decision which according to art. 288 TFEU is “binding in its entirety”. Furthermore, the obligation is spelt out in detail. Accordingly, Council has to respond to written questions at least within “less than two months”. Whether this time frame is indeed effective, might be questioned. The Note, however, does not provide for a further reaching duty. Interinstitutional custom between the Parliament and the Council might, however, evolved within the last decades, which provides for a duty to answer in a more rapid manner. A hint to such a custom would be that Parliament’s internal Rules of Procedure foresee a much shorter time frame (Rule 117 para. 4). The Rules of Procedure are not binding on the Council. It would need further proof from practice whether Council indeed complies with an obligation to respond in a narrower time frame and feels legally obliged to do so, which is beyond the scope of this briefing paper. As an obligation to respond more rapidly does not contradict primary law, custom could indeed bind the Council. Parliament has thus a right to get responses to written question.

Can this be extended to oral questions? This seems more doubtful. Council merely states “its desire to reply”. The note continues by spelling out this right partially. The Council states that it will contribute to a debate within the limit of its power, which the Parliament wishes to hold on the basis of a reply given by the Council. Furthermore, the Council “reaffirms the importance it attaches” to oral questions. The provisions are drafted in a rather vague manner. To regard legal effect to this part of the note seems to be beyond the wording of the note. Rules 115 and 116 of the Rules of Procedure of Parliament again exceed the note which hints once more at a further reaching customary obligation of the Council. It would need further research beyond the scope of this paper whether institutional practice allows for the finding that a customary obligation of the Council to respond to oral questions indeed exists. As far as an obligation to attend meetings is concerned, the Council states in the note that it “is prepared in principle to be represented in important debates”. While the wording is again vague, a basic obligation to attend at least some debates can be derived from it. If custom gave Parliament the right to attain replies to oral questions, this would entail an obligation by the Council

65 2.3.3. of the Solemn Declaration, supra note 61.
66 Note from the Council to the Parliament, supra note 60, 3.
67 Ibid., 4.
68 Ibid., 5.
to attend meetings. An obligation to respond to oral questions would be rendered meaningless, if it was not supported by a duty to attend meetings. The scope of the obligation would, however, be limited to a general attendance. It is part of the Council’s autonomy to decide on the person that represents it.

In conclusion, Parliament has a general right to ask written questions beyond budgetary questions from a Note dating from 1973. Further obligations of the Council to respond to oral questions and to attend meetings might be derived from institutional practice and could thus form customary law.

Matthias Rossi argued in the workshop against the binding legal effect of the Note. He brought forward that the Note of 1973 provided for a useful regime only when Parliament did not have broad rights of participation. As those circumstances changed, the Note could not be taken as binding anymore due to an evolutionary approach. This fails to convince. Stronger rights of participation need to be accompanied by stronger rights to information. Depriving Parliament of its right to information as soon as it becomes stronger seems to contradict the enhanced role it acquired. The institutions seem to be of the same view. In the Declaration of 1983 they reiterated the Parliament’s rights. While the act is not legally binding, it shows the clear intention of the institutions not to reduce parliamentary rights. Between the acts of 1973 and 1983 Parliament was directly elected for the first time and thus gained considerable strength. Denying legal effect to the Note of 1973 due to an evolutionary interpretation thus contradicts teleological reasons as well as institutional practice. Parliament, hence, still holds the described rights to information.

While the Note of 1973 and probably custom thus provide for certain obligations of the Council, it is doubtful whether the rights are granted only to the Parliament as such or also to its Committees, in particular. In order to assess this question the scope of the obligation need to be determined by interpretation. In favour of a broad right to information encompassing committees mitigates the notion of the efficiency of the parliamentary procedures. The committees offer valuable assistance to the Plenary. The day-to-day work is dealt with in the committees preparing the Plenary’s work. A broad right to information would thus support the Parliament’s work efficiency. On the other hand, Council has legitimate rights which need to be protected. It might exceed the needed assistance, if Council was requested to attend every meeting of all committees. On the basis of these general considerations, the following findings are convincing. The right to ask written questions is an individual rather than a group right. Every Member of Parliament thus has the right to ask written questions to the Council which need to be answered. Whether the reply is dealt with in Plenary or in a committee is the sole responsibility of the European Parliament. While the general thoughts apply for the other parliamentary rights as well, individual factors must be taken into consideration. If Parliament had the right to ask oral questions and the Council the obligation to attend committee meetings, those obligations would stem mainly from custom. Rule 115 of the Rules of Procedure of Parliament frames the right to ask oral questions as a group right of e.g. a committee. Rule 197 of the Rules of Procedure extends this right to committees. Whether this is part of existing custom, is a general question beyond the scope of this paper. It would need to be researched whether the Council indeed takes part in committee meetings and feels legally obliged to do so.

Concluding questions 2 – 4 can be answered as follows: Council has an encompassing obligation to provide the needed documents to Parliament and to answer to written questions. A right to respond

69 For the different opinions see supra note 59 and Kotzur, “Art. 230 TFEU”, in: Geiger/Khan/Kotzur (eds.), EUV/AEUV, para. 9, who is also in favor of an obligation.
70 Rossi, supra note 9, 33.
to oral questions and an obligation by the Council to attend meetings could only be derived from a
general customary rule. Whether this rule exists, is beyond the scope of this paper as it would include
an overall review of the Council’s actions.

2. THE COUNCIL’S RIGHT TO INFORMATION

The Council’s right to information in the discharge procedure is dealt with in art. 319 (1) TFEU and art.
146 (2) FR. The Commission and the Court of Auditors are obliged to submit the same documents to
the Council which form the basis of the Parliament’s discharge decision. As seen above, art. 319 (2)
TFEU and art. 146 (3) FR give rise to an all-encompassing right to information of Parliament for the
purposes of the discharge procedure, which extends beyond the documents explicitly mentioned in
art. 319 (1) TFEU. The wording of the Treaty as well as of the FR only includes the Parliament as
beneficiary. The Council thus has no general right to attain the same documents as the Parliament.
However, according to art. 319 (1) TFEU the Council proposes the discharge of the Commission. The
Council needs to be enabled to effectively execute this right. While Parliament is not bound to follow
the Council’s discharge proposal\(^\text{71}\), it is nevertheless an important procedural right of the Council\(^\text{72}\). Therefore, an obligation of the Parliament to forward documents which have an important bearing
on the discharge decision follows from the duty of sincere cooperation (art. 13 [2] TEU). Furthermore,
Council also has the right to obtain a report on the implementation of its recommendations and on
obligation to all institutions. The Council can thus ask the Parliament for the report and vice versa.

\(^\text{71}\) Niedobitek, \textit{supra} note 11, para. 6.

\(^\text{72}\) The ECJ has only decided the vice-versa-case for legislative proceedings. Parliament’s right in legislative proceeding even
if it is only a right to be heard need to be respected. This reasoning can be transferred to the question at hand (See ECJ, Case
PART C – CONSEQUENCES OF REFUSING DISCHARGE

With its last question Parliament wants to know about the possible consequences of refusing discharge. In the last years no consequences were attached to the discharge decision.

The discharge procedure has two functions. On the one hand, it has an accounting function. Upon discharge, the budget cycle is closed and all accounts are closed. On the other hand, discharge has a political function, which is more interesting to the case at hand. In the course of the discharge proceedings, Parliament has the opportunity to thoroughly evaluate the budget of the institutions. It can politically assess whether the budget has been in line with Union law. The two functions of the discharge decision can be separated, as the Parliament is obliged to close the accounts but can at the same time refuse the political part of discharge.

If Parliament refuses to discharge the Commission, this has no direct legal effect. The refusal cannot be reinterpreted into a motion of censure vis-à-vis the Commission (art. 234 TFEU). This is already due to the fact that the requirements of majority are different in the respective proceedings. Obviously, there cannot be a motion for censure vis-à-vis the Council.

Indirect legal effects of a refusal are provided for in art. 319 (3) TFEU and art. 147 FR. The Commission and, according to secondary law, all other institutions have to "take all appropriate steps to act on the observations accompanying the European Parliament’s discharge decision and on the comments accompanying the recommendation for the discharge adopted by the Council". This is a legal obligation for all institutions. It can be relied on before the ECJ in an action for failure to act according to art. 265 TFEU. The scope of control of the ECJ on the merits is limited, however, as the institutions possess a wide margin of appreciation with regard to the appropriateness of the steps to be taken. However, an action – assuming its admissibility – will be successful if the institutions take no action at all, or if the action taken is obviously ineffective.

An identical obligation by the other institutions to act on the Parliament’s observations can be inferred from the Parliament’s unwritten right to take separate discharge decisions on the other institutions analogous to art. 147 FR. Such an obligation is needed for the effective implementation of the right. Furthermore, to exclude this right in the separate discharge decisions would only complicate the administrative proceedings without serving a greater purpose. In order for the observations to be relied on, Parliament would need to include them in the discharge decision on the Commission’s budget. If discharge of the other institutions is delayed, Parliament would need to delay the discharge of the Commission as well. This seems an unnecessary complication of matters. The unwritten right of Parliament to discharge the Council hence entails an obligation on the part of the Council to take the appropriate steps requested in the observation.

It might further be questioned whether the Parliament or the Council could rely on their respective rights on the discharge decision in Parliament. Could Parliament rely on its right in Court to discharge the Council in the abstract? One might think of an action for annulment according to art. 263 TFEU. This would require an act by the Council with legal effect. The Council has so far only voiced protest.

73 For more details see Niedobitek, supra note 11, para. 2.
74 Ibid., paras. 15-16.
75 Ibid., para. 19.
and given its legal opinion to Parliament. Neither of these actions has sufficient legal effect.\textsuperscript{76} Art 263 TFEU explicitly rules out opinions as the object of an action for annulment. While the form an action is cast in is generally not decisive, it is hard to see how the Council’s sole statement that the right to separate discharge decisions does not exist could bindingly interfere with the rights of Parliament. However, if the Council did not comply with the complementary rights of Parliament, an action could be brought. These complementary rights particularly concern the right to information and the obligation of the Council to take all appropriate steps requested in the Parliament’s observation. Parliament could rely on these in an action for failure to act (art. 265 TFEU). Within the proceedings the ECJ could implicitly rule on the question whether Parliament indeed has the right to discharge the Council separately. However, the ECJ would probably only decide on this matter if it had an influence on the outcome. If all complementary rights relied on by the Parliament could already be inferred from the Parliament’s right to discharge the Commission, there would be no need to decide further. I have argued that the separate discharge decision exceeds the obligation Council has within the Commission’s discharge procedure on two points. First, the Council is obliged to formally and directly deliver the documents to the Parliament. If the Council complies with this duty as it seems to be willing, there is no reason for an action. Second, I have argued that the Council needs to take all appropriate steps on the observations included in the separate discharge decision. This obligation might be relied on, and the ECJ would then need to implicitly rule on the question whether Parliament indeed has the right to take a separate discharge decision. Furthermore, if it was assumed – contrary to this paper – that the Council was obliged to attend meetings of the Committee and respond to oral questions, these rights could also be relied upon.

The possible actions by the Council are less indirect. It could bring an action for annulment against the Parliament’s decision refusing discharge. As there are legal consequences attached to it, the decision has the required legal effect. Even if those legal consequences were denied, an action would still be possible, as the ECJ has made it clear that an action claiming the violation of the principle of institutional balance can always be brought before it.\textsuperscript{77}

As one can convincingly argue both for and against Parliament’s right to take a separate discharge decision, depending on whether the focus is on democratic accountability or on the institutional balance, the outcome of a case at the ECJ remains open to speculation. Due to the overriding interest in a democratic control of a partially executive institution, I would find it more convincing to grant Parliament the right to separately discharge the Council.

Beside legal consequences, the refusal to grant discharge also has political effects. It is one of the prime methods available to the Parliament to raise awareness for the Council’s action in implementing the budget. A debate on this question – whether in the Committee or in the Plenary – could enhance discussion in the more general public. Furthermore, Parliament could use the insights gained from the budget discharge in the establishment of the next budget. If Parliament is not satisfied with the Council’s information policy in discharge proceedings, it could use this to halt the proceedings for the establishment of the subsequent budget in which the Parliament decides on an equal footing with the Council (art. 314 TFEU).

\textsuperscript{76} For the criterion of legal effect see ECJ, Case C-60/81, IBM, [1981] ECR 2639, summary.
\textsuperscript{77} ECJ, Case C-106/96, United Kingdom v Commission, [1998] ECR, I-2729, paras. 21-37.
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ANNEX

Treaty on European Union

Article 2
The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 10
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

Article 11
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

Article 12
National Parliaments contribute actively to the good functioning of the Union:
(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
[…]

Article 13
1. [...] The Union’s institutions shall be:
— the European Parliament,
— the European Council,
— the Council,
— the European Commission (hereinafter referred to as ‘the Commission’),
— the Court of Justice of the European Union,
— the European Central Bank,
— the Court of Auditors.
2. 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 16
8. The Council shall meet in public when it deliberates and votes on a draft legislative act.
[...]
Treaty on the Functioning of the European Union

Article 230
The Commission may attend all the meetings and shall, at its request, be heard. The Commission shall reply orally or in writing to questions put to it by the European Parliament or by its Members. The European Council and the Council shall be heard by the European Parliament in accordance with the conditions laid down in the Rules of Procedure of the European Council and those of the Council.

Article 287
1. The Court of Auditors shall examine the accounts of all revenue and expenditure of the Union. It shall also examine the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union in so far as the relevant constituent instrument does not preclude such examination. The Court of Auditors shall provide the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions which shall be published in the Official Journal of the European Union. This statement may be supplemented by specific assessments for each major area of Union activity.
2. The Court of Auditors shall examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether the financial management has been sound. In doing so, it shall report in particular on any cases of irregularity. The audit of revenue shall be carried out on the basis both of the amounts established as due and the amounts actually paid to the Union. The audit of expenditure shall be carried out on the basis both of commitments undertaken and payments made. These audits may be carried out before the closure of accounts for the financial year in question.
4. The Court of Auditors shall draw up an annual report after the close of each financial year. It shall be forwarded to the other institutions of the Union and shall be published, together with thereplies of these institutions to the observations of the Court of Auditors, in the Official Journal of the European Union.

The Court of Auditors may also, at any time, submit observations, particularly in the form of special reports, on specific questions and deliver opinions at the request of one of the other institutions of the Union.

[…]

It shall assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget.

[…]

Article 289
3. Legal acts adopted by legislative procedure shall constitute legislative acts.

Article 310
5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.
Article 314
10. Each institution shall exercise the powers conferred upon it under this Article in compliance with the Treaties and the acts adopted thereunder, with particular regard to the Union’s own resources and the balance between revenue and expenditure.

Article 316
In accordance with conditions to be laid down pursuant to Article 322, any appropriations, other than those relating to staff expenditure, that are unexpended at the end of the financial year may be carried forward to the next financial year only.

Appropriations shall be classified under different chapters grouping items of expenditure according to their nature or purpose and subdivided in accordance with the regulations made pursuant to Article 322.

The expenditure of the European Parliament, the European Council and the Council, the Commission and the Court of Justice of the European Union shall be set out in separate parts of the budget, without prejudice to special arrangements for certain common items of expenditure.

Article 317
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.

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.

Within the budget, the Commission may, subject to the limits and conditions laid down in the regulations made pursuant to Article 322, transfer appropriations from one chapter to another or from one subdivision to another.

Article 318
The Commission shall submit annually to the European Parliament and to the Council the accounts of the preceding financial year relating to the implementation of the budget. The Commission shall also forward to them a financial statement of the assets and liabilities of the Union.

The Commission shall also submit to the European Parliament and to the Council an evaluation report on the Union’s finances based on the results achieved, in particular in relation to the indications given by the European Parliament and the Council pursuant to Article 319.

Article 319
1. 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.

2. 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.

3. 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.

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 335
In each of the Member States, 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 Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

Financial Regulation

Article 50
The Commission shall confer on the other institutions the requisite powers for the implementation of the sections of the budget relating to them.

Each institution shall exercise these powers in accordance with this Regulation and within the limits of the appropriations authorised.

Article 53b
2. Without prejudice to complementary provisions included in relevant sector-specific regulations, and in order to ensure in shared management that the funds are used in accordance with the applicable rules and principles, the Member States shall take all the legislative, regulatory and administrative or other measures necessary for protecting the Communities’ financial interests. To this effect they shall in particular:

(a) satisfy themselves that actions financed from the budget are actually carried out and to ensure that they are implemented correctly;
(b) prevent and deal with irregularities and fraud;
(c) recover funds wrongly paid or incorrectly used or funds lost as a result of irregularities or errors;
(d) ensure, by means of relevant sector-specific regulations and in conformity with Article 30(3), adequate annual ex post publication of beneficiaries of funds deriving from the budget.

To that effect, the Member States shall conduct checks and shall put in place an effective and efficient internal control system, according to the provisions laid down in Article 28a. They shall bring legal proceedings as necessary and appropriate.
Article 53c
2. In order to ensure that the funds are used in accordance with the applicable rules, the Commission shall apply clearance-of-accounts procedures or financial correction mechanisms which enable it to assume final responsibility for the implementation of the budget.

Article 145
1. The European Parliament, upon a recommendation from the Council acting by a 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 \( n \).
2. If the date provided for in paragraph 1 cannot be met, the European Parliament or the Council shall inform the Commission of the reasons for the postponement.
3. If the European Parliament postpones the decision giving a discharge, the Commission shall make every effort to take measures, as soon as possible, to remove or facilitate removal of the obstacles to that decision.

Article 146
1. The discharge decision shall cover the accounts of all the Communities’ revenue and expenditure, the resulting balance and the assets and liabilities of the Communities shown in the balance sheet.
2. With a view to granting the discharge, the European Parliament shall, after the Council has done so, examine the accounts and financial statements referred to in Article 275 of the EC Treaty and Article 179a of the Euratom Treaty. It shall also examine the annual report made by the Court of Auditors together with the replies of the institutions under audit, any relevant special reports by the Court of Auditors in respect of the financial year in question and the Court of Auditors’ statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions.
3. The Commission shall submit to the European Parliament, at the latter’s request, any information required for the smooth application of the discharge procedure for the financial year in question, in accordance with Article 276 of the EC Treaty.

Article 147
1. In accordance with Article 276 of the EC Treaty and Article 180b of the Euratom Treaty, the Commission and the other institutions shall take all appropriate steps to act on the observations accompanying the European Parliament’s discharge decision and on the comments accompanying the recommendation for discharge adopted by the Council.
2. At the request of the European Parliament or the Council, the institutions shall report on the measures taken in the light of these observations and comments, and, in particular, on the instructions they have given to those of their departments which are responsible for the implementation of the budget. The Member States shall cooperate with the Commission by informing it of the measures they have taken to act on these observations so that the Commission may take them into account when drawing up its own report. The reports from the institutions shall also be transmitted to the Court of Auditors.

Article 166
1. Actions carried out shall give rise to:
(a) a financing agreement drawn up between the Commission, acting for the Communities, and the beneficiary third country or countries or the bodies they have designated, hereinafter: ‘the beneficiaries’;
The Legal Basis of the Discharge of The Council

by Ricardo Passos

BRIEFING NOTE
Thank you very much for inviting the Legal Service to this workshop on the discharge of the Council, the organisation of which by the Committee on Budgetary Control (hereafter, CONT) is indeed very timely.

CONT has put four questions up for discussion\(^1\). The first question asks whether the European Parliament is entitled to grant discharge to the Council:

- from the point of view of the institutional architecture and its equilibrium;
- from the point of view of democratic scrutiny and parliamentary control;
- from the point of view of transparency and public accountability;
- from the point of view of economy, effectiveness, and efficiency, as well as sound financial management.

I will be focusing on this question from a legal standpoint.

There is no need for me to go into the factual background. Parliament and the Council have long disagreed about the discharge of the latter. This dispute is actually about the role of Parliament in the discharge of the European Union's budget. The Council's argument is basically to say that the discharge of the Council is not foreseen in the Treaties and that Parliament has therefore no legitimacy to decide on the Council's discharge.

Council disputes the interpretation by the European Parliament which gives a separate discharge to each institution. The Council claims that, according to Article 319 TFEU, Parliament is only entitled to grant or reject discharge to the Commission and that by closing the accounts and granting the discharge to the Commission, Parliament has inherently granted the discharge to the Council.

I think it is necessary to analyse the relevant provisions of the Treaty and the Financial Regulation in order to assess whether the position taken by Parliament is legally sound.

Before analysing the Treaty, it is worth recalling that the power to give discharge was initially granted solely to the Council. From 1970 onwards, the Council shared this power with the European Parliament and in 1975 (Treaty of Brussels), Parliament became the sole institution to give discharge. This evolution - which I think is important to note - reflects the increasing role of the European Parliament, which since 1979 has been directly elected. It is pertinent here to take into account the fact that the Member States have gradually modified the role of Parliament in the discharge.

This said, it is true that the main provision of the Treaties concerning the discharge, that is to say Article 319 (1) TFEU, does not explicitly provide for a separate discharge to the Council. This provision reads as follows:

"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".

There are different interpretations of this provision. The Council - and Professor Rossi in his paper and in the workshop this morning - defend a literal interpretation, according to which, since Article 319(1) TFEU only mentions the Commission, Parliament can only give discharge to the Commission.

This interpretation seems to me to be somewhat narrow and not fully compatible with the new realities of the EU budget and its implementation.

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There are three different types of arguments to defend a different interpretation justifying the discharge of the Council by Parliament:

- firstly, the discharge is part of the concept of representative democracy: the requirement of transparency and good governance;
- secondly, the interpretation of Article 319 TFEU in context and in conjunction with Article 317 TFEU;
- thirdly, the need to take into account other provisions of secondary law which provide for a separate discharge.

A. Discharge is part of the principle of representative democracy: the requirement of transparency and good governance

This argument is central and reflects the evolution of the role of Parliament in the successive modifications of the Treaties, as mentioned already.

It should be underlined in this context that the Union is a community of law ("Communauté de Droit") based on the principle of representative democracy. Article 10(3) TEU provides that: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

This is particularly important when it relates to the transparency of public funds and the need to respect the principle of good governance. Indeed, Article 15(1) TFEU requires that "in order to promote good governance, the Union's institutions shall conduct their work as openly as possible". The purpose is to enable citizens to participate more closely in EU procedures and guarantee that the administration enjoys greater legitimacy and is more accountable to the citizens in a democratic society. 2

The principle of transparency is furthermore enshrined in the Financial Regulation. Article 29 (now 31) of the Financial Regulation provides that "the budget shall be established and implemented and the accounts presented in compliance with the principle of transparency".

In this context, the Court of Justice has recognised that in a democratic society, tax payers have a right to be kept informed of the use of public funds. 3 Such information when made available to citizens reinforces public control of the use to which that money is put and contributes to making the best use of public funds. 4 Applied a fortiori to the EU budget, we have to defend the citizens' right to control how the EU budget is implemented.

To sum up, it results from the above-mentioned provisions that the annual discharge is the procedure whereby the citizens can be informed about how the institutions and the agencies implement their part of the EU budget. This applies also to the Council, because there is no reason why the latter should be excluded from public scrutiny through the parliamentary discharge procedure. This is the reason why Parliament - as the only institution elected directly by the citizens - has a role to play.

3 Judgment of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and others [2003] ECR I-4989, paragraph 85.
4 Judgment of 9 November 2010 in joined cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert, not yet published, paragraph 75.
B. **The interpretation of Article 319 TFEU in context and read together with Article 317 TFEU**

One argument is to read Article 319(1) TFEU as a whole - "The European Parliament [...] shall give a discharge to the Commission in respect of the implementation of the budget" - and put the emphasis not only on the word "Commission" but rather on the phrase "in respect of the implementation of the budget".

And here we have to agree that the implementation of the budget has changed dramatically. Today only 10% of the budget is implemented by the Commission directly. More than 80% is implemented by third parties, either by the Member States or by other institutions or international organisations.

Our point is that Article 319(1) TFEU should not be read alone but together with Article 317(2) which reads as follows:

"*The regulations* [meaning in fact the Financial Regulation, because reference is made to Article 322] shall lay down the [...] responsibilities and detailed rules for each institution concerning its part in affecting its own expenditure" (emphasis added).

This provision gives a clear indication that each institution is responsible for its own expenditure, and the logical consequence is that the discharge procedure should specify how this expenditure is effectuated in the discharge procedure. In fact, the Financial Regulation is more explicit about the separate discharges.

C. **Legal basis for separate discharges**

As already mentioned, Article 317 TFEU makes reference to the Financial Regulation (hereinafter FR).

Articles 50, 146 (2) and 147 FR provide that each institution has the power of implementation of its section of the budget once this power has been conferred on it by the Commission. As a consequence, the responsibility for the implementation of the budget also lies with each institution and not with the Commission alone.

Article 50 (now 55) FR explicitly states that "the Commission shall confer on the other institutions the powers for the implementation of the sections of the budget relating to them" (emphasis added).

Article 146 (2) (now 165) FR mentions explicitly that the European Parliament, with a view to granting discharge, shall examine the annual report of the Court of Auditors together with the replies of the institutions under audit.

Article 147 (now 166) FR also underpins separate discharges, when it states that:

Paragraph 1 "[...] the Commission and the other institutions shall take the appropriate steps to act on the observations accompanying the Parliament's discharge decision."

Paragraph 2: "At the request of the European Parliament or the Council, the institutions shall report on the measures taken in the light of these observations and comments, and, in particular, on the instructions they have given to those of their departments which are responsible for the implementation of the budget. [...] The reports from the institutions shall also be transmitted to the Court of Auditors" (emphasis added).
It is our understanding that these provisions provide a basis for the practice established by Parliament to grant separate discharge as they refer to separate services of the budget by different institutions.

* * *

Taking into account the three arguments analysed supra, we believe that there is sufficient legal basis in the Treaties and in the Financial Regulation to provide for a legal justification of the position taken by Parliament concerning separate discharges of the institutions and agencies. The discharge of the Council is therefore in our opinion justified.

In this context, it should be noted that, with the exception of the Council, no other institution has disputed this procedure undertaken by Parliament. When on 25 October 2011 Parliament adopted a decision refusing to grant discharge to the Council for the financial year 2009, the Chairman of CONT, by letter of 22 November 2011, asked Commissioner Algirdas Šemeta to outline the Commission's reading of the Council's position on the 2009 discharge, as communicated by letter of 2 June 2011 from the Hungarian Presidency to the Parliament.

Commissioner Algirdas Šemeta replied by letter on 25 November 2011, emphasising that:

"[...] The discharge decision therefore covers a wide range of issues and documents, and the accounts are only one of them. This means, in the Commission’s view that the closure of accounts alone does not mean that the discharge is granted [...]."

"[...] [The Commission] is also aware that the European Parliament has been giving discharge to the other institutions for now many years. This way of proceeding has never been challenged by the Commission, which considers it desirable that it be pursued in future, in particular in view of the fact that it should not be expected that the Commission oversees implementation of their budget by the other institutions. [...]"

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6 Following the vote in Parliament on 10 May 2011 postponing discharge to the Council mainly due to the lack of cooperation in the procedure, the Council sent a letter to Parliament on 2 June 2011 stating that "the legal interpretation of the Council is that all Union accounts for 2009, including its own, have been discharged in accordance with EU law by the vote of EP on 10 May 2011".
ROLE

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