THE 2012 FINANCIAL REGULATION: BUILDING THE CATHEDRAL OF EU LEGITIMACY?

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Abstract

The quest for enhanced financial accountability is a by-product of the financial crisis that hits Europe since 2008. Attention to sound financial management and its links to overall EU legitimacy has skyrocketed from the vocabulary of clerks and auditors up to top-level strategic documents, including recent Conclusions of the European Council. This trend evidences that the focus on democratic legitimacy in the European Union should shift away from the traditional input-output legitimacy dilemma and towards the so-called throughput or systemic legitimacy. Systemic legitimacy provides the citizen with assurances that the system (s)he is requested to trust is well-functioning and answerable to the people; however, the definition of its scope proves ellusive among scholars. This paper takes account of the relevant literature and concludes that financial accountability remains at the core of systemic legitimacy.

From a legal perspective, financial accountability in the EU is incidentally mentioned in the Treaties, and further ensured by secondary legislation. The EU Financial Regulation, also known as the "EU Financial Bible" stands out from the legal framework governing financial management of the EU budget. Since its adoption in 1977, the EU Financial Regulation has been subject to two major revisions. The first one led to the adoption of Council Regulation 1605/2002 and represented then an attempt to regain citizens' trust on financial accountability after the serious backlash brought about by the resignation of the Santer Commission in 1999. More recently, the Financial Regulation has been revamped through Regulation 966/2012 of the European Parliament and the Council. Following a qualitative and comparative approach, this paper highlights the main changes that have been introduced in the legal framework on financial management, with a view to assessing their potential contribution to improvement in financial accountability and, by ricochet, in the EU's systemic legitimacy.

Keywords: *European Union, systemic legitimacy, financial accountability, public policy management, multilevel governance*

1. Financial accountability as a pillar in the cathedral of EU legitimacy

An old story about how the magnificent Salisbury Cathedral was built tells us that a "traveller came across three stone-cutters and asked them about the nature of their work. Whereas the first and the second provided him with rather down-to-earth answers, the third one paused and, looking skyward, replied *"I am a mason and I am building a cathedral". "I have spent many months away from my family and I miss them dearly. However, I have learnt through the Bishop how people would come from all parts to worship here. He also told that the Cathedral would not be completed in our days but that the future depends on our hard work".*[1]

This inspiring story nicely shows that there is room, even in the most technical and mechanical jobs, for considering the broader picture and design to which such function

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[1] Old story, adapted from John P. Girard and Sandra Lambert "The Story of Knowledge: Writing Stories that Guide Organisations into the Future" *Electronic Journal of Knowledge Management* 5 (2007): 161.

contributes. If we focus in what will represent the core topic of this paper, namely, financial management and accountability in the European Union, some financial managers, clerks and auditors in the European Union (EU) and in the Member States would play the part of the first masons of the story, in the sens that they would present their respective tasks as merely linked to authorizing payments, managing grants or auditing expenditure. Nevertheless, there will possibly be some who will look skywards and affirm that they are stone-cutting financial accountability and, by doing so, building the cathedral of EU legitimacy. A few might even look back on the traveller's eyes and mouther that the future depends on their hard work.

The link between financial accountability and EU legitimacy has not been evident in the scholarly literature for decades. This paper conceptualizes first *accountability* and *financial* accountability, with a view to establishing a link between financial accountability and legitimacy through what has been labelled *systemic legitimacy*. In doing so, the way should be paved to analyze the contribution of the EU Financial Regulation to overall EU legitimacy.

Originally, accountability had an utterly different meaning and referred, in the Anglo-Saxon world to the way in which property holders rendered a count of their possessions to the king, whose results were enshrined in a book. Conversely, the current relationship of accountability involves the citizens holding their authorities to account in the broadest sense. Current accountability is a conceptual umbrella linked to good governance. Accountability involves various processes and institutions: political control, transparent access to documents and open government dynamics, improvements in policy-making and implementation, and even integrity (ethics in public administration). As a result, the very concept proves elusive. Nevertheless, the mainstream has embraced the seminal definition by Bovens and focuses on the *relationship* between the accountability holder and holdee:[2] *"a relationship between an actor and a forum in which the actor is obliged to explain and justify his conduct, the forum can pose questions and pass judgment, and the actor may face consequences"*.[3] Three pillars thus prevent abuses of power and arbitrariness in the conduct of public policies: openness, justification and sanction (the latter representing the "sword of Damocles", or as Papadopoulos puts it, "the shadow of" a sanction)[4]. Along that line, significant attention has been devoted in European studies to expose the performance of accountability holders, the existing gaps in the legal framework and practice of various accountability mechanisms, and whether specific agents and actors can be sufficiently held to account *by others*.

Under the majoritarian approach to accountability, maintaining an acceptable level of accountability hinges on control/sanction mechanisms which are well-performing and accountability holders who are interested enough to live up to their tasks. Little attention is devoted to the role played by the *context* that bounds accountability holdees to carry out their tasks in an accountable way, regardless of any link to the accountability holder. Among the few authors that have stepped over that boundary, Laffan argues that *"[t]he reconfiguration of systems of accountability involves institution building, changes in systems of regulation, shifts in inter-institutional relations, and modifications in the norms that guide the behaviour of institutional actors. New systems of regulation and control may well be contested and resisted by actors whose interests are not served by a reconfiguration of accountability and control"*.[5] We agree with her in that studies on EU accountability might largely benefit from

[2] Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13 (2007): 446. Adrienne Héritier and Dirk Lehmkuhl, "New Modes of Governance and Democratic Accountability," *Government and Opposition* 46 (2011): 126. Deirdre Curtin and Andreas Nollkaemper, "Conceptualizing Accountability in International and European Law," *Netherlands Yearbook of International Law* 36 (2005), 3.
[3] Bovens, "Analysing," 450
[4] Yannis Papadopoulos, "Problems of Democratic Accountability in Network and Multilevel Governance," *Eur. L. J.* 13 (2007): 470.
[5] Brigid Laffan, "Auditing and Accountability in the European Union," *JEPP* 10 (2003): 763.

sociological aproaches that propose a context responsive to accountability, focusing specifically on the behaviour of public servants. Legal scholars might cooperate through translating such underlying philosophy into the legal framework. The stress on processes and institutions should thus be complemented with a reference to the socialization of public ethics among the actors involved in accountability relations. As March and Olsen put it, "[p]ublic officials are expected to act *in anticipation of having to account* for their actions"[6]. Both staff policies and ethic management policies can contribute to creating an 'organizational culture' in which civil servants are responsive to accountability concerns not because they take orders from the representatives of the vested interests, or because they fear punishment, but because they themselves think in a similar manner[7]. The importance of ethics in the 'organizational structure' of EU institutions has been highlighted by some authors, having in mind the ultimate goal to further[8] or else to preserve[9] EU legitimacy.

A taxonomy of accountability mechanisms encompasses various criteria; among others, the field in which the relationship between the actor and the forum unfolds, the nature and degree of the sanction, and the degree of effectiveness in creating a protective environment against arbitrariness and corruption[10]. Adding the adjective 'financial' to accountability would only precise the prism through which the conduct will be held to account, namely, the legal, regular and sound financial management of the budget. However, other types of accountability exist (legal, political and judicial; collective and individual), and giving preminence to one above the rest will largely depend on the context[11]. Second, the nature of the sanction may be legal, political, economical, administrative, and its impact on the status of the agent or institution involved swings from a 'soft' degree, in the case of informal mechanisms (eg. disregarding the deviated behaviour in a private fashion), to a 'hard' degree, in the case of some formal mechanisms (eg. motion of censure). The effectiveness of the accountability mechanism is not so much determined by the degree of the sanction as by the frequent resort to the mechanism that creates an accountability-friendly atmosphere[12]. This said, this paper focuses primarily on formal accountability mechanisms that are enshrined in EU legislation, in the field of budgetary management and control.

A large share of the EU budget is implemented at the domestic level;[13] however, it is doubtful that effective accountability mechanisms are translated to national authorities, not only top-down but also across Member States. Domestic approaches to accountability suffer a deep geographical breach: Anglo-Saxon countries (United Kingdom) extrapolated to public accountability various political tools of accountability that had been developed in the private

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[6] James March and Johan Olsen, *Democratic Governance* (New York: Free Press, 1995).

[7] Adapted from John Donald Kingsley, "Representative Bureaucracy," (1944), as cited by Magali Gravier, "Challenging or Enhancing the EU's Legitimacy? The Evolution of Representative Bureaucracy in the Commission's Staff Policies," *Journal of Public Administration Research and Theory* 23 (2013): 819.

[8] Michelle Cini, "Ethics Management in the European Commission," in *Institutional Dynamics and the Transformation of Executive Politics in Europe*, ed Morten Egeberg (Connex, 2007) 122. Myrto Tsakatika, "Claims to Legitimacy: The European Commission between Continuity and Change," *Journal of Common Market Studies* 43 (2005): 201. Andreea Năstase, "Managing Ethics in the European Commission Services: From Rules to Values?" *Public Management Review* 15 (2013): 65. Carolyn Ban, "Reforming the Staffing Process in the European Union Institutions: Moving the Sacred Cow Out of the Road," *International Review of Administrative Sciences* 76 (2010): 16. Gravier, "Challenging," 822

[9] Cris Shore, "Culture and Corruption in the EU: Reflections on Fraud, Nepotism, and Cronyism in the European Commission," in *Corruption: Anthropological Perspectives,* ed. D. Haller and C. Shore (Ann Arbor / London: Pluto, 2005), 135.

[10] Susana del Río and María-Luisa Sánchez-Barrueco, "Responsabilización Institucional y Comunicación en la Unión Europea," *Cuadernos Europeos de Deusto* 46 (2012): 118.

[11] Anthony Arnull and Daniel Wincott. *Accountability and Legitimacy in the European Union* (Oxford: OUP, 2002), 3. Ruth Grant and Robert Keohane, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99 (2005): 32.

[12] Del Río and Sánchez-Barrueco, "Responsabilización Institucional", 120

[13] Gabriele Cipriani, *The EU Budget: Responsibility without Accountability?* (Brussels:CEPS, 2010), http://www.ceps.eu/book/eu-budget-responsibility-without-accountability

management sector, countries with a strong tradition of administrative law were more reluctant to such dynamics (France, Germany, Italy, Spain), and Nordic countries remained half-way[14]. This is but a reflection of the different European approaches to public administration, which reflect in turn different conceptions of the relationship between the state and the society, and therefore affect the effectiveness of potential administrative reform initiatives[15].

Finally, conceptualizing financial accountability requires asserting a link between accountability and legitimacy, for this paper will argue that mechanisms reinforcing financial accountability in the EU lead to a stronger legitimacy of the system as a whole. The definition of 'financial accountability' is not unchallenged in scholarly literature; however, it essentially remains an obligation of the executive power in Western democracies to ensure the citizens that their money is well spent. This said, some authors embrace a restrictive scope of the concept, focused on "the control and elimination of waste and corruption and involves compliance with legal procedures, as well as the use of external audit mechanisms",[16] whereas others include as well the evaluation of policy performance, namely the adequacy of the measures taken to the political objectives stated in the regulatory framework.

The link between accountability and legitimacy draws on the assumption that the latter stems from a varying array of sources, which gather around the labels of *input*, *output* and *systemic* legitimacy. Input and output legitimacies were coined by Scharpf[17] and quickly rooted in European literature. *Input* legitimacy would refer to the government *by* the people and legitimize the government according to the level of citizen participation in the definition and implementation of policies. Conversely, *output* legitimacy would put the stress on policy performance and the degree to which the outcome of public policies brings about an increase in citizens' welfare, a government *for* the people, for that matter. EU's legitimacy long time lay in its ability to govern "for the people", namely, to provide citizens with solutions to problems related to the economy and the internal market; alas, the impact of output legitimacy started fading away back in the eighties as accusations about democratic deficit spread and is seemingly not enough any longer. Filling the gap has proven difficult. The European Union soon resorted to deliberative democracy, through initiatives aimed at enhancing people's government (input legitimacy) such as citizens' initiative at the European level or toughening requirements as regards transparency. Advocates of *systemic legitimacy*, a more recent trend in European studies,[18] focus on the structures, rules and processes governing the public management and analyze whether their legal framework and practice is optimal as regards performance (managerial style) or accountability (constitutional style). Their main assumption is that an optimal shaping of structures, rules and processes applicable to public management increases citizens' trust in the system, thus reinforcing its legitimacy.[19]

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[14] Mark Bovens, "Public Accountability: A Framework for the Analysis and Assessment of Accountability Arrangements in the Public Domain," *Unpublished Paper* (2005)
http://www.qub.ac.uk/polproj/reneg/contested_meanings/Bovens_Public%20Accountability.connex2.doc. Guy Peters, "Four Main Administrative Traditions" World Bank, 2000
http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/0,,
contentMDK:20134002~pagePK:210058~piPK:210062~theSitePK:286305,00.html.

[15] Peters, *Ibid.*; Susan Rose-Ackerman and Peter Lindseth, *Comparative Administrative* Law (Chentelham:Edward Elgar Publishing, 2010).

[16] Sara Davies and Laura Polverari, "Financial Accountability and European Union Cohesion Policy," *Regional Studies* 45 (2011): 701.

[17] Fritz Scharpf, *Problem-Solving Effectiveness and Democratic Accountability in the EU* (MPIfG Working Paper, 2003). http://www.mpifg.de/pu/workpap/wp03-1/wp03-1.html

[18] Laffan, "Auditing", 763.

[19] Victor Bekkers and Arthur Edwards, "Legitimacy and Democracy: A Conceptual Framework for Assessing Governance Practices," in *Governance and the Democratic Deficit. Assessing the Democratic Legitimacy of Governance Practices,* ed. Victor Bekkers et al. (Aldershot/Burlington: Ashgate, 2007), 44. Mark Bovens, Thomas Schillemans and Paul 't Hart, "Does Public Accountability Work? an Assessment Tool," *Public Administration* 86 (2008): 239. Deirdre Curtin, Paul 't Hart and Mark Bovens, "The quest for legitimacy and accountability in EU governance" in *The Real World of Accountability, what*

The European Commission attached significant importance to accountability in the 2001 White Paper on European Governance. Accountability was identified as one of the five core principles to ensure good governance. The Commission then stated that *"[e]ach of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level"*.[20] The scope of this paper being limited to the legal framework at the EU level, it is necessary again to warn of the undeniable role the Member States level plays in it. Two perspectives can be identified. On one side, own national preferences as regards systemic legitimacy will directly affect Member States negotiating positions within the EU Council of Ministers and the European Parliament, in a fashion that will make fluid (or else hamper) administrative reform at the EU level itself. On the other, financial accountability in the European Union can simply not be divorced from Member States own approach to compliance with European legislation, given the fact that nearly 80% of the expenditure enshrined in EU budget is implemented under shared management with national administrations.[21] The diversity among administrative cultures and paradigms in the 28 Member States is wide; therefore, the trap of analyzing the domestic salience of systemic legitimacy (and financial accountability in particular) as a coherent set of national preferences should be avoided. In the coming paragraphs, we will draw on the four administrative traditions referred by Peters[22] to illustrate further the different weight attached to accountability as part of systemic legitimacy across Member States.

Countries with a strong Napoleonic tradition invested centuries in nation-building through government; and government was conceptualized as part of a highly centralized state structure which imposed its authority over citizens. Civil servants were assigned a constitutional role linked to nation-building and national sovereignty. As a result, citizens were left bereft of the capacity to hold institutions to account on a regular basis. They remained subjects, never to become actors. Accountability mechanisms were traditionally devoid of any sense of due to the citizen, but an expression of the power of the Administration towards the individual civil servant.

Countries in the Germanic tradition share with the Napoleonic tradition an organic conception of the State, in the sense that government may be divided into ministries and agencies but the authority of the state is not divisible. In both administrative traditions the "citizen is not an atomistic individual but rather a member of an essentially organic society" [23]. Accordingly, the underlying philosophy in civil service is to serve the state, and not the civilians. Interestingly, the Germanic tradition appraise civil servants as the channels to convey the power and centrality of the state, therefore, they must display a firm moral and legal foundation. Hence the importance attached to recruitment and training processes.

In Anglo-Saxon societies, the state arises from a contract among citizens who delegate power to civil servants and remain conscious of their capacity to hold the latter to account. A step forward, states under the Nordic administrative tradition are grounded on extensive commitments to provide their citizens with social and economic well-being, accordingly, "there is a strong participative ethic in the society and government".[24]

Deficit?, eds. Deirdre Curtin, Paul 't Hart and Mark Bovens (Oxford: OUP, 2010) 27-29. Andreas Føllesdal, "The Legitimacy Challenges for New Modes of Governance: Trustworthy Responsiveness," *Government and Opposition* 46 (2011), 81-100. Héritier and Lehmkuhl, "Modes", 138; Vivien Schmidt, "Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput," *Political Studies* 61 (2013), 5. Laffan, "Auditing", 764.

[20] Commission, White Paper on European Governance, COM (2001) 428, July, 25, 2001.

[21] 76%, according to the Commission (DG Budget), http://ec.europa.eu/budget/explained/management/managt_who/who_en.cfm.

[22] Peters, "Traditions"

[23] Peters, "Traditions"

[24] Ibid.

Finally, links between accountability and systemic legitimacy are young in Central and Eastern European Member States. The heavy burden left by their long communist past is twofold: low capacity and over-politization. The communist state carried out tasks linked primarily to government, since state administration was intertwinned with party bureaucracy. The government was weakly endowed in terms of policy-making capacity. Rule of law was generally disregarded in the event of a collision with party decisions. Besides, state employees (the term civil servant is just not applicable to that paradigm) were chosen and promoted drawing on their political reliability and loyalty to the communist party: partisanship prevailed over technical and police expertise. The sole room left to accountability in those societies was answering before the party bureaucracy, and creating such space proved a central challenge in post-communist administrative reform.[25] The lengthy process of passing administrative reform legislation in post-communist countries illustrates the extent to which national paradigms may potentially impact on overall European accountability. Drawing on a comparative analysis on Civil Service Laws, Goetz concludes that the process has been uneven.[26] The performance of new administrative laws as catalyst for real administrative reform in post-communist countries is low: analysts have underlined that, the most often, legislation has been considered an end in itself to answer EU conditionality before accession. Therefore, a relaxation in compliance with accountability mechanisms can be observed once accession is completed.[27]

The uneven balance at the domestic level may help understand the reasons why accountability in general and financial accountability in particular do not usually top the EU agenda, which tends to bow to issues of policy efficiency or policy development. Steps forward towards improvement, modernization, or reform, would rarely originate under ‘normal’ circumstances, but happen instead as an outcome of periods of crisis. Timescape is thus important in the analysis of financial accountability. Historical institutionalists have resorted to the expression ‘critical junctures’ to explain significant reorientations in policy-making and this theoretical framework may help explaining bumps in the salience of systemic legitimacy in the European Union, and by extension, the salience of financial accountability.[28] Following their understanding, a ‘critical juncture’ represents a key event whose perceived impact on established collective identities and values is so substantial that leads (or forces) relevant actors to turn previous institutional arrangements upside down and trigger a readjustment in policy orientation which then cristallizes into a long-lasting legacy. Improvements in EU financial accountability are largely indebted to these critical junctures.

[25] Klaus Goetz and Hellmut Wollmann, “Governmentalizing Central Executives in Post-Communist Europe: A Four-Country Comparison,” *Journal of European Public Policy* 8 (2001): 883.; Klaus Goetz, “Making Sense of Post-Communist Central Administration: Modernization, Europeanization Or Latinization?,” *Journal of European Public Policy* 8 (2001): 1035.

[26] Goetz, “Making sense,” 1036.

[27];Rachel Epstein and Ulrich Sedelmeier, “Beyond Conditionality: International Institutions in Postcommunist Europe After Enlargement,” *Journal of European Public Policy* 15 (2008): 806. Tanja Börzel et al., “Obstinate and Inefficient: Why Member States do Not Comply with European Law,” *Comparative Political Studies* 43 (2010), 1387-8. Ulrich Sedelmeier, “Europeanisation in New Member and Candidate States,” *Living Reviews in European Governance* 6 (2011): 25. Jan-Hinrik Meyer-Sahling, “The Durability of EU Civil Service Policy in Central and Eastern Europe After Accession,” *Governance* 24 (2011): 255.

[28] For a state of the art from a historical institutionalist perspective see Giovanni Capoccia and Daniel Kelemen, “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism,” *World Politics* 59 (2007); whereas among European scholars, see Petya Alexandrova, Marcello Carammia, and Arco Timmermans, “Policy Punctuations and Issue Diversity on the European Council Agenda,” *Political Studies Journal* 40 (2012); Simon Bulmer, “Theorizing Europeanization,” in *Europeanization: New Research Agendas* ed. Paolo Graziano and Maarten Vink (New York: Palgrave MacMillan, 2007), 50; Thomas Risse and Antje Wiener, “'Something Rotten'and the Social Construction of Social Constructivism: A Comment on Comments,” *Journal of European Public Policy* 6 (1999); and in the specific field of financial accountability Paul Stephenson, “60 Years of Auditing Europe: A Historical Institutionalist Analysis” (Paper Presented at the JMCE Conference, University of York, September, 13, 2012); Carlos Mendez and John Bachtler, “Administrative Reform and Unintended Consequences: An Assessment of the EU Cohesion Policy ‘audit Explosion’,” *Journal of European Public Policy* 18 (2011).

The collective resignation of the European Commission in 1999 is certainly one of them, to the extent that it sowed the seeds of the most comprehensive reform in the EU administration to date.[29]

The economic and financial crisis that haunts the European Union since 2008 has been characterized as a critical juncture for the EU and its Member States.[30] Financial accountability and its advocates could have emerged as beneficiaries of the economic crisis; however, as empirical analysis of European Council conclusions shows, this has only happened with regard to systemic legitimacy in the field of national economic policies to the extent to which they impact on the overall Eurozone. The salience of issues linked to systemic legitimacy within the EU system has been limited, throughout the financial crisis, to democratic accountability of the European Council, the European Central Bank and the new institutions on financial supervision. European institutions have thus arguably missed an opportunity to seize the problems of financial accountability of the EU budget itself. We find a single reference to this topic in the European Council Conclusions of February 2013 Conclusions, following a meeting devoted to the EU Multiannual Financial Framework (the so-called 'financial perspectives'): "*The EU has the responsibility,* through certain conditionalities, robust controls and effective performance measurement, *to ensure that funds are better spent*. […] All sectoral legislation relating to the next Multiannual Financial Framework as well as the new Financial Regulation and the Interinstitutional Agreement on cooperation in budgetary matters and on sound financial management should therefore contain substantial elements contributing to simplification and *improving accountability and effective spending of EU funds*".

The return of financial accountability to EU political agenda is thus to be welcome, but defenders of EU systemic legitimacy are warned not to count the chickens before they are hatched. The meager attention devoted by the highest EU institution to systemic legitimacy can be explained as follows: although institutional and financial crisis find their grass-roots in gaps in financial management and accountability; legal improvements in these issues cannot be expected to produce a seizeable outcome in the short term. Accordingly, actors in the vortex of a crisis lack incentives to push accountability upwards in the political agenda more than issues linked to restoring trust or improving performance (output legitimacy). Issues of financial accountability and systemic legitimacy are more likely to arise in post-crisis scenarios, provided that the momentum for institutional improvement –administrative reform- lasts enough. Throughout the worst moments in the Euro crisis, the core narrative tried to convey Member States agreement around the survival of the EU single currency,[31] and not wiser expenditure at the EU level.

The abovementioned theoretical debates provide the backdrop against which the rest of this paper will unfold. Financial accountability in the European Union is primarily enshrined in the so-called Financial Regulation, which is the basic (and throrough) legal

[29] María Luisa Sánchez Barrueco, *El Tribunal De Cuentas Europeo: La Superación De Sus Limitaciones Mediante La Colaboración Institucional* (Madrid: Dykinson, 2008): 205-223; Hussein Kassim, "'Mission Impossible', but Mission Accomplished: The Kinnock Reforms and the European Commission," *Journal of European Public Policy* 15 (2008); Michelle Cini, *From Integration to Integrity: Administrative Ethics and Reform in the European Commission* (Manchester University Press, 2007); Michael Bauer, "Impact of Administrative Reform of the European Commission: Results from a Survey of Heads of Unit in Policy-Making Directorates," *International Review of Administrative Sciences* 75 (2009); Tim Balint, Michael Bauer, and Christoph Knill, "Bureaucratic Change in the European Administrative Space: The Case of the European Commission," *West European Politics* 31 (2008). Emmanuelle Schön-Quinlivan, "Administrative Reform in the European Commission," in *Management Reforms in International Organizations*, ed. Michael Bauer (Baden-Baden: Nomos, 2007), 25.

[30] Dermot Hogdson and Uwe Puetter, "The European Union and the Economic Crisis," in *European Union Politics*, eds. Michelle Cini and Nieves Pérez-Solórzano (Oxford: Oxford University Press, 2013), 367; Benjamin Braun, "Preparedness, Crisis Management and Policy Change: The Euro Area at the Critical Juncture of 2008–2013," *The British Journal of Politics & International Relations* (2013) doi:10.1111/1467-856X.12026.

[31] eg. Statement by the Heads of State or Government of the Euro Area and EU institutions, 21 July 2011

instrument which governs budgetary implementation in the EU. The stress will be put first on financial accountability as enshrined in EU primary and secondary law, from a general perspective (section 2) and then drawn to the Financial Regulation, whose latest revision has been in force since 2012 (section 3).

2. A general legal framework on EU financial accountability.

Financial accountability is a part of EU financial management which represents the control of the way in which the EU budget is implemented. Rules on financial management are enshrined in EU primary law, although their concrete legislative development is made possible through secondary law.

There are scattered references to issues of systemic legitimacy in the Treaty on the European Union (TEU) but no clear mention of financial accountability. The Preamble of the Treaty on the European Union states the willingness to "enhance further the […] *eficient functioning of the institutions* so as to enable them better to carry out […] the tasks entrusted to them" (para. 7). Beyond the references to 'the rule of law', too vague, the TEU ignores systemic legitimacy when listing the values (article 2 TEU) and objectives (article 3 TEU) of the EU. Likewise, issues linked to input and output legitimacy are mentioned among the principles of the EU in articles 9-12 TEU, but systemic legitimacy is clearly side-lined.

The same applies largely to the initial provisions of the Treaty on the Functioning of the European Union (TFEU). Surprisingly enough, systemic legitimacy has been denied a place in Title II TFEU (Provisions having general application, articles 7 to 17) beyond open government considerations (article 15). It is not until the Treaty has regulated the whole set of EU policies (Part III), the status of overseas countries and territories (Part IV), the Union's external action (Part V) and the institutional framework (Part VI, Title I) that attention is drawn to the rules governing budgetary implementation and control in Title II of Part VI, headed "Financial Provisions". That part of the Treaty deals, one after another, with the EU's own resources (Chapter 1), the Multiannual Financial Framework (Chapter 2), the Annual Budget (Chapter 3), budgetary implementation and control (Chapter 4), common provisions (Chapter 5) and the protection of EU's financial interest and the fight against fraud (Chapter 6). For the sake of a better comprehension of forthcoming reflections, it seems necessary to explain the nuts and bolts of the EU budgetary cycle.

The EU budgetary cycle starts when the annual budget is adopted by the Parliament and the Council, and the fundamental grounds have remained unchanged from the origins of the European integration process. However, the EU budget essentially differs from national budgets in that it is balanced by constitutional design (article 310 TFEU). Starting in 1988, Member States adopted the political decision to prevent any budgetary deficit from arising at the EU level, by means of an interinstitutional agreement that would set annual expenditure ceilings throughout a seven-year timeframe. That document was known as the 'financial perspectives' or the Multiannual Financial Framework. Following the Lisbon Treaty, and under article 312 TFEU, the original interinstitutional agreement became a Council Regulation, which is adopted by the Council on a unanimity basis following European Parliament's assent (internally reached through absolute majority). The European Council might change this procedure to qualified majority in the future. The first Multiannual Financial Framework in the post-Lisbon era was adopted in December 2013 and covers the 2014-2020 period.[32]

[32] Council Regulation (EU, EURATOM) N. 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347/2013, December, 20, 2013.

As a result, European institutions, notably the Commission and the European Parliament, are constrained by the limits enshrined in the Multiannual Financial Framework when it comes to adopting the EU annual budget year after year. The complexities of the budgetary procedure (established in articles 314-316 TFEU) are irrelevant for the purpose of this work, we will thus jump straight into the details of budgetary implementation.

Article 310 (5) TFEU states that the EU general budget must "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." Here, the Treaty refers to the revenue side of the budget.

Some lines below, article 317 TFEU commands the Commission to "implement the budget in cooperation with the Member States", "on its own responsibility and within the limits of the appropiations, having regard to the principles of sound financial management". In doing so, it must act "in accordance with the provisions of the regulations made pursuant to Article 322." This expression essentially refers to the so-called Financial Regulation, as we will develop later on. Then again, article 317 TFEU includes a specific reference to the participation of national authorities in the expenditure wing of the EU budget. They "shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management."

Interestingly enough, a clear asymmetry as regards respective rights and obligations of the Commission and Member States is enshrined in the Treaty. To put it bluntly, the Commission executes directly only a meagre 22% but it remains responsible for the sound financial management of the EU budget as a whole.[33] Member States' authorities are required to cooperate in both the collection of revenues (article 310 TFEU) and a financially sound implementation of expenditure (article 317 TFEU), as two specific manifestations of the general obligation to cooperate with EU authorities under the principle of sincere cooperation, as enshrined in article 4 (3) TEU. The relevant case-law issued by the European Court of Justice (ECJ) might be applicable to national administrations taking part in the implementation of EU budget; however, cases dealing with this matter are rare.[34]

The control of budgetary implementation opens the door to the intervention of the European Court of Auditors (ECA), the European Parliament (EP) and the Council. According to article 318 TFEU, the Commission must submit annually to the EP and the Council the accounts of the previous years, together with a financial statement of the assets and liabilities of the EU. Drawing on the results of the audits carried out by the Court of Auditors, both at the EU and national levels, and reflected in the annual and special reports issued by this institution, the Budgetary Authority (that is, the European Parliament and the Council) will issue a decision on the discharge of the Commission in respect of the implementation of the budget, under article 319 TFEU. The Treaty does not ellaborate on the choices and effects of the discharge decision beyond the fact that it brings the budgetary cycle to an end. Interinstitutional practices have shaped the discharge decision as a highly political decision. The EP has gone to great lengths to turn its power to issue the discharge decision into a permanent oversight on EU policy-management. Three are the possible outcomes of the discharge decision: positive, negative and conditioned. Whereas positive and conditioned discharge decisions close the budget cycle with a (generally) favourable assessment on the Commission's activity, a negative discharge would have a similar impact to that of an atomic bomb in the interinstitutional relations, and therefore must be used carefully to maintain its threatening power before the Commission.[35] However, the power of the discharge decision

[33] Cipriani, *EU Budget,* 16
[34] Among the very few of them, see Case *Commission vs Germany,* November, 15, 2011, C-539/09.
[35] Francis Jacobs, Richard Corbett and Michael Shackleton, *The European Parliament,* 7th ed. (Boulder: Westview Press, 2007), 128; Sean Van Raepenbusch, *Droit Institutionnel De l'Union* Européenne (Brussels: Larcier, 2005), 307.

should not be overestimated, given the fact that it is issued nearly two years after the moment in which the funds were spent.[36] Opting for one or another largely reflects the EP's own opinion on the capacity and willingness of the Commission to embrace financial soundness when it spends EU funds, as well as the likelihood to obtain specific concessions from the Commission in a related policy field.[37]

A detailed account of provisions on financial accountability in the EU primary law would be incomplete if it ignored article 325 on *"combating fraud."* The second paragraph of this provision obliges Member States to *"take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests."*

3. The "Financial Regulation": old wine in new wineskins?

A. A European bible almost as old as the Bible

The Financial Regulation represents the 'financial bible' of EU budget management.[38] It develops the Treaty provisions as regards types of management and basic requirements on the use of public funds, among other important fields. Following Craig, it can be affirmed that the Financial Regulation enjoys constitutional nature from a twofold perspective. From a vertical perspective, the Financial Regulation raises above the rest of EU legal acts in spite of being secondary EU law. From a horizontal perspective, the Financial Regulation contributes to the constitutionalization of EU administrative law through a core of structural norms governing policy-implementation across EU fields of competence which are administered in an essentially different way[39]. Financial rules enshrined in the Financial Regulation bind all European and national authorities that implement EU funds, and even private actors acting as beneficiaries of EU programmes. As a fundamental criterion, public or private subjects will be bound by the Financial Regulation to the extent that they are linked in any way to public management of revenue or expenditure enshrined in the EU general budget.

The first Financial Regulation was adopted in 1977[40], following the Treaty of Luxembourg on certain financial provisions[41]. From that moment on, that legal instrument was subject to a neverending series of specific reforms that would render it, throughout decades, likelier to a patchwork bedspread than to the financial backbone of EU policy management that European institutions assumed it was.

Redressing this situation was a by-product of the severe institutional crisis brought about by the resignation of the Santer Commission in 1999. A complete revamping of the Financial Regulation crystallized in Regulation 1605/2002[42] as part of administrative reforms launched by Commissioner Kinnock under the lead of Commission President Prodi. Regulation 1605/2002 was groundbreaking in many ways, but perhaps two features qualify as its main contributions. The one was establishing a classification of the types of public management: centralized by the Commission's services, decentralized through agencies,

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[36] Jean-Paul Jacqué, *Droit Institutionnel De l'Union Européenne*, 4th ed. (Paris: Dalloz, 2006).
[37] Sánchez-Barrueco, *El Tribunal de Cuentas Europeo*, 205-223.
[38] European Commission, "Un nouveau règlement financier pour l'Europe" IP/02/929, 26 June 2002
[39] Paul Craig, "A new Framework for EU Administration: The 2002 Financial Regulation" *Law and Contemporary Problems* 68 (2004), 107.
[40] Financial Regulation of 21 December 1977 applicable to the General Budget of the European Communities, 1977 OJ L 356.
[41] Traité portant modification de certaines dispositions budgétaires des traités instituant les Communautés européennes et du traité instituant un Conseil unique et une Commission unique des Communautés européennes, OJ L 2/1971, January, 2, 1971
[42] Council Regulation (EC, Euratom) 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, September, 16, 2002.

outsourced to private operators, shared with national authorities and through international bodies. The goal was not only linked to transparency purposes (ie. enhancing their visibility) but mainly to set constrains on the Commission's resort to certain management modalities proner to financial irregularities. The other was to affirm the responsibility of managers, and therefore to remove stages in the financial audit procedure that had proved useless in the past; we refer to the former *ex ante* visa that was granted (in practice, automatically and without any substantial revision of the contents) by the "authorising officer".

After the entry into force of the Lisbon Treaty (December 1, 2009), the implementation of specific financial provisions of the new treaty required further reform of the Financial Regulation, which led to the adoption of Regulation 966/2012, in force since 1 January 2013[43]. The reader's eye is first caught by the European Parliament as a newcomer to the adoption procedure of the Financial Regulation. In fact, Regulation 966/2012 is the first Financial Regulation adopted following codecision between the Council and the Parliament, under the revised article 322 TFEU. The Parliament's involvement has certainly lengthened the legislative procedure and probably affected the actual outcome of the Financial Regulation.

B. Interinstitutional politics behind the Financial Regulation: the legislative procedure leading to the adoption of Regulation 966/2012

The legislative procedure that led to the adoption of Regulation 966/2012 was lengthy and complex, partly because it coincided in time with the worst moments of the financial crisis in Europe, and with harsh negotiations among Member States on the renewal of the Multiannual Financial Framework that was to expire on 31 December 2013. It should be noted that the Multiannual Financial Framework affects all financial programmes run under the EU budget. A belated adoption of the Financial Regulation would thus have a negative impact on the management of new programmes under the 2014-2020 financial perspectives. Anyway, the fact that projects are financed by EU budgetary lines over a span of years has made an instantaneous shift to the new regime simply not possible. Current programmes, which are managed under regulation 966/2012, coexist with the remains of old programmes, run under the old regime of Regulation 1605/2002: this may become a source of confusion for financial actors other than the Commission officers.

Within the Commission (Barroso II), drafting the proposal for a Financial Regulation corresponded to Directorate-General for Budget, under the supervision of the Commissioner for Financial Programming and Budget, the Polish Janusz Lewandowski, although close cooperation is expected with the Commissioner for Budgetary Discharge, the Lithuanian Algirdas Šemeta. The Commission eventually merged under a single proposal[44] for revision two on-going proposals[45], although it acknowledged that no substantial change had been made in the final version. This feature may explain why the ECA, which must be consulted under article 322 (1) TFEU, did not issue an opinion this time. However, it does not seem adequate from a formal perspective, and it dangerously borders the limits of the ECJ

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[43] Regulation (EU, Euratom) 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) 1605/2002. OJ L 298, October, 26, 2012

[44] Commission. Proposal for a Regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union. COM (2010) 815. December, 22, 2010.

[45] Commission's Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, COM (2010) 71, March, 3, 2010. That proposal aimed at adapting the Financial Regulation to the Lisbon Treaty. Furthermore, Commission's Proposal for a Regulation of the European Parliament and of the Council on the Financial Regulation applicable to the general budget of the European Union. COM (2010) 260, May, 28, 2010. This second proposal involved the triennial revision of the Financial Regulation and took special account of budgetary implementation under economic crisis.

traditional case-law on the prerogatives of consultative organs[46]. The ECA's views are however reflected in Opinion 6/2010, issued on an earlier proposal[47], which the Court updated in January 2011 of its own initiative[48]. The ECA managed to assert its disagreement with the Council's proceeding, although in a soft way, by including a separate paragraph to its Opinion 4/2013.[49]

The Commission Proposal on the Financial Regulation was then subject to exam by the European Parliament, for the first time ever, and thanks to the innovations made by the Lisbon Treaty as of 1 December 2009. Two Parliament committees are involved in financial management and accountability matters on a regular basis, namely, the Committee on Budgets and the Committee on Budgetary Control. These two committees joined their forces together under rule 51 of the European Parliament's Rules of Procedure[50] and delivered a single opinion in first lecture (the Gräβle/Rivellini Report),[51] including the amendmends proposed by the Committees on Foreign Affairs (AFET), on Industry, Research and Energy (ITRE), and on Regional Development (REGI).

The European Parliament adopted its position on the Commission proposal and assorted it with no less than 308 amendments on 26 October 2011, in plenary session[52].

The political trialogue then opened between the European Parliament, the Council and the Commission, with a view to reaching agreement at an early stage of the legislative procedure. Divergences arose between the Council and the EP, and the early agreement was jeopardized at several moments. Representatives within the European Parliament were concerned about ensuring effective scrutiny and a clear chain of responsibility regarding the domestic management of EU funds under shared management, the special provisions on financial instruments, EU trust funds, among others[53]. After more than 15 trialogue meetings throughout nine months, both institutions seemingly agreed on a 'package deal' between the key budgetary rules that were at stake at the same moment: the Financial Regulation and the

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[46] The European Court of Justice has accepted the legal standing of the European Parliament in annulment if the final text, assessed in its entirety, differs from the proposal that served as a basis for consultation to the EP, in Case 41/69 *Chemiefarma/Commission*, 1970 ECR 661 and Case 817/79 *Buyl/Commission* 1982 ECR 245. Despite a favourable view of the legal service of the European Court of Auditors towards invoking such case-law (Court of Auditors, Doc.Ref 10/83), a dominant trend within the institution itself baulk at claiming authority through judicial channels. This is a topical issue, given the fact that the Council did not consult the European Court of Auditors on the Commission's proposal for a Regulation establishing the rules on the Multiannual Financial Framework, COM (2011) 398, which laid down the basis for the adoption of Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ L 347/2013 of 20 December.

[47] Court of Auditors, Opinion No 6/2010 on a proposal for a regulation of the European Parliament and of the Council on the Financial Regulation applicable to the general budget of the European Union, OJ C334/2010 of 10 October 2010.

[48] Interestingly enough, the update proposed by the Court of Auditors is not featured in the EU Pre-Lex database because the ECA's opinion was neither asked for by the Commission nor by the Council. However, it resorts from the Grassle/Rivellini Report, see *infra* fn 51.

[49] ECA's Opinion 4/2013 concerning a proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ C 4/2013 of 8 January 2014, para. 2.

[50] The most recent version of these being European Parliament, Rules of Procedure, 7th parliamentary term, March 2014, available at http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC (last accessed 21 march 2014)

[51] European Parliament. Report on the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the annual budget of the Union, delivered by the Committee on Budgets and the Committee on Budgetary Control (Rapporteurs Gräβle and Rivellini), A7-0325/2011, of 4 October 2011.

[52] European Parliament, amendments adopted on 26 October 2011, P7_TA(2011)0465, OJ C 131/2013 of 8 May 2013, p.158

[53] For instance, regulations on expenditure linked to the purchase of EU buildings through loans, mostly associated with the funds earmarked for building projects by the European Parliament (See the statement by the European Parliament annexed to the formal adoption of the legislative act by the Council, 23 October 2012, available at http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2014800%202012%20ADD%203 (last accesed 21 March 2014).

Multiannual Financial Framework[54]. This made possible a political agreement in September 2012.

Herman Van Rompuy, President of the European Council and an external observer to this procedure although indirectly involved in it, put it this way: *"[w]e have seen Parliament's new confidence in the discussions on […] Financial Regulation […;] there were quite intense debates, in which Parliament made its voice heard. But in the end a compromise was found – and it is the result which counts."*[55] The position of the European Parliament was strengthened by the Member States' need (in the framework of the Council) to count on its assent as regards the Multiannual Financial Framework, as Van Rompuy did not cease to highlight: *"The European budget needs to take off on 1 January 2014, but months of preparation will still be required to set all the pieces. Finding a compromise is a political challenge. […]To conclude it, we all need to be very flexible.*"[56]; *"Let's be honest. Finding a compromise next week is not a small political challenge. It needs the unanimous agreement of every Member State and the consent of the European Parliament. But we badly need the agreement. We need an agreement to have the right framework for growth and jobs for the rest of this decade. We need an agreement to demonstrate our continued ability to take difficult decisions even in difficult times. And we need an agreement because the consequences of no agreement would be negative for everybody."*[57] Such scenario benefitted the relative position of the European Parliament.

Since the Financial Regulation was adopted before the Multiannual Financial Framework, both institutions agreed to modify the Financial Regulation afterwards, in a joint statement accompanying Regulation 966/2012. The revision process took most part of the year 2013 and was completed.

A last point should be made with regard to the nature of the Financial Regulation as a delegating act. Numerous are the provisions in that Regulation which bestow power on the Commission to define concepts or to detail the way in which they must be applied, under article 290 TFEU. Delegation resulted in a general delegated regulation on re rules of application of the Financial Regulation and a several specific ones.[58]

C. A comprehensive approach to financial management? Provisions inside (and outside) the Financial Regulation

Regulation 966/2012 follows a comprehensive approach to financial management, in the sense that it aims at regulating the whole budget implementing cycle across all policy areas. It is therefore a complex and thorough regulation. For the sake of better understanding its scope and the extent of the reforms that have been introduced, we will provide next a descriptive account of the main structure of this legal act.

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[54] Council of the European Union. Note from the General Secretariat of the Council to delegations. Summary of the meeting of the European Parliament Committee on Budgetary control (CONT) held in Brussels on 29-30 May 2012, Doc. Ref. 10916/12 of 6 May 2012, available at http://www.parlament.gv.at/PAKT/EU/XXIV/EU/08/38/EU_83869/imfname_10031874.pdf (last accessed on 21 March 2014).

[55] Herman Van Rompuy, "Visions, determination, results" Address to the EPC breakfast. PCE 265/10, Brussels, 16 November 2010.

[56] Herman Van Rompuy, Remarks at the official visit to Latvia, EUCO 160/13 of 2 July 2013

[57] Herman Van Rompuy, Remarks following the President's meeting with the Prime Minister of Austria, EUCO 220/12 of 16 November 2012

[58] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 362, 31 December 2012. The specific delegated regulations are Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 FR, OJ L 328, 7 December 2013 and Commission Delegated Regulation (EU) No 110/2014 of 30 September 2013 on the model financial regulation for public-private partnership bodies referred to in Article 209 FR, OJ L 38, 7 February 2014.

The Financial Regulation is structured around three parts. Part One includes the "Common provisions", Part Two refers to "Special Provisions" and Part Three covers the final and transitional provisions.

The "common provisions" establish basic principles in European Budgetary Law, which apply, in principle, to all operations linked in any way to the Union's budget. Article 1 is crystal clear in this regard: the Financial Regulation "lays down the rules for the establishment and the implementation of the general budget of the EU and the presentation and auditing of the accounts". The Financial Regulation occupies a privileged place in the European legal order, in-between primary and secondary law, in accordance with article 3 ("Compliance of secondary legislation with this Regulation", paragraph 1, which states that "[p]rovisions concerning the implementation of the revenue and expenditure of the budget and contained in a basic act shall respect the budgetary principles set out" by this regulation.

Title II of Part One establishes the core budgetary principles applicable in the European Union. As a general rule, European budgetary principles are heir to their national counterparts, eg. principles of unity, budgetary accuracy, annuality, unit of account, universality, specification, and transparency. However, the principles of equilibrium and sound financial management have been traditionally absent from national legislations, for various reasons. Taking the case of Spain, the General Law on the Budget is the equivalent of the EU Financial Regulation. This core legal act has been modified several times as a result of Spanish membership of the European Economic and Monetary Union, and of the guidelines agreed by Member States within the European Council in the aftermath of the financial crisis[59]. Spain has *downloaded* several principles from the EU and onto the Spanish domestic legal order. Three are the main ones, namely, those of equilibrium (the balance between revenue and payment appropriations becomes compulsory under the label of 'fiscal stability'), multiannuality (establishing an annual ceiling to the expenditure by public authorities, with a view to pushing them towards better planning and spending), and efficiency[60]. The last principle refers to what is labelled "sound financial management" at the EU level, a cryptic expression lacking a consistent meaning across Member States. The Anglo-Saxon financial culture resorts to the expression of 'value for money', whereas the Mediterranean cultures use the term 'efficiency' in the allocation of resources (to cover in turn economy, efficiency, efficacy and quality of the results). The lack of a consistent definition and the divergences in interpretation stemming thereof might potentially give rise to disagreements between the European authorities involved in budgetary implementation and control, on the one hand, and national authorities, on the other.

Title III of Part One contains the provisions relevant to the adoption of the EU general budget and its basic structure.

Title IV importantly governs its implementation. After specific provisions on sound financial management, delegation of budget implementation powers and conflict of interests, Chapter 2 defines and regulates the various methods whereby the Union's budget is implemented. These include centralized management (by the Commission's services and agencies), shared management (by national authorities), indirect management (outsourcing to private contractors). Chapter 3 revolves around the actors playing a role in the budgetary implementation cycle (mainly, the authorising and accounting officers). Chapter 4 establishes the liability of financial actors. Chapters 5 and 6 regulate revenue and expenditure operations respectively. Chapter 7 deals with IT systems and e-Government. Chapter 8 establishes two specific administrative principles with regard to public procurement. Finally, Chapter 9 is

[59] Spanish General Budget Law, Law 47/2003, November, 26, 2003 OJ 284 of 27 November. Consolidated version of 26 December 2013, available (Spanish) at http://www.minhap.gob.es/Documentacion/Publico/NormativaDoctrina/Presupuestos/LeyGeneralPresupuestaria.pdf.

[60] Article 26 of the General Budget Law, further referred to in articles 29, 69 (1).

devoted to the role of internal auditor in each European institution, its appointment procedure, its powers and duties and its independence.

Thenceforward, several titles successively regulate the main instruments for budgetary implementation: public procurement (Title V), grants (Title VI), prizes (Title VII) and other financial instruments (Title VIII). Title IX creates obligations regarding the presentation of the accounts and accounting. Finally, Title X closes the budgetary cycle by developing the Treaty provisions on external audit and discharge.

As mentioned before, Part Two of the Financial Regulation contains special provisions. These regard the specificities of budget implementation in the fields of agriculture (Title I) and structural policies (Title II), research (Title III), external actions (Title IV), European offices (Title V), administrative appropriations (Title VI) and the position and responsibilities of external experts that have been hired by European institutions (Title VII).

Final and transitional provisions are enshrined in Part Three.

The abovementioned paragraphs have presented the structure of the Financial Regulation, which aims at providing a comprehensive regulation of issues linked to financial management and accountability in the European Union. The Financial Regulation does not fully succeed in this goal, though, due to three main reasons.

First, the Financial Regulation does not cover the specificities of financial management in all EU policies, which are in turn governed by sectorial regulations. The most striking cases are the Common Agricultural Policy, Structural Policy and Cohesion Policy. EU secondary law in these fields must adapt to their particularities, and therefore financial management features significant differences with regard to the general regime of the Financial Regulation.

Besides, not all EU activities are enshrined in the Union's general budget. The European Development Fund, the important financial policy tool of the privileged partnership between the EU and countries of Africa, the Caribbean and the Pacific remains outside the general budget for the time being, although its budgetisation is one of the Commission headline goals for the post-2020 period. Likewise, neither the borrowing and lending operations carried out through the European Investment Bank nor the administrative budget of the European Central Bank are included in the general budget. Finally, in the field of military operations launched under the European common defence policy, operational expenditure not strictly linked to military issues falls beyond the remit of the general budget when the Council does not decide otherwise by unanimity, following article 41 (2) TEU.

These two reasons highlight the fact that the general budget does not cover the *whole* scope of EU activities, since there are some specific expenses which are not covered by the general budget. Yet an important point is missed here: *even the Financial Regulation itself* does not clamp down on the *whole* implementation of the general budget. Multilevel governance as regards financial management is very present. 76% of the general budget is implemented through national bodies and therefore subject to domestic rules on financial management. This affects not only the implementation stage of the budgetary cycle, but also the accountability one. In fact, divergences arising from the respective scope of the European and national audit bodies may result in duplications and gaps in the financial control of the implementation of EU funds down to the final beneficiary. All in all, building the cathedral of EU legitimacy through financial accountability might take more than adopting a detailed Financial Regulation. It would imply the harmonization of a common set of rules governing financial management when it comes to the national level. This has not happened so far, although some steps have been given, as will be developed later on.

D. An account of the main reforms introduced by Regulation 966/2012

From a legal perspective, the Financial Regulation has been affected by the new balance between legislative and non legislative acts brought about by the Lisbon Treaty. Before, the articulation between the Financial Regulation and the implementation rules answered the willingness to present financial rules in an understandable way: the Financial Regulation stated general principles and rules but detailed provisions were to be found in the implementing rules. According to the new framework established by article 290 TFEU, the Financial Regulation becomes a legislative act which is also a delegating act in itself; therefore, numerous Financial Regulation provisions delegate powers to the Commission to either supplement concepts or provide detailed provisions. However, article 290 TFEU expressly forbids delegated acts to decide upon essential elements of the legislation. Accordingly, certain provisions formerly included in the implementation rules have been shifted to the Financial Regulation itself. As a result, the new Financial Regulation is less synthetic and more comprehensive than Regulation 1605/2002.

Progress has been made in some key areas of budgetary management. Several former challenges deserve further attention.

First, the Financial Regulation now allows for a certain harmonization among the Member States' accounting systems and the EU's own accounting systems. This change had been sought by the ECA in several annual and special reports, because the different approaches to accounting increased the probability of errors.

Secondly, financial corrections and recoveries. A definition was introduced for the first time. On a particular note, no interinstitutional agreement was reached on the treatment of funds resulting from the agreements on the fight against the illegal traffic in tobacco products, as the Court of Auditors has noted.[61]

Thirdly, the Financial Regulation represents a major breakthrough in terms of transparency. Chapter 8 of Title II on the 'Principle of transparency' added important provisions in this regard. Article 35 (2) FR now requires the Commission to make available *"information on recipients, as well as the nature and purpose of the measure financed from the budget."* Likewise, greater transparency is sought as regards the so-called "external assigned revenue", that is, funds provided by governments or other organizations for earmarked projects are not merged into the mainstream of the general budget any longer, and can now be more easily traceable throughout implementation.

Fourth, improvements in reducing waste through better spending. The Court of Auditors had complained repeatedly that rules on reimbursements should not put the stress merely on cost claims (that is, the beneficiary, be it a national authority or an individual, had already spent the money and asked to be reimbursed) but shift to a focus on the quality of the results delivered. The Commission acknowledged that reimbursements built on a share of the actual costs incurred by the beneficiary is time consuming *"both for the beneficiary, who must itemise all expenditure, and the Commission, which then has to check the project not only against the delivery of the results, but also against the eligibility of all the costs claimed."*[62] Therefore, alternatives to actual costs have been introduced: lump sums as payments against delivery; flat rates, as percentages of certain categories of costs, and unit's costs (applicable to cases in which it is impossible to ascertain the exact amount of the cost, eg. project staff who does not receive a salary because they are self-employed).

Progress has also been made as regards the responsibility of the national authorities for the implementation of EU funds. Cross-fertilization among EU policies has allowed for

[61] ECA's Opinion 4/2013 *op.cit.* para. 3. Opinion 3/2012 on the Hercule III programme to promote activities in the field of the protection of the EU's financial interests. OJ C 201 of 7 July 2012.

[62] Commission, "Why was it necessary to change the budgetary and spending rules in the Financial Regulation?" MEMO 12/795, October, 29, 2012.

good accountability practices to spread beyond the specific boundaries of a specific policy into other domains. That is the case of the Common Agricultural Policy. Under the previous scenario, national paying agencies offer the EU with a formal statement of assurance, that is, a document in which they state they have respected financial soundness in their implementation of agricultural funds, and support their statements with facts and figures. Under the new Financial Regulation, this good practice is extended to structural and other EU funds under shared management, therefore, national authorizing officers will have to issue annual declarations which will be subject to independent audit by the ECA.

The new Financial Regulation contains as well improved provisions on conflict of interest (article 57) which prevent financial actors from getting involved in actions that might conflict with the Union's financial interests, offers a definition of conflict and puts forward a procedure when such a situation arise. However, the actual definition of 'conflict of interest' is left to the Commission's discretion in article 32 of the implementation rules (Commission Delegated Regulation 1268/2012).

4. Conclusions: to what extent does the new Financial Regulation help building the cathedral of EU systemic legitimacy?

The reforms introduced by the 2002 Financial Regulation gave a boost to financial accountability, and overall legitimacy of the EU administration, following the worst institutional crisis in the European Union that led to the collective resignation of the Santer Commission. Important norms were then introduced on the different ways of implementing EU policies (centralized, decentralized, shared, outsourced) and the boundaries that could not be overstepped so as to preserve a reasonable level of accountability.

Following the adoption of the Lisbon Treaty, further innovations have been included in the Financial Regulation through Regulation 966/2012. The main improvements refer, as a general rule, to transparency, better definition of the responsibilities of both parties under shared management and better quality of expenditure. These reforms provide the ground to assert that the revised Financial Regulation is yet a further step in the quest for financial accountability in the European Union. Nevertheless, it would be too ambitious to consider Regulation 966/2012 as a milestone in the path towards financial accountability, or even the cathedral of EU legitimacy in itself. Financial accountability in the European Union still displays core gaps. Suffice it to highlight the lack of ownership of national authorities as regards the financial soundness of EU budgetary implementation. For the time being, the current system does not answer such concerns in a comprehensive way.

Against this backdrop, further empirical, comparative and qualitative research is deemed necessary to ascertain the extent to which the provisions enshrined in the Financial Regulation stick to high standards in their performance, down to the final recipient and back upwards towards the Budgetary Authority for discharge. Were the answer to be negative, it would mean that the provisions of the Financial Regulation would be watered down in practice.

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