Walter van Gerven [1]

# Political, ethical and financial and legal responsibility of EU Commissioners

## 1. Defining different kinds of responsibility.

Responsibility is often looked at as being of a purely legal nature. That is obviously wrong: in addition to legal there is also ethical, political, and financial responsibility.

1.1. In the strict sense of the word *legal* responsibility relates to the responsibility of a person for violating a rule or principle of law which results in that person's liability for the prejudicial consequences which the violation has caused to third persons. In EC law the subject is regulated by Article 288, par. 2, EC Treaty which provides in non-contractual (=tort) liability for Community institutions, including the Commission, the Council and the Parliament, having committed themselves or through their servants a serious violation of Community law, and obliges them "to make good any damage" caused thereby to third parties.[2] The content of that liability is to be defined by the Court of Justice "in accordance with the general principles common to the laws of the Member States." Article 288 also provides, in par. 4, in personal liability of Community servants towards the Community, for damage caused by them to the Community, then however in accordance with Staff Regulations or Conditions of Employment. Since Commissioners are not civil servants but officials holding office (infra 2.2), par. 4 is not directly applicable to them.[3]

1.2. *Ethical* responsibility is a concept which is less precise than legal responsibility. Generally speaking, the concept refers to responsibility for behaviour held to be reprehensible for infringing non binding and not directly enforceable rules or standards on how one should behave properly and responsibly in personal and/or societal life. In a political context it refers to violations of standards in public life which may be unwritten, but are often spelled out in written codes of conduct. In its first report, the Committee of Independent Experts (hereinafter the Committee), set up by Parliament and the Commission in 1999 to investigate allegations of fraud, mismanagement and nepotism in the Santer-Commission, took the position that not only administrative irregularities, *i.e.*, infringements of binding administrative rules, but also

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[1] Professor em. KU Leuven, Former Advocate General ECJ, Member of the Committee of Independent Experts Investigating Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission (1999), Member of the Independent Panel Review of the World Bank Group Department of Institutional Integrity (2007).

[2] It should be mentioned that the liability of Community institutions for damage caused to a third person by one of their civil servants can be the result of either personal misbehaviour on the part of the civil servant or of conduct, attributable to another person or imputable to a thing, for whom or for which the civil servant is held responsible by law. See for example ECJ, Cases 169/83 and 136/84, *Leussink-Brummelhuis v. Commission*, [1986] ECR 2801.

[3] That might not prevent Commissioners from being held liable towards the Community by a national court applying national law in so far as the protocol on privileges and immunities is not applicable (see further fn. - ). See, in the case of a former Commissioner, ECJ judgment, Case C-432/04, *Commission v. Cresson* judgment, [2006] *ECR* I-6387, par. 35, where it is mentioned that the Commission claimed damages against Mrs Cresson in criminal proceedings that were initiated before the Belgian courts following a complaint by a Member of Parliament.

ethically reprehensible behaviour could be held against Commissioners and, as such, give rise to political responsibility (see point 1.4.5 of the report). The Committee opined that "there exists a common core of 'minimum standards', in addition to rules laid down in black and white, which binds holders of high office …"[4] adding that "[t]he higher the office, the more demanding those standards are in requiring the holders to conduct themselves properly in appearance and behaviour" (point 1.5.2). As mentioned, these standards are often laid down in codes of conduct which can be different in nature: either specific ("prohibition-oriented" and more "bureaucratic") or general ("value-oriented" and more "democratic").[5] As a matter of law, ethical rules are not directly enforceable in a court of law but they may be used by a court of law in order to flesh out general and/or open-ended legal terms or clauses, such as fault, wrong, or acting responsibly, or in good faith.

1.3. Unlike the two preceding kinds of responsibility which refer to legal or ethical misbehaviour, *political* responsibility refers to the possibility for a political organ to attach a political *sanction* to such misbehaviour on the part of a holder of public office, and/or to politically incorrect behaviour, such as failing to give complete information to Parliament, or giving incorrect or misleading information. Thus, one or some individual ministers, can be asked by the head of government to step down alone, or together, for individual misbehaviour (individual responsibility). Conversely, a head of government and with him or her the whole government can be asked by parliament to resign for collegial misbehaviour (collective responsibility). Obviously, there are sanctions of a lesser nature than resignation, for example: for the Parliament to blame a member of government, or to ask his or her removal by the head of government to another or lesser governmental position, or to pass a resolution of distrust against him or her, or the whole government, on a particular issue without asking for outright resignation. Political responsibility is *constitutional* in nature if the sanction and the procedure to apply it are set out in a constitutional text (or constitutional tradition in countries that have no written constitution) as it normally is.

Two additional remarks. *First*, political responsibility as described above, *i.e.*, as a sanction for incorrect behaviour, is characteristic of a *parliamentarian* form of government, as opposed to a (purely) *presidential* one, like that in the U.S. In the latter case, the head of government - who then is also head of State - is directly elected by the people in the same way as the two houses of Congress are. In such a system of dual democratic legitimacy, there is no political responsibility of the kind described above, because - save for exceptional situations (impeachment) - the popularly elected president cannot be asked to resign by the equally elected parliament, nor can his/her cabinet members be asked to resign, because they have been appointed by the president and can only be dismissed at his or her discretion.[6] *Second*, political responsibility, as described above, is synonymous with *accountability for* (incorrect behaviour), that is one of the two basic meanings of the latter word, the other being accountable *to* (for example: to Parliament), that is, being obliged to inform someone (see further in section 4).[7]

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[4] For a concrete example, the committee referred, on p. 13 of its (first) report to the *Standards in Public Life* of the UK (then) Nolan Committee, 1995.

[5] See further W. van Gerven, *The European Union. A Polity of States and Peoples*, Stanford University Press and Hart Publishing Oxford, 2005, pp. 162-164.

[6] That does not exclude that persons appointed by the president may be screened in advance by Congress, or be questioned when they are in office.

[7] Accountability is an ambiguous word. In its meaning of "accountable to", it is derived from the expression primarily used in a principal/agent context: to render account (rendre compte, Rechenschaft geben, rekening afleggen, …). In its meaning of "accountable or responsible for" it refers to: to be called to account (règlement de comptes, abrechnen, afrekenen,…).

1.4. *Financial* responsibility is a concept that can be used in a double meaning, either to refer to responsibilities regarding financial and budgetary matters, or to refer to pecuniary sanctions applied to wrongful behaviour of any kind. The latter – *sanctions* – normally consists in damages which holders of public office or civil servants, or the institution they work for, are ordered to pay by a court of law in order to make good the harm which they have caused to third persons as a result of wrongful behaviour for which they are held responsible in law (see 1.1). In Community law the sanction can also consist for Commissioners in the deprivation of their right to a pension, or other benefits in its stead, when he or she has seriously breached "the obligations arising from their office". As stated by the ECJ in par. 70 of its *Cresson* judgment,[8] this expression "falls to be broadly construed" and "to be understood as extending not only to the obligations of integrity and discretion expressly referred to [in Article 213 (2) EC] but also to all of the duties … includ[ing] the obligation … to be completely independent and to act in the general interest of the Community." As for the second and more important meaning – *responsibilities* – it refers to the duty of financial management on behalf of the Commission in cooperation with Member States (see 5.3. below). Financial mismanagement, through out-sourcing, was at the heart of the Committee's first report where it was stated at the end (point 9.4.5): " The problems encountered in connection with each of these cases can be traced back to the *mismatch* between the objectives assigned to the Commission, in the context of the new policy laid down by the Council and Parliament, on the proposal of the Commission, and the resources which the Commission has been able, or has chosen, to employ in the service of that new policy." In its second report (point 7.16.18), the committee repeated and extended that observation as follows: "Council and Parliament should be bound by the principle of budgetary discipline to take into account the resource requirements attached to any policy initiative they request from the Commission. The Commission should be able to refuse to assume any new tasks for which administrative resources are not available and cannot be provided through redeployment." To address these concerns, the Commission now operates an annual planning cycle, which begins with the Annual Strategy Decision (APS) and ends with a Synthesis Report by the Commission of the Director-Generals' Annual Activity Reports (see also below at 5.3).[9]

2. The Status and Duties of EU Commissioners.

The legal status of the members of the EU Commission as well as their political status and 'constitutional' duties are regulated in the EC (and EA) Treaty, more specifically in Articles 213-217 EC.

2.1. According to par. (1) of Article 213 EC "shall be chosen on the grounds of their general competence", and should possess "independence beyond doubt" which is clarified in par. 2 to mean that they "shall, in the general interest of the Community, be completely independent in the performance of their duties" – "in (which) performance …., they shall neither seek nor take any instructions from any government or from any other body…". Moreover, Commissioners "may not, during the term of office, engage in any other occupation, whether gainful or not… [T]hey shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising there from and in particular the duty to behave with integrity and discretion …." . As already mentioned, in its *Cresson* judgment of 11 July 2006 [10] the ECJ has emphasized that the concept of 'obligations arising from their

[8] Supra n. 3.
[9] See further P. Craig, *EU Administrative Law*, Oxford University Press, 2006, pp. 24-25.
[10] Supra n. 3.

office' falls to be broadly construed.[11] In the event of a breach of obligations, with a certain degree of gravity (the ECJ added), the Court of Justice may, on application by the Council or the Commission, "rule that the Member concerned be, according to the circumstances, either compulsory retired in accordance with Article 216 or deprived of his right to a pension or other benefits in its stead." [12] As for the latter sanction, the ECJ stated that "it is open to the Court to order deprivation in whole or in part thereof, depending on the degree of gravity of the breach." (par. 73).[13]

2.2. As was pointed out by Mrs Cresson before the ECJ, and acknowledged by the Court in its judgment (par. 86 resp. 111), the status of a member of the Commission is not the same as that of a civil servant. Mrs Cresson rightly said that "an official of the European Communities benefits from considerably more extensive safeguards than those provided for Members of the Commission, both at the stage of the administrative procedure and in proceedings before the Court." The latter is particularly true in that "an official may challenge a decision of the Appointing Authority before the Court of First Instance … and then bring an appeal before the Court of Justice" (both in par. 86) whereas a Commissioner lacks "any opportunity to challenge the decision of the Court of Justice which, according to Mrs Cresson, constitutes a breach of fundamental rights" (ibid.). The Court did not accept this argument though for which it referred to Article 2 (2) of Protocol no. 7 to the ECHR that provides in an exception to the requirement of two levels of jurisdiction, "where the person concerned was tried in the first instance by the highest court or tribunal" (par. 112).

The difference in status between Commissioners and civil servants lies in the fact that Commissioners who are holders of public office, are not subjected to staff regulations: for better and for worse. *For worse*, that is, for not enjoying the same procedural safeguards, as mentioned; *for better*, that is, by way of example, for not being subjected to the application of Article 288 (4) EC. As already mentioned (at 1.1 above) this paragraph provides in personal liability of Community servants, for instance in regress claims, that is, when the Commission or another EU institution has been ordered to pay compensation to a third party on the basis of Article 288 (2) EC, that is, for breaches of Community law committed by "its servants in the performance of their duties." When this has happened, the Community institution involved can, on the basis of Article 288 (4), initiate a regress claim against the civil servant which claim is then to be decided in accordance with "the provisions laid down in the servant's staff regulations or conditions of employment." Commissioners are not subjected to such regulations or conditions which, however, should not – I would think - prevent them from

[11] In the case of Mrs Cresson, she had given precedence to her *personal interests* by being personally involved in the appointment of a close friend as a personal adviser in her cabinet, in circumvention of standing rules. The Court regarded this as a breach of a certain degree of gravity of the obligations arising from her office, but considered this finding, of itself, as an appropriate penalty (par. 150) without there being a need, as asked by the Commission, to deprived Mrs Cresson of her right to a pension (par. 151) – and this contrary to A.G. Geelhoed's Opinion (par. 124-126 at *ECR* [2006] I- 6424) to deprive the former Commissioner of her pension up to 50%.w).

[12] Article 216 EC provides: "If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council or the Commission, compulsory retire him."

[13] That does not prevent the Commission and the Court from being bound to apply general principles, thus for instance, as regards the timely initiation of proceedings under Article 213 (2) EC. In para 90 of the *Cresson* judgment the Court acknowledges that the Commission "must not indefinitely delay the exercise of its powers, in order to comply with the fundamental requirement of legal certainty" (with references to case law of the Court).

being sued in a regress action by the Community before a national court[14] -- in which case national law would apply, albeit only in so far as the member's immunity does not come into play.[15] Actually, members and servants (present or former) of Community institutions may also be sued before a national court by third persons, external or internal to EU institutions.[16]

2.3. As stated in Article 213, par. 1 and 2, EC (cf. supra 2.1), the independence of Commissioners must be beyond doubt which means that, in the performance of their duties, they shall neither seek or take instructions from any government or from any other body. Moreover, they may not, during their term of office, engage in any other occupation, whether gainful or not. In these provisions, the terms "from any other body" and "not engage in any other occupation, whether gainful or not" give rise to difficult questions as to whether and in how far Commissioners may take instructions from political parties and/or engage in political activities in their State of origin, or elsewhere. The most delicate question is in how far Commissioners – who, as mentioned above, are holders of public office rather than civil servants and, moreover, part of the Community's main policy-formulating and law-initiating body - are allowed to represent views advocated by a political party of which they are -- or perceived to be (mainly because of their affiliation in their national past) -- if not an active, then at least a passive member. In my opinion, the answer is somewhere in the middle. On the one hand it is clear that Commissioners who carry out an essentially *political* function, may not be prevented from having a political view and expressing it in an independent and responsible – that is, not in a unnecessarily controversial or partisan - manner.[17] In other words, in expressing their views, Commissioners must check and weigh these against, and in light of, opposing reasonable views. In that regard, it is acceptable and even desirable that, in the appointment of Commissioners, Member States seek to establish within the Commission a balanced representation of European political tendencies.[18] On the other hand, it should be equally clear that Commissioners may not seek instructions, not even occasionally, from a political party, whether national or European, on how to vote in the Commission on an issue that is politically controversial or sensitive. Taking instructions from a political party seems to me to be in conflict with the neutrality and impartiality which the function of Commissioner requires.

What about being an *active member* in such a political party[19] and, more specifically, taking part in a national or European *election campaign* on behalf of such a party? In so far as these activities constitute an "occupation, gainful or not, outside the Commission" in the sense of

[14] Article 236 EC gives competence to the ECJ "in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment" but that article does not govern disputes between the Community and its Commissioners, current or former.

[15] See Protocol on the privileges and immunities of the European Communities which provides in Article 12, sub (a) that "officials and other servants of the Community [shall]… be immune from legal proceedings in respect of acts performed by them in their official capacity". In this provision, the terms "officials and other servants" do not seem to be accurate and should rather be replaced by "holders of public office and civil servants".

[16] See the reference in fn. 3 above to the *Cresson* judgement.

[17] According to the Commission, members of the Commission are politicians carrying out a political function, who, while honouring the obligations imposed by their function, remain free to express their personal opinions quite independently and on their own responsibility: thus in answers to written questions particularly the answer of February 7, 2000 to questions E-2459/99, E- 2600/99 and E-2628/99, [2000] O.J. C255E/139 (taken from K. Lenaerts and P. Van Nuffel (R. Bray, ed.), *Constitutional Law of the European Union*, Thomson, 2nd. ed., 2005, at p. 435, fn. 247.

[18] As has happened in the past: see P.J.G. Kapteyn and VerLoren van Themaat, ed. and rev. by L.W. Gormley, *Introduction to the Law of the European Communities*, Kluwer Law International, 3rd. ed.,1998, at 195, fn. 90.

[19] In some Member States (the UK) civil servants in policy grades may not even be passive members of a political party: Kapteyn and VerLoren van Themaat (supra n. 18), at 200, fn. 112.

Article 213 (2) EC – which in my opinion is to be understood as "taking up working time" – such activities are not allowed under the wording of the Treaty itself, and may therefore not been deviated from. But even if they are not "occupational", for example because they are carried out during vacation periods, or a sabbatical leave, I would opine that active involvement in party politics is not permissible for Commissioners: being an active member of a political party, *a fortiori* campaigning for that party, implies in my view that the person concerned accepts to adhere to the party line, and therefore to follow and take instructions from that party – and/or is perceived to do so.[20] Obviously, that would be different if it were to be decided that the Commission as a body be transformed into a parliamentarian government (see section 5 below).

3. The Committee of Independent experts on Collective responsibility, Codes of conduct and Standards in public life.

The Committee of Independent Experts -- instituted, as mentioned (1.2 above), at the initiative of the European Parliament and in agreement with the Commission in January 1999 to investigate allegations on Fraud, Mismanagement and Nepotism in the European Commission - submitted its *first report* to the two institutions on 15 March 1999. It led to the immediate resignation, the same day, of the *Santer* Commission. Parliament then asked the Committee to write a *second report*, this time on the Reform of the Commission.[21] That report, dated 10 September 1999, formulated 91 recommendations on very diverse subjects. Chapter 7 of the report dealt with Integrity, Responsibility and Accountability in European Political and Administrative Life. Some recommendations on the latter subject are still of importance in the present context.

3.1. One such subject concerns *collective responsibility* which, in the opinion of the Committee, does not only encompass a prohibition on calling into question decisions adopted by the college[22], but also the right and the obligation of each Commissioner to keep him/herself fully appraised of the activities of every other Commissioner and to take action in this respect as necessary, for example by having frank and open discussions with other Commissioners both inside and outside the college (point 7.16.2 of the second report). The latter principle played a crucial role in the Committee's evaluation of the incumbent Commission in that it was clear that the breaches of Commissioner's duties committed by Mrs Cresson, as they were later confirmed by the ECJ (above at 2.1-2.2), were, from a certain point in time, known by other Commissioners (point 5.5.11ff of the first report), and not acted on by the Commission as a whole. In the final observation of its *first report*, the Committee stated unequivocally: "The responsibility of individual Commissioners, or of the Commission as a body, cannot be a vague idea, a concept which in practice proves unrealistic. It must go hand in hand with an ongoing process designed to increase awareness of that responsibility. Each individual must feel accountable for the measures he or she manages. The studies carried out by the Committee have often revealed a growing reluctance among the members of the hierarchy to acknowledge their responsibility … However that sense of responsibility is essential. It must be demonstrated, fist and foremost, by the Commissioners individually and

[20] I know that my opinion is in conflict with the provisions of the Code of Conduct for Commissioners (under point 1.1.1), dated 20 August 2004, as prepared by the Secretariat-General (Directorate B). However, I find my interpretation more in line with the text and the spirit of the Treaty and with the terms "independence beyond doubt" in Article 213 (1) EC.

[21] On the Committee, its origin and operation, and its two reports, see a.o. P. Craig, supra n. 9, pp. 3-12, 18-20, and ff.; see also S. Douglas-Scott, *Constitutional Law of the European Union*, Longman, 2002, at 71-74.

[22] That is the narrow interpretation attached to the concept of collective responsibility in point 1.2.1. of the aforementioned (supra n. 20) Code of Conduct for Commissioners.

the Commission as a body. The temptation to deprive the concept of responsibility of all substance is a dangerous one. That concept is the ultimate manifestation of democracy."[23]

3.2. In its second report the Committee recommended to the Commission to review the *code of conduct for Commissioners* which the Prodi Commission had put in place (following the Committee's first report) and to give it legal backing. Codes of conduct do not contain legally binding rules which does not prevent them from persuading officials and servants for complying with them, and influencing decision making authorities in prescribing, and judges in subscribing to, best practices and good conduct (see point 7.7.1 of the second report). The Committee's recommendation went even further: it recommended the establishment of both a general and specific codes of conduct: a general one laying down basic standards applicable to all officials and servants of the Community institutions (including the EP), and specific codes for the different institutions implementing the general rules taking into account each institution's peculiarities (point 7.7.2). Following the UK example, the Committee also recommended the establishment, by inter-institutional agreement, of a *Standing Committee of Standards in Public Life* to monitor the above and, where appropriate to provide advice on ethics and standards of conduct in European institutions (points 7.7.3, 7.7.4. and 7.16.11.). In the Committee's opinion such an inter-institutional standing committee was indispensable to give flesh and bone to non-binding ethical rules in diverse circumstances but taking into account the peculiarities of each institution. Even more importantly, in my view, by instituting such a standing committee the European institutions, including Parliament (see last sentence of point 7.14.17 of the second report), would show that they adhere to the overriding concept of the rule of law and ethics and that they are ready to exterminate any misconduct in their midst.

3.3. The above recommendations have encouraged the Commission to initiate important reforms[24] and to endeavour to put in place a culture based on service and ethical standards.[25] Apart from the promulgation of the *Prodi* Code of Conduct for Commissioners which was revised by the *Barroso* Commission on 24 November 2004,[26] significant attention was given to the creation of an *Advisory group* on Standards in Public Life in view of which a proposal for an inter-institutional agreement was prepared by the Commission[27] and submitted to the Parliament and the Council. Regrettably, according to the competent Commissioner the document "has not been given adequate attention" by the latter two institutions, but President Barroso "has signalled the Commission's readiness to discuss the proposal" further.[28]

4. The Commission's political responsibility in relation to the European Parliament.

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[23] In this quotation I omitted the controversial sentence which read: "It is becoming difficult to find anyone who has the slightest sense of responsibility" in order to show that the sentence which has drawn most attention from the media – more than any other sentence in the 142 pages long report - is totally superfluous. It could have been omitted, clearly constituting overstatement or, as I have said at other occasions, being a 'cri de coeur'. See also Craig, supra n. 9, at 4-5.

[24] See P. Craig, supra n. 9, at 12-30.

[25] Besides the documents referred to in the text above, see the Commission's White Paper on *Reforming the Commission*, COM (2000) 200, which appeared in March 2000.

[26] P. Craig, supra n. 9, at 23-24. See also the Communication to the Commission referred to below in n. 28.

[27] SEC (2000)2077. The advisory group would consist of five external experts appointed by common agreement of the European bodies on the basis of pre-established criteria.

[28] Thus "Communication to the Commission from the President and Mr Kallas for an orientation debate on a possible European Transparency Initiative" , under point 3 II, loaded down from the Internet in August 2007. As for Parliament, see the Working Document on European Transparency Initiative from the EP Committee on Budgetary Control (rapp. José Javier Pomès Ruiz) dated 4 December 2006.

In a parliamentary system, as it exists in most of the EU Member States, the accountability and political responsibility of cabinet ministers towards an elected parliament is a keystone of constitutionalism. It implies that the head of government, the prime minister, and his cabinet ministers must render account of their actions to the parliament which may hold them politically responsible for their shortcomings in the performance of their office. Cabinet ministers are also responsible, through the principle of the primacy of politics, for the shortcomings of civil servants in the performance of their duties. When these shortcomings cause parliament to lose the confidence that it had in a minister, the prime minister, or the whole cabinet, the parliament may force those persons to resign.

4.1. This raises the question of how accountability and political responsibility of the Commission - its president and its members – operates in the European Union. Under current Community law, members of the Commission are bound to explain their actions to the European Parliament, and they can be held accountable by Parliament when those actions constitute wrongful behaviour. The first requirement follows from Article 197 EC, which gives Parliament the right to hear and interrogate Commissioners orally and in writing. The second requirement follows from Article 201 EC, which enables Parliament, by open vote, to censure the Commission, compelling it to resign "as a body" if the motion is carried by two thirds of the votes cast, representing a majority of Members of the European Commission. In that connection, Article 193 EC gives Parliament the ability to set up temporary committees of inquiry to investigate mismanagement on the part of commissioners or civil servants (on all this, see also section 5 below). Moreover, since the Nice Treaty of February 2003, the Commission president's authority over the Commissioners has been strengthened, Article 217 EC now providing, in paragraph 1, that the Commission "shall work under the political guidance of its President, who shall decide on its internal organisation," and, in paragraph 2, that the Commission responsibilities "shall be structured and allocated among its Members by the President," and, most importantly, providing in paragraph 4, that "a Member of the Commission shall resign if the President so requests, after obtaining the full approval of the College." It follows from all this that the principle of accountability and political responsibility of the Commission to the directly elected European Parliament already constitutes a basic and, through the controlling action from the EP, an operational element of the European Community's political and legal order.[29]

4.2. The scope and content of Commissioners' accountability and political responsibility towards Parliament should also be defined with regard to acts and omissions not only of the Commissioners themselves but also of *civil servants* falling within their sphere of competence.[30] With respect to civil servants, EU staff regulations provide that "an official in

[29] It is noteworthy that, although the Council – for being part of the legislative branch in the EU legal order - and its individual members are *not* politically accountable *to the Parliament*, the problem of the Council's political responsibility was not entirely ignored by the framers of the EC Treaty, who, from the outset, had provided in Article 140 (now 197) EC, that "the Council shall be heard" by the European Parliament "in accordance with the rules laid down by the Council in its rules of procedure." Moreover, on the occasion of later Treaty amendments, now reflected in Article 207 (3) EC, accountability of the Council to the public has been enhanced by obliging the Council, when "acting in its legislative capacity . . . to [allow] greater access to Council documents . . . [and making public] the results of votes and explanations of vote as well as statements in the minutes."

[30] I will not deal herein with the delicate question of political responsibility of *independent agencies.* See for a start, W. van Gerven, supra n. 5, at 91-97 with special reference to the legal situation in Sweden, at 92-93. For a thorough analysis, see P. Craig, supra n. 9, at 168- 183, including the issue of financial accountability, at 180-183.

charge of any branch of the service shall be responsible to his superiors in respect of the authority conferred on him and for the carrying out of instructions given by him" [31] - which includes the responsibility of the highest ranking civil servants, the directors-general to their superior: the Commissioner responsible for their department. By contrast, the political responsibility of Commissioners to Parliament for their own wrongful action and that of civil servants working under them is not spelled out explicitly—staff regulations apply to civil servants only, and not to Commissioners (see 2.2 above). However, there is no reason to believe that Parliament's right to pass a motion of censure under Article 201 EC would not encompass action taken by Commission civil servants. If that were not the case, the sanction would lose most of its application. This was also clearly the assumption of the Committee of Independent Experts, which, in its first report, held Commissioners personally and collectively responsible for not taking adequate measures to combat wrongful action on the part of Community civil servants up to the highest level (see also infra 5.3. on the political responsibility of the Commission for financial management).

Political responsibility of commissioners for the actions of their civil servants is an issue that deserves to be studied in depth.[32] As in the Member States, the issue turns in the first place around the duty of Ministers to inform Parliament, that is, accountability in the sense of rendering account to Parliament by explaining action and giving insight into executive decision making. In that context, the question is often raised whether members of the executive branch (Commissioners or Ministers) should be blamed only for knowingly misleading Parliament, or also for giving inaccurate or incomplete information by omission (that is, because they were misinformed by their administration). The issue turns, secondly, around the political responsibility of Commissioners or Ministers to Parliament for past action, whereby the question comes up whether they can be held politically responsible only for so-called policy decisions or also for operational decisions. Thirdly, it turns on whether a member of executive government (Commissioner or Minister) can be subjected to a political sanction - not forced to resign, necessarily, but also, for example, relegated to a less important department - only when he or she has acted wrongfully, or also when civil servants or third persons have acted wrongly within the sphere of competence for which he or she is responsible.

4.3. In the second report of the Committee of Independent Experts, the issue of political responsibility was defined as follows: "Political responsibility concerns the political consequences attached to conduct of holders of public office, or to conduct of civil servants working under them within their sphere of competence, by the institution or person who can hold such holders of public office to account. Although political responsibility exists in all democratic legal systems, it exists in different forms and at different levels depending on the constitutional structure of the legal system concerned" (para. 7.14.15). The report goes on to say, that differences exist: (i) "as to the extent of political responsibility: only for individual, personal or functional, misconduct or also for misconduct of subordinate civil servants?" (ii) "as to the nature of the political consequence: dismissal, or other consequences of a lesser nature; imposed collectively, or also individually?" and (iii) "as to the institution or person called upon to impose the political consequence: parliament, president or prime minister?" (ibid.). Distinguishing between the enforcement of individual and collective responsibility, the

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[31] Article 21 of Council Regulation no. 259/68 of February 29, 1968, as amended by Council Regulation no. 723/2004 of 22 March 2004, OJ 2004 L124/1.

[32] For further reference, see W. van Gerven, supra n. 5, at 77-80 and 88-90 where special attention is given to the situation in the Netherlands.

report concludes that, with regard to the Community institutions, the latter is a matter for Parliament, while the former is a matter for the president of the Commission, who, however, is answerable to Parliament for any action or inaction on his part (paras. 7.14.20 and 7.14.21).

4.4. Already in its first report, the Committee had observed that Commissioners have a tendency to evade political responsibility for acts or omissions of their services, on the pretext that they are responsible only for laying down policy while directors-general implement it. The Committee rejected such distinction, rightly in my view, for being untenable both in law and in fact. It is untenable in law because it would mean that nobody is accountable to Parliament for implementation of policy decisions, neither the Commissioner, nor the head of the administration (nor, a fortiori, his subordinates), who owes responsibility only to his Commissioner. The distinction is also untenable in fact because it "is a falsely rigid one, difficult to define in principle and even more difficult to apply in practice." [33] To give only one example, is it a matter of mere implementation, or is it a matter of both policy and implementation, to set up an effective organization, and to provide criteria and a framework for adequate procedures regarding, for example, division and delegation of work, including assigning work to the private sector, or regarding citizens' rights of administrative appeal against a decision they feel to be unjust? I would suppose that the second is correct and that, therefore, both Commissioner and Director-General should bear co-responsibility for these matters, albeit that the Commissioner alone would be answerable to Parliament. The matter is of special importance in the case of financial management (see infra 5.3).

5. The European Parliament's control instruments.

Not unlike national parliaments, the EP has different functions. In the case of the EP there are four: (i) policy-making, that is, participating and influencing the preparation, adoption, implementation, and control of binding legislative acts; (ii) control, that is to call other institutions, bodies and agencies of the Union into account; (iii) the elective function, that is participating in the nomination and investiture of other EU institutions (Commission, Ombudsman); and (iv) system developing, that is participating in the development of the EU's constitutional system.[34] I will concentrate here on the control function, however not without saying that, in order to enhance the democratic legitimacy of the Union, the elective function of the EP in forming the Commission will have to be increased gradually in the way in which it is constructed in most of the Member States, that is in the way it functions in a parliamentary system.[35]

5.1. As between institutions, the *EP's control function* encompasses the following elements: the right of granting budgetary discharge to the Commission, putting oral and written questions to the Commission and the Council, hearing Commission officials (and national ministers) in parliamentary committees, holding public hearings, setting up temporary committees of inquiry, and discussing the EU's performance with the Council's presidency.[36] However, because of the shared powers structure between the EU and its Member States, the

[33] See A. Tomkins, "Ministers and Parliament" in *The Constitution after Scott: Government Unwrapped*, Oxford, Clarendon Press, 1998, at 25.

[34] This enumeration is taken from Andreas Maurer, "The European Parliament between Policy-Making and Control" in *Debating the democracy of the European Union* (B. Kohler-Koch and B. Rittberger, eds.) Rowman & Littlefield Publishers, Lanham, 2007, at 76-78. Hereinafter: *Debating Democracy*.

[35] On this subject, see Chapter 7 in my book supra n. 5; also, with modifications and additions, "Which Form of Accountable Government for the European Union?" in 36 *Netherlands Yearbook of International Law*, 2005, 227-258.

[36] *Debating Democracy*, supra n. 34), at 77 where those functions are further described at 93-97.

EP's control function will necessarily have to be exercised as closely as possible in cooperation with the Member State parliaments.[37] That is particularly true in recent years because of the enhanced role which an increasing number of networks of national regulators play, in cooperation or consultation with the Commission, in the formulation, implementation and application of EC legislation in specific areas, such as competition law, but now also in the implementation of EC rules in the Member States through national laws, as in the field of securities markets (the so-called Lamfalussy process).[38] The latter is of particular importance because of the creation therefore of a network of national regulators' networks, CESR, which takes strong action to make national implementation in the now 27 Member States as convergent as possible – a matter reserved to the Member States and therefore subjected to the control of national parliaments. If the latter do not exercise this control function, jointly, large parts of policy and law making may escape any parliamentary control (see also infra at 5.2).

For an outsider it is difficult to assess the value of the different kinds of control instruments. According to recent empirical research, a major consequence of the strengthening of the EP's legislative powers is a strong decrease in the number of non-legislative initiatives, such as urgency resolutions and own initiative reports. Because these are instruments which reflect awareness and interest of individual MEP's and of Euro-political parties, this decrease is seen to result in a lesser visibility of individual members and of political groups other than the two largest – whose votes are required to obtain an absolute majority for legislative measures and remain therefore on the front scene.[39] If that is so, it is time to re-orientate the parliamentary work to non-legislative activities, that is mainly, to its function to control the executive. In what follows, I will focus on three 'control' issues: cooperation between parliaments, budgetary discharge and temporary committees of inquiry.

5.2. The relationship between *European and Member State parliaments* has not been easy going at all times -- and this although mutual learning and cooperation are of crucial importance and will become even more in the future. It is of crucial importance because of the deep involvement of Member States, their parliaments and administrations, in the adoption and implementation of EC laws and policies through the Council - still the most prominent part of the legislative and, together with the European Council, of the policymaking functions in the Union taken as a whole. As such, that is *as a college*, the Council – *a fortiori* its supporting bodies, starting with the Committee of Permanent Representatives and the numerous working parties underneath it – is *not* submitted to a *full-fledged* parliamentary control, either at Union or at national level (see above and below). This particular "overarching democratic deficit" can only be remedied through a close cooperation between the European and Member State parliaments. Actually, the effectiveness of cooperation between the EP and its counterparts in the Member States, some unitary, others federal, depends to a large extent on the traditional role which each of them plays or has played on the national scene, and therefore on the balance of power inside the national system between parliament and government, mainly with regard to the role of parliament in controlling the

[37] On the role of national parliaments, see Katrin Auel and Arthur Benz, "Expanding National Parliamentary Control: Does It Enhance European Democracy?" in *Debating Democracy*, supra n. 34, at 57-74.

[38] An example of the first is the European network of competition authorities of the Member States set up, pursuant to Article 11 of Council Regulation 1/2003 on Competition, to organize close cooperation between the Commission's Competition Directorate General and the Member State competition authorities; an example of the second is the Committee of European Securities Regulators (CESR) set up by a Commission Decision of 6 June 2001, to serve as an independent body for reflection, debate and advice for the Commission in the securities field. See further my contribution to NYIL, supra n. 35, at 254-255.

[39] Thus A. Maurer, supra n. 34, at 58 where further in the article the role of the British House of Commons, the Danish Folketing and the German Bundestag is examined: at 62-69.

executive in general and, more specifically, in the conduct of foreign affairs.[40] And indeed, empirical research tends to shows that "the actual power of national parliaments in the European multilevel system depends not only on their institutional rights to participate in and to scrutinize European policy-making but, more importantly, on the strategic use they make of these rights."[41] Moreover, with the growth of independent agencies, some with regulatory allures, and, as mentioned above (at 5.1 above, second paragraph), also of independent networks of national regulators, in this case to accompany these European agencies, the creation of a *joined network of European and national parliamentary accountability control* is urgently needed. Like the Council itself, such networks may, as a body, very well escape any parliamentary control -- and, unlike the Council, may escape judicial control as well.[42] In this respect there may be a role for the Conference of European Affairs Committees (COSAC) – although for an outsider it is not clear how useful an instrument COSAC is.[43] What is clear, however, is that there is an important gap here and that somehow, somewhere an initiative must be taken to fill it.

5.3. *Budgetary discharge* to be given by the EP to the Commission -- on a recommendation from the Council -- in respect of the implementation of the budget is a powerful weapon in that Parliament's refusal to give discharge constitutes a clear political signal. Through it, Parliament may want "to press for policies which it favours and to improve its own position in the Community's constitutional hierarchy."[44] However, it falls short of a political nuclear weapon because, although the Commission may be dismissed as a result, that can only happen if a motion of censure is passed by the Parliament in accordance with the strict procedure and majority requirements set forth in Article 201 EC. In actual practice, discharge has been provisionally refused, or postponed, at several occasions, but has never led, directly, to dismissal of the Commission.[45]

The parliamentary control of the Union's financial management is, once more, clearly a joined matter for the European and national parliaments, as is provided in Article 274, par. 2, EC - itself a concrete application of Article 10 EC. On several occasions the European Parliament, at the initiative of its committee on budgetary control, has emphasized with regard to the implementation of the budget, that, in the wording of one of successive discharge resolutions, "it recognises … that whilst the Commission has sole responsibility under the Treaty for implementing the budget, four out of every euros in the budget are in reality handled by the member States under shared management."[46] And has pointed out, in another resolution, "that, in accordance with Article 274 of the EC Treaty, each and every one of the Member States must fully shoulder its management responsibilities and take appropriate steps to minimise the risk of errors arising in the underlying transactions". In that context, the EP has strongly insisted on the need for introducing *national management declarations* in which the Member State concerned produces an assessment concerning the compliance of its management and control systems with the regulations of the Community. So far, only a few

[40] See Carol Harlow, *Accountability in the European Union*, Oxford University Press, 2002, at 85-107
[41] K.Auel and A. Benz in *Debating Democracy*, supra n. 34, at 58.
[42] What is meant here is that some networks of regulators, like CESR (supra n. 37), are as a 'college' not submitted to European parliamentary or judicial control -- for not being a European body - nor to parliamentary or judicial control in a Member State -- only the individual member from a Member State may eventually be submitted to parliamentary and judicial control in that State.
[43] On COSAC, see C. Harlow, supra n. 40 at 103 and 105. See also, in a broader context: W. van Gerven, supra n. 5, at 365-366.
[44] P. Craig & G. De Búrca, *EU Law*, Oxford UP, 3rd. ed., 2003, at 108.
[45] For a list see K. Lenaerts & P. Van Nuffel (R. Bray, ed.), supra 17, at 499, fn. 601.
[46] 2004 discharge resolution: Mr Jan Mulder, at no. 13.

Member States (Netherlands, United Kingdom and Sweden) have indicated that they welcome this initiative. Accordingly, the EP calls on the *national parliaments* "to discuss the introduction of national declarations and to inform the house of the outcome of this discussion." [47] National declarations of assurance are needed to allow the Commission to assume, together with the Member States, political responsibility for the *whole* of the EU's financial management – which, needless to say, does not prevent Member States, and their parliaments, from bearing prime responsibility for the use of *their* share of EU funds. [48] In law and in fact, these declarations give flesh and bone to the duty of Member States imposed by Article 274 (2) EC "to cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management." They should allow the Commission to better monitor the Member State performances and discover insufficiencies, possibly irregularities, and to hold them clearly responsible, and facilitate an action in Court on the basis of Article 226 EC, when reality does not correspond to what the Member State has declared.

Besides national declarations, there is also the Commission's own assurance that it can take political responsibility for the EU's financial management. This assurance finds its expression in the annual activity reports presented by each of the Directors-General and the declarations on the quality of internal controls signed by each of them. These documents allow the Commission to present a *Synthesis Report* – this synthesis being, in the words of the Commission, "the apex of the Commission's accountability architecture" while the annual activity reports "constitute the pillars".[49] In the Commission's own words: "By adopting this synthesis, the Commission *assumes* its political responsibility for management by its Directors-General and Heads of service, on the basis of the assurances and reservations issued by them in their annual activity reports …" (italics added)[50] The expression "assumes its political responsibility" adds high value to the discharge procedure. It means, in my opinion, that the Commission, without further ado, takes on itself as a college, and thus collectively, the political responsibility -- that is, including the possibility of being dismissed by Parliament in accordance with the procedure of Article 201 EC -- for the full content of the assurances (and reservations) given and signed of by its Directors-General. The expression bridges the distance between policy and implementation (cf. supra 4.4), making the competent Commissioner and Director-General jointly responsible and, trough the Synthesis report and the underlying annual activity reports, the whole Commission and its Directors-general. To be sure, for all its strength, the expression "assuming political responsibility" should not be understood as an encouragement for Parliament to resort easily to the 'ultimum remedium' of Article 201 EC. That should be the case only when the concrete circumstances of the event are such that Parliament (i.e., two-thirds of the votes cast representing a majority of its members) has *lost confidence* in the incumbent Commission to a point that it wants the *whole* Commission to go (see also supra 1.3, where lesser sanctions are named).

5.4. As already mentioned, Article 193 EC provides that " [i]n the course of its duties the European Parliament may, at the request of a quarter of its Members, set up a *temporary Committee of Inquiry* to investigate, without prejudice to the powers conferred by this Treaty on other institutions or bodies, alleged contraventions or mal-administration in the implementation of Community law, except where the alleged facts are being examined

[47] 2005 discharge resolution, rapporteur: Mr Salvador Garigga Polledo, at nos. 23-30.
[48] 2004 discharge resolution, supra n. 46, at nos. 15-18; 2005 discharge resolution, supra n. 47, nos. 19-30 where national parliaments and COSAC are asked to discuss the introduction of national declarations.
[49] COM(2006) 277 final, at p. 4, third paragraph.
[50] Ibid, second paragraph.

before a court and while the case is till pending to legal proceedings … The detailed provisions governing the exercise of the right of inquiry shall be determined by common accord of the European Parliament, the Council and the Commission." (emphasis added). [51] These provisions have been applied for the first time in 1996 to look into transit fraud in the EU[52], and a second time, after detailed provisions for holding inquiries had been laid down in an inter-institutional agreement between the European Parliament, the Council, and the Commission of 19 April 1995,[53] to examine the spread of BSE ("mad cow disease").[54] The second inquiry has led to important reactions from the Commission, under pressure of the EP which had warned the Commission that, if the Committee's recommendations were not carried out within a reasonable deadline and in any event by November 1997, a motion of censure would be tabled.[55] As a result, the Commission's Directorate General underwent significant changes and, even more basically, a fundamental change of the legal basis for EC legislation in the field of veterinary medicine was agreed at the 1996/97 IGC.[56] On the negative side, some difficulties arose mainly because of the lack of coordination or even interaction between the European inquiry and a parallel U.K. inquiry,[57] showing again that there is an urgent need for adequate cooperation between Union and national levels.[58]

5.5. Committees of inquiry are an example of how lessons can be learned from Member States, in this case the U.K. and Ireland where tribunals of inquiry are used to scrutinize complex cases of ministerial misconduct, and are seen as an essential device to interrogate cabinet ministers, including the prime minister, and civil servants.[59] It is a flexible (but expensive) instrument, as it is for the chairman, usually a senior judge, to decide how to conduct the inquiry, whom to call as witnesses and how long the inquiry will take. As mentioned above, the instrument is also available under Community law. Strangely enough - probably because of political deadlock, at the time, between the two major political parties[60] - and also regrettably, the procedure of Article 193 EC was not followed by the European Parliament in 1999 to investigate the allegations raised in Parliament against members of the *Santer* Commission (section 3 above). "Regrettably" - because it might have prevented the Commission from resigning voluntarily and immediately after the report came out and, instead, might have induced the Commission to appear before Parliament to answer questions, justify its behaviour and, eventually, contradict the committee's findings, or some of them. That could have constituted a precedent for the future and have provided an important tool for the European and national parliaments –where appropriate acting jointly - to exercise their

[51] It is for the European ¨Parliament to determine the composition and the rules of procedure of these committees: K. Lenaerts and P. Van Nuffel, supra n. 17, at 398.
[52] European Parliament, Report of the Committee of Inquiry into Community Transit System, A4-0053/97 (19 Feb. 1997); [1996] O.J. C7/1; identical version in C17/47
[53] Decision 95/167/EC, Euratom, ECSC of the European Parliament, the Council, and the Commission of April 19, 1995 on the detailed provisions governing the exercise of the European Parliament's right of inquiry, [1995] O.J. L113/2, appended to the EP Rules of Procedure as Annex VIII. See for a short overview, with references, K. Lenaerts and P. Van Nuffel , supra n. 17, at 397-398.
[54] [1996] O.J. C239/1. On this inquiry, see Carol Harlow, supra n. 40, p. 99-100; also, and more recently, Andreas Maurer, supra n. 34, at 95-96.
[55] A. Maurer, supra n. 34, at 96.
[56] Ibid., and C. Harlow, supra n. 40, at 100.
[57] C. Harlow, supra n. 40, at 100.
[58] Recently, the procedure has been used again to investigate "the crisis of the Equitable Life Assurance Society" in which case a resolution was adopted on 19 June 2007.
[59] A recent illustration is the tribunal set up to inquire into the suicide of Dr. Kelly, the British expert who had said to a journalist that the Blair administration was responsible for consciously misleading the public on the issue of weapons of mass destruction in Iraq. See W. van Gerven, supra n. 5, at 74.
[60] See S. Douglas-Scott, supra 21, at 71-72.

control function in an efficient manner. Moreover, the use of Article 193 EC instead of an ‘ad hoc’ procedure would have made it unnecessary for the Committee of independent experts to examine its own status and jurisdiction at some length (see points 1.2.1 to 1.2.6 of the first report.

Leuven, September 11, 2007.