The Changing Role of the European Council in the Institutional Framework of the European Union
Frederic Eggermont

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Consequences for the European Integration Process
Frederic Eggermont


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DEDICATION

This doctoral dissertation is dedicated to the late Professor Gabriel Wilner, former Executive Director of the Dean Rusk Center for International, Comparative and Graduate Legal Studies of the Law School of the University of Georgia, who was a dear friend and mentor.
ACKNOWLEDGEMENTS

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COMMON ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<tr>
<td>COREPER</td>
<td>Committee of Permanent Representatives of the Member States</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<tr>
<td>ECU</td>
<td>European Currency Unit</td>
</tr>
<tr>
<td>ESDP</td>
<td>European Security and Defence Policy</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EMS</td>
<td>European Monetary System</td>
</tr>
<tr>
<td>EMU</td>
<td>Economic and Monetary Union</td>
</tr>
<tr>
<td>EPC</td>
<td>European Political Cooperation</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EURATOM</td>
<td>European Atomic Energy Community</td>
</tr>
<tr>
<td>HSG Council</td>
<td>Council in composition of the Heads of State or Government</td>
</tr>
<tr>
<td>IGC</td>
<td>Intergovernmental Conference</td>
</tr>
<tr>
<td>JHA</td>
<td>Justice and Home Affairs</td>
</tr>
<tr>
<td>PJCCM</td>
<td>Police and Judicial Cooperation in Criminal Matters</td>
</tr>
<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>WEU</td>
<td>Western European Union</td>
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INTRODUCTION

It in fact all started during spring 2004 in the coffee-house Blue Sky in Athens, Georgia (United States) where Professor Tony Joris and I discussed possible topics for a future Ph.D., once I had obtained my LL.M. He proposed examining the European Council, a topic that immediately drew my attention. Today, and years later, Blue Sky has disappeared but I possess two things that give me good memories of that wonderful place: a coffee-cup purchased there and this doctoral dissertation.

This dissertation is intended to provide the reader with a picture of the European Council’s creation, composition, competences and functioning. It also aims to provide an analysis of the interactions of the European Council with other institutions and actors of the European Union (hereinafter ‘EU’). But the main goal of the dissertation is to identify the various roles of the European Council in the EU decision making process.

Writing about the European Council is not an easy task due to the closed character of its meetings. Nonetheless, most sessions end with written conclusions which are a tangible object for examination. Already Jan Werts¹ and Béatrice Taulègne² had studied the European Council in great detail, but nobody had ever taken the time to examine in what manner European Council conclusions have been used in the decision making process of the European Union. Besides, the doctoral dissertations of Werts and Taulègne dated from 1993 (during the period of the entry into force of the Treaty on European Union (hereinafter ‘EU Treaty’)) and a lot of things have happened in the meantime (just think about the entry into force of the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon).

After careful consideration and study, I decided to focus my Ph.D. on the delimitation of the European Council in the institutional structure of the EU and answer two main research questions. First, what is the relationship between the European Council and the other EU institutions? Second, what are the various roles of the European Council

in the EU decision making process? The results of this dissertation will show that European Council conclusions have been used extensively in this decision making process, and this merely increased over time.

1. What is the relationship between the European Council and the EU institutions?

The Report on European Institutions, presented by the Committee of Three to the Dublin European Council of 29–30 November 1979, foresaw that the European Council “should not erode the competences of [the] institutions. It should help them work better, by giving encouragement, coherence and an overall direction to their efforts”.3 However, the question is whether the European Council has not, in effect, eroded the competences of the other EU institutions, and more specifically of the Council, the Commission and the European Parliament. Judgments of the Court of Justice of the EU which are relevant for the topic of this research are also examined.

Council

Since the Treaty establishing the European Economic Community (hereinafter ‘EEC Treaty’) stated that the “Council shall consist of representatives of the Member States”,4 it was possible for the European Council to sit as a Council for the reason that both had the same composition. Indeed, the Heads of State or Government are considered the highest representatives of the Member States. However, the Heads of State or Government had not the intention to modify their Summit meetings into rigid Council sessions, and since the entry into force of the Single European Act (hereinafter ‘SEA’) the European Council and the Council have a different composition: the Commission President is a member of the European Council but not of the Council. The same applies today to the European Council President.

Has the Council lost a great part of its significance due to the appearance of the European Council? Is the Council, due to the European Council, not bound by the coercion to find compromises within the time limits set by the European Council?5 More and more, the European Council spends its time dealing with issues which in fact have to be handled at the level of the Council.6 This is, of course, not only detrimental to the European Council’s specific impetus giving role, but it also triggers a certain automatic reaction within the Council to forward all difficult issues to the European Council, instead of trying to find a solution itself. The Council came even under more

4 Art. 146 EEC Treaty.
5 See Franklin Deshousse and Jordi García Martínez, “La politique européenne d’immigration et d’asile”, 55 Studia diplomatica 1, 91 and 98 (2002).
pressure with the open method of coordination. This method placed the actual decision making and guidance role in the hands of the European Council and not in those of the Council.

**Commission**

The Commission never opposed the European Council (nor did it oppose the Summit meetings which were held before the establishment of the European Council) because it saw in the system of the Summit/European Council meetings an opportunity to put the Community integration (back) on track. With time, it appeared that the Commission increasingly started to depend on the impetus giving role of the European Council. As such, it forfeited its sacred role as instigator of the European integration process. It also has to be examined if the European Council provided an opportunity for the Commission to use European Council conclusions in the Commission's interaction with the Council in the formal EU decision making process.

If not provided otherwise in the EU Treaty or the Treaty on the Functioning of the European Union (hereinafter "TFEU"), agreements in the European Council are made by consensus. This means that no accord can be made as long as the Commission President is opposed. Besides, the more the European Council becomes involved in European policy making, the more the Commission, due to the presence of its President in the European Council, is involved in that policy making.

**European Parliament**

Although the European Parliament initially saw the establishment of the European Council as something positive, it considered the fact that the Commission sent communications to the European Council, instead of proposals to the Council, a thorn in its flesh, because unlike proposals, such communications do not have to be submitted to the European Parliament.

In its 1981 resolution on the role of the European Parliament in its relations with the European Council, the Parliament stressed that the European Council, whenever it acted as a Council, should abide by the established procedures for consultation and conciliation. The European Parliament also demanded that the European Council would keep it regularly informed of the proceedings and the subjects discussed at its meetings, and that the presiding Council President would take part once a year in a general debate in the European Parliament on the role of the European Community.

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7 Under the open method of coordination, Member States have to coordinate their national policies towards one or more common objectives. During this process, Member States are evaluated at regular intervals.
(hereinafter ‘EC’) in international politics and on the progress towards European integration (see current Article 15, §6(d) EU Treaty, which states that the President of the European Council has to present a report to the European Parliament after each of the meetings of the European Council). The European Council was requested to forward to the European Parliament a written communication on these issues one month before a joint debate that could be linked to the debate on the Commission’s annual report.10

**Court of Justice**

Some judgments of the Court of Justice, such as *Federal Republic of Germany v. European Parliament and Council* (13 May 1997),11 *Roujansky v. Council* (14 July 1994),12 and *Commission v. Council* (13 July 200413 and 20 May 200814), will be examined to see in what manner European Council conclusions are used in deciding cases.

2. What are the various roles of the European Council in the EU decision making process?

It has never been thoroughly examined in what manner European Council conclusions have been used in the EU decision making process. That these conclusions are at times an important reference is shown by the following example.

In order to enable European citizens and companies to derive full benefit from the setting up of an area without internal frontiers, the EU can identify trans-European transport projects of common interest.15 According to the TFEU, these projects have to be selected using the ordinary legislative procedure (codecision under the former EC Treaty).16 However, in 1994 the identification of trans-European transport projects was made by the Corfu and Essen European Council meetings of 24–25 June and 9–10 December 1994 respectively.17 The European Council had taken the lead from the beginning, although, taking into account that the codecision procedure had to be followed, the procedure had to start with a proposal of the Commission.18 This had been the case, but the Commission was fast to amend its initial proposal after the Essen European Council of 9–10 December 1994 which had taken the final decision on the priority projects.

10 Id., §3–4.
15 Art. 129c, §1, first indent EC Treaty (Maastricht); ex art. 155, §1, first indent EC Treaty; current art. 171, §1, first indent TFEU.
16 The European Parliament and the Council decide on the basis of a Commission proposal.
18 Art. 189b, §2 EC Treaty (Maastricht); ex art. 251, §2 EC Treaty; current art. 294, §2 TFEU.
In many instances, European legislation refers to European Council conclusions, but in what specific fields of European policy making European Council conclusions have been an important reference for the other EU institutions in the decision making? By identifying and examining these policy fields we will be able to provide a typology of the various roles of the European Council in the EU decision making process.

In addition, although according to the text of the EU Treaty before the entry into force of the Treaty of Lisbon there was no involvement of the European Council in the enlargement process, the latter has established different criteria that have to be fulfilled by candidate Member States in order to enter the EU. Are these criteria really a reference when the EU institutions, which have actual treaty competence to decide on accession criteria, have to make the final decision?

The European Council is also involved in the actual decisions allowing a state to become a member of the EU. The reaction of the Spanish government in the face of the coup d’état of 23 February 1981 under the command of Colonel Antonio Tejero convinced the Maastricht European Council of 23–24 March 1981 that Spain could now accede to the European Economic Community (hereinafter ‘EEC’). 19 When the Copenhagen European Council of 21–22 June 1993 took note of the progress in the enlargement negotiations with Austria, Finland, Norway and Sweden, the European Council also determined that the enlargement with those Member States had to become a reality by 1 January 1995. 20

The same applies for the treaty revision procedure of Article 48 EU Treaty. The European Council was not involved in that procedure, according to the EU Treaty until the entry into force of the Treaty of Lisbon. However, political reality showed otherwise. The European Council is involved in calling the Intergovernmental Conference (hereinafter ‘IGC’) and decides on its agenda, but to what extent European Council conclusions arrange the outstanding important political issues? Or is it in fact not the European Council, but the Heads of State or Government who decide on this matter?

In answering our two research questions, one has to take into consideration that there is no linear relationship between the European Council and EU decision making. It is not because the European Council adopts conclusions that these immediately form the basis of a Commission proposal which in the end will be approved by the European Parliament and the Council. Sometimes, the initiative is not in the hands of the European Council but in those of the Commission, and the European Council merely gives its support to the Commission (communication/proposal).

The European Council is a very complex EU institution because the meetings are not public and there are no minutes of the meetings available for research. However, this

does not prevent that the manner in which European Council conclusions are used in EU decision making is examinable. Although the written results of the meetings of this EU institution are conclusions of the European Council (in fact of the Council Presidency until the entry into force of the Treaty of Lisbon), one should be aware that the Heads of State or Government and the Commission President do not always discuss in their meetings all the matters which are written down in the conclusions. In other words, European Council conclusions are in no way always the product of the European Council. In addition, the reader should not be given the impression that there is a strict procedure to be followed by the European Council. Often the European Council reaches agreement on a sensitive issue in the middle of the night after hours of tactical and political machinations full of intrigue. In no way this dissertation intends to provide an overview of the discussions during the meetings, of the failed meetings, of the tensions and even the fights at these sessions, sometimes with bad compromises as result. Thus, the political games during a European Council session are outside the scope of this research.

In the first part (Part A), the European Council will be clearly delimited abreast the institutional structure of the EU (and the former Communities). This entails that the European Council will be examined from a historical perspective (Chapter I) starting with the Summit meetings until the European Council under the Treaty of Lisbon. This will be followed by Chapter II on the composition of the European Council. Understanding its composition will help to define the European Council’s changing place in/outside the institutional structure of the EU. Once the place of the Summit meetings and the European Council has been defined, their competences and functioning throughout the whole period examined (1961–today) will be studied (Chapter III), including the provisions of the Treaty of Lisbon of 2007.\footnote{The Treaty of Lisbon was originally called the ‘Reform Treaty’, but it is tradition that treaties are called after the city in which they are signed.} It is not possible to describe the European Council’s functioning without giving special attention to the appearance of informal European Council meetings which were not described in the EU Treaty.

The second part (Part B) will examine the European Council’s relationship with the other EU institutions and actors. While examining the manner in which European Council conclusions were used in EU law making, it will also be observed in what way this EU institution got involved. An in depth analysis of the relation between several institutions of the EU (Council, Commission, European Parliament and Court of Justice) and the European Council will be performed (Chapter I). Finally, Chapter II will pay attention to the relation between the IGC and the governments of the Member States on the one hand, and the European Council on the other hand.

The third part (Part C) will study European Council conclusions in law and policy making in the EU in order to answer on the second research question. EU law based on European Council conclusions will be investigated. With respect to policy areas where
the Commission has an exclusive right to submit proposals, only binding secondary legislation, namely regulations, directives and decisions will be examined; no attention will be given to non-binding secondary legislation, such as resolutions, opinions and recommendations, unless they are relevant.

Through an intensive examination of the text of these acts using databases such as EUR-LEX, OJ, PreLex, documents of the individual institutions and bodies, references to the European Council are analysed. Once archived, these acts are subsequently examined on the way European Council conclusions were a reference for the other institutions in the decision making process. The influence of European Council conclusions will not be (statistically) measured (this is something which belongs to political sciences). This means that this research does not aspire to establish an impact scale from one to ten because this cannot be automatically deduced from the empirical results, but it will indicate, in a reliable manner, when European Council conclusions have been used in the decision making process as described in the Treaties. A substantive amount of literature will be referred to, so that acts without reference to the European Council but which actually have been based on European Council conclusions, can be spotted.

In this way, based on a textual analysis of European Council conclusions and legal texts, a typology will be created to provide an orderly picture of the European Council’s various roles: allocating budget funds (Chapter I), political initiator (Chapter II), interpreter of the Treaties (Chapter III), European (economic) government (Chapter IV), implementation of decisions (Chapter V), establishing bodies (Chapter VI) and appeals council (Chapter VII). In order to make a complete analysis of European Council conclusions in law and policy making in the EU, Chapter VIII will deal with the European Council in the CFSP, Chapter IX with the European Council in the area of freedom, security and justice, Chapter X with the European Council’s involvement in individual decisions and Chapter XI with the European Council’s involvement in relations with Member States and third countries.

Once again it should be clearly kept in mind that this is a legal dissertation and that, by no means, we intend to measure the influence of the European Council on the formal decision making process. The identification of a typology is based on the study of legislation in which reference was made to the European Council conclusions during the decision making process. The typology is thus based on the exhaustive list of policy areas which could be identified, by using the aforementioned methodology in which European Council conclusions have played an important role, namely: financial perspectives, Economic and Monetary Union (hereinafter ‘EMU’), environment, regional development, social development, transport, growth and employment, services, utilities market, transparency, subsidiarity, simplification of EU legislation, Charter of Fundamental Rights, savings tax directive, the CFSP and the area of freedom, security and justice.
For clarity, whenever reference is made to the EU Treaty and the TFEU in the footnotes, the Article as it was applicable under the Treaty of Nice (referring to the consolidated version of the EU Treaty and the Treaty establishing the European Community as published in OJ CE 321/1 of 29 December 2006) will be mentioned too, insofar as this is appropriate (the word ‘ex’ will be placed before that Article). For example: art. 171, §1, first indent TFEU (ex art. 155, §1, first indent EC Treaty). In case the word ‘Maastricht’ or ‘Amsterdam’ is used, this means that reference is made to an Article as it was applicable respectively under the EU Treaty (referring to the EU Treaty published in OJ C 191 of 29 July 1992 or the consolidated version of the Treaty establishing the European Community as published in OJ C 224 of 31 August 1992) or the Treaty of Amsterdam (referring to the consolidated version of the EU Treaty and the Treaty establishing the European Community as published in OJ C 340 of 10 November 1997).

For example, reference ‘art. 102a EC Treaty (Maastricht); ex art. 98 EC Treaty; current art. 120 TFEU’ means that the Article referred to in the text is art. 102a EC Treaty as applicable under the EU Treaty (Treaty of Maastricht). Article 102a EC Treaty (Maastricht) was later on Article 98 EC Treaty under the Treaty of Nice, but is today (under the Treaty of Lisbon) Article 120 TFEU.

When in a footnote the following reference is made: ‘art. 153 TFEU as amended by art. 2.116 Treaty of Lisbon’, this means that Article 153 TFEU is used as it has been formulated by Article 2.116 Treaty of Lisbon.

The suggestions to amend the Treaties, which are discussed in the conclusions, are listed in the Annex.

Although in the coming years and even months a number of noteworthy innovations and changes in the European Council’s practice will take place (this is the risk of examining a moving target such as the European Council), all things have to end. The doctoral dissertation is up to date until 1 September 2011. In a couple of years somebody else can pick up where I left off…