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The European Council after Lisbon: A review article

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Abstract

This contribution deals with the role of the European Council in the institutional framework of the European Union, as it has been laid down by the Lisbon Treaty. It focuses on its rising influence, even beyond the wording of the Treaty, and the increasing criticism stimulated by this evolution. In reviewing the main relevant issues and critical viewpoints related to the European Council, some aspects are considered in depth: the increasing institutionalisation of the European Council and its critical position with regard to the management of the economic and financial crisis and to the ongoing process of “politicisation” of the Union. The discussion also considers comparative constitutional data and organic proposal of reform of the institutional architecture of the EU.

Key-words

European Council, President of the European Council, intergovernmentalism, politicisation of the European Union, comparative federalism



1. Introduction

This contribution deals with the role of the European Council in the institutional framework of the European Union, as it has been laid down by the Lisbon Treaty. It will consider its rising influence, even beyond the wording of the Treaty, and the increasing criticism stimulated by this evolution. In reviewing the main relevant issues and critical viewpoints related to the European Council, some aspects will be considered in depth: the increasing institutionalisation of the European Council and its critical position with regard to the management of the economic and financial crisis and to the ongoing process of “politicisation” of the Union. Can it plausibly serve as collective “head of state” of a federalised polity? Should an effectively “politicised” Union relativize the role of the European Council? The discussion will also consider comparative constitutional data and organic proposal of reform of the institutional architecture of the EU.

2. Problematising the European Council

The proper place and role of the European Council within the institutional system of the Union is typically subject to never-ending dispute. Far from settling this issue, the Lisbon Treaty, which has explicitly included the European Council among the institutions of the Union at Art. 13(1) TEU, has intensified controversy. The management of the economic and financial crisis – which coincides, in chronological terms, with the existence of the “new” European Council and Herman Van Rompuy’s term(s) in office – has further complicated the overall picture, thus revealing the persistent flaws of the Lisbon constitutional settlement. As a consequence of this, it might be argued that doubts about (or open criticism of) the European Council can be traced back to three main arguments: (i) the unsatisfactory features of its institutionalisation under the terms of the Lisbon Treaty; (ii) recurrent distrust of intergovernmentalism, of which the European Council is the most obvious personification; (iii) anxiety for the current constitutional arrangements in the area of the coordination of economic policies.

The first point is directly related to the distinctive features of the Lisbon Treaty. In spite of having the ambition to put an end to the semi-permanent Treaty revision process



(as defined by De Witte 2002), the Lisbon Treaty clearly reflects the “tradition” of EU constitutional law (Besselink 2008; Martinico 2011: E68 f.). The Treaties have been said to be a “snapshot” or an “achievement” constitution (Carrozza 2007): they provide a rationalisation of the state of affairs rather than serving as a blueprint for further development. This is particularly true for the European Council: prior to the coming into force of the Lisbon Treaty, the European Council was not part of the institutional framework of the Union, at least in strictly formal terms. This may also have been the reason why the European Council has only received intermittent attention in legal scholarship (as critically observed by Vogiatzis 2013: 1663). The Lisbon Treaty has institutionalised the European Council and provided it with a semi-permanent, full-time President, clearly distinct from the rotating President of the Council. Does the Lisbon settlement measure up to the mandate for the Intergovernmental Conference in 2007, which mentioned the enhancement of the efficiency and democratic legitimacy of the enlarged Union¹?

A clear shortcoming of the Lisbon Treaty concerns the *functions* of the European Council, which are not presented in a satisfactory way; as will be shown later, the internal *structure* of the institution has been subjected to reform proposals too. According to Art. 15(1) TEU, “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”. The wording of this Treaty provision is hardly in accordance with the way the European Council acted before the entry into force of the Lisbon Treaty (and has acted since). According to a widespread opinion, the European Council is the body which *leads the Union* (Editorial Comments 2009: 1383). Leading the European Union cannot be reduced to the (altogether important) function of defining general political directions and priorities. The hiatus between legal provisions and constitutional practice has further increased since 2009, as the European Council has showed an explicit willingness to take over a role of active direction in the management of the crisis (Schoutete 2012: 11). On 25 March 2010, the heads of state or government of the Member States of the Eurozone issued a statement in which they held that “the European Council must improve the economic governance of the European Union”ⁱⁱ. They also proposed “to increase its role in economic coordination and the definition of the European Union growth strategy”ⁱⁱⁱ. All those formulation hint at a willingness to intervene directly and decisively in the EU’s political direction. They also



point out a fundamental transformation. The first steps of the European Council and its ability to play a leading role have historically been related to economic or constitutional crises (think e.g. of the oil shock in the 1970s). Contingency, rather than permanency and stability, has been a key factor in shaping the peculiar nature of the European Council (see, inter alia, Wessels 1981, Bulmer 1985, and Bulmer 1996). Now its institutionalisation seems to announce a different approach, more confident in its own resources and less dependent on the outbreak of crises.

The second point has a longer story. The first meetings of the European Council in the mid-1970s were surrounded by the deep scepticism of partisans of the Community method (concentrated above all in the three smaller Benelux countries): in fact, a meeting of the heads of State or government of the Member States had been a recurring request of Gaullist France, aiming at providing the Communities with a clearly *political Directoire* (Werts 2008: 3). In this regard, an interesting paradox should be pointed out. In recent times, the discretionary appointment of the President of the Commission by the European Council – and the (supposedly) excessive involvement of the latter in Europe’s day-by-day business – has been seen as the major obstacle to the politicisation (meant as parliamentarisation) of the EU. In the 1970s, however, the organisation of regular summits of the heads of State or government was perceived by the French government as a way of politicising the Communities and providing them with more effective impetus than the allegedly technocratic approach of the Commission could ever do. This trend was further encouraged by the Maastricht Treaty, which “fundamentally increased the significance of the EU for European governments: member states have extensively extended the scope of dealing with public policies and differentiated their modes of governance” (Wessels 2012: 765).

In fact, both the origins of the European Council – in which Jean Monnet was no less influential than President Giscard d’Estaing – and its subsequent action should have greatly relativised those alarmed claims (Mourlon-Druol 2010). The European Council played a crucial role in the creation of the European Monetary System, the resolution of budgetary disputed in the 1980s and the launch of further treaty amendments (Lewis 2013: 155). It should be added, however, that this was often possible thanks to the strong leadership of the then President of the Commission, Jacques Delors. This remark allows adding another clarification which strengthens this argument. There is no *necessary* contradiction between



what is known as Community method – centred on the main role of the European Commission – and European-Council-based intergovernmentalism. The President of the Commission is entitled to take part in the meetings of the European Council as a non-voting member (Art. 235(1) TFEU): hence the importance of his *effective* ability to influence the decision-making processes of the institution^{IV}. This was particularly evident under such a strong Commission President as Jacques Delors – or, conversely, under his weaker successors (Werts 2008: 51; Kassim 2012). Furthermore, political scientists have recently emphasised that the relationship between the European Council and the Commission would properly be described in terms not so much of *principal agent theory*, as of *competitive cooperation*: “in many cases the European Council – Commission relations are two way rather than purely top-down, and often collaborative rather than antagonistic” (Bocquillon and Dobbels 2014: 26). It is for the Commission – and its President – not to turn such collaboration into a top-down relationship. On the other hand, however, the establishment of a permanent President of the European Council can also be interpreted “as an attempt to reinforce the ability of the European Council to monitor the Commission and prevent agency drift” (*ibidem*).

An optimistic presentation of the relationship – and the proper balance – between Community method and intergovernmentalism is clearly present in the speech given by the German Federal Chancellor on 2 November 2010 at the college of Europe in Bruges: according to Angela Merkel, the possible synthesis between the two approaches may be labelled as “Union method”, which is properly described as “coordinated action in a spirit of solidarity”^V (see Rittelmeyer 2014: 39).

In recent years, however, a more and more perceptible shift has taken place – to the advantage of the European Council. A feeling of satisfaction with the status quo was clearly the dominant note in Angela Merkel’s address, whereas the former President of France, Nicolas Sarkozy, was more peremptory in saying that intergovernmentalism – and the European Council – should be clearly strengthened: “The crisis has driven heads of state and government to take on ever greater responsibility because ultimately it is they alone who hold the democratic legitimacy that permits them to take the decisions. The road to European integration is through intergovernmental relations because Europe will need to make strategic choices, political choices”^{VI}. Such proposal reflected a traditional French approach which has recently spread to Germany as well (Fabbrini 2013: 1012; see also



discussion by Padoa-Schioppa 2013b: 1001). In recent years, this view also relied on a gamble, whose stake was the ability of the European Council to drive the Union out of the crisis.

The third controversial point is the dominant role of the European Council in the management of the economic and financial crisis in the last five years or so. In this field, the rise of the European Council has been interpreted as the result of a bargain between Germany and France, whereby the former would accept the “French political paradigm” (see above) and the latter would adapt to the German-inspired economic paradigm based on financial stability (Fabbrini 2013: 1012). This role is particularly evident with regard to the European Semester. It is for the European Council, first, to adopt economic priorities for the EU based on the Annual Growth Survey between February and March. Those priorities are the basis for the country-specific recommendations issued by the Commission. The European Council, again, endorses those recommendations in Summer. Apart from this, another point which is worth mentioning in economic affairs is the shift of power from the Council towards the European Council and the instauration of a “dialogue” between the latter and the European Central Bank – which might make questions arise with regard to democratic accountability. Finally, the European Council has taken the lead in ensuring the compatibility of the European Stability Mechanism with the primary law framework, by amending Art. 136 TFEU by means of a simplified revision procedure^{VII}. Economic governance has recently been interpreted as a system of *deliberative intergovernmentalism*. This notion “highlights the dependency of policy co-ordination in the field of EU economic governance on policy deliberation” (Puetter 2012: 166): instead of focusing just on negotiation between Member States, deliberative intergovernmentalism is an approach which underlines “the paradoxical struggle for policy consensus in a decentralised policy framework” (Puetter 2011: 4).

The course of action followed by the European Council in this area, however, has been criticised for its limited effectiveness: be it Angela Merkel’s Machiavellian strategy of “hesitation” (*Merkiavellis Zögern*: Beck 2012) or a complacency ultimately resulting in “too little too late” (Spinelli Group and Bertelsmann Stiftung 2013: 11), intergovernmentalism seems not to have measured up to early expectations.



3. The semi-permanent President: flexibility to welcome?

The creation of the entirely new semi-permanent President of the European Council has been generally welcomed. Although the arguments in favour of a semi-permanent President which were used during the drafting of the Constitutional Treaty and then the Lisbon Treaty were hardly unquestionable^{VIII}, the establishment of a Presidency with a two-year-and-a-half term, providing the European Council with a more stable leadership, made it possible for the institution to work on the basis of a longer-term agenda (Blavoukos, Bourantonis and Pagoulatos 2007).

A second innovation can be labelled as “Europeanisation” of the European Council, whose leader is no longer the head of a national executive but a truly “European” figure. This Europeanising trend also affects the source of funding for the European Council, which now comes from the central EU Budget, and no longer from the Member State holding the rotating presidency (Lewis 2013: 155). As it occurs with the President of the Commission, the President of the European Council also has a cabinet at his disposal (Eggermont 2012: 31).

Being the result of a difficult compromise, however, this new institutional role is not without defects (Eggermont 2012: 31) – an analysis of its flaws is a way of assessing how much the current normative framework and its implementation have measured up with the underlying conception of the “new” European Council. These flaws primarily concern the legitimisation of the President of the European Council. The President of the European Council is *de facto* co-opted by his fellow members of the European Council (Art. 15(5) TEU). These have a clear democratic legitimacy in their capacities as heads of state or heads of government of their respective Member States (Art. 10(2) TEU)^{IX}. The “election” (according to the wording of the Treaty) of the President of the European Council is affected by the very same critical features which have long been observed with regard to the parliamentary election of heads of state: lack of formal candidacies (in the absence of explicit provisions which so require), lack of a public debate with a clear presentation of the main relevant stakes, and a general lack of transparency (Stradella 2013).

The election of the President of the European Council is a convincing example of how a selection procedure may influence the overall attitudes of the office-holder (and the expectations related thereto). Some official versions of the Treaties design the top officer



of the European Council as its President; the Dutch version, in turn, uses the term *voorzitter* (*chairman/Vorsitzender*): “This seems to indicate that a deliberate choice was made for the word with greater gravity. ... the prevailing vocabulary is a consciously presidential one. It may then be noted that the chosen term holds a certain promise, at least from a linguistic point of view, and that it might signify a more than auxiliary function” (De Waele and Broeksteeg 2012: 1046). Be that as it may, the President of the European Council is supposed to “endeavour to facilitate cohesion and consensus within the European Council” (Art. 15(6)(c) TEU) rather than taking forward a political agenda of his own.

The President of the European Council is a non-voting member of the body he presides over (just like the President of the Commission, indeed): this probably limits the potential for a more assertive presidency model (Dinan 2013: 1260). Being a “stateless” official without a constituency of his own, the President has to rely much more on his own personal and political skills than a national head of State or government normally does (Dinan 2013: 1269).

A variable on which the ability to act of the President of the European Council depends is the presence of a well-established “directory” within the body. More particularly, a strong Franco-German partnership, when existent, is normally able to play a dominant role within to European Council and to impair its President’s influence. This is what happened in the so-called “Merkozy” phase, which ended in coincidence with President Sarkozy’s electoral defeat in 2012. Nicolas Sarkozy’s successor, President François Hollande has not been able to rebuild so strong a partnership with the German Chancellor (Charlemagne 2012). On the other hand, this has considerably strengthened Herman Van Rompuy’s position: the end of a privileged cooperative relationship between the heads of government of Germany and France meant that consensus would not be built within the European Council on a stable basis, thus allowing the President to deploy his own mediation skills^x. Similar remarks can be made with regard to the attitude of the Member State holding the rotating presidency of the Council and his willingness to define policy priorities and broad orientations for the Union, thus overshadowing its semi-permanent counterpart at the European Council. In fact, this was truer when the Treaty of Lisbon had just come into force – by now, the distinction between these two functions is much clearer.

Another occurrence which has helped the first President of the European Council



affirm his position is the growing degree of asymmetry within the European Union and, more particularly, within its institutional system (Cantore and Martinico 2013). This, indeed, reflects a more general trend which studies in comparative federalism have consistently highlighted in the past few decades (Palermo 2007). For the purposes of this paper, the more interesting point is how policy asymmetry affects the structure and functioning of EU's institutions. Within the European Council, asymmetry can strengthen the coordination function of its President.

This view is confirmed by the informal establishment of the Euro summit within the European Council since March 2010. The activities of the Euro Summit have been more clearly formalised in October 2011^{XI}. Herman Van Rompuy was also designed as President of the Euro Summit. This led a number of commentators to argue that Van Rompuy's appointment was also due to his coming from a Eurozone Member State. This would clearly reduce "the already small pool of potential European Council presidents ... consisting in effect of current or former leaders of eurozone countries and current or former Commission presidents" (Dinan 2013: 1271). This forecast has been contradicted by the election of Donald Tusk, the sitting Prime Minister of Poland, as successor to Van Rompuy and new President of both the European Council and the Euro Summit. On the other hand, the designation of a President of the European Council and the Euro Summit from a non-Eurozone Member State may even be welcomed as a way of "taming" the impact of asymmetry at the top of the EU's institutional system.

At the end of this paragraph, we can tentatively state that the office of European Council President is inherently marked by flexibility. This has to do not only with the personal qualities of the office-holder – as it is generally typical of monocratic functions – but also with a number of additional circumstances.

4. Unifying presidencies

Before the formal launch of the "*Spitzenkandidaten* process"^{XII}, the constitutional debate in the EU was marked by a recurrent proposal aiming at improving the effectiveness of its institutional system without amending the Treaties. This could arguably be achieved by "unifying" the two main offices in the European Union, the presidency of the European Council and the presidency of the Commission (Pernice et al. 2012: 38; Oreja 2013: 19 f.;



Padoa-Schioppa 2013a: 8). Nothing in the Treaties prevents from strengthening the link between the two bodies by means of such personal union. The debate about whether to provide the European Council with a “single-hat” or a “double-hat” President had been one of the most heated ones at the Convention on the Future of Europe. Declaration no. 6 annexed to the Treaties makes it clear that the decision in favour of a “single-hat” presidency has also to do with the complexity of the Union: having three executive top offices – Presidents of the European Council and of the Commission, and High Representative for Foreign Affairs and Security Policy – should allow for a more faithful representation of the “geographical and demographic diversity of the Union and its Member States”^{xiii}. More generally, a unification of the two presidencies would have undermined the inter-institutional balance in the Union (Dougan 2008: 628)^{xiv}.

Why has the dominant feeling about this arrangement so clearly changed? The most plausible explanation lies in the further rise of the European Council and its responsibilities after the entry into force of the Treaty. As said before, this has often taken place to the detriment of the Commission’s ability to articulate its policies effectively^{xv}. On the other hand, a “double-hat”, President would also be stronger within the European Council, in which he would be able to challenge established coalitions of Member States.

Indeed, there is no incompatibility between the two jobs, as Art. 15(6) TEU only prohibits the President of the European Council from holding a national mandate – and both Presidents are not entitled to vote within the European Council. Still, some elements might suggest a more cautious approach (or perhaps just what is not sought, i.e. a revision of the Treaties). The President of the European Council is only answerable to the national heads of State or government, who can end his term of office in the event of an impediment or serious misconduct (Art. 15(5) TEU). The President of the Commission, on the other hand, is primarily answerable to the Parliament. If the latter approves a motion of censure, the Commission – thereby meaning its President as well – is forced to resign collectively. In that event, the “double-hat” President could stay in office as President of the European Council; this, however, would not reduce the magnitude of such political conflict. In this regard, discrepancies between parliamentary majority and European Council “majority” should not be discarded: the composition of the European Council depends on the results of national elections, whereas the composition of the European Parliament depends on the results of European elections (Fabbrini 2013: 1006).



A solution which has been generally refused is the direct election of the President of the European Council. This is quite unpopular with the smaller Member States, which could hardly influence the electoral process (Fabbrini 2012: 6). On the other hand, the introduction of a kind of presidential regime would deeply alter the nature of the office.

According to another proposal, the reform of the process of selection of the President of the European Council should take into account the difficulty of parliamentarising the EU around the European Parliament. The legitimacy of the President of the European Council could be enhanced by introducing a system of election of the President of the European Council by a composite assembly, made up of members of national parliaments. In order to be elected a candidate would need a majority of votes – with smaller Member States being overrepresented in the electoral college. The European Parliament would not take part in the election procedure (Fabbrini 2012: 6). This proposal is probably inspired by the American model and the discussion about the role of the U.S. Electoral College as a political safeguard of American federalism (Wechsler 1954). It stresses a separation between supranational democratic legitimation (provided by the European Parliament) and national democratic legitimation (provided by the electoral college for the selection of the European Council President). It also tries to reconcile democracy – i.e., rule by the majority – and the concerns of the smaller Member States.

The German model could suggest an alternative solution^{xvi}. The President of the European Council would be elected by a mixed assembly, made up of members of the European Parliament and an equal number of members of national parliaments. This system would be inspired by the provisions of the German Basic Law on the election of the President of the Federal Republic of Germany (Art. 54(3)), which aim at reconciling the unitary and the federal dimensions of Germany's constitutional order (Nettesheim 2005: 1047 f.).

What is interesting is that all those proposals seem to take for granted that the European Council can be viewed as a kind of collective “head” of the European Union (Fabbrini 2012: 4). The most obvious term of comparison for this may be the Swiss Federal Council (see above and Biaggini 2007): a non-monocratic executive body, “representing” the diversity of the Confederation. These arguments, however, have to be reconciled with the well-rooted conception of the Commission as the government of the Union^{xvii}.



5. The long-lasting shadow of dualism: a critical assessment

Comparative constitutional analysis suggests that the European Union presents a number of state-like features (Rosas and Armati 2012: 15 ff.)^{xviii}. Having in mind this starting point, this paragraph argues (i) that for constitutional law the executive power is normally more difficult to encompass than the legislative, and (ii) that the tradition of *executive dualism*, proper to a number of European nation states, may offer some interpretive tools for assessing the current supranational developments.

The tradition of European constitutionalism has been more careful of defining the role and functions of parliaments than those of the executives (Carrozza 2009: 860). This had to do with the struggle of representative assemblies for gaining control over the activities of the (mainly monarchical) executive, thus seeking the recognition of specific powers. The executive, in turn, was already part of the picture, which may explain the absence or the vagueness of provisions concerning the executive in many European constitutional charter in the 19th century and the first half of the 20th century (until the appearance of “rationalisation” in constitutional law). The picture has become even more complicated in the 20th century because of the autonomisation of public administration and the “pluralisation” of the executive power. Even at the EU level, the position of national executives vis-à-vis the Union is less clearly defined than that of national parliaments, “which were sidelined from the start of the integration process, only to regain lost ground later” (DN, JHR and TV 2012: 165).

The rise of representative government in 19th-century Europe is also at the origin of dualism. At the very beginning, this concerned the relationship between a monarchical head of state and “his” (or “her”) government, which was now supposed to enjoy the confidence of parliament. Strong theoretical foundations were provided by Benjamin Constant’s *pouvoir neutre* theory (see Luciani 2014). The gradual decline of royal powers was the starting point of a monistic understanding of parliamentary regimes in Europe (just think of Bagehot’s elective dictatorship). Executive dualism is still particularly strong in those Member States in which the head of state is directly elected by the voters (the 5th French Republic, Poland, Romania, etc.). This circumstance also contributes to a certain rigidity of the constitutional system, in which conflicts between the branches and uneasy *cobabitations* are always possible. It is more difficult to conceive of dualism in parliamentary



systems in which the head of state is indirectly elected and which are more accurately described as monistic (as is the case for Italy or the 3rd Republic in France^{XIX}). Still, political crises may allow the head of state to (re)gain some ground to the detriment of the cabinet (Fusaro 2013).

Dualism – and criticism thereof – is probably the main point in the current debate about what the role of the European Council within the institutional system of the Union should be. According to a widespread feeling, the main executive responsibility lies with the European Council, and its relationship with the Commission should be described according to the principal-agent model (see above). This state of affairs has been subject to criticism: according to a number of scholars, the “actual substance” (*la realidad*) of executive power should be reserved for the Commission and its President (Juillet 2010: 47).

The main supportive reason for these claims is that the European Council has been too often perceived as an institution in which the relative weight of the “big” Member States is able to condition the determination of policies decisively (Schoutete 2012, Novak 2014). As said before, the crisis of the Franco-German partnership has partially changed this, thus increasing President Van Rompuy’s influence. The debate about how the (s)election process of the European Council President could be amended aims at consolidating this shift in influence by transforming it into a structural feature of the European Council.

An alternative and more radical solution is the politicisation of the Union by establishing a more direct link between election of the European Parliament and designation of the President of the Commission (see Maillo González-Orús 2015). In this regard, the possibility of genuinely political conflicts between European Parliament and Commission, on the one side, and the European Council, on the other side, should not be underestimated (see above at 4). A less visible, more uncertain politicisation is also taking place within the latter: the left-right divide and European political parties are able, to some extent, to influence the deliberation process of the European Council (Tallberg and Johansson 2008). According to the prevailing opinion, however, negotiation within the European Council does not mainly happen along party lines: “The purely national interests of Member States and of the governmental leaders have rather been the main force” (Werts 2008: 27).

Even more radical is the draft Fundamental Law published by the Spinelli Group and Bertelsmann Stiftung. Their proposal, aiming at enhancing efficiency, effectiveness,



transparency and accountability in the EU's institutional system, tries to soften the risk of dualism by “beheading” the European Council. In order to reduce the risk of tension and confusion with the Commission, the “supernumerary ‘permanent’ President of the European Council is abolished in favour of the election by the heads of government *of one of their number* to chair their meetings for a period of two and a half years” (Spinelli Group and Bertelsmann Stiftung 2013: 16)^{xx}.

The success of “politicisation” (in the current sense) will paradoxically depend on the willingness of the European Council to continue making decisions on non-(party)-political bases. If this happens, the shadow of dualism will probably re-emerge.

6. Strengthening accountability

The political and legal accountability of the European Council is another issue which has not been properly regulated by the Lisbon Treaty. This might not have been particularly urgent if the body had merely stuck to its task of defining “general political directions and priorities”. Things go clearly different, however, if the European Council engages with actual decision-making. This makes it necessary to have a closer look at the possibilities of holding the European Council to account under the current circumstances.

In this respect, its *political* accountability seems to be particularly weak. Primary law only asks the President of the European Council to present a report to the European Parliament after each of the meetings of the European Council (Art. 15(6)(d) TEU). This provision is hardly a real innovation, as it codifies a constitutional practice which had been in place since 1987.

The “personal union” of the two Presidencies would make it possible to strengthen the institutional connection between the European Council (or, properly speaking, its head) and the European Parliament. As argued above, this could also strengthen the position of the “double-hat” President within the European Council itself (Oreja 2013: 20).

Apart from this, the European Parliament adopts resolutions before every meeting of the European Council “in order to stress the issues which are of importance to it and to make the European Council aware of its expectations” (Werts 2008: 141). After that, the President of the European Parliament traditionally gives an introductory speech at the beginning of European Council meetings (see Art. 235(2) TFEU), without taking part in



the subsequent course of its discussions. More generally, the way the summits of the European Council are conducted does not automatically lend itself to the exercise of effective parliamentary control (Hefffler et al. 2013: 1).

When it comes to holding the European Council to account, other commentators have focused not so much on the European Parliament as on more “traditional” forms of parliamentary control. More properly speaking, they have suggested that national parliamentary control be “Europeanised” in order to control the European Council more effectively. According to these interpretations, the current state of affairs, in which the national heads of state or government are mainly held to account by national parliaments, should not be radically overturned but simply “adjusted” in order to favour cross-national parliamentary oversight. *Permanent interparliamentary conferences* have been hinted at as perhaps the most appropriate tool in order to ensure effective control of the activities of the European Council (Lupo 2014: 6). The chief example for this trend is the “conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national parliaments in order to discuss budgetary policies” (Art. 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; see also Fasone 2014). Other studies, however, have also stressed a great diversity among Member States parliaments and the persistent impairment of a number of them when “controlling” the activities of the European Council^{XXI}. No less than seven models have been identified in this regard, among which a “Europe as usual” model, according to which the national parliament does not make any distinction between control over the European Council and *ex ante* control over EU legislative proposals^{XXII} (Hefffler et al. 2013: 9; Wessels et al. 2013).

As far as *legal* accountability is concerned, the turning point has been, again, the institutionalization of the European Council. In the mid-1990s the Court of Justice had clearly stated that Art. 230 (ex 173) TEC did not allow reviewing the legality of acts adopted by the European Council^{XXIII}. Art. 263 TFEU now empowers the Court of Justice to review the legality of acts of the European Council “intended to produce legal effects *vis-à-vis* third parties”. More recently, the *Pringle* case has allowed the Court to go a bit further: the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council in the framework of the preliminary reference procedure, as Art. 267(1)(b) TEU gives it jurisdiction “to give preliminary rulings concerning ... the validity



... of acts of the institutions”^{XXIV}. This is a direct consequence of the formal recognition of the European Council as one of the institution of the European Union (Goebel 2011: 1258). In the very same decision, the Court of Justice also used the Conclusions of the European Council in order to interpret the impugned Decision^{XXV}.

7. Concluding remarks

When analysing the main issues in the discussion about the European Council, this short contribution has taken for granted that it is possible and heuristically useful to do so by means of a clearly constitutional perspective. This peculiar vantage point, however, is quite far from absorbing all the possible ways of studying this institution, which continues being somehow eccentric within the institutional system of the Union.

In recent years, in fact, the study of the European Council as a very developed example of institutionalised summitry has also gained ground (Starita 2013; Mourlon-Druol and Romero 2014). This has to do not only with the origins of the European Council in the mid-1970s, but also with a renewed rise of intergovernmental institutions since the outburst of the crisis (think e.g. of G20)^{XXVI}.

The analysis of many of the developments presented in this contribution is conditioned by a fundamental uncertainty: whether or not the leading role played by the “new” European Council since 2009 mirrors a permanent transformation or is just a result of an unprecedented crisis. In other terms, things will (or might) go different when economic normalcy reappears (Schoutheete 2012: 21). On the other hand, it should also be considered that perennial emergency and short-term perspectives seem to be a defining trait of today’s decision-making processes^{XXVII}. If this (rather pessimistic) assessment is accepted, it is also possible to analyse the recent performance of the European Council in order to draw more general conclusions.

This short contribution has shown some (probably inevitable) shortcoming of the Lisbon constitutional settlement. They have to do with both structural and functional features of the European Council. All the reasons for dissatisfaction with it point at the end of the EU’s output legitimacy (as a sufficient justification for its activities) and an ever-rising necessity of redefining input legitimacy (Jakab 2012: 18).



The conclusions can be summarised as follows. First, the process of autonomisation of the European Council and its emancipation from the Council as a political institution (Werts 2008: 59) is by now complete. Second, a generally accepted point is that the European Council takes part in the exercise of the executive power together with the Commission. Both institution play a crucial role for the purposes of a deeper integration (Oreja 2013: 26). The decisive point is to what extent this should happen. All the proposed reforms suggest that this question is far from being resolved. As shown before, this should not even be seen as surprising. General formulations – e.g., a collective “head of the Union” not interfering with day-to-day government business (*ibidem*) – may be satisfactory insofar as the emergence of new crises does not reveal again their practical frailness. A final and distinct issue is the degree of autonomy of the European Council vis-à-vis some of the Member States. In order for this institution to be convincingly described as a “head of the Union”, the structure and functioning of the European Council should be somehow modified. As said before, much of this depends on the role and the legitimacy of the European Council President. If he succeeds in getting greater authoritativeness vis-à-vis to his national counterparts (following one of the ways mentioned above), deliberation within the European Council would probably be less strongly influenced by specific national coalitions than they used to be between 2009 and 2012^{XXVIII}.

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^I The IGC mandate is available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011218%202007%20INIT> (accessed 15 December 2014).

^{II} Statement available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf.

^{III} *Ibid.* In its *Europe 2020 Strategy*, the Commission also stated that “the European Council should steer the strategy as it is the body which ensures the integration of policies and manages the interdependence between Member States and the EU” ([ec.europa.eu/eu2020/pdf/COMPLET_EN_BARROSO_007 - Europe 2020 - EN version.pdf](http://ec.europa.eu/eu2020/pdf/COMPLET_EN_BARROSO_007_-_Europe_2020_-_EN_version.pdf)).

^{IV} In the 1980s – i.e., before the “recognition” of the European Council in the primary law of the EU – there was some discussion about whether or not the President of the Commission had some kind of right of veto within the European Council. A group of legal experts concluded that the collaboration of the President of the Commission was not needed for the formation of a position in the European Council (Werts 2008: 35 f.).

^V English translation of the speech available at <https://www.coleurope.eu/speeches>.

^{VI} Speech given by the then French President Nicolas Sarkozy on 1 December 2011 in Toulon (abridged translation available at <http://www.ambafrance-uk.org/President-Sarkozy-s-keynote-speech>).

^{VII} Decision 2011/199/EU of 25 March 2011.

^{VIII} Among them, the supposed lack of effectiveness of the rotating presidency when occupied by a (comparatively) small Member State.

^{IX} Also see critical remarks by Reestman 2011: 269 f.



^X This also means, incidentally, that equality among the twenty-eight Member States is stronger when there are no pre-defined coalitions within the body.

^{XI} “To deal more effectively with the challenges at hand and ensure closer integration, the governance structure for the euro area will be strengthened, while preserving the integrity of the European Union as a whole. We will thus meet regularly – at least twice a year – at our level, in Euro Summits, to provide strategic orientations on the economic and fiscal policies in the euro area. This will allow to better take into account the euro area dimension in our domestic policies. The Eurogroup will, together with the Commission and the ECB, remain at the core of the daily management of the euro area. It will play a central role in the implementation by the euro area Member States of the European Semester. It will rely on a stronger preparatory structure” (Euro Summit Statement, 26 October 2011, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf).

^{XII} See the European Parliament resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP), available at www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-462).

^{XIII} Tools for ensuring the representation of cultural pluralism not only within the legislature but also within the executive are typical for polities marked by great cultural diversity. Think e.g. of Art. 175(4) of the Swiss Federal Constitution of 1999: “In electing the Federal Council, care must be taken to ensure that the various geographical and language regions of the country are appropriately represented”. If not only constitutional provisions but also constitutional conventions are taken into account, another convincing example comes from the Canadian long-established practice of regional ministers within the federal cabinet (see e.g. Bakvis 1988).

^{XIV} This point is quite important as it can be used as the most solid objection to the “foreign policy analogy”, according to which “[t]he same logic which lies behind the future combination of the functions of the High Representative for the CFSP and the Commissioner in charge of Exterior Relations, also supports the notion of such a single President” (Werts 2008: 158).

^{XV} As a veteran EU correspondent put it, “it seems hardly conceivable that either Commission President José Manuel Barroso (2004-) or his successor will ever be capable of reconquering the position once held by Delors. To do his job well today, every Commission President needs, more than ever, broad support in the European Council for his programme” (Werts 2008: 51).

^{XVI} See Article 54 of the German Basic Law: the Federal President shall be elected by a Federal Convention (*Bundesversammlung*) consisting of the members of the Federal Parliament (*Bundestag*) and an equal number of members elected by the parliaments of the *Länder* on the basis of proportional representation.

^{XVII} This idea, however, has also been criticized by some political scientists (e.g., Kreppel 2009).

^{XVIII} This can be done without departing from the view that the EU cannot be regarded as a state, let alone a federal one (Pinelli 2013: 179).

^{XIX} On the latter see Hauuy 2013.

^{XX} In fact, the elimination of the head of state – possibly the most radical way of “exorcising” a resurgence of dualism without creating a useless institution – has been discussed by constituent legislators and constitutional scholars both in Italy (Baldassarre 1987: 477) and Germany (Nettesheim 2005: 1033 f.).

^{XXI} Inverted commas are used because, properly speaking, parliaments in the Member States control their own heads of State or government.

^{XXII} The “Europe as usual” model is typical of Italy and some “new” Member States in Central and Eastern Europe. The other models which have been pointed out are the limited control model, the expert model, the public forum model, the government accountability model, the policy maker model, and the Danish fully parliamentarised model.

^{XXIII} Court of Justice of the European Communities, Cases C-253/94, *Ronjansky v Council* and C-264/94, *Bonnamy v Council*.

^{XXIV} Case C-370/12, *Pringle* (see also Vogiatzis 2013: 1675).

^{XXV} “It must ... be stated that, as is confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199 ...” (Case C/370/12, *Pringle*, para. 58). See also the view by Advocate General Kokott.

^{XXVI} According to Starita (2013), the exclusion of the European Council from “strong” parliamentary control is neither an accident nor a mere “modification” of the Community method. Rather, it can be traced back to a widespread attitude of national executives, which tend to escape democratic control when elaborating programmatic international norms in the economic domain. Furthermore, the European Council may act in



two capacities: as an institution of the European Union and as an international summit. When acting in the latter capacity, the European Council does not undergo the limitations stemming from the principle of conferral of Art. 13(2) TEU.

^{XXVII} With regard to the distinction between *Katastrophe* and *Rhetorik der Katastrophe* in the framework of the risk society theory, see Beck 2012: 28.

^{XXVIII} A development of this kind would clearly take place to the detriment of flexibility, which has often been welcomed as a positive feature of the European Council. On the other hand, it should also be underlined that greater rigidity would be a clear signal of an even stronger “constitutionalisation” of this institution.

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