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The *Ethereal Plane* of EU Decision-Making: The Relationship Between the European Council and the Rule of Law During the Eurozone and Refugee Crises.

MASTER'S THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

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SUMMARY

This paper aims to identify whether the European Council has respected the general principle of the rule of law during the actions taken during the Eurozone and refugee crises. The research is structured in three parts: first, a detailed overview of the intuitional formation of the European Council since its origins to the present day, with a closer look at the competences provided for by the Lisbon Treaty. Second, an analysis of the decision-making process of the European Council through the Eurozone and the refugee-management crisis, with more emphasis and detail dedicated to the second one, being far less researched than the first one.

Using an inductive approach, the paper concludes that, while the European Council did overstep its Treaty mandate in the adoption of the EU-Turkey Statement, the larger result of the research is the identification of a problematic dynamic between the European Council and the rest of the institutions. In times of crisis the pressure of an agreement struck by the European Council forces other institutions to implement its decisions with a lesser degree of oversight of compliance with norms such as the rule of law and human rights protection. An important factor is the difficulty to discern a breach in the use of competences with the Court of Justice of the European Union taking a rather deferential position towards decisions made by the European Council. Without judicial review, the boundaries of action for the European Council remain ambiguous and open, contrary to what the Treaty of Lisbon had intended. Arising from this tolerated malpractice, a pattern of increase of executive authority in the European Union has been identified as representing a serious threat to the conception of the Union as presented by Article 2 TEU.

INTRODUCTION

The Treaty of Lisbon formalized the European Council (EUCO) as an institution of the European Union (EU) for the first time since its creation in the Paris Summit of 1974. Ever since that initial moment the European Council had existed in a sui generis form, with a special status within the legal order, being part of it while at the same time standing above it. With no accountability towards other bodies it resembled, as Armin von Bogdandy puts it, "the king in the constitutional regimes of the nineteenth century"¹. The Treaty of Lisbon modified this supra-legal condition by including the European Council in Article 13(1), which establishes the institutions of the EU. Additionally, the competences that had carried out until that point were modified, as well as being bestowed a different array of new ones. An important change included the establishment of the President of the European Council as a semi-permanent position. This was done in order to ensure a greater continuity in the work of the institution, as well as improving its visibility both internally and externally.

Coincidentally with the changes brought by Lisbon, the worst global economic crisis since the Great Depression was starting to make an impact in the financial system of the Union, bringing about unprecedented challenges and testing the ability of the EU to face in a coherent and effective manner a highly difficult and political salient situation. The European Council acted as the conductor of the management of the Eurozone crisis while raising questions about the legitimacy of EU actions, which included the introduction of harsh austerity measures and strict conditionality programs for countries that had incurred into large sovereign debts. Not completely out of the Eurozone crisis, instability in the Middle East and Africa pushed millions of people to make a dangerous journey towards Europe, seeking an improvement of their living conditions. The large amount of incoming refugees and migrants overwhelmed the administrations of several Mediterranean Member States, with some others choosing to accept as many as possible and others closing their terrestrial borders for the first time since the adoption of the

¹ Armin von Bogdandy, "Founding Principles", in *Principles of European Constitutional Law*, ed. Armin von Bogdandy and Jurgen Bast, (Hart Publishing: 2011), p. 34.

Schengen system. In this instance once again it was the European Council the one institution to assume the position of crisis-manager, and in the same manner as in the Eurozone context several irregularities were identified in regards to the procedures established and the actions taken.

This paper sets out to identify whether the European Council has respected the general principle of the rule of law during the actions taken during these crises. The relevance of the research question is marked by the importance that these consideration against the background of the European Union as a whole, for the European Council carries with it a strong but ambiguous power. The delicate institutional equilibrium of the EU as set out by the Lisbon Treaty acts as a system of checks and balances that has to be monitored closely in order to ensure the democratic legitimacy of the project, and more importantly, its continuity. As for the relevance of the paper within the academic literature on the topic, it is important to note that while the amount of research conducted on all aspects of the Eurozone crisis is almost overwhelming, that of the consequences of the role of the European Council during the refugee-crisis is almost non-existent. Additionally, this paper will support the argument that the crises of the past decade have curtailed the objectives that the Lisbon Treaty set out to achieve, specifically to ensure that the European Council would be subject to review by the Court, establishing instead a disquieting development of executive dominance of the EU's framework. The research will be structured in three parts: first, a detailed overview of the intuitional formation of the European Council since its origins to the present day, with a closer look at the competences provided for by the Lisbon Treaty. Second, an analysis of the decision-making process of the European Council through the Eurozone and the refugee-management crisis, with more emphasis and detail dedicated to the second one, being far less researched that the first one. Lastly, through an inductive process the conclusions as they stem from the previous analysis will be defined, together with an assessment of its implications for the European Union.

METHODOLOGY

The research question that this paper aims to answer is whether the European Council acted during the Eurozone and refugee crises in respect of the rule of law, a general principle of EU law by virtue of Article 2 TEU. While that is the specific objective of the thesis, there is a more general one, which aims to assess the overall relationship between the European Council and the rule of law. This stems from the fact that the Treaty of Lisbon has for the first time introduced the institution within the boundaries of primary law, as well as making it subject to review by the Court. Being historically an inherently ‘flexible’ institution, the relationship between the European Council and its new duties warrant a detailed analysis.

This paper takes an inductive approach to assess that relationship critically. First, the main body of the paper moves chronologically through the development of the European Council over its history. While often times papers include a brief historical overview in order to establish the context of the topic to be reviewed, in this instance the relevance is greater and thus the length justified. Several arguments of the paper will take into consideration the pre-Lisbon institutional framework, therefore the historical analysis is needed. A critical analysis will accompany the description of the events as they occurred, trying to clarify the legal sources for actions taken and the problematics that arise in the way. Secondly, the paper then focuses on the Eurozone and refugee crises, while describing and analysing the actions taken by the European Council. The reasoning behind this approach is to acquire a clear conception of the institutional characteristics of the European Council that stem from the way its contemplated in the treaties and then contrast the law with the actual practice.

After the analysis, following the inductive approach, the paper will outline a synthesis of the key aspects of the relationship between the European Council and the rule of law, identifying several issues that arise from the complicated dynamics between the two. In order to first establish the groundwork of the paper, the conception of the rule of law used in it will be laid out next.

The Rule of Law

The legal order of the European Union is regulated in two ways: firstly, by procedural norms in regards to the competences that its bodies have, as well as the limits of those competences². Secondly, by a series of ‘substantive standards’ that set out a series of norms, which in the case of the European Union carry the weight of general principles of EU law. Those provisions apply both, and equally, to the Member States and to the institutions. Article 2 TEU is the cornerstone of the EU’s system in regards to those substantive standards. It reads:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights [...]”

While in national constitutions these type of elements provide for ‘aspirational provisions’³ or ‘fundamental ethical convictions’⁴ that do not implicitly carry a formal obligation, in the case of the European Union the values that are stated in Article 2 TEU are not just idealistic notions with no legal relevance, or strength⁵. Quite the contrary, they represent not only general principles of EU law, but also ‘the very foundation of the EU legal order’⁶. Among those constitutional precepts one of the most relevant for the present analysis is the rule of law, one of its key tenets being ‘the idea of bounded government restrained by law from acting outside its powers’⁷. The principle can be divided into two dimensions, one negative and one positive, where the former provides that decisions adopted by any of the Union’s bodies has to be fully in line with primary law, as well as constituting an ‘absolute’ dimension, i.e. there are no exceptions to the rule.⁸

² Timothy Moorhead, “The Values of the European Union Legal Order: Constitutional Perspectives”, *European Journal of Law Reform*, 16 (1), (2014). p. 4.

³ Dmitry Kochenov, “The *Acquis* and Its Principles: The Enforcement of the ‘Law’ versus the Enforcement of ‘Values’ in the European Union,” in *The Enforcement of EU Law and Values*, eds. D. Kochenov and A. Jakab. (Oxford: Oxford University Press, 2016): p. 10.

⁴ von Bogdandy, “Founding Principles”, p. 22.

⁵ The Values of the European Union Legal Order, p. 4.

⁶ Kochenov, “The *Acquis* and its Principles”, p. 2.

⁷ Ester Herlin-Karnell, “Constitutional Principles in the Area of Freedom, Security and Justice”, in *EU Security and Justice Law: After Lisbon and Stockholm*, eds. Diego Acosta Arca, Cian C Murphy, (Oxford: Hart Publishing, 2014), p.

⁸ *supra* at n., “Founding Principles”, p. 34.

Given the ambiguity as to the definition of the concept, the approach taken in this paper is that of a formal understanding of the rule of law, as proposed by Joseph Raz. This conception includes two dimensions, one in regards the way in which actions by public authorities are taken and another one related to the ability of those decisions to guide behaviour⁹. The first one is defined as the concept of legality,¹⁰ understanding which simply posits that for a measure to comply with the principle of the rule of law it has to be legal, i.e. it has to be in respect with the norms that are higher in the system. The second element of the formal conception includes that a decision has to be, inter alia, open and clear. This approach is in line with the one present in the EU legal order, interpretation that stems from the differentiation in Article 2 TEU of the rule of law from the other values included in it, namely respect for human dignity and human rights, freedom, democracy and equality.¹¹

CHAPTER I: INSTITUTIONAL SET-UP OF THE EUROPEAN COUNCIL FROM PARIS TO LISBON

“The creation of the European Council is the most important decision for Europe since the Treaty of Rome”

Jean Monnet

In order to understand the changes the European Council has gone after the entry into force of the Treaty of Lisbon, its current position within the institutional dynamics of the Union and its role in decision-making, it is important to analyze the way in which it has been included in the relevant legal texts. This overview will establish the groundwork of the paper and will ultimately provide an insight into the reasons for the *behavior* of EUCO in the crises of the past decade. The chapter will be structured in three parts, the first one will provide the initial wordings by which the European Council was ever mentioned within the Communities framework by looking at the period from the months leading up to the Paris Summit of 1974 to the signing of the Single European Act in 1986. The second one will look at the impact of, and changes

⁹ Paul Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, *Public Law*, Autumn, (1997): p. 468.

¹⁰ Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012), p. 91.

¹¹ Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What Has Been Done, What Can Be Done', *Common Market Law Review* 51, Issue 1, (2014): pp. 62–63.

brought about by the Maastricht Treaty and its amendments of Amsterdam and Nice. Lastly, the Lisbon Treaty will be addressed in detail, laying out the competences that it grants the European Council and the positions that it establishes for it within the balance of the Union.

The study of the present of the European Council warrants a historical overview more than a similar study of any other institution of the European Union, due to the particular nature of the development of the EUCO. Unlike other bodies, the European Council has always had a similar role and position on the architecture of the Union, what has changed over time has been the way in which that role has been included in the primary law. The legal ambiguity that characterizes the European Council is an inherent element of its ethos and sets it apart from other institutions. This is the reason why the following chapter is not an unnecessary re-statement of things known, but rather the contextualization of a personality that the European Council has had ever since the Paris Summit of 1974, where it was first introduced. The institutional characteristics have been largely constant over time, and it certainly can be observed in the present-day EUCO.

1.1. The early stage. From Paris to Luxembourg

The need for including officially meetings of Head of State in the context of European integration was contemplated since the early beginnings of the project, at first being met with opposed perspectives as to its necessity, added value and potential - positive or negative - impact¹². On one side Charles de Gaulle defended the need for national executives to be the most important actors in a political union, since they were ‘the only entities with the right to give orders and the power to be obeyed’¹³. This was opposed by other member states such as the Netherlands, who did not want to make any profound changes until the UK joined as well as Germany, who had supranational

¹² Paul Craig, “Institutions, Power and Institutional Balance”, in *The Evolution of EU Law*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2011), p. 45.

¹³ Anthony F. Imbrogno, “The Founding of the European Council: Economic Reform and the Mechanism of Continuous Negotiation”, *Journal of European Integration*, Vol. 38, Issue 6, (2016): p. 721.

entities - NATO and the EEC - as ‘supervisors’ of its own executive and thus did not prefer to further a more intergovernmental approach¹⁴.

These differences, the concomitant debate between supranationalism and intergovernmentalism as well as the debate whether cooperation should be economic or political, together with the existence of a big and small member states ran through the Bonn declaration, the Fouchet Plans and overall through the entirety of this early period of integration.¹⁵ Feelings towards institutionalized summitry on the capitals fluctuated between the 60s and early 70s all the way from disillusionment, such as in the ‘empty chair crisis’ and the summits in 1972 in Paris and 1973 in Copenhagen¹⁶, to enthusiasm, such as in the Hague summit of 1969 and the Paris summit of 1974¹⁷. This is illustrative of the myriad of possibilities and possible paths that integration could take at that point, every actor moving in *terra incognita*, since there were no historical precedents to it. It is worth noting that this ‘state of mind’ is not something unique to the 60s and 70s, and has in fact been, and is, a constant in the history of the Union. The best example of this notion is the decision in 2015 of the United Kingdom to abandon the project entirely. Taking this permanent imbalance in consideration it becomes clear where the necessity of meetings of Heads of State comes from, and De Gaulle’s words were certainly not too far off. Member states ultimately decided that the guidance of the premiers had to be institutionalized as part of the Community architecture.¹⁸ This happened in the Paris Summit of 1974.

In spite of the differences in opinion, one notion was common: there was a need to better structure the Community if it was to survive. The Council of Ministers was too fragmented and lacked general coherence while at the same time, neither the Council nor the Commission were acting as leaders within the EEC, and thus there was an additional lack of general direction. One element of a potential solution to this problem was put into words by the French presidency, in particular by Giscard d’Estaing, who

¹⁴ Imbrogno, “The Founding of the European Council, p. 722.

¹⁵ *Ibid*, p. 723.

¹⁶ Damian Chalmers and Adam Tomkins, *European Union Public Law*, (Cambridge: Cambridge University Press, 2012), p.14.

¹⁷ *Ibid*, p.15

¹⁸ Craig, “Institutions, Power and Institutional Balance”, p. 50.

proposed the inclusion of the European Council as part of the Community¹⁹. In order to appease the governments that saw it as an intergovernmental take-over, d'Estaing phrased the new institution as 'a complement, not an alternative, to the existing EEC mechanisms'²⁰. Moreover, the new addition was not seen as a crucial new element that would mark a new beginning of stability and prosperity in terms of the structure and workings of the EEC.²¹ Together with this, it was also believed that what was written down would have as much impact as the subsequent practice of the meetings.²²

Here, the personality of the European Council is starting to be built, and becoming visible, i.e. an institution that relies in the 'natural' development of its own method, not observing too closely what is written if that is not felt fitting for the specific moment in time. This flexibility, or rather the self-perception its flexibility, is telling of a EU body that has always been aware of the gravitas of its status. The very way in which the European Council came to be attests to this sui generis quality, being introduced by a communiqué, an uncodified and non-binding decision.²³ The special characteristics of the EUCO, namely the fact that it was the meeting of the Heads of State and the freedom of action that it enjoyed progressively proved to be highly relevant for the working of the Union and ultimately established that the institution was an integral part of the EEC. Over the years following the Paris Summit the European Council, positioned itself as the key body in terms of providing a highly valuable forum of discussion for the Heads of State.

The transition from Paris to the SEA was marked by the progression of early development to a more 'mature' institution. The first years after the 1974 Summit had a more markedly informal quality, as well as an overarching one²⁴. The European Council did not restrict itself to including matters in the agenda that were part of the treaties, and it frequently discussed topics directly outside of the framework of the Communities,

¹⁹ Emmanuel Mourlon-Druol, "Filling the EEC leadership vacuum? The creation of the European Council in 1974", *Cold War History*, Volume 10, Issue 3 (2010): p. 3

²⁰ *Ibid.*

²¹ *Ibid.*, p. 330.

²² *Ibid.*

²³ Emmanuel Mourlon-Druol, "Steering Europe: Explaining the Rise of the European Council 1975-1986", *Contemporary European History*, Vol. 25, Issue 3, (2016): p. 410.

²⁴ *Ibid.*, p. 413.

aspect that was referred to as 'political cooperation'.²⁵ As it becomes clear over the development of the institution, the European Council is a forum that was seen as useful in its quality as a 'fireside chat'²⁶, which provided 'a forum as informal and private, but at the same time as high-ranking, as possible'.²⁷ The value of the EUCO was its ability to touch upon any potential issue that may be of concern generally to the Heads of State, and thus to the Union, possessing a 'hybrid nature' where it tackles equally Community as well as non-Community matters.²⁸

The fact that a wide variety of topics were discussed among the highest members of the executives does not mean that it was producing concrete plans of action or specific decisions to be implemented later, on the contrary, often times the European Council meetings did not result in them, nor in policy guidelines²⁹, highlighting once again how it was mostly relevant as a forum of discussion among Heads of State. Progressively, after a series of documents in the late 70s and early 80s, namely the London declaration of 1977, where it adopted its rules of procedure, and the 1981 London Report on the role of the institution in European Political Cooperation, the European Council gained formality, i.e. it was not just a 'fireside chat' anymore, but an important actor with the - increasingly - key role of 'orientation and arbitration'³⁰. This evolution culminates with the Single European Act of 1987, where the European Council was for the first time included in the primary law of the Communities as well as in EPC, with its introduction in that Treaty³¹.

Article 2

The European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission of the European Communities. They shall be assisted by the Ministers for Foreign Affairs and by a Member of the Commission.

²⁵ Emmanuel Murlon-Druol, "Steering Europe", p. 415.

²⁶ Philipp Dann, "The Political Institutions", in "Principles of European Constitutional Law", p. 262.

²⁷ *Ibid.*

²⁸ *Supra* at n. 25, p. 415.

²⁹ *Ibid.*, p. 414 - 415.

³⁰ *Ibid.*, p.418.

³¹ Chalmers and Tomkins, "European Union Public Law", p. 19.

The European Council shall meet at least twice a year.

Even though the SEA itself does not define anything apart from acknowledging the existence of the body, the conjunction of the documents adopted up until that moment laying out different aspects about the characteristics of the EUCO, together with this formal recognition, established the ‘maturity’ of the institution.

1.2. Maturity. Maastricht, Amsterdam and Nice.

The main impact of the Maastricht Treaty, signed in 1992, was the formal inclusion of a thick intergovernmental 'layer' in the European Union. Up until that moment the decision-making procedure was mainly the Community method. What changed in 1992 is that now there was, within the Union, certain areas that belonged to the Community method and as a new addition, important areas which were under an intergovernmental method.³² This was a result of the need felt by the governments of the Member States of including specific aspects of national politics in the Community's mandate. These areas included foreign policy and economic governance, among others. The transfer of these to Brussels did not incur the transfer to the Community method though. Governments were clear as to the fact that the change did not include a loss of sovereignty over some of the most delicate aspects of their activity, and thus a different way of making decisions within the Union was to be introduced with the Maastricht Treaty. This ‘integration without supranationalisation’³³ would set the tone for the following decades, forming a more serious Union that included an increasing amount of policy areas, signaling the need of transnational decision-making in a international arena that as becoming increasingly interconnected and complex.

³²Philippe de Schoutheete, “The European Council and the Community Method”, *Notre Europe - Jacques Delors Institute Policy Papers*, 56 (2012): p. 18.

³³ Sergio Fabbrini and Uwe Puetter “Integration without supranationalisation: studying the lead roles of the European Council and the Council in post-Lisbon EU politics”, *Journal of European Integration*, Volume 38, Issue 5, (2016): pp. 482.

The Treaty of Maastricht introduced the pillar system, by which three different policy areas - with different decision-making mechanisms - were now part of the European Union. These were the competencies that the Union possessed up until that point in terms of the common market, agricultural policy (first pillar), and the newly introduced common foreign and security policy (second pillar) and justice and home affairs (third pillar). Within the Maastricht Treaty's framework, the European Council acted as the 'federating power of the three pillars'.³⁴ Additionally, the Treaty included an article laying out its general mandate under the new Union set-up, which contains the text present in the 1983 Stuttgart Solemn Declaration, and that overall represented the powers that the Heads of State had vested upon the institution through their practice over the years. The text reads:

Article D

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council.

The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

As reflected by the text, the European Council was given a role indistinct from the one a formal institution would have. It is part of the Treaty, it is composed of representatives of Member States together with the President of the Commission and it has the mandate of providing 'general political guidelines'. For an unofficial body of the Union, the responsibilities are anything but informal. This is illustrative of the overall identity of the European Council being 'outside and above the EU legal system'³⁵ and, similarly, to

³⁴ Emmanuel Mourlon-Druol, "Steering Europe", p. 420.

³⁵ Jorg Monar, "The European Union's Institutional Balance of Power after the Treaty of Lisbon" in, *The European Union after the Treaty of Lisbon: Visions of Leading Policy-makers, Academics and journalists*, ed. Enrique Banús Irusta, (Luxembourg: Publications Office of the European Union, 2011): p. 67.

the intriguing absence of strict legal delimitations contrarily to every other aspect of the institutional framework of the EU.

The European Council was given additionally competences with different institutional characteristics. On one hand, under the second and third pillars, the European Council was given a purely intergovernmental role, outside the Community method and the CJEU framework. Under the first pillar on the other hand, important decisions were to be made by the Council of the European Union, but in its highest possible composition - that of Heads of State and government. This reflects a middle ground agreement between the need to have heads of state making certain crucial decisions, but the emphasis of different actors - smaller member states, commission and EP - to keep them under the community method.³⁶

Overall, these elements introduced by the treaty of Maastricht were maintained through Amsterdam and Nice, and provide the architecture of the Union at the turn of the century. One of its main characteristics is what was referenced earlier, the fact that the capitals moved politically salient areas to the EU level, but did not provide the Commission nor the European Parliament a relevant role in them. In this 'integration paradox' the governments retained control through the European Council and the Council, although not in the classic interpretation of the intergovernmental mode of action - through pushing 'a narrow defense of national interests'³⁷ - rather cooperation was 'deliberative and consensus-seeking'³⁸. An important peculiarity that follows from status of the European Council up until this point is that it was ultimately a 'protected institution'. It could not be brought to the Court because its decisions were never the final implementing decision, and being outside the formal framework the Court did not have jurisdiction over it. The dynamic was that there would always be an additional step on the lower level of the hierarchy by which the path set by the EUCO was operationalized. The institution would have been the Commission or the Council, including the Parliament if it is a procedure fell under the codecision procedure. That

³⁶ Wolfgang Wessels, "The Maastricht Treaty and the European Council: The History of an Institutional Evolution", *Journal of European Integration*, Vol. 34, (2012): p. 763.

³⁷ *Ibid.*

³⁸ *Ibid.*

adopting institution would have been the one taken to the Court, and it would be its decision the one reviewed. The fundamental characteristic changed with the Treaty of Lisbon.

1.3. The Treaty of Lisbon

The Treaty of Lisbon is the instrument that brought the European Council the formal identity that it has today. Fundamentally, the change that Lisbon brought was that the European Union finally recognized the EUCO as a *de jure* institution, after almost 30 years of being a *de facto* one. Together with the strategic guiding responsibility that it had ever since the Paris Summit, several new provisions were introduced, all of them with a strong systemic relevance, such as the ability of amending certain parts of the Treaties, changing voting or legislative procedures and appointing the High Representative.³⁹ The European Council is the institution with the most power to change or shape the Union itself, unlike the other institutions, which have the power to change or shape what the Union's output.

An initial in-depth view into the competences granted to the European Council by the Lisbon Treaty will be carried out first. The aim of this thesis is to discern whether there is a pattern of changing institutional characteristics, and if so whether they go further than the treaties intended. Given the dangerous implications of the notion of potential increasing power by the European Council, the setting of the starting point is warranted. Only with a clear picture of what the primary law sets out it can be compared further ahead with current actions. It is important to note that it is difficult to differentiate what is part of the mandate and what is not, since the wording does leave ample room of interpretation, and can be used in different ways depending on the requirements of the specific situation. Thus, in a crisis the European Council would have the possibility of trying to extend its competence by way of a generous reading of the text, after all ever since the Paris Summit, the 'implied political functions [...] remain vague and ambiguous'.⁴⁰ Nonetheless, the 'generosity' of that reading cannot be infinite, and there

³⁹ Monar, "The European Union's Institutional Balance", p. 68.

⁴⁰ Wessels, "The Maastricht Treaty and the European Council", p. 762.

are limits to it, limits that this paper will assess in Chapter IV. In this section only the Treaty of the European Union will be reviewed, since it contains the more relevant provisions for the purposes of the paper.

The first time the European Council is mentioned in the TEU is in Article 7⁴¹, which provides for sanctions for breaches by Member States of the values present in Article 2 TEU⁴². The role given to the European Council is that of determining whether there has been in fact a breach or not. That is arguably the most relevant part of the Article 7 procedure, since it is the one that opens the door to the Council to adopt further decisions. Without the initial determination there is no procedure. With the first mention it is already clear what is the position of the EUCO in the framework: that of an authority situated above, not deciding on the specifics of any situation, but effectively orienting the direction that those specifics will take.

Article 13 establishes the elements with greater relevance in regards the European Council in the Lisbon framework; Article 13(1) recognizes it as one of the seven European Union institutions while Article 13(2) includes a crucial control on discretionary action, stating:

Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

This part also applies now to the European Council, who for the first time is explicitly included within a framework that sets boundaries of action; unlike the position it had held up until that point. A question arises as to why was it only in Lisbon that the European Council was legally recognized. The fact that it was not until Lisbon that the

⁴¹ Treaty on European Union (Consolidated version 2012), OJ C 326.

⁴² Article 2 TEU reads 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.'

European Council was included as an official institution of the Union does not mean that it had not had a role before that. As it follows from the previous analysis, quite on the contrary, the European Council carried an important function ever since it was created at the Paris Summit. That it remained outside is normally attributed to two reasons, the preference to keep the ‘high executive’ outside of the Treaty and thus not put any limits on its freedom⁴³ (it could not be reviewed by the Court) and secondly, due to the strong intergovernmental identity of the EUCO, which different actors did not want officially included in the primary law⁴⁴.

With these notions in consideration, it is clear that the fact that the European Council was made official only in Lisbon does not mean it was only then that it started to have a relevant role in policy-making. A key aspect to stress here is that the Lisbon Treaty answered a call to bring down the Maastricht pillar structure, which had a large proportion of policy areas standing outside of the jurisdiction of the Court, thus in order to remedy the 'rule of law deficit' Lisbon made important changes in this regard.⁴⁵ This was in line with the aims that originated the IGC for the Future of Europe, with the Nice European Council of 2000 addressing the need of bringing Europe ‘closer to the citizens’ by ensuring better democratic legitimacy and transparency.⁴⁶ Interestingly enough, the Constitutional Treaty did not include the expansion of the jurisdiction of the Court in order to include revision of European Council decisions, being only in the IGC for the Lisbon Treaty where this was included.⁴⁷ By formalizing the European Council, the Treaty of Lisbon brought it under the scope of the Court, as well as the duties set out in Article 13(2). That is a total reconfiguration of the institution, and carries with it a completely different conception of it. The defining characteristic of the European Council within the Union's framework was its ambiguity, its capacity to act in a much

⁴³ Rittelmeyer Yann Sven, “The institutional consecration of the European Council: Symbolism beyond formal texts”, in *The European Council and European Governance: The commanding heights of the EU*, eds. Foret François and Rittelmeyer Yann-Sven, (Abingdon: Routledge, 2014): p. 31.

⁴⁴ *Ibid.*

⁴⁵ Laurent Pech, “A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law”, *European Constitutional Law Review*, Vol. 6, Issue 3, (2010): p. 396.

⁴⁶ Clive Church and David Phinnemore, “From the Constitutional Treaty to the Treaty of Lisbon and Beyond”, in *European Union Politics*, eds. Michelle Cini and Nieves Pérez-Solórzano Borragán, (Oxford: Oxford University Press, 2016): p. 32.

⁴⁷ Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, (Oxford: Oxford University Press, 2010): p. 115.

more unfettered way than the others. This paper puts forward the argument that bringing the European Council under Article 13(2) is the one of the most important additions of the Lisbon Treaty.

Article 15 sets out the overall competences of the EUCO, stating in its first paragraph the main one, that it 'shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof'. Paragraphs 2 to 5 establish different elements such as procedural rules and composition of the body, while 15(6) deals with the President of the European Council. Subsequent articles provide the European Council with relevant power in terms of shaping the composition of other institutions. This is the case of the European Parliament, the Commission, and the High Representative. These are followed by Title V relating to the Common Foreign Security Policy, in which the EUCO 'stands at the top'⁴⁸. Together with the Council they are the only institutions with the ability to make decisions and take action. This sets CFSP apart from all other areas of Union policy and represents the uniqueness of the area. Complete intergovernmentalism, something de Gaulle would have been happy with.

The final provisions of the TEU include Article 48, which sets out the different treaty-amending mechanisms of the Union. In this regard the European Council enjoys a substantial position, having the possibility of amending through a simplified revision procedure 'all or part of the provisions of Part Three of the [TFEU]'. This decision has to be reached by unanimity and later approved by Member States according to their individual constitutional requirements.⁴⁹ The last subparagraph of 48(6) establishes that amendments concluded under this procedure 'shall not increase the competences conferred on the Union in the Treaties'. This part is highly relevant, since whatever the aim of the amendment may be, the competences must remain the same, i.e., the EUCO cannot expand its powers by making use of Article 48. Read together with Article 13(2) it is clear that Lisbon envisioned clear boundaries for the European Council. That does not mean it does not acknowledge its importance and status as a sort of higher authority

⁴⁸ Youri Devuyt, "The European Council and the CFSP after the Lisbon Treaty", *European Foreign Affairs Review*, Vol. 17, Issue 3, (2012): p. 327.

⁴⁹ Article 48(6)(2) TEU.

- after all it was the Head of State the ones to draft it - but it nonetheless sets limits to that height. These limits were tested very early on, as the Eurozone crisis started to set in.

CHAPTER II: THE EUROZONE CRISIS

“The reform of Europe is not a march towards supra-nationality [...] The crisis has pushed the heads of state and government to assume greater responsibility because ultimately they have the democratic legitimacy to take decisions [...] The integration of Europe will go the intergovernmental way because Europe needs to make strategic political choices”

Nicolas Sarkozy

The weakness of the Stability and Growth Pact had not presented any real problems until the onset of the Eurozone crisis, mainly due to the fact that the economies of the Eurozone had not been under significant pressure since its adoption. After 2008 that changed and the reform of the framework was put on the agenda. Two instruments belonging to that reform plan and the processes that lead to their adoption will be reviewed in this section, namely the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. An analysis into these two instances will establish whether, within the context of the management of the Eurocrisis, the European Council disregarded its Treaty competences and thus infringed the Rule of Law, contrarily to its obligations stemming from Article 2 and 13 TEU.

2.1 European Stability Mechanism

In December 2010 the European Council issued a Decision by which, through the accelerated procedure established in Article 48 TEU, it amended Article 136 TFEU. That amendment would include a new paragraph that allows the Union to create the

European Stability Mechanism, which forms part of the elements considered to be needed to save the EU from the crisis. In October 2012 ESM was inaugurated, following the signature by the Member States of an intergovernmental treaty. It is worth noting that the amendment of the TFEU did not contemplate the Union creating the mechanism but that the Member States had the option of doing so if the circumstances required them to do so. The ESM represented the first economic governance body to be formed outside of the Union framework and thus inaugurated a trend that would continue with through the crisis, including the TSCG, which will be reviewed further ahead.

The position of the powerful executives at the time of the Eurocrisis , namely that of Merkel's Germany, Sarkozy's France, Cameron's UK and Berlusconi's Italy is best reflected by the comments made by Angela Merkel in a speech in November 2012 when she stated that "the Lisbon Treaty has placed the institutional structure [of the EU] on a new foundation" by which she meant that Heads of State in the European Council had the authority to take the lead and be in charge of decision-making in specific, highly salient areas.⁵⁰ The Heads of State decided on the amendment of the TFEU and subsequently concluded the ESM as an international treaty. Both these actions were within the legal framework of the Union since the EUCO is entitled to amend Title III of the TFEU by virtue of Article 48 TEU through the simplified revision procedure, and the Member States are allowed to enter into international treaties where the Union does not have exclusive competence. In the creation of the ESM the European Council acted unilaterally, and there was no role envisioned or granted to any other institution, apart from a consultation with the ECB⁵¹ *ex ante*. Within the structure of the ESM other institutions were provided with a role, namely monitoring and assessing responsibilities to the ECB and the Commission. The European Parliament was excluded completely throughout the whole process, including its absence of a role in the mechanism, even though this was not necessary and certain tasks could have been placed upon it.⁵²

⁵⁰ Sergio Fabbrini, "Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis", *Comparative Political Studies*, 46(9), (2013): p. 1013.

⁵¹ *Ibid.*

⁵² David Yuratich, "Article 13(2) TEU: Institutional Balance, Sincere Co-Operation, and Non-Domination During Lawmaking?", *German Law Journal*, Vol. 18, No. 1, (2017): p. 104.

The ESM Treaty does not have an explicit provision establishing its obligation to comply with European Union law, except in terms of the Memoranda of Understanding⁵³, including only a somewhat confusing preamble paragraph stating that ‘[s]trict observance of the European Union framework [...] should remain the first line of defence against confidence crises affecting the stability of the euro area’. That seemingly aloofness toward the EU legal order is present elsewhere in the ESM Treaty, namely with the fact it does introduce certain arrangements that do not match the general order of EU decision-making such as the voting mode within the ESM. Votes are allocated based on the number of shares each country has within the mechanism, with the result of the big countries having a quantifiably larger amount of votes than smaller states. This changes the philosophy behind normal QMV voting as it would be present in the Council for a logic of economic power, where Germany stands clearly on top, and importantly, small states stand with even less power. In fact, a qualified majority of 80% as laid out by the ESM treaty cannot be achieved if Germany votes against, since it has 27% of the voting rights.⁵⁴ Essentially, Germany is the only state under the ESM regime to have a veto right, clearly affecting negatively the spatial constitutional balance of the EU⁵⁵. The result from the ESM is that the European Council modifies the very essence of the EU by stepping outside of it by way of international law. Additionally, being outside of the Union’s framework, its activities are not subject to the provisions on accountability and transparency provided by the treaties.⁵⁶ Therefore, while the process of amending the TFEU and signing the ESM treaty were, technically, within the legality of the EU’s order, effectively the European Council has amended EU law by way of using international law.

2.2 The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

⁵³ Article 13 (3), Treaty Establishing the ESM, signed on 2 February 2012 (Consolidated version following Lithuania’s Accession to the ESM).

⁵⁴ Fabbrini, “Intergovernmentalism and Its Limits”, p. 1021.

⁵⁵ Mark Dawson and Floris de Witte, “Constitutional Balance in the EU after the Euro-Crisis”, *Modern Law Review*, Vol. 76, Issue 5, (2013): pp. 817-844.

⁵⁶ Yuratich, “Article 13(2) TEU”, p. 103.

Following the adoption of the ESM, another international treaty was envisioned by the executives of the Member States in order to continue the strengthening of the Stability and Growth Pact framework. That next step was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), which presents another interesting instance of the role of the European Council during the Eurozone crisis. Three documents mark the process of the reform of the SGP, a ‘Euro Summit Statement’, an ‘Interim Report’ by the President of the European Council and a ‘Statement by the Euro Area Heads of State or Government’. These documents were the ones that established the changes that the Pact would go through, with the final culmination of the international treaty on Stability, Coordination and Governance - the reasons for it being an international treaty will be reviewed further below. Apart from the last one they were all adopted by informal set-ups, not mentioned in the Treaties, created by the European Council in the course of its Eurocrisis management. A closer look into them is warranted, in order to assess which kind of content do they include, what processes they envision and what idea of EU decision-making informs them.

The first document was prepared during a meeting of the recently conceived Euro Summit, an informal group consisting of the Heads of State of the Eurozone countries, and was released as a ‘Summit Statement’ on the 26th of October 2011. That Statement is relevant for various reasons, one of them being that it is the one that formalized the Euro Summit, by stating “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”. A number of interesting details can be observed in the phrasing of the document, such as the use of the first person ‘we’ and ‘our’, instead of the usual way in which European Council conclusions are phrased, by using the name of the institution to refer to itself. There is certainly a perception of attempted ‘closeness’ or ‘informality’ which considering that comes from a group of Heads of State at the height of the Eurozone crisis is definitely a purposeful approach to stress the non-official status of the configuration. Another aspect of the phrasing worth noting is the established mission of the new body, namely to ‘provide strategic orientations’, clearly echoing the Treaty mandate of the European Council which is in turn the only competence the Euro Summit can have a claim for.

In terms of the Stability and Growth Pact, the Statement was the first step into its reform for it mandates the President of the European Council, together with the President of the Commission and the President of the Eurogroup to ‘identify possible steps to reach [the strengthening of the economic union]’ while ‘in full respect of the prerogatives of the institutions’.⁵⁷ The second document is the product of the Euro Summit commission, elaborated by Van Rompuy and dated 6 December 2011.⁵⁸ In it the President of the European Council lays out two possible ways forward, both involving a combination of Treaty amendments and secondary legislation. That proposal follows closely the path envisioned by the German and French executives, the amendment of Article 126 is cited in a position paper of the German government that calls for upgrading the theoretical sanctions of the SGP to ‘real automatic sanctions’⁵⁹. It is ironic since it was both Germany and France the first two countries to fail to meet the requirements of the SGP, although in that case the theoretical sanctions remained theoretical and were never applied.⁶⁰ In a letter from Merkel and Sarkozy to Van Rompuy from the 5th of December, they restated that plan as the required one in order to improve the coordination of fiscal policies across the EMU and to build ‘on enhanced governance’.⁶¹

This was the initial idea, however in the European Council that followed on the 9th of December the United Kingdom exercised its veto power to block the Treaty amendment process going forward. Following that development the European Council, in its conclusion of 9th of December, stated that ‘considering the absence of unanimity among the EU Member States, they decided to adopt them through an international agreement’. That agreement was adopted on the side of the 2012 January European Council meeting, and included the elements that were stated in the December Statement of the Euro Area Heads of State or Government. Although the executives of most

⁵⁷Euro Summit Statement of 26 October 2011. Available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf. Last accessed 18 May 2018.

⁵⁸ Initially intended as a secret document, it became leaked. Available at: <https://www.ft.com/content/257bba2b-85fc-351e-ae7e-f5a6d1701436>. Last accessed 10 May 2018.

⁵⁹ “The future of the EU: Necessary Integration Policies for Progress Towards Establishing a Stability Union”, Available at: political issues at <http://s3.documentcloud.org/documents/267781/brusselsembed.pdf>

⁶⁰ Claudia M. Buch, “From the Stability Pact to ESM - What next?”, *IAW Diskussionspapiere*, Nr. 85 (2012).

⁶¹ Sarkozy and Merkel's letter to Van Rompuy. Available at: <https://www.reuters.com/article/us-eurozone-france-letter/text-sarkozy-and-merkels-letter-to-van-rompuy-idUSTRE7B612Y20111207>

Member States had declared that they preferred the amending of the Treaty as the way forward, the UK veto changed the course to an intergovernmental treaty.⁶² Overall, the process started in the Euro Summit, and moved through the President of the European Council, to a European Council meeting finally ending the adoption of a treaty, the content of which was present in an earlier EUCO conclusion.

The final result has been defended as being respectful, and compliant both with EU law and its institutional framework, Steve Peers even going as far as qualifying it as legally unnecessary and redundant, since it ‘largely restates obligations that already apply pursuant to EU law’.⁶³ While the fact that the Treaty’s subject-matter may respect EU law, can the same be said about the way in which it was adopted? The signatory parties note their wish to make use of the enhanced cooperation provisions of the treaties and they recall that they are to ‘refrain from any measure which could jeopardise the attainment of the Union’s objectives’, but was the procedure that led to the TSCG in line with the TEU and TFEU? This could be considered an example of output legitimacy, without an accompanying input one. That the provisions included in an intergovernmental treaty are in line with EU law does not necessarily imply that its signing followed it. Restating the provisions of Article 13 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. It shall not exercise legislative functions.” The negotiation of the strengthening of the SGP that has been outlined here cannot be considered ‘general’, since the work of the European Council has been highly detailed and specific, its conclusion of December 2011 being transposed into a treaty without much variations.

2.3. The European Council during the Eurozone Crisis: Respecting its powers under the Treaty?

⁶² Rudolf Streinz, “The Limits of Legal Regulation: Will the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Have a Real Legal Effect?”, in *Legal Challenges in the Global Financial Crisis: Bail-outs, the Euro and Regulation*, eds. Wolf-Georg Ringe and Peter M Huber, (Oxford: Hart Publishing, 2014) p. 239.

⁶³ Steve Peers, “The Stability Treaty: Permanent Austerity or Gesture Politics?”, *European Constitutional Law Review*, Vol. 8, Issue 3, (2012): p.441.

The conduct of the European Council during the Eurozone crisis was marked by the ‘legal grey area’ in which it acted⁶⁴. Among the elements the European Council used during the management of the crisis, there were soft law instruments to put forward specific policy directions, a step ahead of simply dictating strategy orientations. This is reflected in the Conclusions, such as the one from the meeting in March 2012, where it stated that in order to enhance the role of ‘peer pressure’ in Member States complying with economic governance rules, the European Council, inter alia, “invites the President of the European Council to promote regular monitoring by the European Council of progress achieved on key Single Market proposals in the various Council formations.”⁶⁵ This mode of policy making has resulted in a European Council very actively involved with Heads of State taking a position at the forefront of decision-making within the EMU framework.

Conclusions are the currency of the European Council, they are its main instrument of action, through which they set out the strategic guidelines that the Union ought to follow. They normally focus on salient topics of EU policy such as economic governance, foreign policy and terrorism. They provide general provisions on potential action, leaving the details on legislation and implementation to the other institutions of the Union. In its conclusions the European Council ‘wishes’, ‘assesses’, ‘welcomes’, ‘invites’. These are broad terms, used to guide policy, express the opinion of the Heads of State and communicate which topics are of importance in its view. Up to March 2008, a few months before the bankruptcy of Lehman Brothers, and in an economic environment that was already being defined as ‘quickly deteriorating’ and in state of ‘turmoil’, the European Council still ‘invited’ the ECOFIN to implement policy in the area.⁶⁶ This contrasts with the Conclusion on the meeting of March 2011, when the European Council ‘adopted a comprehensive package of measures’. This reflects the way in which EUCO simply adapted the Conclusions to the necessities of the moment,

⁶⁴ Alicia Hinarejos, “Economic and Monetary Union”, in *European Union Law*, eds. Catherine Barnard and Steve Peers, (Oxford: Oxford University Press): p. 586.

⁶⁵ European Council – Conclusions 1-2 March 2012.

⁶⁶ European Council – Conclusions 13-14 March 2008.

expanding their scope to act as de facto legislation proposals, displacing the position of other institutions.⁶⁷

Desmond Dinan defends that “the European Council exists in part as a crisis management mechanism”, given that the Heads of State are the best positioned to deal with that type of situation.⁶⁸ That may be a logical assumption since the Heads of State carry with them a strong mandate directly stemming from the Member States and it has always been a part of the “original raison d’être”⁶⁹. The problem arises when a strategic role in dealing with a crisis evolves into a more specific decision-making mode, whereby the European Council leaves its position ‘above’ and takes on responsibilities initially vested upon other bodies of the EU.⁷⁰ Importantly, the fact is that the Lisbon Treaty does not make any reference to the role of the European Council as a crisis-manager, nor generally nor in any specific area. For instance, the TEU includes in the CFSP title an article regarding crisis management, where the Council is granted power to act accordingly if the need arises⁷¹, with the option of delegating to the Political and Security Committee “the political control and strategic direction of the crisis management operations”⁷². If a role in this kind of situation would have been envisioned for the EUCO it would have been within the CFSP, yet what is provided is an active involvement at the Council or more specifically at the Committee level. From this it also follows that, in the case of economic governance, if the Lisbon Treaty would have contemplated the possibility of a large scale economic crisis, it would most likely have been ECOFIN the one to have the responsibility to handle it. No part of the text gives room to the interpretation that the European Council should rise to the occasion and take action. There are several misinterpretations of the Lisbon Treaty that must be rejected, for they establish an institutional framework that is simply not there. Specific

⁶⁷ Pierre Bocquillon and Mathias Dobbels, “An Elephant on the 13th Floor of the Berlaymont? European Council and Commission Relations in Legislative Agenda Setting”, *Journal of European Public Policy*, Vol. 21, Issue 1, (2014): p. 31.

⁶⁸ Desmond Dinan, “Governance and Institutions: The Unrelenting Rise of the European Parliament”, *Journal of Common Market Studies*, Vol. 52, Issue S1, (2013): p. 104.

⁶⁹ *Ibid.*

⁷⁰ Dermot Hodson, *Policy-Making under Economic and Monetary Union*, in *Policy-making in the European Union*, eds. Helen Wallace, Mark A. Pollack and Alasdair R. Young, (Oxford: Oxford University Press, 2014): p. 190.

⁷¹ Article 43 TEU.

⁷² Article 38 TEU.

decision-making is not contemplated for the European Council, yet this was disregarded during the Eurozone crisis.

Steven Peers defends there is nothing substantially new, but a Treaty amendment was argued as necessary, only being blocked by a veto. That did not stop the Eurozone leadership, which instead of going back to the table finalized an international treaty. It is doubtful whether executives would go through the process of considering a Treaty amendment when the objective is ‘legally unnecessary’⁷³. Bruno de Witte sees the desire of the German government to have to budgetary stability introduced in the Union’s legal order in a ‘solemn and more permanent’ manner as the reason behind the troublesome process of amendment.⁷⁴ Additionally, other commentators have stated the European Council fixed some ‘leftovers’ from the Maastricht Treaty, where fiscal integration was rejected and the control of this area of policy was to remain with national governments⁷⁵. If the European Council is ‘fixing’ the Maastricht Treaty and advancing the process of economic integration, it should be done through the appropriate channels, with publics having a say.

Both Peers and de Witte offer compelling arguments as to why there is no need to see a wide network of shadow powers trying to exercise absolute power on the supranational elements of the Union, as well as on the European people. Nonetheless, the behavior shown by the members of the European Council is far from what should be expected in the EU’s legal order. In the course of the Eurozone crisis, the European Council assumed a more assertive position than usual. That assertiveness modified the institutional framework of the Union by displacing the Commission in its role as a legislation initiator, and to a lesser extent, the Council.⁷⁶ Moreover, the inherent nature of the European Council as a forum where larger Member States carry a stronger

⁷³ Peers, “The Stability Treaty”.

⁷⁴ Bruno De Witte “Using International Law in the Euro Crisis: Causes and Consequences”, *ARENA Working Paper*, No. 4, (2013): p. 8.

⁷⁵ Dorel Vlad, “The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Social Economic Debates”, Vol. 5, Issue 2, (2016): p. 10.

⁷⁶ Dawson and de Witte, “Constitutional Balance”, p. 831.

position relative to other institutions goes against the political set-up of the Union, by leaving smaller states with a “voice without a choice”.⁷⁷

CHAPTER III: THE REFUGEE CRISIS

Instability in the Middle East was heightened after the Afghanistan and Iraq wars, the Arab Spring and the subsequent conflicts that arose in its wake such as the Libyan and Syrian. Together with the overall troubled state of Sub-Saharan Africa with, among others, the civil wars in Somalia and South Sudan have provoked a steady flow of migrants and refugees to the European Union. In particular, Syrian and Afghani refugees started crossing into the EU *en-masse* during 2014 and 2015, overwhelming national administrations, as well as provoking an intense debate on whether Europe should accept them or close its borders. The refugee-management crisis threatened the basic consensus required for the Union to function. A difference of opinions along yes/no refugees dividing lines brought to light issues that the continent had just started to experience. After action at the Council and Commission level, the European Council increasingly became involved in strategic guidance and ultimately in taking specific actions in order to end the flow of people coming from Turkey by sticking a deal to avoid refugees from entering Greece through Anatolia.

The role of the European Council in the Area of Freedom, Security and Justice is halfway between the one it has in supranational areas of EU policy and the one it has in CFSP. This is due to the hybrid characteristics of the AFSJ after the Lisbon Treaty, where the third intergovernmental pillar of Maastricht was moved closer to the Community method, but still retaining some peculiarities from its original mode.⁷⁸ Article 68 TFEU states that the European Council is to set out “the strategic guidelines for legislative and operational planning within the [AFSJ]”. The wording is slightly different from the “general political directions and priorities” of Article 15 TEU and is understood to entail a more active role on the part of the EUCO in terms of agenda-

⁷⁷ Christopher Bickerton, “A Union of Member States: State Transformation and the New Intergovernmentalism”, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, eds. Christopher J. Bickerton, Dermot Hodson, and Uwe Puetter, (2015).

⁷⁸ Adina Maricut, “With and Without Supranationalisation: the post-Lisbon Roles of the European Council and the Council in Justice and Home Affairs Governance”, *Journal of European Integration* Volume 38, Issue 5, (2016): p. 543.

setting. In practice, the Heads of State do not put much emphasis in the normal course of events in this area of policy-making and only provides ‘political impetus’ in cases of a deadlock in the Council⁷⁹. In times of crisis on the other hand, the European Council does come to the forefront and assumes a leadership position, this being its main role the institution has in AFSJ.⁸⁰

The following will be a detailed review of the steps that preceded the EU-Turkey Statement and in particular the role that the European Council played on it. The aim of this paper is to establish whether there is a pattern of activity where the EUCO is systematically overextending its Lisbon mandate and thus violating Article 13 TEU. Thus the refugee-management crisis provides for a useful case study in order to assess whether the prominent executive role that the European Council had during the Eurozone crisis, as shown by the previous section, continued in the same way. The analysis will serve to identify the dynamics of the existence of breaches of the Rule of Law. First, a timeline of the events since the increased tension from the beginning of 2015 on, with a focus on the European Council activity during the time. Secondly, a review of institutional competences as present in the Lisbon Treaty and whether the EUCO acted within its mandate, or if instead it either expanded it or encroached on a different EU body with the relevant powers. This will be followed by an assessment of the instruments used by EUCO during the refugee-management crisis, with a particular emphasis on the press release used to inform about the EU-Turkey Statement. Lastly a general synthesis of the important notions raised by the analysis will be carried out.

The focus of this section will be on the relationship between the European Council and Turkey almost exclusively. Over the period of time that will be reviewed a multiplicity of other areas of policy were touched upon by the EUCO, and more specifically in relation to the refugee crisis, similarly a varied amount of other topics were dealt with, among others, the relationship of the EU with the Western Balkans, or the steps to take in regards the Syrian Civil War.

⁷⁹ Maricut, “With and Without Supranationalisation”, p. 545.

⁸⁰ Maricut, “With and Without Supranationalisation”, p. 546.

3.1. The European Council through the refugee crisis.

In April 2015 the European Council held an emergency meeting in order to address the at the time referred to as the ‘situation in the Mediterranean’. In that meeting a series of measures were approved, which were initially proposed by a joint Foreign and Home Affairs Council chaired by High Representative Mogherini, held three days earlier, with ministers of foreign affairs and interior agreeing on the way forward. Some of the decisions included the aim of disrupting trafficking networks by ‘swift action’ and cooperation between Member States and the relevant agencies, and the prevention of migration flows by enhanced support of northern African countries by way of CSDP mission present on the grounds, as well as cooperation with regional partners and bordering states, such as Turkey.⁸¹ Additionally, the European Council agreed on ‘tripling the financial resources’ of Frontex Operations Triton and Poseidon, based on an initial proposal by the Council of ‘increasing the financial resources’⁸², reflecting an instance where it is the European Council the one to establish the final amount upon a proposal of the Council which is a technical reversion of their roles. Already here it is observable the dynamics at work when a crisis is present and the European Council takes its role as crisis manager. The treaties provide mere guidelines, with the EUCO being the one to chose its own power.

In the scheduled meeting of June, the ‘emergency situation’ was first in the agenda and a series of important decisions were adopted along three different dimensions, namely ‘relocation/resettlement, return/readmission/reintegration and cooperation with countries of origin and transit’⁸³. Firstly, the European Council agreed on a relocation scheme for 60000 people from Italy and Greece to other Member States, the ration of which to be decided at a Council by consensus. This is a specific example of the EUCO taking very concrete decisions, merely stating the Council to the ‘rapid adoption of a Decisions to this effect’. Additionally, the Conclusion states that high-level dialogues were to be initiated by the High Representative with origin and transit countries,

⁸¹ Special meeting of the European Council, 23 April 2015 - statement. <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/pdf>

⁸² Joint Foreign and Home Affairs Council: Ten point action plan on migration Luxembourg, 20 April 2015.

⁸³ European Council meeting (25 and 26 June 2015) – Conclusions

marking how at the beginning of the crisis the role of the High Representative is still recognized as being the main diplomat for the EU.

In an informal meeting in September, the main focus was the now termed ‘unprecedented migration and refugee crisis’. At this point the tensions between Member States have clearly become an issue in the process of managing the crisis. Donald Tusk in its intervention before the meeting stated ‘for many days I have tried to moderate discussions between Member States, but we have now reached a critical point where we need to end the cycle of mutual recriminations and misunderstandings’⁸⁴, while the beginning of the official Statement mentions early on the need to work together ‘in a spirit of solidarity and responsibility’⁸⁵. Apart from the general state of affairs in regards the divide between different perspectives as to how to tackle the issue of relocation, the Statement is in line to what should be expected of a European Council meeting. It states: “We ask the EU institutions and our Governments to work speedily on the Priority Actions proposed by the Commission. We want operational decisions on the most pressing issues before the October European Council, along the following orientations”⁸⁶. Following that statement there is a list of guidelines that do not go into specific details, but are rather general in its approach. When it mentions the need to increase funding, it does so by mentioning the need to ‘enhance’, or a bit more specifically, to add ‘at least’ 1 billion euros. They are not specific amounts, but indicative amounts that the other institutions will later, through the procedures contemplated in the treaties, make the final decision and implement them.

In October 2015 the Commission, ahead of the European Council meeting presented the ‘EU-Turkey joint action plan’ (JAP), a soft law instrument that reflects the commitment of both parties to cooperate in order to improve the situation in regards to the crisis by “(a) by addressing the root causes leading to the massive influx of Syrians, (b) by supporting Syrians under temporary protection and their host communities in Turkey and (c) by strengthening cooperation to prevent irregular migration flows to the EU.”

⁸⁴ Doorstep remarks by President Donald Tusk before the Informal meeting of Heads of state or government, 23 September 2015

⁸⁵ Informal meeting of EU heads of state or government on migration, 23 September 2015 - statement

⁸⁶ Informal meeting of EU heads of state or government on migration, 23 September 2015 - statement

The EU promises to provide Turkey with know-how and funding, as well as hinting at the improvement of its conditions for accession, in exchange of ensuring the protection of the refugees present in its territory and the enhancement of its efforts to the ‘fight against and dismantling of criminal networks’. Even though the JAP does not mention the compromise of the Union to further the accession talks, the document begins by referring to Turkey as ‘negotiating candidate country Turkey’, and the European Council Conclusion on the meeting of the same day (October 2015 Conclusion) remarks that ‘the accession process needs to be re-energized with a view to achieving progress in the negotiations’.⁸⁷ The JAP also has a peculiar characteristic, namely as the fact that it is ‘agreed ad referenda’ without stating what are the timeframes for its conclusion or what details are to be finalized upon. The October 2015 Conclusion ‘welcomed’ the JAP, adding that ‘successful implementation will contribute’ to the accession process and that the progress will be assessed in the spring of 2016.⁸⁸ In the informal meeting of the European Council in November, the only document produced was a brief ‘Press Remarks’ by Donald Tusk⁸⁹. In it the President remarks the gravity of the situation with grave statements such as ‘the future of Schengen is at stake and time is running out’ and stating his position towards a more hard security approach on people coming into Europe, mentioning that ‘if a migrant does not cooperate, there must be consequences’. After those comments he stressed that the main focus of the meeting had been the negotiations with Turkey, but the following elaboration explains the process in a rather confusing way.

Our main point of discussion however was on Turkey. President Juncker and Vice-President Timmermans, who was just back from his meeting with the Turkish Prime Minister, gave us a detailed update on where negotiations with this important partner stand. We feel confident that a mutually beneficial relationship can be established that will help us confront the present crisis.

⁸⁷ European Council meeting (15 October 2015) – Conclusions

⁸⁸ European Council meeting (15 October 2015) – Conclusions

⁸⁹ Press remarks by President Donald Tusk after the informal meeting of EU heads of state or government

We all agreed that the EU side will do what it takes to achieve this while expecting the Turkish side to play its part.⁹⁰

What is confusing is that it is not clear what this refers to since there is no mention on what is there to achieve, or what is the part that Turkey has to play. Considering the importance of the moment, and the relevance of the person producing the press release, much more clarity is to be expected. It is worth noting that at this point it is still not entirely certain whether JAP has indeed been adopted between the parties and this document does not assist, if anything it does the exact opposite.

At the end of November the Heads of State of the EU met with their Turkish counterpart, to discuss the crisis, producing a press release referred to as ‘EU-Turkey Statement’ (from now on ‘2015 Statement’). This is not the one that will be the main focus of this section, which was concluded in March 2016. The wording of the November Statement is what can be expected from this type of instrument, stating elements of common ground that are to be developed further, such as visa liberalization and the holding of frequent summits at different levels.⁹¹ Most importantly, point 7 of the statement reads: “Turkey and the EU have decided to activate the Joint Action Plan”. It is now that the required element to initiate it following the ‘ad referenda’ clause was the activation of the European Council. This *modus operandi* does not appear in any official or informal document, as far as the author is concerned. The requirement of the European Council formally ‘activating’ and informal agreement negotiated by the Commission with a third country is a new element, created at that juncture. Additionally, the Statement also states the commitment of the EU to provide 3 billion euros⁹² in order to support humanitarian efforts in Turkey as part of a ‘Refugee Facility for Turkey’ (‘Facility’) set up by the Commission, which is the instrument by which the EU would operationalize its part of the JAP. Confusingly once again, this is stated in paragraph 6 of the Statement, i.e. the ‘activation’ of the JAP was mentioned

⁹⁰ Press remarks by President Donald Tusk after the informal meeting of EU heads of state or government. 12/11/2015 (emphasis added)

⁹¹ Meeting of heads of state or government with Turkey - EUTurkey statement, 29/11/2015

⁹² The first time the specific amount of 3 billion euros is mentioned is in a press release by the Commission 4 days before the release of the 2015 Statement.

later than the set-up of the instrument that was part of the JAP itself. Why would that had been the order in which the Statement was set up is not clear, but it certainly contributes more to the feeling of disorder. Apart from that element, the Statement does not lay the ground of the agreement between the EU and Turkey, it is not the instrument by which the compromised of both parties are included. It states provisions in a general manner.

The Conclusion of the December meeting of the European Council does not refer to ‘orientations’ as the previous one did, but rather establishes a series of provisions that the institutions and Member States ‘must urgently’ conduct. The tone of the document reflects the gradual worsening of the crisis, despite the efforts from the EU to slow down the transit of people across the Mediterranean. In relation to the Turkey deal the document tasks COREPER to ‘rapidly conclude its work on how to mobilize the 3 billion euro’ from the Facility.⁹³ The Conclusion of the meeting in February 2016 of the European Council remarked that despite action taken in the area, ‘the flows of migrants arriving in Greece from Turkey remain much too high’ and further efforts have to be realized, on the side of Turkey, to implement its side of the JAP. A meeting of the Heads of State and the Turkish Prime Minister, as well as Donald Tusk and Jean Claude Juncker, took place on the 7th of March 2016, in between the February and March EUCO meetings, in order to discuss the state of affairs in the crisis.. The results of the discussions were made available through a press note released by the Secretariat of the Council, which included several key elements. One of them was the set of ‘additional proposals’ that Turkey had brought to the table in order to further limit the number of people crossing into the EU, noticeably the controversial prospect of returning ‘all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU’⁹⁴, as well as different steps towards accession negotiations and implementation of the JAP. The document follows by stating that it will be the President of the European Council the one to ‘take forward these proposals and work out the details with the Turkish side before the March European Council’. This particular element will be reviewed in closer details in the following subsection.

⁹³ European Council meeting (17 and 18 December 2015) – Conclusions

⁹⁴ Statement of the EU Heads of State or Government, 07/03/2016

3.2. 2016 EU-Turkey Statement

The next European Council meeting took place on the 17th and 18th of March, in parallel to a separate meeting between the Heads of State of the EU and the Prime Minister of Turkey, together with the Presidents of the European Council and the Commission. That meeting resulted in an agreement referred to as the EU-Turkey Statement ('2016 Statement' - Full version included in the Annex) and it included the proposals that Turkey had put forward in the March 7th meeting, which were introduced in the document by stating that the parties had 'agreed on the following additional action points'. Following that statement a series of detailed provisions ensue, where the first provision reads 'all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey'. Other provisions included are the further implementation of the JAP, continuation of visa-liberalization talks and the disbursement of the 3 billion euros from the Facility as well as the commitment to mobilize 3 billion euros more once the first ones have been used. The 'freedom' the European Council enjoys becomes clear when analyzing its decision-making procedures. Unfettered by legal constraints, it has the ability to act, negotiate and, while not formally, nevertheless bind the Union, since political agreements carry the responsibility of having to uphold them, with risks related fundamentally to the credibility of the EU in the international arena as an actor on its own right.

Article 15(1) states clearly that the European Council 'shall not exercise legislative functions', provision that includes entering into legally binding agreements with third countries. To be sure, the EU-Turkey Statement is defended by the European Council to be non-binding, and thus it would not have been a problem had it been concluded by the EUCO. As it follows from case C-233/02⁹⁵, "[t]he willingness to be bound by an agreement can be expressed in any form", in this case a Press Release could also be considered an agreement in the legally binding sense. Interestingly, in the *Vademecum on External Action of the EU*, prepared by the Commission, there is a section aimed at

⁹⁵ Judgment of the Court (Full Court) in *French Republic v Commission of the European Communities*, C-233/02, ECLI:EU:C:2004:173.

explaining the way an international non-binding agreement has to be drafted, in order to avoid it as being classified as binding.⁹⁶ Among the necessary considerations it states that the text “must not contain any ‘Treaty-type’ language or clauses such as [...] ‘agree’”, word that the EU-Turkey Statement does include when it states ‘[i]n order to achieve this goal, they have agreed as follows’⁹⁷. This is not some twisted interpretation trying to find guilt where there is none, the text of the Statement is worded exactly in the way the EU’s own internal documentation explicitly mentions it should not. Another element that the Vademecum stresses is that “in any event, the intention of the signatories should be clarified by inserting a clause stating, for instance, that [...] or that “this text does not intend to create rights or obligations under international law”.⁹⁸ This type of statement is not included in the Press Release, supporting the notion that the instrument was intended to produce binding effects. Interestingly, it is in the European Council Conclusion of that weekend that include, in its paragraph 4 the phrase ‘The European Council reiterates that the EU-Turkey Statement does not establish any new commitments on Member States as far as relocation and resettlement are concerned’. Considering that the European Council later defended not to be part of the deal would mean that they are in fact an unrelated third party to the agreement, by which the provision is meaningless. Additionally, the clause is included in a separate document, not the agreement itself thus it has no relevance. The presence of the clause in the Conclusion, taking into consideration these notions is confusing, and supports the argument that legal certainty is far down in the list of priorities of the European Council.

The negotiation and cooperation process with Turkey during the refugee-management crisis has proven one thing, the European Council has the ability to take a political space that, even though is not contemplated by the Treaty of Lisbon, it nevertheless exists and in certain situations is the only one that can offer the appropriate forum for foreign policy. The European Council does not have the power to enter into an international treaty on behalf of the European Union, condition enshrined in Article 15(1), thus the European Council can only, if at all, enter into political agreements with

⁹⁶ European Commission, Vademecum on External Action of the European Union, p. 44.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

other states. The way in which the European Council has acted in the refugee-management crisis carries problematic connotations, namely the fact that it is not bound by European law in the way other institutions are, mainly stemming from the way it understands its role within the framework of the Union. As the analysis has shown, the European Council has not experienced a change in the decision-making process, it still acts with the freedom it had before being formally included in the Treaty of Lisbon. The problem that arises when striking political agreements with third countries is that, as the EU-Turkey Statement has shown, there is no careful consideration of the impact that the provisions included in it will have in terms of human rights protection, which is in itself a general principle of EU law.⁹⁹ This issue has been dealt with by the Ombudsman of the EU precisely in this case, where several Spanish human rights organizations raised the claim that the Commission, while implementing the agreement, had not made the necessary assessment of its impact on human rights.¹⁰⁰

3.3 NF v European Council

On the 28th of February 2017 the General Court ruled on the case of NF v European Council, T-192/16¹⁰¹. Remarkably, this is the first, and only, case of the Court of Justice of the European Union that has had the European Council directly as a party to the proceedings, and even more importantly, it did so as the defendant. The case was brought by a Pakistani national that applied for asylum in Greece in order to avoid being sent back to Turkey, the country through which he had arrived to the EU, pursuant to the provisions of the EU-Turkey Statement.¹⁰² The decision sought by the applicant was the annulment of the 2016 Statement¹⁰³, based on the review procedure included in Article 263 TFEU, which in turn is available since after the Treaty of Lisbon, European

⁹⁹ Paula García Andrade, “EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally”, *Common Market Law Review*, 55 Issue 1, (2018): p.194. Article 6(3) TEU reads: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

¹⁰⁰ Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement

¹⁰¹ Order of the General Court (First Chamber, Extended Composition) of 28 February 2017, in Case T-192/16 *NF v European Council*, ECLI:EU:T:2017:128.

¹⁰² *NF v European Council* paras. 10-13.

¹⁰³ *NF v European Council* para. 46.

Council's measures are also subject to it.¹⁰⁴ The GC had before it the potential of ruling that the European Council had in fact been the one to conclude the agreement, even if it is titled as being from the Heads of State¹⁰⁵, as well as ruling that even though through a press release, the agreement could have a binding nature and thus be considered a formal legal instrument under international law¹⁰⁶. Here the GC was confronted with a decision that would shape the institutional framework of the Union, deciding whether the EUCO had acted ultra vires and thus leaning towards the positions of defending an interpretation of the Treaty of Lisbon that does not allow the institution to roam free or on the other hand, the confirmation that the EUCO was the crisis-manager per excellence of the EU and had certain leeway that would be respected if the situation required it.

With those notions in consideration, it is clear the importance of the case and the responsibility the GC faced itself with. The only other time that the European Council was related to a case was in *Pringle*¹⁰⁷, where the CJEU sat in full court, a configuration used that once in the past 12 years¹⁰⁸, fact which serves to understand the contrast between the magnitude of the instance and the level at which it was being decided. Interestingly enough a motion from the EUCO to have a Grand Chamber following Article 28(1) of the Rules of Procedure of the GC was dismissed and instead the composition chosen was that of an extended one, with 5 judges seating¹⁰⁹. Why would a Grand Chamber be deemed not necessary when the subject-matter concerns a decision of the relevance of the 2016 Statement made by non-other than the Heads of State seems odd, though the reasons for it are not stated, which is even odder. That was not the only instance of the apparent haste with which the GC moved through the ruling, paying little attention to key aspects of the situation in doing so ensuring the European Council was not subject to inquiry. The following passage provides a glimpse of the GC's imprecise argumentation throughout the case:

¹⁰⁴ *NF v European Council* para. 43.

¹⁰⁵ *NF v European Council* para. 45.

¹⁰⁶ *NF v European Council* para. 42.

¹⁰⁷ Judgment of the Court (Full Court) in *Pringle*, Case C-370/12, ECLI:EU:C:2012:756.

¹⁰⁸ The first one before *Pringle* was *Commission of the European Communities v Édith Cresson*, which ruled that the at the time Commissioner for Trade had abused her power in office.

¹⁰⁹ *NF v European Council* paras. 15-18.

“It is therefore necessary to determine whether the use of [‘Members of the European Council’] implies, as the applicant submits, that the representatives of the Member States participated in the meeting of 18 March 2016 in their capacity as members of the ‘European Council’ institution or that they participated in that meeting in their capacity as Heads of State or Government of the Member States of the European Union.”¹¹⁰

What the GC is incidentally highlighting is the fact that there is already a formulation used in practice when there is the need to specify in what capacity are the members of an institution meeting. When the Ministers of the Council meet in that capacity, not as in the Council, the formulation is precisely ‘representatives of the Governments of the Member States meeting in the Council’¹¹¹. In the case of the European Council, as the GC itself mentions, it is ‘Heads of State or Government of the Member States of the European Union’, which is absent from the Statement. That way of identifying the capacity of parties to an agreement should have been the one used most importantly given the simple reason that Heads of Member States of the EU is not analogous to Members of the European Council. The European Council is composed by the Heads of State ‘together with’ the Presidents of both the EUCO and the Commission¹¹², which were indeed present in the meeting with the Turkish Primer. This is completely disregarded by the GC, which defends the interpretation that Members of the European Council means Heads of State acting within that capacity based on, first, the fact that the EUCO in its reply had explained what it meant¹¹³ as well as stating that “[a]ccording to [the European Council], the term ‘EU’ must be understood in this journalistic context as referring to the Heads of State or Government of the Member States of the European Union”¹¹⁴. Basically the first part of the argument by the GC accepts the explanation given by the defendant in the case, taking a position of deference towards the European Council that is unwarranted and product of a decidedly lenient interpretation.

¹¹⁰ *NF v European Council* para. 54.

¹¹¹ Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union*, para. 2-019.

¹¹² Article 15(2) TEU: “The European Council shall consist of the Heads of State or Government of the Member States together with its President and the President of the Commission” (emphasis added).

¹¹³ *NF v European Council* para. 57. reads literally: “However, in its reply of 18 November 2016, the European Council explained that the expression ‘Members of the European Council’ contained in the EU-Turkey statement must be understood as a reference to the Heads of State or Government of the Member States of the European Union, since they make up the European Council.”

¹¹⁴ *NF v European Council* para. 58.

The second part of the argument follows from the GC concluding that the ambiguity of the terms used, and that therefore it is needed to look at the documents relating to the meeting from which the 2016 Statement arose.¹¹⁵ From this documents the GC argues it is clear that it was the Heads of State the ones to conclude the 2016 Statement since, among others, a note from the Council's Directorate for Protocol and Meetings of the Directorate-General 'Administration' invited the participants to a 'working session of the ... Heads of State and Government and High Representative [of the European Union] with Prime Minister of Turkey'¹¹⁶. So in order to assess who is a party to the agreement preference is given to a protocolary note over the very agreement, which states something different.

Additionally, the reason as to why Donald Tusk was present in the meeting is presented in the decision by stating that "the Heads of State or Government of the Member States of the European Union conferred upon [the President of the European Council] a task of representation and coordination of negotiations with the Republic of Turkey in their name"¹¹⁷. Thus Donald Tusk was there not as a Member of the European Council which concluded the agreement, but as the person charged with representing and coordinating. The issue is that, if that argument is taken as is presented, what can be observed is the President of the European Council representing the Heads of State of the Union and not the European Council itself, which is a role that is not contemplated in Article 15 TEU. This is reminiscent of the Van Rompuy task force that was established during the Eurocrisis, and follows a very similar pattern. In a moment of crisis, the office of the President of the European Council is provided with an extensive mandate, one that goes beyond the Treaty and allows him or her to pursue a more active role, be it by internal or external brokering.

Another argument supporting the fact that the GC took an overly lenient attitude in NF is the fact that, once ruled that it had not been the European Council but the Heads of State acting on their own right it did not review whether that was a possibility available

¹¹⁵ *NF v European Council* para. 61.

¹¹⁶ *NF v European Council* para. 65.

¹¹⁷ *NF v European Council* para. 68.

to them in light of EU law.¹¹⁸ The case-law on the exclusive right of the Union to enter into international agreements in specific cases is long and highly complex. In this case it is not only that they are of law is covered to a large extent by EU law, taking into consideration readmission agreements in general, but specifically with Turkey, where there was a previous Readmission Agreement (RA) in place. The JAP, which built on that RA was an instrument concluded by the Commission. This is not to convey that the Heads of State could not have struck the deal with Turkey, but the conclusion as to whether in this case they could establish such an agreement is not clear enough nor apparent, it was not *acte claire*, therefore the GC would have needed to review it. Far from doing so and offering a response on the matter, it was not touched upon in the ruling. That can hardly follow from the situation, if looked at legally, on the other hand if looked at politically, the same problematic that was presented in the previous section arises once again. When it is the Heads of State in a crisis situation, the case presents important issues.

If the institutions of the EU do not have control over the agreement that ought to implement because breaking it when it has been concluded by the Heads of State of the Member States during times of crisis, and there is no prior assessment of the consequences of that deal in terms of, for example, human rights, then there is a flaw in the EU system of checks and balances. The need for action cannot be left unchecked, not when the negotiations impact so closely the lives of people. Automatically assigning Turkey, in a general way, the category of ‘safe-third country’ cannot be accepted as adequate. These are crucial times for the European Union, choosing whether it will stand for an effective system of protection of human rights, not only of its own citizens, but those that touch upon its shores is a delicate decision. Signing expedient deals with a problematic neighbor should not be a matter of a few days¹¹⁹, and they should not be signed in a ‘twice-removed’ way, first by using a press release as an instrument of policy-making and then by leaving the EU framework to act as Heads of State.

¹¹⁸ José Martín y Pérez de Nanclares, “The External Dimension of the Area of Freedom, Security and Justice: An Essential Part of the European Union's External Action”, in *The European Union's External Action in Times of Crisis*, eds. Piet Eeckhout and Manuel Lopez-Escudero, (Oxford: Hart Publishing, 2016) p. 520.

¹¹⁹ Turkey put forward the proposal on the meeting on the 7th of March and the agreement was struck on the 18th.

What has been analyzed thus far gives way to an unsettling realization. The Heads of State have moved themselves to a higher, third level of decision making, above the national and the EU one. They do not act as Heads of State in the classical sense, in an intergovernmental meeting or summit, but something different. The protocolary notes may have mentioned it, but that is not the way it was communicated to the public. What about the EU level? The Statement had all the signs of a European Council instrument, there was no explicit mention of the Heads of State anywhere in the text, it was named EU-Turkey Statement, the officials present were the ‘Members of the European Council’ which were all indeed at the venue, since both President of the European Council and President of the Commission were there. Lo and behold, it was not the European Council the one to conclude the agreement. The General Court decided it had been the Heads of State. The apparent attribution of the Press Release only due to the good intentions of making clear to the public that it had been the EU, they would not understand otherwise. The days after its announcement it was defended even by other institutions as a success of the EU.¹²⁰ But it was not, the protocolary notes say. It was not, a Statement of the President of the European Council say. It was not even an international agreement, the March Conclusions say. Such is the unclarity surrounding the Statement that the General Court admitted that it could not order the applicant of *NF v European Council* to pay the costs, as is in normal practice, ‘in view of the circumstances of the present case, in particular the ambiguous wording’¹²¹. The Heads of State thus were in a level of decision-making above the European Council, in a realm where it is almost impossible to discern the true owner of the agreements being concluded. A thick curtain pulled in between the executive and the European people.

Once again, there is an issue that has to be reckoned with, namely the fact that the European Council has not been granted the role of an executive power neither in crisis situations nor in the normal course of EU decision-making. The Lisbon Treaty states explicitly that its role is that of providing strategic guidelines both in general and in AFSJ in particular. So there cannot be a criticism based on the fact that the activity of

¹²⁰ Sergio Carrera, Leonhard den Hertog and Marco Stefan, “It wasn’t me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal”, *CEPS Policy Insights*, No 2017-15, (2017), p. 1.

¹²¹ *NF v European Council*, para. 77.

an executive power can act with certain freedom, which may be true for Heads of State within their own countries. But this power is not transposed to the Union, because there is no such provision in the treaties, which would be the way in which that would be enacted. The fact that a policy area is intergovernmental within the framework of the Union does not mean it is intergovernmental in its international law sense. Here it is important to make a differentiation between the two applicable dimensions of intergovernmentalism. The first one is contemplated in the treaties, it has been defined with a range of competences, an applicable voting mode and certain other procedural provisions, i.e. it is the EU's intergovernmentalism, which in this sense is the work of national governments, but always within, and never out, what is stated in the treaties. The second one on the other hand is intergovernmentalism in the international law sense, namely the aspect by which sovereign states are free to enter into agreements with other parties, retaining freedom to act within their executive powers as provided by their constitutions. As it can be observed the Heads of State tend to behave in the second sense of the term when a crisis situation hits the European Union. During the the course of the Eurozone crisis and the refugee-management crisis, including the conclusion of the EU-Turkey Statement, the European Council has behaved in a sovereign state logic. It simply acts, decides, dictates and asks to implement, with details.

CHAPTER IV: THE EUROPEAN COUNCIL AND THE RULE OF LAW

“The imperatives of globalization render cooperation necessary, yet they exacerbate the injustices rendered by the failures and imbalances of integration”¹²²

The rule of law mainly establishes the obligated respect to a law that guides other laws, i.e. there is a primary text that is not available to the authority to change at will so when a public body acts, it must respect the norms and follow the procedures set out on that higher law¹²³. It follows that a mode where the European Council takes on the capacity to expand however slightly its competences goes against the precepts of the principle and so are not compliant with the rule of law as it stems from Article 2 TEU. The same applies for Heads of State acting on that capacity, since Member States do not have the capacity to change unilaterally the limits of their mandates.¹²⁴ Next, two arguments will be presented as to the role of the European Council in the two crises tackled in the paper. First, there is an inherent problem tied to the nature of the European Council when it acts in times of crisis, coupled with the ambiguity of its mandate and the attitude of the Court towards the institution. Secondly, the adoption of the EU-Turkey Statement provides for a 'next-step' in the European Council's actions, going further than it had gone in earlier instances in actually taking an active position in decision-making.

4. 1. Pressure, Ambiguity and Silence

What follows from looking in details at the decision-making of the European Council in times of crisis is that the position of the institution provides for a series of complex

¹²² Sionaidh Douglas-Scott, “Justice, Injustice and the Rule of Law in the EU”, *Europe’s Justice Deficit?*, eds. Dimitry Kochenov, Gráinne de Búrca, Andrew Williams, (Oxford: Hart Publishing, 2015) , p. 57.

¹²³ Dimitry Kochenov, “EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?” *Yearbook of European Law*, Vol. 34, Issue 1, (2015): p. 81.

¹²⁴ Robert Schütze, “On ‘Federal’ Ground: The European Union as an (Inter) National Phenomenon”, *Common Market Law Review*, 46 (4), (2009): p. 1083.

problems. Firstly, the nature of the European Council is inherently one that carries an exceptional gravitas. Heads of State meeting in a delicate situation would have an important relevance, more so when there are decisions arising from those meetings. Two instances of this, of from each crisis, illustrate the argument well. In the case of the Eurozone crisis, the adoption of the ESM was a highly contentious action taken by the European Council, being subject of review by several national constitutional courts as well as the CJEU, sitting in its exceptional full court configuration. The reality remains that the ESM was introduced at a moment where there was a very real threat of a complete collapse of the European Union's financial system. Even though the Against that context whether the European Council followed correctly its procedural provisions and its competences is bound to be subordinated to the wider implications of the decisions being taken. As Alicia Hinarejos put it, "while the ESM may not be perfect, few expected the CJEU to stand in the way of an emergency mechanism that had political support, and whose demise would likely have sent the euro area back into the acute phase of the crisis".¹²⁵ Changing the name of the crisis for the refugee-management one would maintain the relevance of the statement intact.

When the European Council or the Heads of State enter into an agreement with a third country, the responsibility on reviewing its compliance with human rights will fall onto other institutions post-facto¹²⁶. From the analysis of the previous chapter, it can be observed that in crisis situations and in a political context, the European Council has shown to put effective action above everything else. Even more considering that the threshold of protection may be much less in the case of the counterpart, such as Turkey, and thus the negotiation terms may overlook the levels expected by Union law. Paying lip service to these obligations by way of a sentence in a Conclusion¹²⁷ does not constitute an appropriate assessment. Therefore, the agreement will be struck with effectiveness in consideration by which it follows that it will be the institutions that

¹²⁵ Hinarejos, "Economic and Monetary Union", p. 586.

¹²⁶ Decision of the European Ombudsman in the joint inquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement

¹²⁷ The European Council takes note of the Commission Communication "Next operational steps in EU-Turkey cooperation in the field of migration", in particular as to how an asylum application from a migrant crossing from Turkey into Greece can be declared inadmissible, based on the concept of "first country of asylum" or "safe third country", in accordance with European and international law.

implement that agreement the ones that will have to review it. This means that potentially, an agreement could be regarded to fail the protection mandated by the primary law only once it has already been made.

The situation in that case is a conflict between an agreement done by no less than all the Heads of State of the Union and human rights provisions. For an institution, be it the Commission, the Court, the European Parliament or the Council the decision is clearly made difficult, since declaring an agreement as not meeting EU law would mean the need to not follow through with it. The EU would, after the deal is concluded, have to declare it inadmissible. The political implications of such a move are unimaginable, and it is hardly possible that the final decision would be to sacrifice a compromise made at the Head of State level, even more when it was made under the immense pressure of a crisis of the scale of the refugee-management one. This is an issue that is related with the particular characteristics of the European Council, not as they follow from the treaties, but as they follow from its practice and the way it has shaped its role within the framework of the Union. The General Court's decision on the EU-Turkey Statement is also closely related to this problematic.

Apart from the pressure put on other institutions to follow the lead of the European Council, an important element that makes a review of whether the EUCO is acting within the limits of its Treaty mandate is the ambiguity of that very mandate. The wording, coupled with a difficult situation, could provide for a wide variety of policy and decision making procedures. That is the case with most Treaty provision, and that is why the role of the Court is such a crucial one. The Court is the one in charge of defining the boundaries of powers, modes of action, attributed competences and a long list of other notions.¹²⁸

That being said, the problem in this case is the one outlined above: in times of crisis decisions taken by the European Council are a very delicate concept. Another aspect that can be observed from the analysis in the previous two chapters is that both reactions

¹²⁸ von Bogdandy, "Founding Principles", p. 279.

to the crisis are marked by a highly confusing array of instruments, interlinked between them and often times difficult to understand. The spiderweb of measures in the Turkey negotiation is a clear case in point, for example with complete absence of procedural provisions for the Joint Action Program, which after what had seemed like its adoption by way of the Conclusion of the October 2015 meeting turned out it was not yet adopted - step that came with its 'activation' by the European Council months later. Steve Peers, referring to the measures taken during Eurozone management has stated that "they fail the test of transparency, because of their near-total complexity and unreadability, scattered across a dozen primary, secondary and soft-law sources".¹²⁹ The fact that the statement could be very well about the refugee-management crisis stresses the vacuum left by the Court in these types of instances. Even though there is a multiplicity of instruments being used and decisions being taken that warrant a definition of the boundaries within which they are adopted, its review carries a concomitant pressure.

This judicial deference towards the European Council is apparent in a more marked manner in *NF v European Council*. Deference in this instance reflects 'a reluctance to question' in areas of a highly delicate nature, as the refugee-management in early 2016 was indeed an instance of.¹³⁰ The resulting 'silence' opens the way for a vacuum of power where 'power is not given but is up for grabs'.¹³¹ Thus, with the absence of a review by the Court of the limitations set by Article 13(2) on the competences of the European Council it is impossible to assess whether the institution is acting formally within its mandate, and therefore whether it can be accused of breaching the principle of the rule of law as protected by Article 2 TEU. This is the case generally, where the European Council acts in the 'grey area'¹³², which almost always considering the undefinedness of the limits, but there can still be a determination of cases that are flagrantly outside of the scope established by Article 15 TEU. Examples of this were observed during the adoption of the EU-Turkey Statement, and will be addressed below.

¹²⁹ Douglas-Scott, "Justice, Injustice and the Rule of Law", p. 60.

¹³⁰ Conway, "The Limits of Legal Reasoning", p. 18.

¹³¹ Suvi Sankari, *European Court of Justice Legal Reasoning in Context*, (Groningen: Europa Law Publishing, 2013) p. 214.

¹³² Hinarejos, "Economic and Monetary Union", p. 586.

4.2. Progressive Assertiveness

Considering that the question of who really adopted the EU-Turkey Statement is highly difficult to answer, notwithstanding the resolution of the GC, it is worth looking at which factors would have been seen as breaches of Article 13(2) in both hypotheticals. This will provide the conclusion that whichever interpretation taken as to whether the European Council or the Heads of State alone concluded the agreement there would be an overstepping of competences highlighting that the fact that the European Council took a step further into assuming powers it does not official have. Precisely one of the pleas in law of the applicant in *NF v European Council* in support of the acceptance by the Court of the appeal brought against the decision of the GC is the European Council's disregard for 'the principles established by the Court in [*Les Verts*]'.¹³³

If it is accepted that the European Council was the one to do it, then the issues arise as to its ability to do it, since the treaties do not allow the institution to enter into agreements producing legal effects. If, as has been argued before, it is accepted that the agreement does establish a legal relationship between the parties, the answer is straight forward: The European Council does not have the ability to enter into such type of instrument, being precluded by its inability to 'exercise legislative functions' as Article 15(1) dictates.

Taking the second assumption, the negotiation of the EU-Turkey Statement saw a decision-making procedure by which the European Council atomized itself, the President of the European Council being mandated by Heads of State to prepare a future meeting of Heads of State where he would also be present, together with the President of the Commission. This hardly follows from the way in which the Treaty of Lisbon sets out the duties of the office, and claiming the need for action in order to address a difficult situation is simply not acceptable. That negotiations at the level of Heads of State may be necessary in certain instances is undoubted and this paper does not

¹³³ Case C-208/17P, *Appeal brought on 21 April 2017 by NF against the order of the General Court (First Chamber, Extended Composition) delivered on 28 February 2017 in Case T-192/16: NF v European Council*.

proclaim in any way to qualify it as wrong, but the way in which the actors conducted themselves in this instance was unsettling from a legal perspective. The infringement in this case of primary law comes from, first, the ultra vires role of the President of the European Council preparing a meeting and a text that was not for a European Council meeting, taking the role of a Foreign Minister for all the Member States simultaneously, but still in a completely intergovernmental sense, which the office is not. The President of the European Council does not represent the Heads of State of the Member States, it represents the European Council, whatever the vagueness of the setting and the vagueness of the wording. Secondly, in the vein as an argument presented earlier in the paper, the competence of the Heads of State would not have been present since it is an exclusive competence of the Union, which has already regulated in the area, to enter into a subsequent agreement.

What follows from this consideration is the fact that the European Council took a course of action that had, under no circumstances, a legal basis. This is an institution that will take action if the moment so requires, disregarding the strict hierarchy of EU law as to an unilateral extension of competences.¹³⁴ An Ethereal Plane, away from the eyes of the Treaty of Lisbon. What follows is that whatever the position taken on who concluded the 2016 Statement, there would have been a wide disregard for the rule of law as a constitutional principle of the Union, indeed supporting Kochenov's argument that in the legal framework of the Union the norm has not 'acquired any self-standing value'¹³⁵. In turn, a worrying assertiveness of the European Council illustrates the rise of executive authority in detriment of fundamental values such as the rule of law.

4.3. The Rise of Executive Authority

The Treaty of Lisbon formalized the European Council as an institution, it constrained it constitutionally by making it subject of Article 13(2), but it did not grant it the power to make legislative decisions and did not extend the competences that the Treaty of Maastricht had already vested upon it in any significant way. It did not include mentions

¹³⁴ Bogdandy p. 279.

¹³⁵ Kochenov, "EU Law without the Rule of Law", p. 81.

of crisis-management and did not envision an office of the President that could have a significant role in decision-making. While it can be defended, as Jorg Monar does, that there was a clear strengthening of the institution since the wording of its main function had been changed from providing the ‘general political guidelines’ to ‘general political directions and priorities’¹³⁶, substantially that change did not change the nature of the duties of the European Council. It was still supposed to limit itself to thinking ‘generally’.

The drafting of the Lisbon Treaty happened at a point when the potentialities of the EUCO were understood, since it had a long history in which it had carried a similar power. What follows is that the Treaty of Lisbon acknowledged the European Council but there was no intention of making it a co-executive body with the Commission. The crucial impact that the two crises that followed 2008 has been that of shifting the constitutional understanding of the Union. By way of practice, or more precisely, by way of the need for action in difficult times opened the door to a framework where a self-confident institution could extend its power beyond the primary law. The European Council has done so through exercising more competences and utilizing a wider toolbox of instruments. That there was a need for action though does not justify that the European Council was the one to fill that requirement, since nowhere in the law that was reflected, to the contrary, what the law reflected is that this was no longer a Paris, or a Maastricht European Council with no accountability to the other institutions but one that did. The key element of Article 13 TEU is not its first paragraph, but its second one. The problem is that, as has been defended earlier in the paper, what has happened is that there has been a misinterpretation of the changes brought by Article 13 TEU to the role of the European Council, by focusing on its formalization as an adoubement and an indication that it had the capacity to act in a more decisive manner. The very European Council showed how that was the way it understood its new role when it appointed the first High Representative. The process requires the approval of the President of the Commission, but the press release announcing the designation of Catherine Ashton did not mention him¹³⁷. That the European Council decided not to include that approval shows certain disrespect to the role that other institutions play in

¹³⁶ Monar, “The European Union’s Institutional Balance”, p. 7.

¹³⁷ *Ibid.*

the framework of the Union, as well as illustrating how Van Rompuy's EUCO saw itself as a club of Heads of State in the most Gaullian sense. Tolerated malpractice, not constitutional provisions, shaped the European Council after Lisbon.

It is important to stress the fact that this process has been tolerated. The other institutions have allowed, if not incentivized this development through their own practice. As James and Copeland argue, the European Council is the locus that the Commission and the Council turn to when there is a deadlock, producing what they term as 'executive empowerment'.¹³⁸ These deadlocks can be in agenda setting in the case of the Commission or in negotiation in the Council¹³⁹ and the European Council provides for a venue where these issues can be dealt with and surpassed. An issue that arises from this practice, is that the solution to such a deadlock cannot be to move the problem to an institution that does not have the power to deal with it. If there are issues faced by the Council and the Commission, then those must be the settings where a way to move forward that is in respect of the treaties is found. The argument of the European Council as the only available 'deal maker' cannot be accepted because that role is not contemplated in the treaties, which in turn undermines the democratic foundations of the Union. The fact that the EU framework is shaped by the practice of its institutions, a process that at times 'evolves beyond [the] formal constitutional frame'¹⁴⁰ if the situation so requires, cannot be understood as providing a *carte blanche* to the EU bodies, whether while establishing policy guidelines or while making decisions. Institutional rules provide for a guide for action¹⁴¹ and as such should be respected, at least in their overall purpose, in the constitutional principles that lay behind them¹⁴². Merkel's 'new foundation' is an euphemism for executive liberty that does not follow

¹³⁸ Scott James & Paul Copeland "Governing in the Shadow of Intergovernmental Hierarchy: Delegation Failure and Executive Empowerment in the European Union", *Perspectives on European Politics and Society*, Vol.15, Issue 4, (2014): p. 521-524.

¹³⁹ *Ibid.* 523, 527.

¹⁴⁰ Deirdre Curtin, Herwig Hofmann and Joana Mendes, "Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda", *European Law Journal*, Vol. 19, No. 1, (2013): p. 1.

¹⁴¹ Roberto Cortinovis, "Forced Displacement and EU External Action: Exogenous Shocks, Policy Frames and Institutional Dynamics", *European Foreign Affairs Review*, 22, No. 4 (2017): p. 477.

¹⁴² *Supra* at n. 139, p. 1.

from the Lisbon Treaty, it has to be described as a willful misinterpretation of both its aims and the historical process that led to it.¹⁴³

Another point that Monar stresses is that particularly, in the area of AFSJ the European Council has been given such a major role that puts it ‘in a stronger position than the Commission regarding the Union’s legislative agenda’¹⁴⁴, but the truth is that the Commission in AFSJ has been granted an ever-larger role after Lisbon with the ‘communitarization’ of Maastricht’s third pillar¹⁴⁵. With that process equally importantly, the powers of both the European Parliament and the Council have been extended, and the jurisdiction of the Court now applies to the whole area.¹⁴⁶ Additionally, the Commission is the one vested with the mandate of representing the Union externally in this area. Yes, the European Council was set to have a more important part to play, but still within the ‘strategic guidelines’ and not further. For instance in the section dedicated to the decision making changes brought by the Lisbon Treaty to asylum and immigration law Helen Toner does not mention once the European Council.¹⁴⁷ Steve Peers equally understood Article 68 TEU as rephrasing the role that the European Council had played until that moment and additionally, he saw the EUCO as ‘not playing a major role’ in operational matters given its ‘obvious lack [of] specialist knowledge’¹⁴⁸. Fast forward to 2016 and what can be observed is a President of the European Council preparing meetings with third-country Premiers, striking agreements dealing with very specific plans and actions in the areas of asylum and migration.

The result of empowering an executive is an empowered executive which is not legitimized constitutionally. If the development of the Union has led to a slightly supra-nationalized, but still Westphalian model where Heads of State bargain in an international law modus much like other classical international organizations then Van

¹⁴³ Michael Dougan, “The Treaty of Lisbon 2007: Winning Minds, not Hearts”, *Common Market Law Review*, 45, Issue 3, (2008): p. 621.

¹⁴⁴ Monar, “The European Union’s Institutional Balance”, p. 10.

¹⁴⁵ Pérez de Nanclares, “The External Dimension of the Area of Freedom, Security and Justice”, p. 514.

¹⁴⁶ Steve Peers, *EU Justice and Home Affairs Law*, (Oxford: Oxford University Press, 2016): p. 18.

¹⁴⁷ The Lisbon Treaty and the Future of European Immigration and Asylum Law, p. 15-

¹⁴⁸ *Supra* at n.145, p. 22.

Gend en Loos, as Ole Spiermann defended back in 1999¹⁴⁹, had no relevance, there is no ‘new legal order’¹⁵⁰. If transnational networks of governance are taken to reinforce the power of national executives¹⁵¹, the possibility that the Lisbon Treaty offered was that of establishing a firm transnational network that would strengthen, not the national executives, but a transnational legislature¹⁵². The most important aspect of the text was the unprecedented expansion of competences of the European Parliament, especially with the formalization of the codecision procedure as the default mode of policy-making in the Union. The Lisbon Treaty called ‘ordinary’ the legislative process involving the European Parliament and made the European Council subject to review by the Court of Justice. Instead, reactions based on achieving results, rather than respecting values have transformed the reality of the Union.¹⁵³

Justifying this result-oriented mentality as inherent in the openness or fluidity of the Union’s policy process or its need for adaption is warranted, but so is addressing the definition of its limits. Its limits are to be found in the constitutional principles of the European Union, which provide the boundaries of the institutions, as well as the Member States, and stand above them, even above the European Council. That a legal framework put in place in a specific area, such as the Common European Asylum System, is not efficient when it is needed the most and acts as a ‘statutory corset’, not allowing adaption to fast-paced changes in times of crisis¹⁵⁴ should not open the door to putting a blindfold over the EU’s primary law. The label of ‘superior commander’ enshrined in the opinion that the Heads of State carry the ultimate legitimacy to act cannot be accepted as being superior to the constitutional principles of the EU, because doing so enhances a mode of governance heavily reliant on executive power, or as Joerges puts it echoing Hobbes, the EU is slipping into ‘Schmittianism’ through a

¹⁴⁹Ole Spiermann, “The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order”, *European Journal of International Law*, Vol. 10, No. 4, (1997): pp. 763-789

¹⁵⁰ *Van Gend en Loos*.

¹⁵¹ Bickerton, “A Union of Member States”, p. 6.

¹⁵² Habermas, The Crisis of the European Union in the Light of a Constitutionalization of International Law, *The European Journal of International Law*, Vol. 23, no. 2 (2012) p. 345.

¹⁵³ Curtin, Hofmann and Mendes, “Constitutionalising EU Executive Rule-Making Procedures”, p. 3.

¹⁵⁴ Daniel Thym, The ‘Refugee Crisis’ as a Challenge of Legal Design and Institutional Legitimacy, *Common Market Law Review*, 53 (2016): p.1552.

policy process that follows the maxim of ‘auctoritas, non veritas, facit legem’.¹⁵⁵ A turn towards modes with authoritarian characteristics is a grim prospect in itself, but the crises have furthermore seen arise the existence of concomitant problems to it with the surge of Euroscepticism and populism, in a process that Christian Kreuder-Sonnen calls ‘the authoritarian cycle’¹⁵⁶. This cycle is defined by a dynamic in which undemocratic actions at the EU level are met with a heightened radical politicization of the domestic discourses in the Member States, as well as antagonizing ‘Brussels’ as the source of all the evils of the post-industrial era¹⁵⁷.

What has been termed as ‘post-democracy’ precisely points out to the subordination of national parliaments to transnational policy-making, where they simply carry out a formal function, but not a substantive one, which is taken to the international realm.¹⁵⁸ In terms of the European Union during the Eurozone and the refugee-management crises is a sort of post-post-democracy, where the executive has appropriated the powers that are constitutionally vested upon other institutions. Instead of buttressing the collaboration between the Commission, the Council and the European Parliament, the tendency has been towards accepting the European Council as a legitimate avenue for taking decisions. In this consideration the side-lining of the EP is crucial, given that Lisbon ‘upgraded’ it precisely to avoid EU action to be seen as devoid of public input, of the citizens’ voice, carrying with it an exacerbation of the authoritarian cycle. The diagnosis that Somek conducts of national parliaments, describing how they become passive actors that ‘do not take risks or leave toying with hazardous ideas [...] to the parties on the ends of the political spectrum’¹⁵⁹ can be transposed into the EU’s institutional framework, highlighting the potential negative consequences of tolerating the malpractice of the European Council. There is a responsibility on the part of the European bodies to reaffirm the main aims of the Lisbon Treaty, and revert to an interpretation of it that is more faithfully to what its intentions were.

¹⁵⁵ Christian Joerges, “Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation”, *ZenTra Working Paper in Transnational Studies*, No. 06/2012, (2012).

¹⁵⁶ Christian Kreuder-Sonnen, “An authoritarian turn in Europe and European Studies?”, *Journal of European Public Policy*, Volume 25, Issue 3, (2018).

¹⁵⁷ *Ibid.*

¹⁵⁸ Alexander Somek, “Delegation and Authority: Authoritarian Liberalism Today”, *European Law Journal*, Volume 21, Issue 3, (2015), p. 347.

¹⁵⁹ Somek, “Delegation and Authority”, p. 347.

CONCLUSIONS

The paper set out to answer the question of whether the European Council has breached the general principle of the rule of law during its handling of the Eurozone and refugee crises. In order to do so a critical analysis of the action taken by the institution during the developments of both instances has been carried out, within the wider context of the historical evolution of the European Council and the changes brought by the Treaty of Lisbon.

It has been concluded that during the adoption of the EU-Turkey Statement the European Council did indeed overstep its Treaty mandate, whether it is considered that it was the European Council or the Heads of State the actual parties to the agreement. Additionally, an important conclusion of the paper is that the relationship between the European Council and the wider institutional framework of the Union during times of crisis is a problematic one due to the especial nature of the high profile of a meeting of the Heads of State. In this dynamic, the pressure of an agreement struck by the European Council forces other institutions to implement it with a lesser degree of oversight of compliance with norms such as the rule of law and human rights protection. An important factor is the difficulty to discern a breach in the use of competences with the Court of Justice of the European Union taking a rather deferential position towards decisions made by the European Council. Without judicial review, the boundaries of action for the European Council remain ambiguous and open, contrary to what the Treaty of Lisbon had intended. Thus the result, as identified by the paper, is that the European Council retains the characteristics that had historically, that of a ‘king in the constitutional regimes of the nineteenth century’¹⁶⁰. Arising from this problematic, a pattern of increase of executive authority in the European Union has been identified and presented as a serious issue that puts at risk the conception of the Union as presented by Article 2 TEU.

¹⁶⁰ Bogdandy, “Founding Principles”, p. 34.

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