

Can the European Council impose consensus on EU climate policies?

Discussion Paper

Nils Meyer-Ohlendorf

with contributions from Ralph Bodle

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How would Europe react if the European Parliament adopted a political commitment to adopt future legislation only by 2/3 majority, 4/5 majority or unanimously, instead of the majorities set forth in the treaties?

I. Summary

In its conclusions of October 2014, the European Council claimed an ever more active role in shaping the details of future EU climate policies. The European Council stated that it “will continue to give strategic orientations as appropriate, notably with respect to consensus on ETS, non-ETS, interconnections and energy efficiency.” This statement raises concerns about potential interference by the European Council regarding the decision-making process for, and content of, the implementation of the climate framework 2030. In broader perspective, the concerns are about establishing a constitutional practice which could in fact circumvent the possibility of adopting implementing acts by qualified majority vote (QMV). This could alter the balance of power between the EU institutions. The conclusions of October 2014 **could even violate the Treaty**:

- The European Council is **bound by the Treaty**. It is not a political body vested with unlimited discretion to act as deemed politically appropriate. The European Council must act within the legal limits of its mandate, i.e. to define the EU's general political directions and priorities. The European Court of Justice may control the legality of acts of the European Council (Article 263 Treaty on the Functioning of the European Union (TFEU)). It is a challenge to determine the legal limits of the mandate, which the TFEU defines in broad terminology and which is shaped by political practice.
- The European Council, like any other EU institution, has to **respect the mandate of other EU institutions** and must mutually and sincerely cooperate with the other institutions (Article 13 TFEU). The European Parliament and the Council of Ministers are separate institutions with distinct roles, functions and corresponding legal powers (Article 13 TFEU). According to Article 14 and 16 TFEU, legislative functions are among the core functions of the European Parliament and Council. Article 15(1) TFEU prohibits the European Council from exercising legislative functions. These rules bar the European Council from rendering the legislative functions of these institutions *de facto* meaningless. The European Council may not turn the Council of Ministers and the Parliament into a mere rubber-stamping body.
- The Council of Ministers generally decides by **qualified majority**. The European Council may not undermine the specific voting requirements of the other EU institutions. It may only change voting requirements to extend QMV and ordinary legislative processes to areas where unanimity or the special legislative procedures applied before (Article 48 (7) TFEU). Requiring consensus for climate legislation would restrict QMV.
- The European Council has often engaged in the **details of political or legislative processes**. In principle, this is in line with its mandate to provide strategic guidance to the EU, simply because details can have a significant impact on the EU's strategic orientation. In the case of EU climate and energy policy, the European Council played a decisive role in agreeing on the details of the 2020 package in 2008. There are, however, a number of important differences between the 2008 and 2014 package, largely because the Lisbon Treaty was not in force in 2008. First, Article 15(1) TFEU now explicitly states that the European Council has no

legislative powers. This strengthens the case against future guidance by the European Council that would seek to determine legislative details or procedures, even politically. Second, Article 296 (3) TFEU provides: “When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.” While the wording does not directly apply to the European Council, it could be argued that if it constrains the institutions directly involved in the legislative process, then by implication it also constrains institutions with no formal role.

- Given the ambiguity of the October conclusions and the potentially serious political impact, it is worth looking at ways to **clarify the situation**. Clarification through the European Court of Justice is not a viable option. The conclusions of October 2014 appear too vague to start court proceedings based on the argument that the European Council violated, for example, the obligation to respect the mandate of other institutions or to cooperate. According to Article 263 TFEU, the Court of Justice may only review the legality of acts of the European Council if they are intended to “produce legal effects vis-à-vis third parties”. A resolution by the European Parliament on the content and interpretation of the conclusions as well as its possible legal implications is more likely to clarify this important institutional issue. National parliaments are equally interested in restricting policy making through an EU dominated by the executive.

2. Introduction

In late October 2014, the European Council agreed on the 2030 climate and energy package. The package contains agreements on targets of greenhouse gas reductions of at least 40% compared to 1990 plus a target of at least 27% for renewable energy and energy savings by 2030. To achieve the overall 40% target, the sectors covered by the EU emissions trading system reduce their emissions by 43% compared to 2005, other sectors cut by 30% below the 2005 level. The package also includes an EU ETS reform, whereby the cap declines by 2.2% annually from 2021 onwards, instead of the rate of 1.74% up to 2020.

Another important element of the conclusions concerns **the role of the European Council** in the implementation of the 2030 package: “The European Council will keep all the elements of the framework under review and will continue to give *strategic orientations as appropriate, notably with respect to consensus* on ETS, non-ETS, interconnections and energy efficiency.” The sentence is ambiguous in terms of wording and message; depending on how it is read or understood. It could have far-reaching consequences for the implementation of the climate 2030 framework as well as more broadly for the balance of power between the EU institutions.

This **discussion paper** discusses in brief the potential consequences of this sentence. It discusses in particular whether the European Council envisaged a new or more clearly established role for itself in determining even details of EU climate policies. Assuming that the European Council envisaged such a new role for itself, the paper discusses a number of legal questions with potentially high political relevance:

- The European Council “provides the Union with the necessary impetus for its development and defines the general political directions and priorities thereof” (Article 15(1) TFEU). Is the European Council entitled to determine, even if only in political terms, the details of legislative

processes, possibly at the expense of the legislative powers of the Council of Ministers, Parliament and / or Commission?

- The European Council may not exercise legislative functions (Article 15(1) TFEU. Would a quasi-legislative role of the European Council violate this rule?
- Article 13(2) TFEU stipulates that institutions practice mutual sincere cooperation. Would a practice that turns the European Council *de facto* into the sole decision-making body instead of the Council violate the cooperation requirement?
- May the European Council require politically the Council to adopt measures implementing the 2030 package by consensus only, although most of the implementing measures fall under Article 191 or 194 Treaty on the Functioning of the European Union (TFEU), which require QMV? Would such a policy undermine the voting system and the supranational nature of the EU?

3. What are the concerns raised by the October conclusions?

The role that the European Council envisages for itself is ambivalent or even contradictory. On the one hand it merely maintains that the European Council will continue to give strategic orientation, i.e. that it will provide strategic guidance, which is the **European Council's routine function** according TFEU. On the other hand, the European Council explicitly announces that it "will" (sic) give guidance "with respect to consensus" on a number of specific areas and instruments. This suggests that the European **Council will engage in achieving consensus on the details of these areas**, i.e. on ETS, non-ETS, interconnections and energy efficiency. Procedurally, this could mean that the European Council intends to give detailed political guidance to the Council at the beginning of a legislative process or through political confirmation of a legislative proposal at the end of the legislative process. The European Council's intention could also be that it seeks to require the Council to adopt implementing measures by consensus only.

Given this ambivalence, it is no surprise that there are **different readings** of this sentence. Some believe that not much would change.¹ They argue that the European Council has no mandate to amend the Treaty unilaterally; the legislative procedures under the TFEU will not change. Other stakeholders believe that the conclusions could be the beginning of a new political practice where the European Council *de facto* determines even the details of future EU climate policies.² Such reading seems plausible, largely because it is out of question that the European Council would unilaterally change the procedures set out in the TFEU. Save for a few exceptions, the European Council cannot adopt legally

¹ ClientEarth: Consensus v QMV in Climate & Energy Law, October 2014: "What the statement does not mean is that the European Council can retain a veto on future climate and energy legislation. Nor does it mean that any legislation proposed in future must be adopted using the special legislative procedure (i.e. using unanimity)", available online at <http://www.clientearth.org/reports/Consensus-v-qualified-majority-voting-in-climate-legislation.pdf>.

² Ends daily, 5 November 2014: "The unanimity provision resulted from demands from Poland, which wants a veto on emissions trading rules, and the UK, which does not want to have binding energy efficiency targets, according to Green MEP Claude Turmes.", "Chair of the centre-right EPP group Manfred Weber said that EU leaders have overstepped their powers by claiming the right to require a unanimous vote on climate and energy issues affecting industry".

binding decisions; the Treaty contains an exhaustive list of areas where the European Council adopts legally binding decisions, which does not include climate or environmental policy.³

If the latter reading became an established practice, **EU climate policies would change fundamentally**. Although majority voting is not a common practice in the Council, the simple possibility of being outvoted has had a considerable effect on the willingness of Member States to compromise. The European Council in contrast decides by consensus except where the treaties provide otherwise – which is not the case in the area of climate change policy. In consequence, the involvement of the European Council in the details of EU climate policies could change the rules of the game – possibly very significantly. The least ambitious Member State would retain a *de facto* veto and the EU’s ability to act would be reduced considerably. In the end, the implementation of the 2030 package will show how the conclusions will play out – will they lead to a different voting practice or will they have only marginal effects? ETS reform could be the first litmus test.

The **political consequences of such a potential new practice seem clear and dire** – the least ambitious Member State would know that by and large it could determine the speed and level of ambition of future EU climate policies. In addition, this practice would not only change EU climate policy but could be an important moment in **shaping the constitutional reality** of the Lisbon Treaty. Similar to many other new constitutions or founding documents, the Lisbon Treaty, just 5 years old, will be brought to life through the practice of its institutions. Institutions set precedents through their actions, which can become binding *de facto* and – potentially – also in legal terms. The process of selecting the new President of the Commission is such an example, where the European Parliament’s quick support for Juncker probably set precedence for the selection of future Commission Presidents.

4. Much ado about nothing: Can (European) Council conclusions have a legal effect?

European Council conclusions are political statements, which in principle seem to have no legal effect. The European Council’s mandate in Article 15 TFEU explicitly uses the word “political” to qualify the nature of the general directions and priorities to be provided. As such, they obviously change neither the legislative processes nor the treaty itself. Given the political nature of conclusions, there is an argument that conclusions by definition cannot change the legislative processes.

In light of Article 263 TFEU, examples of European Council conclusions and the case law of the European Court of Justice, however, these questions cannot be simply answered by assuming a mere political nature of European Council’s conclusions, which – by definition – would exclude binding instructions by the European Council. First, Article 263 TFEU⁴ determines that the Court of Justice may review the legality of acts of the European Council provided they are *intended* to “produce legal effects vis-à-vis third parties”. Second, the European Court of Justice ruled that conclusions of the

³ Examples of explicitly binding decisions of the European Council include Article 7 (2) TFEU according to which the European Council determines “the existence of a serious and persistent breach by a Member State of the values referred to in Article 2”. Other provisions entitle the European Council to make appointments, to change the composition of institutions or to change to legislative procedures and voting requirements (Article 48 (7) TFEU).

⁴ This provision extends judicial control to the European Council. The old Article 230 only included the Council of Ministers: “The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.”

Council of Ministers can have legal effects. Third, the ECJ ruled⁵ that “the Council had no right to “break free” from a specific legislative or administrative procedure through the use of Council conclusions. [...] Any procedure formally prescribed by law is “exclusive” in so far as it prohibits the use of other procedures to the same end without sufficient reasons.”⁶ In short, if the European Council acts with the intention to oblige other institutions to pursue certain policies, the conclusions adopted have legal effects.⁷

There is a case to argue that the European Council intended to oblige other institutions when it decided to adopt targets on greenhouse reductions or renewable energies, for example. The European Council did not propose these targets but adopted them, expecting that the relevant institutions would implement them. Legally, the Council of Ministers or the European Parliament could deviate from the decision on targets but *de facto* these institutions consider themselves obliged to implement the decision of the European Council. Arguably, the conclusions of October 2014 have a legal effect.

However, the conditions, consequences and conditions for legal scrutiny and unlawfulness are not fully clear or defined. The case law challenging the validity or lawfulness of Council conclusions is not comprehensive. It stipulates that Council conclusions can have a legal effect and can be unlawful, but the ECJ gives a lot of leeway for the European Council, similar to other EU institutions.⁸

Case Law of the European Court of Justice

There are a number of cases where the ECJ dealt with the legal nature and lawfulness of conclusions of the Council of Ministers and the European Council. Each case has its specific circumstance, but **the Court dismissed the notion that conclusions cannot have a legal effect *per se***. The Court explicitly rejected the argument that the conclusions cannot impose obligations, and that they are only meant to coordinate policies.⁹

In the case of AETR¹⁰, the Court held:

“It thus seems that in so far as they [the Council conclusions] concerned the objective of the negotiations the proceedings of 20 March 1970 [the Council conclusions] could not have been simply the expression or the recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States, and destined ultimately to be reflected in the tenor of the regulation.”

In the case of Pringle¹¹, the Court confirmed that the **Court has jurisdiction** over decisions (not conclusions though) of the European Council:

“It must be borne in mind that the question of validity concerns a decision of the European Council. Since the European Council is one of the Union’s

⁵ Judgment of the Court (Full Court) of 13 July 2004, *Commission of the European Communities v Council of the European Union*, Case C-27/04, [2004] ECR I-6649, para. 81.

⁶ Boysen, Sigrid and Moritz von Unger, *Legal Requirements for the Adoption of Conclusions by the Council and the European Council in the Area of EU Climate and Energy Policy* (2014), p.36-37.

⁷ Boysen/von Unger, Fn. 6.

⁸ Oppermann, Thomas, Claus Dieter Classen and Martin Nettesheim: *Europarecht*, 5th edition (2011), p. 35.

⁹ Boysen/von Unger, Fn. 6, p. 25.

¹⁰ Judgment of the Court of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22-70.

¹¹ Judgment of the Court (Full Court) of 27 November 2012, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, Case C-370/12.

institutions listed in Article 13(1) TFEU and since the Court has jurisdiction, under indent (b) of the first paragraph of Article 267 TFEU 'to give preliminary rulings concerning ... the validity ... of acts of the institutions', the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council."

The Court also held that **conclusions of the Council of Ministers can violate the treaty**. In the case *Commission v Council*¹² it stated that the Council of Ministers must comply with the procedures laid down in the Treaty:

"[...] it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC [now Article 126 TFEU] and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions."

5. What are the limits of European Council in legislative processes?

There is no catalogue defining in detail the functions and mandate of the European Council. The Treaty makes only two broad statements in Article 15 (1) TFEU: 1) that the European Council provides the EU with the necessary impetus for its development and defines the **general political directions and priorities**, and 2) that the **European Council has no legislative powers**. This leaves ample room for defining and developing the European Council's mandate. The European Council clearly can provide the EU with the broad and strategic directions but it is less clear to what extent the European Council can engage in details of a legislative process, possibly at the expense of the legislative powers of the Council of Ministers, Parliament and / or Commission. At which point would political priorities amount to, or be understood as, legislative interference? When would a **quasi legislative** role of the European Council exceed its mandate?

The following consideration help reconcile this tension:

- The European Council and the Council of Ministers are **separate institutions** with distinct roles, functions and corresponding legal powers. Article 13 TFEU is clear in providing that 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. In light of these provisions, the European Council could not decide on every single occasion on the details of a legislative proposal, thereby rendering the Council of Ministers irrelevant. The European Council can give political guidance, including on strategically important details, but **must respect the core of the legislative function** of the Council and the European Parliament. The

¹² Judgment of the Court (Full Court) of 13 July 2004. *Commission of the European Communities v Council of the European Union*. Case C-27/04.

European Council may not turn the other institutions into simple rubber-stamping bodies that simply formalise what has been politically decided in the European Council.¹³

- According to Article 14 and 16 TFEU, **legislative and budgetary functions** are among the core functions of the European Parliament and Council. In combination with Article 13 TFEU, these rules bar the European Council from rendering these functions *de facto* meaningless.¹⁴
- Article 13(3) TFEU stipulates that institutions practice **mutual sincere cooperation**. This provision complements the Articles 14 and 16 that set out the mandate and functions of the Council and the European Parliament. It is an additional safeguard, aimed at protecting the institutional balance of the EU. It stipulates that each institution exercises its function in full respect of the mandate and powers of the other institutions. The ECJ can decide on violations of these principles, provided specific rights of an institution are violated, such as the right to be consulted.¹⁵
- The European Council, composed of the heads of state and government, is naturally a leading institution, with considerably more political power than the Council, composed of Ministers that take instructions from heads of states in accordance with their respective internal frameworks. However, the European Council is **not an appeal body of the Council or a separate Council formation**.¹⁶
- The European Court of Justice ruled that “the Council had **no right to “break free” from a specific legislative or administrative procedure** through the use of Council conclusions. [...] Any procedure formally prescribed by law is “exclusive” in so far as it prohibits the use of other procedures to the same end without sufficient reasons.” This decision could entail, for example, that the European Council would violate Article 294 (2) TFEU if it were directly requesting the Council to adopt certain legislation bypassing the Commission.¹⁷
- The European Council provides the EU with the necessary impetus for its development and defines the general political directions and priorities, according to Article 15(1) TFEU. This provision encompasses a competence to determine the overall political direction of the EU, including – according to a leading commentary – what the European Council deems relevant for the overall direction of the EU.¹⁸ This might include strategic political issues but also specific details that cannot be solved in EU decision making.¹⁹ Despite a competence to politically determine details of the political process, **this competence may not be invoked to intervene routinely in the operation of other institutions**.
- With a few exceptions²⁰, the European Council cannot adopt legally binding decisions. In consequence, decisions of the European Council on other subjects are generally not legally

¹³ Goebel, Roger J., The European Union and the Treaty of Lisbon, Fordham International Law Journal, Volume 34, Issue 5, 2011, Article 4.

¹⁴ According to Roger J. Goebel (Fn. 13), Article 15(1), prevents the European Council “from supplanting the Parliament, Council, and Commission in their respective roles in the legislative process.”

¹⁵ Judgment of the Court of 22 May 1990, European Parliament v Council of the European Communities, 1990 I-02041, .C 70/88: “1. By setting up a system for distributing powers among the different Community institutions, assigning each institution to its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, the Treaties have created an institutional balance. Observance of that balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance, and in order to do so must be able to review observance of the prerogatives of the various institutions by means of appropriate legal remedies.”

¹⁶ Calliess, Christian and Matthias Ruffert, EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, Article 15, No. 7.

¹⁷ Boysen/von Unger, Fn. 6, p. 37.

¹⁸ Calliess/Ruffert (Fn. 16), Article 15, No. 7.

¹⁹ Calliess/Ruffert (Fn. 16), Article 15, No. 21.

²⁰ See above Fn. 3.

binding. Only the overall objectives are binding, **adoption of the details is left to the implementing institutions.**²¹

Against this backdrop, the European Council would violate the TFEU if it were to introduce a politically or even legally binding requirement or instruction on the Council to adopt legislation on the implementation of the 2030 package by consensus only. It would also violate the treaty if it determined that implementing acts require the approval of the European Council, either before or at the end of the legislative process. Boysen and v. Unger argue that the conclusions of December 2008, which determine the details of a legal proposal, are another case in which the European Council violated its mandate; the conclusions of October 2014 are another example.²² The conclusions of October 2014 could infringe upon its mandate when the European Council indicates *in advance* that it intends to determine details of adopting upcoming implementing legislation on the climate framework 2030, or even that it should be agreed by consensus.

6. Can the European Council circumvent qualified majority voting?

QMV is an essential element of the EU legislative processes. In fact, it is one of the defining elements of the EU as a supranational organisation. The expansion of QMV into new policy fields is one of the key improvements of the Lisbon Treaty, and its introduction was the result of intensive negotiations. A political commitment to adopt measures only by consensus in a policy field that normally is governed by QMV would undermine this decision making process.

Furthermore, the European Council can only change the decision making rules in line with Article 48 (7) TFEU. This provision only permits changing the decision-making in the Council either from unanimity to QMV, or from special legislative procedure to ordinary legislative procedure, not the other way around. In addition, the European Council's power to change the Council's decision-making procedure is subject to a no-objection procedure involving national parliaments as well as the consent of the European Parliament. These requirements show that the Treaties impose high barriers on changing the regular decision-making procedures.

7. Nothing new: the European Council routinely determines legislative details

There are various examples of European Council conclusions pre-determining details of legislative acts.²³ In 2008, the European Council had already assumed a crucial role in the adoption of the **2020**

²¹ Calliess/Ruffert (Fn. 16), Article 15, No. 8.

²² Boysen/von Unger, Fn. 6, p. 51.

²³ Boysen/von Unger, Fn. 6, p. 11: "The meetings of the heads of state and government have become the new center of gravity of the European Union and the European Council strongly asserts the lead role in policy-making"; Boysen/von Unger, Fn. 5, p. 11: "The result is a new intergovernmentalism that sometimes complements, sometimes replaces the classic 'community method' with its focus on legislative decision-making, and that balances the supranational process with the political legitimation from the Member States. [...]"

climate and energy package. At that time, before the entry into force of the Lisbon Treaty, the TFEU (2001) did not explicitly provide that the European Council shall not exercise legislative functions. However, the mandate to give general guidance was generally understood to not confer legislative competence. Legally, the European Council had no part in the adoption of the legal acts implementing the package.²⁴ However, during the legislative procedure, it provided its view on the proposal in two sets of conclusions, which even presented “agreed” detailed outcomes on contentious unresolved issues. Concerns about this procedure were raised from various sides, but the package was adopted by the Council as agreed in advance in the European Council.

There are, however, a **number of important differences** between the case of 2008 and the October 2014 conclusions, largely because the Lisbon Treaty entered into force in 2009. First, the new Article 15(1) TFEU now explicitly states that the European Council has no legislative powers. This strengthens the case against future guidance by the European Council that would seek to determine legislative details, even politically. Second, Article 296 (3) TFEU provides: “When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.” While the wording does not directly apply to the European Council, it could be argued that if it constrains the institutions directly involved in the legislative process, then by implication it also constrains institutions with no formal role.

²⁴ Such as Directives 2009/29/EC, Decision 406/2009/EC, Directive 2009/28/EC and Directive 2009/31/EC.