BRILL NIJHOFF

JOURNAL FOR EUROPEAN ENVIRONMENTAL & PLANNING LAW 12 (2015) 128-155

JOURNAL FOR EUROPEAN ENVIRONMENTAL & PLANNING LAW

brill.com/jeep

Regulating EU Climate and Energy Matters through Conclusions: The Limits of Consensus

Sigrid Boysen
Helmut Schmidt University Hamburg
boysen@hsu-hh.de

Moritz von Unger
Atlas, Brussels
m.vonunger@atlasela.com

Abstract

The practice of governing by action-driven conclusions is particularly evident in the field of climate and energy policy, in which a large number of substantial decisions, at a remarkable level of detail, are pre-set by the Council or the European Council, before they enter the formal decision-making process. The article discusses whether there are formal requirements for the adoption of Council conclusions and conclusions of the European Council, respectively. It also questions whether the practice of either body to channel a wide range of policy details through the adoption of conclusions by consensus is in line with the constitutional architecture of the Treaties.

Keywords

conclusions – consensus – Council – European Council – qualified majority voting – voting requirements – 2030 climate and energy framework

* Parts of this paper are taken from an advisory legal opinion commissioned by the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB). Nothing in this paper shall be regarded as an opinion, view or position held by the German government. The authors wish to thank Simon Marr, Jürgen Friedrich, Christian Lindemann, and Nils Meyer-Ohlendorf for valuable comments on an earlier draft of this project.

 | DOI 10.1163/18760104-01202003

1 Introduction

On 23 October 2014, the European Council agreed on the 2030 framework for climate and energy policies. The package contains a binding target to reduce EU domestic greenhouse gas emissions by at least 40 percent below the 1990 level by 2030, a target of at least 27 percent for renewable energy and energy savings by 2030 as well as a reform of the EU Emission Trading Scheme (ETS).[1] In its conclusions, the European Council emphasized its own role for the decision-making process of the post-2020 EU ETS framework and gave a guarantee on respecting consensus throughout the process. It held that it "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".[2]

As the European Council is claiming an ever more active role in shaping EU Climate and energy law and policies, conclusions of the European Council and the Council represent an increasingly important soft law instrument used by both institutions, when performing their non-legislative functions. Conclusions are not listed among the legal acts as defined in Article 288 TFEU and referred to by the Treaties in the periphery only. The Rules of Procedure of the European Council mention them in passing, while those of the Council consider them to be "non-binding acts" to be included in the minutes of a Council meeting and optionally – the Council makes this decision on a case-by-case basis – in the Official Journal.

Yet, despite the lack of firm process and the perfunctory place in the EU's institutional law, conclusions have become the central instrument for decision-making, "defining political directions and priorities" in accordance with Article 15 (1) TEU,[3] which lays out the mandate of the European Council, and of "policy-making and coordination" in accordance with Article 16 (1) TEU,[4] which lays out the non-legislative mandate of the Council. At times, indeed,

1 European Council Conclusions of 23–24 October 2014 (Brussels), EUCO 169/14. All relevant documents can be found at http://ec.europa.eu/clima/policies/2030/documentation_en.htm.

2 European Council Conclusions of 23–24 October 2014 (Brussels), EUCO 169/14, para. 1, emphasis added.

3 Article 15 (1) TEU: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legal functions."

4 Article 16 (1) TEU: "The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties."

Council or European Council conclusions do more than this. They can be found, then, regulating matters with legislative precision and giving detailed instructions, mostly to the Commission, but also to Member States and (if the European Council) to the Council. Conclusions, especially those of the European Council, have also come to monopolize – in the absence of a formal international negotiation mandate – the EU's position for international negotiations.

The practice of governing by action-driven conclusions is particularly evident in the field of climate and energy policy, in which a large number of substantial decisions, at an impressive level of detail, are pre-set by the Council or the European Council, before they enter the formal decision-making process. The European Council conclusions from October 2014 give just one example among many. At the end of 2008, for instance, plainly interfering with the legislative process of adopting the Climate and Energy Package as proposed by the Commission, negotiations took place at the level of both the Council and the European Council to tackle a number of contentious points ranging from defining industries subject to the risk of "leakage" to the allocation rules (including detailed breakdowns) and auction revenue rules as well as quota and threshold margins under the Effort Sharing Decision. By way of a package deal (addressing concerns almost at a country-by-country basis) formulated at the Council level,[5] the European Council in its conclusions of 10 and 11 December 2008[6] finally declared that it "reached agreement on the points contained in [the respective Council document]" and invited the Council to continue negotiations with the European Parliament on the basis of this agreement.

The risk, in this context, is that Council conclusions, directly or indirectly, override genuine competences of other EU institutions (and perhaps of Member States). This in turn leads to the question whether there are any restrictions on the power of the Council and of the European Council to choose the policy instrument of conclusions and to adopt them – in long-standing institutional (and inter-governmental) practice – by consensus. What happens if consensus cannot be reached? Does the established practice of consensus undermine, or even contradict, the specific voting requirements as set out by Articles 191 to 194 TFEU?

5 Council of the European Union, Document 1725/08 (POLGEN 142, ENER 472, ENV 1010), 12 December 2008.

6 Presidency Conclusions of 11 and 12 December 2008, Document 17271/1/08 of 13 February 2009.

Open disagreement happens every now and then. Over the course of 2011 and 2012, for instance, the Polish government ended isolated in its rejection to endorse the Commission's "Roadmap 2050"[7] proposal. 26 Member States (of then 27 Member States in total) stood behind the draft conclusions against Poland's rejection, which prompted both the Hungarian and the Danish Presidencies to release the respective Council conclusions as "Presidency Conclusions" (a format usually reserved for the conclusions of the European Council).[8] The incident was a telling example for today's political – and possibly legal – significance of Council conclusions. Despite the unassuming language – the conclusions state that the Commission communication which contained the Roadmap 2050 is "welcomed"; that the Roadmap 2050 should be "considered [...] as guidance in the further process" – the different players, above all the Presidency, the Commission and Poland, in their statements following the events, left no doubt about the relevance for policy-making and the legal sensitivity of the issue.

It is against this backdrop that this article undertakes a legal analysis of conclusions as instruments adopted by the Council and the European Council. It investigates the procedural requirements imposed by the Treaties for the adoption of conclusions in the field of climate and energy policy, and it identifies their function in the institutional environment of EU law. In the following, we will first look at the existing procedural provisions on the adoption of conclusions by the Council and the European Council before we describe a number of areas in the larger field of climate and energy policy and regulation in which Council conclusions have played, and continue to play, a prominent role. In a second step, we will examine the legal significance of Council conclusions against the backdrop of the institutional architecture provided for by the Treaties and the case law of the Court of Justice. In a third step, in interpreting the Treaties and the jurisdiction of the Court of Justice, we will specify procedural

7 European Commission, Roadmap for moving to a competitive low carbon economy in 2050, COM/2011/112 of 8 March 2011.

8 The Hungarian Presidency reported in June 2011 that the draft Council conclusions embracing the Roadmap 2050 failed to be adopted because of resistance from one Member State, see Council Press Release 3103rd Council meeting of 21 June 2011; it issued the conclusions consequently as "Presidency Conclusions", see Council document 11964/11 of 22 June 2011; the procedure was repeated by the Danish Presidency, for the "Presidency Conclusions" of 2012 see Council Document 11553/12 of 18 June 2012.

requirements for the adoption of various forms of conclusions both of the Council and of the European Council.

2 The Law and Practice of Conclusions in EU Climate and Energy Policy

Council conclusions represent the most prominent form of EU decision-making outside the catalogue of formal binding (regulation, directive, decision) and non-binding (recommendation and opinion) legislative acts as defined in Article 288 TFEU. Conclusions like declarations and resolutions are referred to as "informal" policy instruments.[9] Yet despite their prominent role in practice and their contentious treatment in one of the most important EU court cases – *AETR* –,[10] they find scarce attention in legal scholarship.[11]

The fact that Council conclusions are not mentioned in the catalogue of Article 288 TFEU says little about their binding or non-binding effect. There is general consensus that the enumeration of legal acts in Article 288 TFEU – the *formal* acts – is non-exhaustive.[12] Formal as well as informal instruments can be binding or non-binding. Recommendations and opinions for instance are formal (referred to in Article 288 (5) TFEU), yet non-binding. Rules of procedure, nominations and other acts are informal and yet binding for the institutions involved.

2.1 *Council Conclusions in the Treaties*

The Treaties refer to conclusions on the periphery only, thereby however suggesting their a priori lawfulness among the instruments enumerated in Article 288 TFEU. According to Article 148 (1) TFEU, "the European Council

9 *L. Senden*, Soft Law in European Community Law (2004), 193 et seq.

10 Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263.

11 E.g: *D. Chalmers/G. Davies/G. Monti*, European Union Law (3rd ed. 2014), 114 et seq.; *A. v. Bogdandy/J. Bast/F. Arndt*, Handlungsformen im Unionsrecht. Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel (2002) 62 ZaöRV, 77–161, make no reference to Council conclusions. Even monographs on soft law instruments in the EU leave out Council conclusions: *M. Knauff*, Recht und Soft Law im Mehrebenensystem (2012).

12 *M. Ruffert*, in: Calliess/Ruffert, AEUV, Art. 288, para. 98; *M. Nettesheim*, in: Grabitz/Hilf/Nettesheim, AEUV, Art. 288, para. 30; *D. Chalmers/G. Davies/G. Monti*, European Union Law (3rd ed. 2014), 112; *P. Craig/G. de Búrca*, EU Law (5th ed. 2011), 107; ECJ, Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263, para. 42; Case C-27/04 *Commission v. Council* [2004] ECR I-6649, para. 44 et seq.

shall each year consider the employment situation in the Union and adopt conclusions thereon [...]". Conclusions are also explicitly mentioned in Article 121 (2) TFEU: "The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union. On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines." Article 135 TFEU makes reference to conclusions, albeit as an instrument used by the Commission.

There are more direct, procedure-focused, if rudimentary, provisions concerning conclusions in the institutions' rules of procedure (both of the European Council and of the Council). As for the European Council and according to the body's Rules of Procedure,[13] the President of the European Council "shall prepare guidelines for the European Council conclusions and, as appropriate, draft conclusions" ahead of a European Council meeting and in close cooperation with the rotating Council Presidency and the Commission (Article 3 [1] subparagraph 3); the minutes of each European Council meeting shall contain "a reference to the conclusions approved" (Article 8).

There is no further mentioning of the function or content of the conclusions of the European Council. For this, one has to go back to 2002, when the European Council declared – itself by way of conclusions – that

> [...] the conclusions, which shall be as concise as possible, shall set out the policy guidelines and decisions reached by the European Council, placing them briefly in their context and indicating the stages of the procedure to follow on from them.[14]

The Rules of Procedure of the Council[15] for their part declare conclusions to be "non-binding acts" (Article 8 [1]) and that the minutes of each Council meeting shall contain "the decisions taken or the conclusions reached by the Council" (Article 13). Article 7 (5) stipulates that the Council's (apparently implicit) right to adopt conclusions at will is restricted, when it interferes with a decision-making process underway. Finally, that the Council or the Permanent Representatives Committee (Coreper) is given the authority to decide, on a "case-by-case basis" whether "other Council acts, such as conclusions or

13 European Council Decision of 1 December 2009 adopting its Rules of Procedure (2009/882/EU), [2009] OJ L 315/51.

14 European Council Conclusions of 21–22 June 2002 (Sevilla), Document 13462/02, Annex I.

15 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU), [2009] OJ L 325/35.

resolutions" should be published in the Official Journal, Article 17 (4) lit. c. Otherwise, the Council's Rules of Procedure however say nothing about their coming into existence. Most notably neither the Council's nor the European Council's Rules of Procedure determine certain majority requirements for the adoption of Council conclusions.

2.2 *Functional Scope of Council Decisions*

Despite their perfunctory legal characterization, Council conclusions have become an inherent part of the Council's day-to-day practice and, as it happens, of its rulemaking process. While Council deliberations have always been of significance for the legislative process, their "soft law" character makes them a policy tool of choice for EU policy makers.

Especially the fields of environmental and energy policy – matters of shared competence according to Article 4 (2) (e) and (i) TFEU – now constitute recurrent items on the European Council's agenda. Yet, questions arise about potential interferences with the decision-making process as laid out by the Treaties. The most problematic examples from recent years can roughly be clustered in three different types. First, conclusions can give instructions to the Commission such as a political mandate to elaborate guidelines, policy options or proposals; second, they may define milestones or targets for very specific policy action; and third, they are used, in the context of international negotiations, in lieu of a specific negotiating mandate for the EU.

2.2.1 Instructions to the Commission

It has become common practice for both the Council of the European Union as well as the European Council to make concrete requests to the Commission by means of conclusions. In a recent example, the European Council in its March 2014 conclusions[16] "calls" on the Commission to "conduct an in-depth study of EU energy security" (para. 20); "invites" the Council and the Commission to "rapidly develop […] elaborate mechanisms which will result in an overall fair effort sharing […] and develop measures to prevent carbon leakage […] and review the Energy Efficiency Directive […]" (para. 18); and "asks" the President of the European Council and the Commission to "take the necessary steps to prepare [a final] decision [on the new policy framework]" (para. 18).

While often packaging such requests in courteous language ("invites", "calls", "asks"), they are precise enough on substance and timing to be seen as *de-facto*

16 European Council Conclusions of 20–21 March 2014, Document 7/1/14, REV 1.

instructions. Non-compliance with such requests is extremely rare for the Commission.

2.2.2 Definition of Precise Milestones and Targets

Another example in which Council and European conclusions are phrased as explicit and concrete demands for specific policy actions can be found in the practice to issue fixed milestones, targets or benchmarks.[17]

The European Council has been particularly active, when it comes to climate and energy targets. For instance, the European Council in its conclusions of 8 and 9 March 2007[18] – later portrayed as the trigger for the Climate and Energy Package of 2008 – "adopts" the European Council Action Plan (2007–2009) – Energy Policy for Europe (EPE), in which the Council "stresses" the need to increase energy efficiency "so as to achieve the objective of 20% of the EU's energy consumption to projections for 2020" and "endorses the following targets [...] a *binding* target of a 20% share of renewable energies [...] [and] a 10% binding minimum target to be achieved by all Member States for the share of biofuels". The Action Plan followed a Commission Communication from earlier that year which had suggested the adoption of it "for Member States to endorse a strategic vision".[19] In its most recent conclusions on the "2030 Climate and Energy Policy Framework"[20] the European Council "endorse[s] a binding EU target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990". It also sets the new annual factor to reduce the cap of the EU ETS (it will be changed from 1,74% to 2,2%) and a number of benchmarks and targets for allowance allocation and auctioning.

The Council, on the other hand, usually fills the European Council's top-level initiatives with more detailed agenda setting. On the matter of energy cooperation, for instance, it can conclude that a certain international treaty (in casu: the Energy Community Treaty) should be extended beyond the year

17 Cf. *F. Eggermont,* The Changing Role of the European Council in the Institutional Framework of the European Union (2012); for a recent overview of "commitments" made by the European Council since its inception, sorted by fields, see European Parliament, European Council Conclusions. A Rolling Check-List of Commitments to Date (European Parliamentary Research Service June 2014, at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/536351/IPOL-IMPT_ET(2014)536351_EN.pdf.

18 Council of the European Union, Presidency Conclusions of 8 and 9 March 2007, Document 7224/1/07 REV 1 of 2 May 2007 (emphasis added).

19 European Commission, An Energy Policy for Europe, COM/2007/01 of 10 January 2007, p. 6.

20 European Council, SN 79/14 of 23 October 2014.

of its extinction,[21] and set dates by which interconnections between Member States need to be established to end the isolation of Member States from European gas and electricity networks.[22]

In all these cases, again, by taking ownership, the Council and the European Council evidently assume agenda-setting power and the opportunity to strengthen their role as institutional actors in the legislative process vis-à-vis the Commission and also the Member States. Even though informal and not explicitly binding, conclusions incorporating such a level of detail have the capacity to engage the Commission, on the one hand, and the Member States, on the other hand. It will be almost impossible for Member States to walk away from the intensely negotiated and publicly announced deal. Thus, the early involvement of the Member States' governments shields the subsequent legislative process from individual opposition.

Member States have taken notice. The practice of formulating milestones and targets through Council conclusions came under fire, when the Polish government rejected repeatedly the endorsement of the Commission's proposal on the "Roadmap 2050".[23] The document suggests that by 2050 the EU should cut its emissions to 80% below 1990 levels through domestic reductions. It also sets out milestones to reach this goal: emission reductions in the order of 40% by 2030 and 60% by 2040. Furthermore, it demonstrates how key sectors – power generation, industry, transport, buildings and construction, as well as agriculture – can make the transition to a low-carbon economy most cost-effectively including through carbon pricing.

The Polish government explained its objection by saying that "Poland cannot accept regulations concerning reduction targets after 2020 without reaching a global agreement on climate issues".[24] After heated debates during two subsequent Council meetings, the situation escalated with the Danish Presidency forcing a vote. 26 Member States (of then 27 Member States in total) stood behind the draft conclusions against Poland's rejection.

21 Council conclusions of 25 November 2011, Document 17615/11, "Communication on Security of Energy Supply and International Cooperation".

22 Council conclusions of 2 June 2014 (Document No 10225/14, "Energy prices and costs, protection of vulnerable consumers and competitiveness").

23 European Commission, Roadmap for moving to a competitive low carbon economy in 2050, COM/2011/112 of 8 March 2011.

24 The government of Poland's Minister of Environment as quoted by EurActiv, 18 June 2012 ("Poland blocks EU's zero-carbon plan", http://www.euractiv.com/climate-environment/poland-blocks-eus-zero-carbon-pl-news-513368).

Council conclusions as "Presidency Conclusions".[25] The Danish Minister of Environment commented at the time:

> 26 Member States signed up to a compromise. One Member State refused to compromise in spite of serious efforts from the Presidency and from all other Member States to deal with their concerns. Milestones are not binding but are necessary if the EU is to stay in the lead on green growth.[26]

Commissioner *Hedegaard* declared:

> The Presidency and the other 26 member states explicitly asked the Commission to move on, and that is what we will do.[27]

2.2.3 International Negotiating Mandate

While the two types of conclusions discussed above – instructions to the Commission, on the one hand, and setting concrete policy targets, on the other – are applied across a wide range of policies, a third type is special to the policy field of climate and energy and relates to international negotiations.

Article 218 TFEU governs the conclusion of international agreements. According to that provision, the European Commission (or the High Representative of the Union for matters involving foreign affairs and security policy) starts the negotiation procedure by submitting recommendations on the opening of negotiations to the Council. The Council then decides whether to authorize negotiations, it nominates the head of the Union's negotiation team, and it may hand out instructions on the substance of the negotiations, Article 218 (3) TFEU. In practice, the Commission submits its recommendations in what is referred to as "draft negotiating mandate", which the Council is free to alter, when it issues its "negotiating mandate". Usually, the Commission will recommend itself as head negotiator, and in most times the Council complies. It may happen nonetheless that the Council nominates the High Representative of the Presidency to lead negotiations, always instructing them to do so according to the substantial guidance given with the negotiating mandate.

---

25 See Council Press Release 3103rd Council meeting of 21 June 2011; Council document 11964/11 of 22 June 2011; for the "Presidency Conclusions" of 2012 see Council Document 11553/12 of 18 June 2012.

26 Danish Minister *Lidegaard*, http://eu2012.dk/en/NewsList/Marts/Uge-10/Lidegaard.

27 Statement by Commissioner for Climate Action *Connie Hedegaard* of 10 March 2012, MEMO/12/178.

It is a curiosity of the EU's international climate negotiations (and increasingly replicated in the context of other multilateral environmental treaties)[28] that they are led outside a formal negotiating mandate. The informal nature of the Union's international climate change negotiations goes back to the rejection of a negotiating mandate for the Kyoto Protocol that the European Commission had requested.[29] Negotiations have been makeshift ever since: Under the Pre-Lisbon rules, the so called 'troika' consisting of the incumbent Presidency, the incoming Presidency and the Commission, led negotiations relying on nothing else but conclusions of the European Council and of the Council. The troika arrangement was challenged by the entering into force of the Lisbon Treaty with its far-reaching changes to the Union's legal personality, Council architecture and a new allocation of responsibilities between the Council, the President of the Council, the High Representative and the Commission. Article 17 (1) TEU gives the right of external representation (outside the Common Foreign and Security Policy) to the Commission. However, under the Belgian Presidency in 2010, the Member States, the Council and the Commission implicitly agreed[30] on a new working formula for international climate change negotiations, which looked much like the old one, whereby both the Presidency and the Commission represent the Union, with Member States representatives leading the different negotiation teams, each time shadowed by a Commission official. As in previous years, there is no formal negotiating mandate and no formal nomination of a negotiation leader. Rather, the Council Conclusions and, primarily, the Conclusions of the European Council give ex-ante guidance to the Presidency, the Commission and, to a certain extent, the Member States while a Council working group – the Working Party on International Environment Issues (WPIEI) consisting of representatives of Members State as well as (in non-voting capacity) of the Commission – makes relevant negotiation decisions and adopts common positions ad hoc throughout the course of the negotiations. The Working Party decides by consensus.

28 Cf. the Convention of Biological Diversity, see, for instance, Council conclusions of 14 October 2010, Document 14975/10.

29 For the history of the negotiating mandate see *N. Lacasta/S. Dessai/E. Pwroslo*, Consensus Among Many Voices: Articulating the European Union's Position on Climate Change (2002) 32 Golden Gate University Law Review, 351; *L. Massai*, The Kyoto Protocol in the EU: European Community and Member States under International and European Law (2010), 51 et seq.

30 For an account of the Belgian Presidency preparing the agreement see *T. Delreux*, The Rotating Presidency and the EU's External Representation in Environmental Affairs: the Case of Climate Change and Biodiversity Negotiations (2012) 8 Journal of Contemporary European Research, 210.

3 Legal Nature of (European) Council Conclusions and Procedural Requirements for their Adoption

As conclusions are gaining weight in EU policy-making, it is necessary to integrate them in the institutional legal framework, i.e. to develop criteria to determine the possible legal value of conclusions according to the context they are used in and the procedural requirements for their adoption. On the surface, the legal identity of conclusions seems to be clear: they are "soft law" instruments, i.e. "rules of conduct, which, in principle, have no legally binding force but which nevertheless may have practical effects".[31] The practical effects are massive, however, which may explain why the de facto (if informal) process of reaching conclusions is complex. Various Member States governments including Denmark, Finland, Germany, Italy and Sweden have rules in place to share draft versions within their respective governments and legislative bodies prior to Council and European Council meetings.

3.1 *Presumption of Normativity*

There is a vast literature about the variety of soft law instruments in EU law.[32] The different contributions explore the wide range of forms of soft law instruments, which range from full to no legal effect. Many authors have shown in their work that there is a broad spectrum between explicit, precise and binding hard law and non-explicit, vague and voluntary soft law. The distinction between law and non-law "is theoretically elusive and is not a meaningful criterion for a theoretically sound distinction between different kinds of instruments expressing different kinds of commitments".[33] Some authors have put forward a behavioral criterion, characterizing normative statements as law when they are respected.[34] Others have suggested that the important perspective is not so much whether something is legally binding, but whether transgressions of norms provoke some kind of community reaction.[35] However these

31 *F. Snyder*, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques (1993) 56 Modern Law Review, 19, 32; for an exhaustive discussion see *L. Senden*, *supra* note 9, ch. 5.

32 *M. Knauff*, Recht und Soft Law im Mehrebenensystem (2012).

33 *M. Goldmann*, Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority (2008) 9 German Law Journal, 1865, 1907.

34 See e.g. *J.E. Alvarez*, International Organizations as Law-makers (2005), who points out that normative output of an international organization may turn out to be 'law', if it has 'normative ripples'. Thus, a resolution can be considered as 'law' if it is followed by according practice.

35 *G. Anderson*, Constitutional Rights after Globalization (2005), 40–44.

approaches only work in an *ex post* perspective and are not able to determine what is law and what is not in an *ex ante* perspective.[36] On the other hand, some authors go so far as to see the divide between law and non-law as irrelevant[37] or at least not as a radical discontinuity.[38] Another part of international legal theory takes a functionalist turn and on the results rather than the origins of norms.[39] Building on these different theories and their shortcomings in explaining the divide between law and non-law, *Klabbers* proposes a "presumption of binding force": "normative utterances should be presumed to give rise to law, unless the opposite can somehow be proven."[40]

3.2 *Conclusions in the Jurisdiction of the Court of Justice*

Besides the benefit of being workable, the presumptive thesis goes hand in hand with the jurisprudence of the international courts, and the Court of Justice of the European Union in particular, which tend to take a rather broad approach to the legal categorization of acts and documents and only dismiss the legal force of soft law instruments if those instruments are explicitly not intended to give rise to rights or obligations.[41]

3.2.1 Judicial Review of Acts of the Council

The Court of Justice has repeatedly held that the catalogue of legally binding acts as per Article 288 TFEU does not hinder the admissibility of actions brought against other types of acts "whatever their nature or form", as long as they are "intended to have legal effects".[42] In other words: The Court's starting

36 *J. Klabbers*, International Law (2012), 38–39.

37 See e.g. *B. de Sousa Santos*, Toward a New Legal Common Sense (2nd ed. 2002); *G. Anderson*, Constitutional Rights after Globalization (2005), 11 et seq.

38 *J. Brunnée/S. J. Toope*, International Law and Constructivism: Elements of an Interactional Theory of International Law (2000–1) 39 Columbia Journal of Transnational Law, 19–74: "there is no radical discontinuity between law and non-law".

39 See e.g. *A. v. Bogdandy*, who distinguishes between authoritative and non-authoritative output: *A. v. Bogdandy*, General Principles of International Public Authority (2008) 9 German Law Journal, 1909, 1917. In this reading, only authoritative acts need to be constituted and limited by public law: *A. v. Bogdandy/P. Dann/M. Goldmann*, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Acitivities (2008) 9 German Law Journal, 1375, 1381.

40 *J. Klabbers*, International Law (2012), 39; *J. Klabbers*, Law-making and Constitutionalism in: J. Klabbers/A. Peters/G. Ulfstein (eds.), The Constitutionalization of International Law (2009), 81, 111.

41 *J. Klabbers*, International Law (2012), 39.

42 Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263, para. 42; Case C-27/04 *Commission v. Council* [2004] ECR I-6649, para. 44 et seq.

point in determining the legal quality of a legal act is not the existence or non-existence of a Treaty authorization to adopt a particular legal act under certain substantive and procedural conditions. Rather, it is the motivation the respective institution has attributed to the legal act that constitutes its legal relevance and that allows to then scrutinize in a second step the requirements that exist for their adoption.

It was indeed the legal challenge of Council conclusions, which prompted the Court of Justice to develop its unrestrictive understanding of judiciable acts. In *AETR* it held:

> Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are 'recommendations and opinions' – which by the final paragraph of Article 189 [now Article 288 TFEU] are declared to have no binding force – Article 173 [now Article 263 TFEU] treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.[43]

The Court, in this context, made reference to its own role as the institution that ensures "the observance of the law in the interpretation and application of the Treaty"[44] and held:

> It thus seems that in so far as they [the Council conclusions] concerned the objective of the negotiations as defined by the Council, 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.[45]

More than 30 years after *AETR*, in 2004, the Court was once more given the opportunity to rule on the legal significance of Council conclusions.[46] The case concerned the area of economic and monetary policy; the Commission had challenged the Council on two grounds: (1) for not adopting a decision under Article 126 (8) and (9) TFEU as part of excessive deficit procedures against Germany and France – the provisions give the Council certain rights vis-à-vis

43 Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263, para. 39.

44 *Ibid.* para. 40.

45 Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263, para. 53.

46 Case C-27/04 *Commission v. Council* [2004] ECR I-6649.

Member States which have persistently failed to reduce their budget deficit – and (2) for adopting Council conclusions which involve holding the excessive deficit procedure in abeyance, i.e. putting it on hold.

The Council had argued that Council conclusions are mere political acts, not entailing any legal effects.[47] The Commission had retorted that the conclusions in question were

> sui generis measures whose main legal effect is to free the Council and the Member States concerned from the binding legal framework formed by Article 104 EC [now Article 126 TFEU] and Regulation No 1467/97, replacing it with new guidelines [...].[48]

The Court found that with the adoption of the Council conclusions, the Council decided to hold in abeyance the ongoing excessive deficit procedures against Germany and France and was thus intended to have "legal effects".[49] It held that

> 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 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.

The Court's reasoning in both *AETR*[50] and the 2004 case[51] is a good illustration of the Court's general approach to Article 288 TFEU and the EU's typology of legal acts. The legal nature of an institutional act – here Council conclusions – cannot be deduced from either an abstract typological concept or a binding component such act may or may not have in general. "[T]he nature of the act in question must be considered rather than its form".[52] As for conclusions, the Court of Justice tends to assume that their legal nature has to be developed from the concrete institutional, procedural and substantive "environment" in

47 Case C-27/04 *Commission/Council* [2004] ECR I-6649, para. 37.

48 Case C-27/04 *Commission/Council* [2004] ECR I-6649, para. 43.

49 *Ibid*. para. 50.

50 Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263.

51 Case C-27/04 *Commission/Council* [2004] ECR I-6649.

52 Cf. Case C-213/88 *Luxembourg/European Parliament* [1991] ECR I-5643, para. 15.

which conclusions are adopted. The notion of "legal effects" in this environment seems to be less a dichotomist threshold than a flexible measurement of de facto impact. In both cases, the Court does not provide any coherent concept or general guidance of what constitutes the notion of "legal effects". Rather, the Court applies an inductive test obtaining the result from the specifics of the respective case. It used a similar approach in a number of cases concerning the reviewability of Commission notifications.[53]

3.2.2 Judicial Review of Acts of the European Council

This leads to the question whether the Court's ruling in the *AETR* case,[54] according to which Council conclusions on the objectives of international negotiations and the negotiating procedure can indeed have legal effects, could be transferred to the situation of the European Council. The "dual nature"[55] of the Council's institutional role as a Community body and as unifying agency of the Member States that gave rise both to its conclusions and the proceedings before the European Court of Justice and was carefully considered by Advocate General *de Lamothe* in his opinion does indeed show some analogies – not to the institutional setting – but to the *practice* of the European Council under the Lisbon Treaty.

In the pre-Lisbon case law, the then European Court of Justice, in two cases, distinctly supported the statement of the Court of First Instance that a declaration of the European Council did not constitute an act whose legality was subject to review under Article 173 TEC. The respective appeals were dismissed as "clearly unfounded".[56] Under the Lisbon Treaty, the situation has changed. Pursuant to Article 263 (1) TFEU, the Court of Justice of the European Union does have the power to review the legality of acts of the European Council "intended to produce legal effects vis-à-vis third parties" as well as the European

53 Case 60/81 *International Business Machines Corporation* (*IBM*)*/Commission* [1981] ECR 2639; Case C-39/93 P *Syndicat Francais de l'Express International* (*SFEI*)*/Commission* [1994] ECR I-2681.

54 Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 263.

55 AG *de Lamothe* in Case 22/70 *Commission v. Council* (*AETR*) [1971] ECR 284, 288 and 287: "a veritable practice, a custom, has grown up in the last twelve years which requires the council of Ministers of the EEC as body to constantly perform two types of duty. The Council of the EEC is first and foremost a Community institution whose existence, powers and procedures are prescribed in the Treaty. However, it is also the framework within the Ministers of the Governments of the six Member States work together to settle the principle and means of achieving their common plans".

56 Case C-253/94 P *Roujansky/Council* [1995] ECR I-7, para. 11; Case C-264/94 P – *Bonnamy/Council* [1995] ECR I-15, para. 11.

Council's failure to act (Article 265 [1] TFEU). Acts of the European Council can also be reviewed via a preliminary reference to the Court (Article 267 [1] b TFEU and Article 13 [1] TEU).

This said, most acts of the European Council relate to the area of soft law defined by "the rather under-determined legal basis of [the European Council's] operations, the opacity of its proceedings and the absence of sanction mechanisms".[57] However, there is a growing gap between the Court's categorical statement in *Roujansky*[58] and *Bonnamy*[59] on the one hand, according to which acts of the European Council cannot by any means produce legal effects that makes them subject to judicial review by the Court of Justice, and, on the other hand, the increasing significance of the European Council conclusions in many policy fields of the European Union. Yet, even considering (the few) provisions of the Treaties that enable the European Council to adopt decisions that bring about distinct legal effects,[60] it is doubtful that the Court would readily exercise a broad right of judicial review.[61] In the event that any European Council conclusions preparing a legislative act were challenged on the ground that the conclusions had legal effects vis-à-vis third parties, it would be "certainly safer for the Court to judicially control the legislative product adopted by the institutions on the basis of the European Council's conclusions [...] rather than the conclusions themselves".[62] In this context it has been pointed out that the new institutional role of the European Council under the Lisbon Treaty does "not in any way affect the rules and procedures laid down in the Treaties".[63]

57 *B. Crum*, Accountability and Personalisation of the European Council Presidency [2009] 31 Journal of European Integration, 685.

58 Case C-253/94 P *Roujansky/Council* [1995] ECR I-7, para. 11.

59 Case C-264/94 P – *Bonnamy/Council* [1995] ECR I-15, para. 11.

60 Article 7 (2) TEU states that the European Council "may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2". Other provisions concern appointments, the composition of institutions and agreed changes to legislative procedures and voting requirements (the so-called '*passerelle* clause' of Article 48 (7) TEU). For a further analysis of the competences of the European Council see *M. Dougan*, The Treaty of Lisbon 2007: Winning Minds, Not Hearts [2008] 45 CMLRev, 617, 627.

61 *R.J. Goebel*, The European Council after the Treaty of Lisbon [2011] 34 Fordham International Law Journal 1251, 1258, calls it "highly unlikely"; cf. *N. Vogiatzis*, Exploring the European Council's Legal Accountability: Court of Justice and European Ombudsman, (2013) 14 German Law Journal, 1661, 1670, who also refers to The House of Lords Report on the Lisbon Treaty [2008], www.publications.parliament.uk.

62 *N. Vogiatzis*, *supra* note 61, at 1672.

63 *J. Werts*, The European Council (2008), 27.

A recent example of the Court of Justice's approach vis-à-vis the European Council is the case of *Pringle v. Ireland*.[64] The case concerned a preliminary reference under Article 267 TFEU challenging the Treaty establishing a European Stability Mechanism (ESM), which had been adopted by a decision of the European Council.[65] The Court confirmed its jurisdiction and stated that

> 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 institutions listed in Article 13(1) TEU 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.[66]

The case concerned a formal decision adopted by the European Council, however, on the basis of Article 49 (6) TEU, which clearly produced legal effects and necessarily had to be published in the Official Journal.[67] The implications of the ruling for the judiciability of conclusions of the European Council are less clear.[68] The Court *in Pringle* does in fact refer to specific European Council conclusions adopted in the context of the ESM and included in the fourth recital of the ESM Treaty, but it only uses them as an interpretative tool. *Pringle* confirmed, nonetheless, the jurisdiction of the Court over European Council acts, and the reasoning of the Court in *Pringle* suggests that the acts of the European Council are scrutinized along the same parameters as any other institution's acts.

Generally speaking, the lack of legislative powers does not hinder acts of the European Council – including conclusions – to produce legal effects. This follows from the Treaties as well as the practice of the European Council itself. Article 263 (1) TFEU ("acts of the […] European Council intended to produce legal effects vis-à-vis third parties") clearly recognizes the possibility of such legal effects. As regards practice, in June 2009 the European Council declared

64 Case C-370/12 *Pringle/Ireland*, Judgement of 27 November 2012, ECLI:EU:C:2012:756.

65 European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L 91/1.

66 Case C-370/12 *Pringle/Ireland*, Judgement of 27 November 2012, ECLI:EU:C:2012:756, para. 30.

67 *Supra* note 65.

68 *N. Vogiatzis*, *supra* note 61, at 1674 et seq.

its decision on the concerns of the Irish people on the Lisbon Treaty that was annexed[69] to the conclusions of that European Council to be legally binding.[70]

As the many examples quoted above show, in which the European Council pre-sets details of legislative acts and international mandates for negotiations, the conclusions this hybrid body adopts are often intended to have a legal and not merely a broad political impact in the sense of Article 15 (1) TEU. Read against *AETR* (establishing the notion of legal effect regardless of an act's formal nature), on the one hand, and *Pringle* (establishing the reviewability of European Council acts according to the same principles as any Council act), on the other hand, this means: If the European Council acts with the intention to oblige other institutions to pursue certain policies, the conclusions adopted have legal effects. The European Council's power includes the scenario that it infringes particular competences reserved for other institutions. If, for example, the European Council directly requested the Council to adopt certain legislation bypassing the Commission and the European Parliament, the violation of Article 294 (2) TFEU would make the conclusion unlawful.

3.3 *Legal Effects and their Implications*

In order to develop a set of more abstract criteria for the concept of legal effects from the existing case law and to apply it equally on other legal fields, it appears helpful to apply the three-step test said to indicate a text's legal nature, namely:

(1) obligation (stipulating to act),
(2) precision (describing the act in sufficient detail), and
(3) delegation (granting the authority to implement or enforce).[71]

This test reflects the inductive assessment the Court applied when judging the legal effects of the Council conclusions in question. In the cases before the Court discussed above, reference was made in particular to the fact that the Council had (1) agreed on a common position including a set of conditions (obligation) with (2) a high level of detail (precision) and (3) an authorization

69 Presidency Conclusions of 18/19 June 2009, Document 11225/2/09 REV 2 of 10 July 2009, Annex 1, p. 17.

70 Presidency Conclusions of 18/19 June 2009, Document 11225/2/09 REV 2 of 10 July 2009, p. 3 (I.5. [iii]).

71 For an in-depth explanation of the criteria employed here see *K. Abbott/R. Keohane/A. Moravcsik/A. Slaughter/D. Snidal*, The Concept of Legalization (2000) 54 International Organization, 401.

to Member States and the Commission, respectively, to act in a certain way (delegation).

Indeed, the majority of conclusions discussed above will fit this definition, as they give clear and very detailed instructions to the Commission, set precise benchmarks or targets, or when they provide a common position and negotiating mandate for international climate change negotiations. The reasoning of the Court does not support the claim put forward by some authors,[72] according to which the instances, in which conclusions produce legal effects, would be rare.

As a rule, it may be said that whenever the Council assumes a function or uses a competence specifically provided for in the Treaties, the result has legal effects whether or not the act concerned comes in the shape of Council conclusions and irrespective of whether additional acts are required to put the conclusions in practice. In such cases the Council cannot take the view that its manifestations would – in reality –lack legal effects. This particularly concerns the three different types of Council conclusions that are frequently used in climate and energy matters, i.e. instructions to undertake a study according to Article 241 TFEU, common positions and mandates for international negotiations according to Article 218 TFEU or, for that matter, all Council conclusions in view of their substantive content refer to climate and energy matters within the scope of Articles 191–194 TFEU.

Note, however, that this rule cannot be equally applied to the conclusion practice of the European Council. This follows from the peculiar institutional structure and position of the European Council in the institutional system of the EU. First of all, unlike all other institutions the European Council does not need a specific legal basis to act. It is free to deal with any policy field it considers relevant for the Union.[73] Pursuant to Article 15 (1) TEU, the European Council "shall define the general political directions and priorities thereof". This wide political discretion is not complemented, however, by a robust legal competence. Hence, unlike in the case of the Council, the legal relevance of the European Council's conclusions cannot be argued referring to the respective competence it is acting upon.

As the many examples quoted above[74] show, in which the European Council pre-sets details of legislative acts and international mandates for negotiations, the conclusions this hybrid body adopts are often intended to have a legal and

72 E.g. *A. Kaczorowska*, European Union Law (2013), 137.

73 *P. Dann*, Die politischen Organe, in: A. Bodgandy/J. Bast (eds.), Europäisches Verfassungsrecht (2nd ed. 2009), 372–4.

74 See sections 2 and 3.

not merely a broad political impact in the sense of Article 15 (1) TEU. Read against *AETR* (establishing the notion of legal effect regardless of an act's formal nature), on the one hand, and *Pringle* (establishing the reviewability of European Council acts according to the same principles as any Council act), on the other hand, this means: If the European Council acts with the intention to oblige other institutions to pursue certain policies, the conclusions adopted have legal effects.

3.4 *Due Process*

Tensions arise when Council conclusions interact with, if not override, genuine competences of either eu institutions or Member States or when they go beyond broad statements of political intent and assume a quasi-legislative role. Especially the European Council's power includes the scenario that it infringes particular competences reserved for other institutions. If, for example, the European Council directly requested the Council to adopt certain legislation by passing the Commission and the European Parliament, the violation of Article 294 (2) TFEU would make the conclusion unlawful.

For the Council, however, as one of two key law-making institutions, the situation is straightforward. It cannot claim a right to "break free" from a specific legislative or administrative procedure through the use of Council conclusions. This has been explicitly made clear by the Court of Justice in its ruling of 2004,[75] and resonates with Article 296 (3) TFEU.[76] The ruling may also have informed Article 7 (5) of the Council's Rules of Procedures, enacted after the ruling in the case was handed down: Once a legislative proposal or initiative has been submitted to the Council, the Council "shall refrain from adopting acts which are not provided for by the Treaties, such as [...] conclusions". Article 7 (5) of the Rules of Procedure is considerably broader than Article 296 (3) TFEU as it includes all "initiatives", not only the legislative acts (which involve the Council and the Parliament, Article 289 [3] TFEU). In its core, the consideration repeats a key element of the due process principle: 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.

75 Case C-27/04 *Commission v. Council* [2004] ECR I-6649, para. 81.

76 "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". The provision first appeared in the Treaty Establishing a Constitution for Europe [2004] OJ C 310/1, Article I-33 (2).

The Council and the European Council certainly do not always comply with this rule, as evidenced by the negotiation of the Climate and Energy Package of 2008 (mentioned above). It is not entirely clear whether the Court would have taken issue with this type of "legislative" conclusions prior to the enactment of the Treaty of Lisbon (arguably the European Council did not break free from the legislative procedure but facilitated it). It is safe to say, however, that it would object their adoption today. While Article 296 TFEU does not explicitly bind the European Council, the de facto legislative intervention in combination with the adoption of the respective "points" by the Council itself argue for non-compliance with the principle enshrined in the article.

3.5 *Voting Requirements*

For a long time, there has been little discussion about the applicable procedure for the adoption of conclusions and in particular to what extent the adoption of conclusions by the Council as well as by the European Council is subject to mandatory requirements concerning the voting procedures of the Treaties. Perhaps until the contentious adoption of the 2012 Presidency Conclusions on the Roadmap 2050 following the failure to adopt them by consensus under first the Hungarian and then the Danish Presidency, no one seemed to have taken issue with the question at all. It was widely accepted and standing practice that Council conclusions require consensus among Member States. Correspondingly, the European Council adopts conclusions by consensus in its long-standing institutional (and inter-governmental) practice.

It was the Polish objection during the adoption of the 2012 Council conclusions that unsettled this practice and gave a telling example for today's political – and possibly legal – significance of Council conclusions. In its resolution on the Climate Change Conference in Doha of 2012, issued after the Polish rejection of the conclusions embracing the Roadmap 2050, the European Parliament expressed its concern

> that the informal practice of waiting for consensus among all Council delegations is delaying urgent climate action and consequently urges the Council to act on the basis of qualified majority voting at all times, in accordance with the Treaties, in particular for general acts under Article 16 (3) TEU and specifically under Article 218 (8) TFEU 'at all stages of the procedure' of reaching international agreements.[77]

77 European Parliament, Resolution on the Climate Change Conference in Doha, Qatar (COP 18) (2012/2722(RSP)), para. 81.

3.5.1 Decision-Making by Consensus

To begin with, no explicit rule exists in EU law that would require consensus for the instrument of Council conclusions. Consensus constitutes a decision-making method that the Treaties formally reserve for the European Council alone. Article 15 (4) TEU states that

> [e]xcept where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

It accommodates the bureaucratic interest in non-confrontational, grand-bargaining arrangements, favored by both the Council and the Parliament,[78] and it is fitting that there is no clear definition of what constitutes "consensus". The European Parliament, in a note to the press, defines consensus as a decision "without vote"; instead consultations take place "until a decision that is acceptable to all is reached".[79] This is a definition used in a range of areas of international law.[80] The level of confusion around the nature of consensus reached a new level, however, when in 2010 the President of the COP, Mexican Foreign Affairs Minister *Patricia Espinosa*, rejected the formal objections of Bolivia arguing that

> [c]onsensus requires that everyone is given the right to be heard and have their views given due consideration [...]. Consensus does not mean that one country has the right to veto, and can prevent 193 others from moving forward after years of negotiations on something that our societies and future generations expect.[81]

The practice of building consensus in the European institutions has mostly proven less contentious. This has probably to do with the fact they are mostly employed against the backdrop (i.e. the alternative or contingency scenario) of a firm vote. Any objections in a venue that a priori applies consensus, thus, can

78 *F.M. Häge*, Coalition Building and Consensus in the Council of the European Union (2013) 43 British Journal of Political Science, 481.

79 See http://www.europarl.europa.eu/brussels/website/media/Definitionen/Pdf/Konsens.pdf.

80 E.g. the practice of the North Atlantic Treaty Organization (NATO), http://www.nato.int/cps/en/natolive/topics_49178.htm.

81 The quote is taken from *S. Park*, The Power of Presidency in UN Climate Change Negotiations: Comparison between Denmark and Mexico, Korea Environment Institute, Working Paper No 12–01, p. 43.

be undermined by putting a matter to a vote – as long as the required majority is not jeopardized. A notable exception to this, then, are the conclusions of the Council. When a Member State objects, conclusions will not be adopted.

There was an echo of the Mexican decision to reject Bolivia's objection, however, when in 2012 the Danish Presidency decided to put the Polish objections aside and issue the conclusions on the Roadmap 2050 as "Presidency conclusions". Yet, different from subsequent developments at the UNFCCC level – the contentious decisions have become an integral part of the UNFCCC regulatory body – the Danish move had no lasting effect. If anything, it has bolstered the claim that Council conclusions must be adopted by consensus in order to produce legal effects. Since the adoption of the "Presidency conclusions" the Roadmap has not appeared in any document of the Council, and it is barely mentioned in the Commission 2030 Policy Framework.[82] The Presidency conclusions do not appear in the online collection of the Council.[83]

3.5.2 Voting Requirements in the Council

The natural starting point for identifying the voting process in the Council is Article 16 (3) TEU. It provides that

> the Council shall act by a qualified majority except where the Treaties provide otherwise.

This general rule forms part of the new rules on voting by the Council introduced by the Lisbon Treaty. The Treaty still prescribes unanimity in a number of cases, yet it is restricted in scope and procedure. According to Article 238 (4) TFEU, abstentions do not prevent the adoption of the respective legal act. The Lisbon Treaty also introduced a flexibility ('*passerelle*') clause in Article 48 (7) TEU enabling modification to the voting rules in the Council.

82 Communication from the Commission, A policy framework for climate and energy in the period from 2020 to 2030, COM(2014) 15 final.

83 The Roadmap 2050 is referred to, however, in the 7th Environment Action Programme to 2020 (Recital 8), with the telling footnote (note 8) that it was "noted" by the Council in its conclusions of May 2011 (before the Hungarian and later the Danish Presidency invited Member States to fully embrace it) and by a resolution of the European Parliament; the "Presidency Conclusions" are not mentioned, Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L 354/171.

The Council is given the authority to autonomously decide on procedural matters and its Rules of Procedure (Article 240 [3] TFEU). Like the parallel provisions on the other institutions, the right to decide open procedural matters grants the institution a substantive power to flesh out its own proceedings within the framework of the Treaty.[84] On this ground, the Council is, first of all, free to actually apply a stricter voting scheme and to stick to its institutional practice to adopt its decisions on the basis of consensus. This practice that can be characterized as a manifestation of institutional respect towards the Member States, has been highly successful in the pre-Lisbon era. Consensual decision-making plays into the context of deliberative intergovernmentalism[85] as well as the bureaucratic interest in non-confrontational, grand-bargaining arrangements.[86]

However, the Rules of Procedure cannot be used to contradict voting requirements established by the Treaties. The procedural autonomy of the Council as laid down in Article 240 (3) TFEU is limited by the institutional provisions of the Treaty. In particular, Article 16 (3) TEU does not allow for a self-directed deviation from the qualified majority voting rule by the Council. Furthermore, Article 16 (3) TEU can not be considered as superseded by a customary law rule of consensual decision-making. It has been argued in the context of EU law that the continued habit of not taking actions in certain situations may lead to the formation of customary law.[87] This argument, however, lacks evidence, at least when it comes to consensus procedures at the Council level. If not the Danish Presidency's decision to issue "Presidency conclusions" as a consequence of the Polish veto in 2012, the European

84 See *S. Lefèvre*, Rules of Procedure Do Matter. The Legal Status of the Institutions' Power of Self-Organisation (2005) 30 ELREV , 802.

85 *U. Puetter, The European Council & the Council (2014), 1 et seq.*

86 This was in fact the situation of the Luxembourg Compromise with its constant threat that a Member State would exercise a de facto veto power that enabled the European Court of Justice to assume its role as the motor of European integration (*J.H.H. Weiler*, The transformation of Europe, in: J.H.H. Weiler (ed.), The Constitution of Europe, 1999, 10, 31 et seq.). This structural equilibrium still constitutes a productive stress field for the EU in its present formation. The combination of the conflicting principles and visions of constitutionalism on the one hand and a rather strict intergovernmentalism on the other constitutes the fundamental feature of European integration. Though, the limits of this constructive stress field can be seen in the field of climate and energy policy. Here according to the critics the informal consensus practice is delaying, if not hindering urgent climate action.

87 See *M. N. Shaw*, International Law (7th ed. 2014), 57; *Tunkin*, Theory of International Law (1974), 116 et seq.

Parliament's explicit rejection of the informal practice of consensus certainly did undermine any notion of general practice at the institutional level.[88] It follows that there is no consistent and accepted practice on consensus within the Council. It would therefore be unlawful to treat conclusions that do reach a sufficient quorum as not adopted because of a standing consensual practice.

The case for applying the specific voting rules as per the relevant Treaty provisions is stronger. It ultimately flows from Article 5 TEU, which obliges the institutions to follow the procedural requirements set out in the respective legal bases. It would seem incomprehensible, in this respect, if the institutions were allowed to evade the procedural requirements simply by adopting informal instead of formal acts. The opposite appears to be the lawful approach: The informal act needs to respect the formal act's requirements (*argumentum a maiore ad minus*).

Outside the specific discussion of Council conclusions this seems to be well understood. Most notably, it is generally accepted with regard to Article 288 TFEU that while the article does not give an exhaustive list of lawful acts, any act adopted must respect the Treaties' provisions on competence as well as any applicable material and formal requirements of adoption.[89] When the respective institution acts on internal matters alone (including internal deliberations), it will have a wide discretion as to process and substance. Otherwise, however, where an act has an external dimension in the sense of producing legal effects, the requirements regarding competence and procedure strictly apply. It is worth noting that the question of voting requirements outside the scope of Article 288 TFEU has received considerable more attention, namely regarding the working groups of the Council below Coreper (for Coreper itself, in theory, the same voting rules as those of the Council apply). It has been argued that the working groups including WGIEI are bound by the voting rules of the Council including qualified majority voting in matters of genuine EU competence.[90]

88 European Parliament, Resolution on the Climate Change Conference in Doha, Qatar (COP 18) (2012/2722(RSP)), para. 81. Furthermore, the practice of consensus in the Council remains complex: In *Commission v. Council*, the Council had indeed adopted the respective conclusions through vote, applying the special voting rules provided by Article 126 (9) and (13) TFEU (qualified majority), Case C-27/04 *Commission v. Council* [2004] ECR I-6649, para. 15.

89 *M. Nettesheim*, in: Grabitz/Hilf/Nettesheim, AEUV, Art. 288, para. 77.

90 *S. Woolcock*, European Union Economic Diplomacy: The Role of the EU in External Economic Relations (2012), 129.

This means for the types of Council conclusions under scrutiny: The voting requirements follow the requirements of the competence the Council makes use of. If the Council requests the Commission to undertake a study or submit a proposal, the voting requirements of Article 241 TFEU will apply. If the competences of Article 192 or 194 TFEU are touched upon, the relevant voting regime (qualified majority vote) applies. When the Council hands out its mandate for international negotiations, qualified majority applies according to Article 218 (8) TFEU.

3.5.3 Voting Requirements in the European Council

For the European Council, the voting requirements can be determined by the same method, yet with a different outcome. The European Council's voting procedure is governed by Article 15 (4) TEU, according to which decisions of the European Council shall be taken by consensus unless the Treaties provide otherwise. This provision means that (except in areas explicitly foreseen) the adoption of conclusions by the European Council will require the consensus of all members and it is not within the power of the European Council to adopt Rules of Procedure that foresee a different voting rule. As the Council, the European Council has a right to self-organization in Article 235 (4) TFEU. However, like in the case of the Council self-adopted rules that change the general consensus rule would not meet the formal restriction of Article 15 (4) TEU to provisions of the Treaty itself. The rare cases in which the European Council decides by qualified majority vote (e.g. Article 236 TFEU) are unlikely to give reason to the adoption of conclusions.

This result fully matches the institutional structure and political role of the European Council as it has been established by the Treaty of Lisbon. Article 15 (1) TEU leaves no doubt that the highest political authority within the Union resides with the European Council. The combination of this exceptional political mandate on the one hand and the lack of substantive competences on the other make it impossible to subject the adoption of European Council acts to qualified majority voting. Any majoritarian decision-making in the European Council on policy matters would go beyond the current institutional balance of the Union.

4 Conclusion

While assuming a corrective, balancing role to the classic 'community method', securing Member State involvement at the outset and sometimes throughout the legislative process, Council conclusions and European Council conclusions

are not mere "soft" instruments of political nature, standing completely outside the EU's legal order. The conceptualization as soft law, in this context, may ultimately be misleading as it points to a dichotomist approach of law versus non-law. The Treaties and the practice of Council and European Council conclusions argue for a field of continuity between soft law and hard law, instead, with different levels of commitment in terms of obligation, precision, and enforceability. The higher the level of commitment in any given case, the more conclusions are subject to legal restrictions and scrutiny. This translates into the following: First, conclusions may not be used in order to bypass a specific legislative or administrative procedure prescribed by law, such as the adoption of a Council or European Council position concerning a particular directive or decision under negotiation. When adopting conclusions giving rise to legal effects, the European Council and the Council must not go beyond, or evade, a specific competence assumed.

Second, the limits of competence, in line with Article 5 TEU, concern both substance and voting requirements. This means for the Council, for instance, when it requests a study, it can do so with simple majority. When the Council adopts, in the form of conclusions, a negotiation mandate for the UNFCCC negotiations, it is bound by the majority requirements of Article 218 (8) TFEU (qualified majority). When it issues conclusions with legal effects on matters concerning Article 191–194 TFEU, qualified majority (or unanimity, in specific cases) applies.

Third, conclusions of the European Council are specific, as the institution cannot rely on legislative competences in the first place. However, the Treaties recognize that acts of the European Council can produce legal effects, and the Court has confirmed the judicial reviewability of such acts. The European Council in turn makes ample use of its political power to pre-set – through the adoption of conclusions – details for the subsequent legislative process, leaving no doubt about the binding nature of their deliberations and the legislative prerogative. The quasi-legislative powers raise concerns about their constitutional validity. With regard to the voting procedure, however, consensus remains the rule.