Articles

Exploring the European Council's Legal Accountability: Court of Justice and European Ombudsman

By Nikos Vogiatzis [*]

A. Introduction: The Increasing Expansion of the European Council's Powers and the Importance of Legal Accountability Therein

The purpose of this article is to explore the avenues for legal accountability vis-à-vis the European Council after the Treaty of Lisbon. This will be achieved through an assessment of the jurisdictional realms of, on the one hand, the Court of Justice of the European Union (CJEU), and on the other hand, the European Ombudsman, always in relation to the European Council. Legal accountability may be understood in this respect as the supervision of the observance of the European Union (EU) rule of law. The European Ombudsman is an EU body established by the Treaty of Maastricht; by virtue of Art. 228 of the Treaty on the Functioning of the European Union (TFEU), he or she has the power to investigate complaints of maladministration "in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role."[1]

The introductory part that follows briefly considers the expansion of powers of the European Council and emphasizes the need for legal accountability therein. The subsequent section (B) examines the post-Lisbon possibilities for judicial supervision by the CJEU, whereas the next section (C) assesses the possibilities for control of maladministration through the post-Lisbon mandate of the European Ombudsman. The final section (D) offers a few conclusive remarks. The main finding of this paper is that as long as the CJEU's stance remains unknown or is projected as minimal in specific areas, there is a meaningful role for the Ombudsman to undertake because his or her mandate presents strengths in areas where the Court cannot be equally effective. Thus, the CJEU and the Ombudsman complement each other; while the former is primarily concerned

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[1] Consolidated Version of the Treaty on the Functioning of the European Union art. 228, Dec. 13, 2007, 2008 O.J. (C 115) 47 [hereinafter TFEU].

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with guaranteeing that the European Council acts within the realm of its institutional powers, the Ombudsman embeds the principles of good administration and transparency therein. Additionally, it is also underlined that although the Ombudsman cannot be the ultimate answer to the European Council's accountability problems, he or she might be a good start and, furthermore, that the *Pringle*[2] case leaves some scope for optimism concerning a more active CJEU vis-à-vis the European Council.

The relevance of the above inquiry primarily resides in the expansion of the European Council's powers[3] and, consequently, in the context of the EU's institutional framework, it is submitted that no actor of such constitutional gravity should be placed beyond the confines of the EU rule of law.

The Lisbon Treaty significantly amended the status of the European Council. It is now an institution of the European Union,[4] while benefitting from a permanent President elected by a qualified majority (practically by consensus) for a period of two and a half years, renewable once.[5] To avoid any doubt, the Treaty clearly stresses the central role of the institution: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general *political directions* and *priorities* thereof";[6] however, "[i]t shall not exercise legislative functions."[7] Little justification is required as to why, in a polity based on the rule of law, where the principles of democratic governance and transparency find (or should find) broad application, such as the EU, the strengthening of an institution simultaneously raises the level of its desired accountability.

"Strengthening" should be sufficiently clarified, for it could imply influence, leadership, and perhaps even dominance. Werts argues that although the decisions of the European Council are of a "*political nature*," they have never been ignored by the institutions, which are always keen on complying when they are "'invited' or 'urged'" to take action.[8] The impact on the Community method,[9] and in particular on the Commission's monopoly of legislative initiative, should also be taken into account: "*The power to initiate legislation*

[2] Pringle v. Ireland, CJEU Case C-370/12, 296 (Nov. 27, 2012), http://curia.europa.eu/jcms/jcms/j_6/.

[3] This expansion is not assed here normatively, but is merely accepted for the purposes of the inquiry.

[4] Treaty on European Union art. 13.1, Dec. 24, 2002, 2002 O.J. (C325) 14 [hereinafter TEU].

[5] *See* TEU art. 15.5.

[6] *See* TEU art. 15.1 (emphasis added). Note the stronger formulation as compared to TEU art. 4 of the Nice Treaty, which stated that the European Council "shall define the general political guidelines thereof."

[7] *See* TEU art. 15.1.

[8] JAN WERTS, THE EUROPEAN COUNCIL 25-27 (2008).

[9] *See* THE 'COMMUNITY METHOD': OBSTINATE OR OBSOLETE? (Renaud Dehousse ed., 2011).

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has been significantly eroded also by both the European Council *and the* Council*.* As to the former, the Commission has increasingly considered itself politically committed to following up to the 'conclusions' of the European Council."[10] It has been claimed that the classic institutional structure changed after Lisbon, upgrading the European Council: "The trio has been converted into a quartet and the triangle into a rectangle," the Commission and the European Council forming the "upper corners" of the rectangle.[11]

Nonetheless, it remains unclear why the literature on the European Council's accountability is far from abundant given that generally, the institution has not operated so far as a fully transparent and accountable entity, and therefore the aforementioned gaps in accountability could have been examined more thoroughly by scholarly contributions. As Crum put it, "[t]he accountability of the European Council is further hindered by the rather under-determined legal basis of its operations, the opacity of its proceedings and the absence of sanction mechanisms."[12]

In this context, it is no secret that the European Council is the pertinent institution behind the majority of the initiatives that aim to overcome the EU's present crisis, including the delineation of the appropriate adjustment measures.[13] This renders the question of its accountability more pertinent than ever, not least because the policies or guidelines decided in Brussels affect an ever-increasing number of European citizens. The *Pringle* case may be seen *inter alia* as a reflection of this development.

For methodological purposes, it is useful to distinguish between *legal accountability* and *political accountability*.[14] The European Council's political accountability cannot be discussed at length in this article, except to briefly mention that some encouraging signs

[10] PAOLO PONZANO, COSTANZA HERMANIN & DANIELA CORONA, THE POWER OF INITIATIVE OF THE EUROPEAN COMMISSION: A PROGRESSIVE EROSION? (2012).

[11] Gian Luigi Tosato, *The Shape of Post-Lisbon Europe*, *in* THE EUROPEAN UNION IN THE 21ST CENTURY: PERSPECTIVES FROM THE LISBON TREATY 271, 276 (Stefano Micossi & Gian Luigi Tosato eds., 2009). *See also* Uwe Puetter, *Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance*, 19 J. EUR. PUB. POL'Y 161 (2012).

[12] Ben Crum, *Accountability and Personalisation of the European Council Presidency*, 31 J. EUR. INTEGRATION 685 (2009).

[13] *See* HERMAN VAN ROMPUY, THE EUROPEAN COUNCIL IN 2011 6 (2012).

[14] PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS AND TREATY REFORM 115-16 (2010). Due to space limitations, the notion of "accountability" cannot be discussed in this account, but see generally Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447 (2007); CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION (2002).

have been observed in scholarship, in particular with regard to the Europeanization of national agendas and a somewhat more active European Parliament.[15]

Let us now turn to legal accountability. It has been argued above that there can be no EU entity, let alone EU institution, which cannot be subordinated under the EU rule of law. It is widely understood that legal accountability implies judicial review.[16] It will be shown below why the Ombudsman's review can also be considered as falling under the scope of legal accountability. Hofmann underlines that the "legal dimension" of accountability "focuses on the issue of compliance with the rule of law in a broad sense, including legally defined structural and substantive elements."[17] As has been observed, to exclude the European Council from such review would be "anomalous given its powers."[18]

The Lisbon Treaty amended considerably the possible avenues for legal accountability vis-à-vis the European Council. These amendments, however, have not yet attracted the appropriate scholarly attention. These amendments are considered below. The objective of the subsequent section is to address whether the CJEU is entitled to provide satisfactory solutions and, if so, to what extent.

B. The Obstacles the CJEU Faces in Order to Provide Judicial Supervision and the *Pringle* Case

This section is divided into three parts. The first part analyzes the pre-Lisbon pertinent case law, the second part discusses the changes introduced by the Lisbon Treaty, and the third part examines the recent *Pringle* judgment.[19] It will be demonstrated that, despite the amendments in the Lisbon Treaty concerning the judicially reviewable acts of the European Council, the CJEU is not likely to put into effect a thorough judicial activity towards the

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[15] *See generally* Marianne van de Steeg, *Public Accountability in the European Union: Is the European Parliament Able to Hold the European Council Accountable?* 13 EUR. INTEGRATION ONLINE PAPERS (2009), *available at* eiop.or.at/eiop/index.php/eiop/article/view/2009_003a; Crum, *supra* note 12, at 696; Henri de Waele & Hansko Broeksteeg, *The Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice*, 49 COMMON MKT. L. REV. 1066 (2012); DN, JHR and TV, *The European Council and the National Executives: Segmentation, Consolidation and Legitimation*, 8 EUR. CONST. L. REV. 166, 170 (2012); VAN ROMPUY *supra* note 13, at 5.

[16] CRAIG, *supra* note 14, at 115-16.

[17] Herwig C.H. Hofmann, *Seven Challenges for EU Administrative Law*, 2 REV. EUR. ADMIN. L. 48 (2009). Hofmann adds that these elements consist of "the principles of requirement of a legal basis, excluding *ultra-vires* activity and all activity violating fundamental rights and fundamental principles including the principles of good administration." *See id.* at n. 33. This definition—encompassing the principles of good administration—is particularly relevant for present purposes, as will be demonstrated below.

[18] CRAIG, *supra* note 14, at 115.

[19] *Pringle*, CJEU Case C-370/12 at 296.

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former. Moreover, it will be explored to what extent the *Pringle* judgment could mark a departure from the somewhat unclear and complicated framework previously discussed.

I. Pre-Lisbon Pertinent Case Law

This sub-section explores the limits of the CJEU's jurisdiction prior to the Treaty of Lisbon's entry into force. Initially, the two cases in which the then European Court of Justice (ECJ) declared its incompetence to judicially supervise the European Council are discussed. An additional path of inquiry is pursued, focusing again on pre-Lisbon cases: Could the ECJ's jurisprudence provide us with further insights into the CJEU's potential to supervise acts that, in nature (as opposed to the form of an act), produce legal effects vis-à-vis third parties? This question is worth exploring because, on the one hand, pursuant to Art. 263 of the Lisbon Treaty, the CJEU does have the power to supervise the European Council's decisions producing legal effects vis-à-vis third parties; on the other hand, the decisions of the European Council are generally considered to fall under the scope of soft law. The question of whether the CJEU could go so far as to consider reviewing soft law instruments adopted by the European Council, but literally fully endorsed afterwards by the remaining institutions, is assessed towards the end of section B II.

To begin with, as stated above, in two cases[20] the ECJ clearly excluded any supervision vis-à-vis a Declaration of the European Council "purporting to inform the citizens of the European Economic Community that the Treaty on European Union was to enter into force on 1 November 1993,"[21] thus confirming the findings of the Court of First Instance. In both cases the ECJ verified that the then Art. 173 TEC did not list the acts of the European Council as subject to review on legality.[22] Similarly, it did not accept the analogy based on *Les Verts*,[23] claimed by the appellants. On the contrary, it considered the appeals as "clearly unfounded."[24]

An interesting line of argumentation—with minimal chances of success at the time, but worth exploring under the post-Lisbon setting, given that the Court post-Lisbon may review acts of the European Council producing legal effects—could be the *Luxembourg v. European Parliament* case where the Court essentially stated that it is the nature of the act that matters and not its form.[25] Parliament adopted a Resolution in January 1989 to

[20] Roujansky v. Council, CJEU Case C-253/94, 1995 E.C.R. I-7 [hereinafter *Roujansky*]; Bonnamy v. Council, CJEU Case C-264/94, 1995 E.C.R. I-15 [hereinafter *Bonnamy*].

[21] *See Roujansky*, *supra* note 20, ¶ 2; *Bonnamy*, *supra* note 20, ¶ 2.

[22] *See Roujansky*, *supra* note 20, ¶ 11; *Bonnamy*, *supra* note 20, ¶ 11.

[23] Les Verts v. European Parliament, CJEU Case C-294/83, 1986 E.C.R. I-1339.

[24] *See Roujansky*, *supra* note 20, ¶ 11; *Bonnamy*, *supra* note 20, ¶ 11.

[25] Luxembourg v. European Parliament, CJEU Case C-213/88, 1991 E.C.R. I-5643 [hereinafter *Luxembourg*].

effectively re-organize its facilities and its modus operandi, further to the tasks assigned to it by the Single European Act.[26] The Court confirmed that for annulment actions, it is "the nature of the act in question" to be considered instead of its "form," and what is more, "the act must be examined to establish whether it is intended to have legal effects."[27] This judgment aligned with previous case law.[28]

The crucial question, therefore, is to explore what type of acts *in nature* could imply legal effects vis-à-vis third parties. In regard to the case on the Resolution of the European Parliament (the *Luxembourg* case), the European Parliament attempted to rely on the *Salerno* jurisprudence where it was decided that "a resolution of the Parliament is not binding and cannot give rise to the legitimate expectation that the institutions will comply with it".[29] However, the Court found in the *Luxembourg* case that the Resolution in question was of a "decision-making nature", therefore admissible for review because it could "affect" Luxembourg in so far as "the seat and places of work of the Parliament" are concerned.[30]

> [I]t is sufficient to state that in the *Salerno* judgment . . . the resolution in question reflected the opinion of the Parliament on a Commission proposal for a regulation and constituted only one step in the procedure for drawing up Community rules, whereas the resolution in the present case specifies the measures considered essential for a major

[26] Resolution of the European Parliament of 18 Jan. 1989 on the Seat of the Institutions and the Main Place of Work of the European Parliament, EUR. PARL. DOC. A2-316/88 (1989) *available at* www.cvce.eu/obj/european_parliament_resolution_on_the_seat_of_the_institutions_18_january_1989-en-eccf4423-735d-45f5-a26c-04c331452d2f.html.

[27] *See Luxembourg*, *supra* note 25, at ¶ 15.

[28] U.K. v. Comm'n, CJEU Case C-114/86, 1988 E.C.R. I-5289 [hereinafter *U.K. v. Comm'n*]. *See also* Comm'n v. Council (European Agreement on Road Transport or ERTA), CJEU C-22/70, 1971 E.C.R. I-263, *cited in* K.C. Wellens & G.M. Borchardt, *Soft Law in European Community Law*, 14 EUR. L. REV. 291, 310, 312 (1989). The Court stated that whatever the form of "common rules" adopted by the Community in order to implement a common policy (transport in that case), member states should not "undertake obligations with third countries which affect those rules." *Id.* at ¶ 17. Moreover, the Court did not accept the Council's submissions on the nature of the proceedings which, according to the latter, "were really nothing more than a coordination of policies amongst Member States within the framework of the Council, and as such created no rights, imposed no obligations and did not modify any legal position." *Id.* at ¶ 36. The judicial review must ensure, according to the Court, the "observance of the law in the interpretation and application of the Treaty" and in that sense any act other than a recommendation or opinion—including acts which might not necessarily constitute a regulation, a directive or a decision—should be examined as to its potential legal effects. *Id.* at ¶ 40-42.

[29] Salerno v. Comm'n and Council, Joined CJEU Cases C-87, 130/77, 22/83, 9 & 10/84, 1985 E.C.R. I-2523, at ¶ 59.

[30] *See Luxembourg*, *supra* note 25, at ¶ 27.

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> reorganisation and a reduction in the current dispersal of the activities and staff of that institution between three places of work.[31]

In the *U.K. v. Commission* case,[32] the Commission's act, announcing that it will consider the nationality of firms in order to form lists of candidates for service contracts did not produce legal effects because it "reflect[ed] the intention of the Commission, or of one of its departments, to follow a particular line of conduct"; more importantly, "it is not the announcement of that intention but the drawing-up of the lists themselves which is capable of having legal effects."[33] Interestingly, the Court requested statistical data demonstrating the Commission's subsequent actual practice and, taking into account the submitted documents, it identified certain limited derogations from the initial criteria announced by the Commission; this evidence "reinforced" the Court's conclusion.[34] In regard to the *ERTA* case, perhaps one should not too readily assume that the Court's finding that the Council's "conclusions" on the "objective of the negotiations" and "the negotiating procedure" *produced* legal effects,[35] may be applied automatically and without hesitation to the European Council. This is so because as was explained in detail by the Advocate General, the Council at the time was rather inventive when identifying lines of delineation between its *institutional* hat and its function as a "framework" strategically deciding the "common plans" of its participants/member states.[36] This promotion of cooperation under the "unifying agency"[37] hat occurred—it should not be forgotten—at a time when a configuration known today as the European Council had not been formally established.

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[31] *See* Luxembourg, *supra* note 25, at ¶ 25.

[32] *See U.K. v. Comm'n*, *supra* note 28.

[33] *See U.K. v. Comm'n*, *supra* note 28, at ¶¶ 13-15.

[34] *See U.K. v. Comm'n*, *supra* note 28, at ¶ 14.

[35] *See ERTA*, *supra* note 28, at ¶¶ 44-55. In particular, the Court found that "the Council's proceedings dealt with a matter falling within the power of the Community, and that the Member States could not therefore act outside the framework of the common institutions." *Id.* at ¶ 52. The Court also found that on the "objective of the negotiations . . . the proceedings of 20 March 1970 could not have been simply the expression of the recognition of 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." *Id.* at ¶ 53. Finally, on the procedure, the provisions adopted by the Council included derogations from the status quo concerning "negotiations with third countries and the conclusion of agreements." *Id.* at ¶ 54.

[36] Opinion of the Advocate General Dutheillet de Lamothe, at 287, Commission of the European Communities v. Council of the European Communities, CJEU Case 22/70 (Mar. 10, 1971), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61970CC0022:EN:NOT.

[37] *Id*. at 288.

Moreover, as Eggermont points out, in another case the Court while "refrain[ing] from determining the precise legal value of the . . . European Council['s] conclusions, it . . . made [it] clear that European Council conclusions cannot derogate from Union law."[38] Similarly, the Court's judgment on the "Stability and Growth Pact" case[39] verified that the conclusions "can be used by the Court of Justice to interpret the meaning of Treaty provisions."[40]

In the following parts of this section discussing the contributions of the Lisbon Treaty and the *Pringle* case, the above deductions from the pre-Lisbon case law concerning the inability of the Court to supervise the European Council based on the absence of such competence, the employment of the conclusions as an additional tool for the interpretation of the Treaties, and the Court's significant findings in relation to acts of other EU institutions possibly producing legal effects will be taken into due consideration.

II. Lisbon's Contribution: A Complicated Framework

The Lisbon Treaty complicates the situation to a certain extent. To begin with, the Court of Justice may now review an act "of the European Council intended to produce legal effects *vis-à-vis* third parties"[41] and also the European Council's failure to act.[42] As Craig observes, an "asymmetry" has been established because the European Council, defendant under both Articles 263 and 265 TFEU, may only bring an action for failure to act, not for annulment.[43] At the same time, as stated above, the European Council "shall not exercise legislative functions."[44]

It is beyond doubt that in the former purely intergovernmental pillar, the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), "the role of the European Council is preponderant."[45] The definition and implementation of the

[38] FREDERIC EGGERMONT, THE CHANGING ROLE OF THE EUROPEAN COUNCIL IN THE INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION: CONSEQUENCES FOR THE EUROPEAN INTEGRATION PROCESS 147 (2012) (discussing Germany v. European Parliament and Council, CJEU Case C-233/94, 1997 E.C.R. I-2405).

[39] *Comm'n v. Council*, CJEU Case C-27/04, 2004 E.C.R. I-6649.

[40] *See* EGGERMONT, *supra* note 38, at 148-50.

[41] *See* TFEU art. 263.

[42] *See* TFEU art. 265.

[43] CRAIG, *supra* note 14, at 127.

[44] *See* TEU art. 15.1.

[45] *Report on the Treaty of Lisbon*, at 47 (Jan. 29, 2008) *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2008-0013&language=EN.

CFSP has been assigned to the European Council and the Council, acting unanimously, whereas legislation is excluded.[46] The establishment of a High Representative of the Union for Foreign Affairs and Security Policy with significant powers[47] is also worth noting, not least because he or she takes part in the work of the European Council;[48] this suggests some form of institutional affiliation, verified by the fact that the latter appoints her.[49] The High Representative is assisted by a European External Action Service.[50]

Nonetheless, the role of the CJEU in CFSP is—or remains, to be exact—marginal, if not nonexistent. Indeed, it stems from Art. 24.1 TEU and Art. 275.2 TFEU that the CJEU cannot exercise any jurisdiction in CFSP, with the exception of monitoring compliance with respect to the EU institutions' competences in CFSP[51] and the power to "review the legality of certain decisions" of Art. 275.2—in other words "to rule on proceedings . . . of decisions providing for restrictive measures against natural or legal persons adopted by the Council."[52] Lisbon's insistence on the CJEU's limited role in CFSP has been criticized.[53]

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[46] See TEU art. 24.1. See also TEU art. 22.1 (stating that, in regard to external action, the European Council "shall identify the strategic interests and objectives of the Union").

[47] *See* TEU art. 18.2 (stating that she will "conduct the Union's common foreign and security policy" and "the common security and defence policy"). *See also* TEU art. 24.1 (stating that the High Representative will "put into effect" the CFSP). Note also that since 2004, a European Defence Agency operates in Brussels.

[48] *See* TEU art. 15.2.

[49] *See* TEU art. 18.1. It has been argued that the High Representative may be seen as an agent of the European Council. *See* Wolfgang Wessels & Franziska Bopp, *The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional Breakthrough or Challenges Ahead?*, CHALLENGE RESEARCH PAPER n.10 (2008), *available at* www.ceps.eu/book/institutional-architecture-cfsp-after-lisbon-treaty-constitutional-breakthrough-or-challenges-a. This is notwithstanding the President's absence of "any autonomous powers" over the High Representative. *See* Henri de Waele &Hansko Broeksteeg, *The Semi-Permanent European Council Presidency: Some Reflections on the Law and Early Practice*, 49 COMMON MKT. L. REV. 1063 (2012) (claiming that "the constitutional position of the President is of slightly greater weight than that of the High Representative" and additionally that "the President prevails, largely by virtue of the weight and force of the institution he presides").

[50] *See* TEU art. 27.3; Declaration No. 15 of the Lisbon Treaty, Sept. 5, 2008, 2008 O.J. (C115) 343.

[51] *See* TEU art. 24.1; TEU art. 40.

[52] *See, e.g.*, WESSELS & BOPP, *supra* note 49, at 17–18; *Report on the Treaty of Lisbon*, *supra* note 45, at 47. Note, though, if CFSP measures require implementation that will be adopted under an area of the CJEU's jurisdiction, as in *Kadi*, the Court "could indirectly review the CFSP act." *See* Dorota Leczykiewicz, *"Effective Judicial Protection" of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?*, 35 EUR. L. REV. 326, 327 (2010).

[53] *See* Piet Eeckhout, *The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism*, *in* EU LAW AFTER LISBON 265, 290–91 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012) (finding the status quo—including the limited role of the European Parliament—"unacceptable in a polity governed by the rule of law" and proposing a departure from the debate between supranaltionalism and intergovernmetalism towards accountability issues and constitutionalism in CFSP).

Putting the CFSP aside, the focus now shifts to the jurisdictional realm of the CJEU further to Art. 263 TFEU. There are at least two insightful accounts that attempt to discern instances "which enable the European Council to take decisions having legal effects."[54] These provisions include, among others, appointments, the composition of institutions, the simplified revision procedure of Part Three of the TFEU, *passerelle* clauses,[55] and the "emergency brakes."[56] Aside from this, Art. 7.2 TEU enables the European Council to "determine the existence of a serious and persistent breach by a Member State of the values" of the Union.[57]

The likelihood of the CJEU's active engagement in the aforementioned decisions of the European Council has been deemed uncertain.[58] The House of Lords Report on the Lisbon Treaty,[59] while acknowledging that it was reasonable for member states to demand some type of judicial control over the European Council given its expanding conferred powers,[60] determined that "the circumstances where that will happen will be quite narrow," given the limited "duties or responsibilities" of the European Council.[61] A member of the Commission supported this view as well: "When you read the Conclusions of the European Council it is very difficult to see how the European Court can come in on them . . . it is not a substantial change."[62]

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[54] *See* JEAN-CLAUDE PIRIS, *Appendix 6 of* THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS, at 379–82 (2010); Michael Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 COMMON MKT. L. REV. 617, 627 (2008) (arguing that some of the legally binding decisions of the European Council are of "'quasi-constitutional' or 'high politics' nature'"). *See also* Editorial Comments to *An Ever Mighty European Council—Some Recent Institutional Developments*, 46 COMMON MKT. L. REV. 1383, 1391 (2009).

[55] Unanimous decisions of the European Council enabling the Council to switch from unanimity to qualified majority or from a special legislative procedure to the ordinary legislative procedure.

[56] *See* Dougan, *supra* note 54, at 643. In sum, these provisions enable a member state in cases where a national interest is at stake to suspend the ordinary legislative procedure and refer the matter to the European Council. The social security measures and judicial cooperation in criminal matters are two areas of use.

[57] TEU art. 7.2.

[58] *Cf.* Francis G. Jacobs, *The Lisbon Treaty and the Court of Justice*, *in* EU LAW AFTER LISBON 197, 199 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012) (asserting that the instances where the Court will review an act of the European Council "might be expected to be relatively rare").

[59] *See* House of Lords, European Union Committee *The Treaty of Lisbon: An Impact Assessment*, *10th Report of Session*, at 2007-08 (Mar. 13, 2008), *available at* http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/ldeucom.htm.

[60] *See id*. at 76 (Opinion of Sir David Edward).

[61] *Id*. (Opinion of Professor David Chalmers).

[62] *Id*.

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On a more positive note, the possibility – but not necessarily the probability - of the CJEU's supervision could "oblige" the European Council in these areas "to respect the rules fixed by the relevant legal basis, which identifies in each case the relevant procedure to be followed."[63] This argument has been advanced elsewhere as well; whereas an action for annulment or an action against a failure to act is "highly unlikely, the availability of judicial review may serve to enforce optimal procedural regularity in the decisions [of] the European Council."[64] It remains to be seen to what extent the European Council will abide by "procedural regularity"; it should be emphasized, however, that the appointment of the first President of the European Council has raised concerns about its lack of transparency.[65] One would also subscribe to the abovementioned assessment regarding the limited possibilities of judicial supervision vis-à-vis a failure to act. For instance, in the case of an "emergency brakes" activation, it might not be entirely coincidental that the European Council is not *obliged* to respond/act, either by contacting the Council or the Commission; it may as well "take no action," in which case "the act originally proposed shall be deemed not to have been adopted."[66]

Moreover, returning to the pre-Lisbon discussion on the conclusions of the European Council, it is clear that they remain in the area of soft law and are therefore not legally binding, despite the somehow political, but not legal, obligation of the institutions to follow the European Council's conclusions.[67] Regardless of their form - conclusions, declarations, or resolutions - they were "not usually published in the Official Journal."[68] Note, however, that after the Lisbon Treaty and in accordance with the European Council's Rules of Procedure, decisions not specifying to whom they are addressed shall be published in the Official Journal.[69] In this context, and in the absence of the CJEU's position on the limits of such formulation, one may translate the non-binding nature of its decisions into acts *not* "intended to produce legal effects *vis-à-vis* third parties." This issue shall be returned to in a moment.

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[63] PIRIS, *supra* note 54, at 205–06.

[64] Roger G. Goebel, *The European Council after the Treaty of Lisbon*, 34 FORDHAM INT'L L.J. 1251, 1258 (2011).

[65] *See* Patrick Birkinshaw, *Transparency and Access to Documents*, *in* THE EUROPEAN UNION LEGAL ORDER AFTER LISBON 232, 232–33 (Patrick Birkinshaw & Mike Varney eds., 2010); CRAIG, *supra* note 14, at 117.

[66] *See* TFEU art. 48(b) (covering the social security system).

[67] *See* WERTS, *supra* note 8, at 62 (using stronger words: the conclusions are "politically binding").

[68] LINDA SENDEN, SOFT LAW IN EUROPEAN COMMUNITY LAW 193 (2004). *Cf.* TFEU art. 297 (stating that legislative acts "shall be published" in the OJEU, but not specifying the process to be followed with non-legislative acts).

[69] *See* European Council Decision 2009/882/EU, art. 12.1, 2009 O.J. (L 315/51) (EC) (adopting its rules of procedure).

Let us now assume that the Court might at some point attempt to apply the *UK v. Commission* test described above, in other words to examine whether practice differentiates from an instrument classified as soft law (for instance, an adopted hard law literally reproducing the text of the European Council's Conclusions—or, more generally, an acknowledgment from the part of the CJEU that while the European Council cannot legislate, it could be worth examining whether it actually produces acts having legal effects *vis-à-vis* third parties). In this hypothetical scenario, an additional obstacle to be overcome is Werts' point that the founders of the European Council had decided on the "legal nature of their creation" as follows: "[T]he new arrangement did 'not in any way affect the rules and procedures laid down in the Treaties.'"[70] This could indeed be raised as an argument by the European Council's legal service, if such need arose. Thus, it is certainly safer for the CJEU to judicially control the legislative product adopted by the institutions on the basis of the European Council's conclusions, as is the case now, rather than the conclusions themselves, especially because such a stance would contradict the widely entrenched view that the European Council's Conclusions remain in the sphere of soft law.[71] Any departure from this position, beyond thorough justification, would quite inevitably face considerable political and scholarly reactions; indeed, many would think that this would be a step too far.

An interesting practice may be derived from the June 2009 European Council, where the Heads of States under the configuration of the European Council clearly stated that a Decision on the Irish case concerning the Lisbon Treaty and annexed to the Conclusions is legally binding.[72] One could argue that, henceforth, this might be the avenue to take when the European Council wishes to issue binding, judicially reviewable decisions.

It should be noted that, from a technical perspective, the acts of the European Council may be reviewed "indirectly" via a preliminary reference to the Court.[73] The latter has the

[70] WERTS, *supra* note 8, at 27. *See* Alan Dashwood, *Decision-Making at the Summit*, 3 CAMBRIDGE Y.B. OF EUR. LEGAL STUD., 29, 81–82 (2000) (arguing accordingly when admitting that had the European Council been granted a "power to effect changes in the law of the Union," this would contravene the "deep structure of the Union order," which imposes upon the institutions a mission to "retain their specific identities and maintain the integrity of their reciprocal relationships").

[71] Note, though, that Wellens & Borchardt, *supra* note 28, at 321 concluded in their seminal article on "soft law" as follows: "In so far as Community law intends to cause legal consequences with regard to the individual these rules of conduct are particularly eligible for an appeal for annulment or a preliminary ruling. In this light having recourse to Community soft law appears to be justified if and in so far as it furthers the process of European integration. On the other hand the individual's legal protection calls for its cautious use."

[72] *See* Editorial Comments, *supra* note 54, at 1386. To be sure, this configuration was not inaugurated in 2009, but is used here as an example for our hypothesis.

[73] *See* CRAIG, *supra* note 14, at 115; Wellens & Borchardt, *supra* note 28, at 321; TFEU art. 267. *See also Pringle* discussion *infra* B.III (reaching the Court via a preliminary reference).

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power to opine on the "validity and interpretation of acts of the institutions," including post-Lisbon the European Council.[74]

For a more complete look at the issue, one could also consider the theoretical distinction in soft law between "legal binding force" and the production of "legal effects," and consider its relevance in regard to the soft law instruments of the European Council.[75] More precisely, the author claims that "[t]he concept 'legal effect' is the broader umbrella term, to be subdivided in legal binding force, and indirect legal effects."[76] But one should apply this broader definition with caution when discussing the possibilities for judicial review of the European Council's Conclusions: It appears that "indirect legal effects" vis-à-vis third parties cannot be brought under the scope of Art. 263 TFEU.[77] To put it differently, the reconciliation between the categorical denial of the ECJ in *Roujansky* and *Bonnamy*[78] (on the basis of lack of competence) and the increasing significance of the European Council's Conclusions, undeniably producing at least "indirect legal effects," might be one of the future—and perhaps inevitable—challenges the CJEU will have to face.

III. A Test Case? Pringle v. Ireland

In November 2012, and further to a preliminary reference under Art. 267 TFEU, the CJEU opined that the Treaty establishing a European Stability Mechanism (ESM) does not violate Union law.[79] It should be noted that the Treaty was adopted on the basis of a decision of the European Council,[80] in the context of the simplified revision procedure to amend Treaty provisions, as established by Art. 48.6 TEU. For present purposes, it is appropriate to focus on any deductions one could discern regarding the possible future stance of the Court vis-à-vis the European Council. A word of caution is befitting: This case constitutes a

[74] *See* TFEU art. 267; TEU art. 13.

[75] *See* Bart Van Vooren, *A Case Study of "Soft Law" in EU External Relations: The European Neighbourhood Policy*, 34 EUR. L. REV. 696, 700 (2009) (citing SENDEN, *supra* note 68, at 112).

[76] Van Vooren, *supra* note 75, at 700.

[77] *See* PIRIS, *supra* note 54, at 379–82; Dougan, *supra* note 54, at 627.

[78] *Roujansky*, CJEU Case C-253/94 P;*Bonnamy*, CJEU Case C-264/94 P.

[79] *See* Pringle, CJEU Case C-370/12. For a thorough analysis, see Vestert Borger, *The ESM and the European Court's Predicament in* Pringle, 14 GERMAN L.J. 113, 113–40 (2013); Pieter-Augustijn Van Malleghem, Pringle*: A Paradigm Shift in the European Union's Monetary Constitution*, 14 GERMAN L.J. 141, 141–68 (2013); Jonathan Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, 14 GERMAN L.J. 169, 169–90 (2013).

[80] European Council Decision 2011/199/EU, 2011 O.J. (L 91) (EC) (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).

sole example and by no means may it be considered as decisive in order to determine with sufficient clarity the future interaction between the Court and the European Council.

The first point is that the Court confirmed its jurisdiction and declared the reference admissible. Several governments, the Commission, and the European Council contested the jurisdiction of the Court on the grounds that it cannot interpret Treaty provisions.[81] The Court opted for an emphatic declaration of its jurisdiction, thus separating the Decision from the future Treaty provision,[82] stating *inter alia* that:

> [I]t 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 . . . '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.[83]

It should be underlined, however, that the Decision contained an article providing for its publication in the Official Journal.[84] Therefore, there can be no doubt as to its intended legal enforceability, not least because its objective was nothing less than an amendment of the Treaty under Art. 48.6 TEU (the simplified revision procedure). On top of this, Art. 48.6 TEU clearly explains that the decision of the European Council will *enter into force* after the ratification by the Member States.[85]

Second, the Court reiterated its competence to observe the procedural rules set forth in Art. 48.6 TEU.[86] This certainly encompasses the European Council, which, while acting by unanimity, should still consult, nonetheless, the Commission, the European Parliament, and the European Central Bank regarding amendments in the monetary area—as was the case here.[87]

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[81] *See Pringle*, CJEU Case C-370/12, at ¶ 30.

[82] Van Malleghem, *supra* note 79, ¶ 149.

[83] *Pringle*, CJEU Case C-370/12, ¶ 31.

[84] *See* European Council Decision 2011/199/EU, art. 3, 2011 O.J. (L 91) (EC).

[85] *Cf.* also PIRIS, *supra* note 54, at 379–82.

[86] *See Pringle*, CJEU Case C-370/12, at ¶ 36.

[87] *Cf.* the Recital 5 of European Council Decision 2011/199/EU, 2011 O.J. (L 91) (EC).

Third, the Court declared the question admissible on the grounds that "it [was] not evident" that the applicant, an Irish MP, could challenge directly the decision of the European Council.[88] This could imply either that the Court leaves the question open, or that it does not consider the individual's *locus standi* in relation to an action for annulment against the European Council as a particularly plausible scenario.

Fourth, the Court indeed referred to the Conclusions of the European Council as an interpretative tool, partly because the aforementioned Conclusions are included in Recital 4 of Decision 2011/199.[89] In this case, however, from a technical point of view, the Conclusions were mainly taken into consideration in order to judicially review a decision of the European Council and not the pertinent Treaty provisions.[90]

It can therefore be claimed that the CJEU in *Pringle* accomplished several tasks: It emphasized its jurisdiction vis-à-vis a decision of the European Council clearly producing legal effects, it underlined its supervisory powers on procedural regularity, and it rendered the scope for individual accessibility a rather unlikely scenario, whereas it used the Conclusions as an interpretative tool. Undeniably, the CJEU's declaration of judicial competence vis-à-vis the European Council is to be welcomed.

IV. Some Observations on the Role of the CJEU Post-Lisbon

To sum up, the overall section on the CJEU demonstrated that the jurisdiction of the latter vis-à-vis the European Council is extremely limited in CFSP to begin with, whereas the picture is rather unclear in regard to the exact scope of the CJEU's supervisory role further to Art. 263 TFEU. The activation of such competence from the part of CJEU is not projected as probable or extensive in scholarly terms and it would certainly produce considerable - and presumably undesirable - repercussions at the EU and the national level if it extended to the Conclusions of the European Council. The *Pringle* case could indeed signify the activation of such competence - in that case through the preliminary reference technique of Art. 267 TFEU - in instances where the decision of the European Council clearly produces legal effects.

The post-Lisbon avenues for legal accountability are not limited to the CJEU. It is submitted that it is worth examining another option provided by the Treaty: The European

[88] *See Pringle*, CJEU Case C-370/12, ¶ 42. *See also* Van Malleghem, *supra* note 79, at 149–50 (noting that it is settled case law "that a preliminary reference concerning the validity of an act is only barred when the party challenging that validity had the right to bring a direct action under Art. 263 TFEU.").

[89] *See Pringle*, CJEU Case C-370/12, at ¶¶ 58, 65.

[90] *Cf.* EGGERMONT, *supra* note 38, at 148–50.

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Ombudsman. It will be shown below that the mandate of the Ombudsman presents specific advantages that should be explored by citizens and legal persons, including the civil society organizations. These advantages, which complement the function of the CJEU, are spelled out in the following section.

C. The Role of the European Ombudsman After the Treaty of Lisbon

I. Why the European Ombudsman Can Plausibly be Classified Among the Mechanisms of Legal Accountability

The first issue to be discussed is why the European Ombudsman provides legal accountability given that his or her decisions are not legally binding. The answer resides in the first Annual Report, where the first Ombudsman attempted to clarify the mission of the institution and the approach to be followed. More in detail, he argued that the logic behind the creation of this body was to protect the rights of the individuals, to give meaning to the European citizenship, and, more importantly: "[i]n performing this task, an approach based on law is to be adopted."[91] He added: "The essence of European law concerning good or bad administration is to be found in the numerous cases heard in th[e] . . . Court of Justice. These will guide the work of the Ombudsman and constitute in fact a veritable treasure trove of resources."[92] Referring to the Treaties and the Statute, he also proclaimed that "[t]he Ombudsman's mission is firmly grounded in law."[93] The above statements reveal the Ombudsman's insistence on legal arguments, but for the avoidance of doubts "[t]he highest authority on the meaning and interpretation of Community law is the Court of Justice."[94] What is more, the concept of maladministration encompasses the rule of law because the CJEU has frequently stated that the EU is indeed a polity based on the rule of law, and in that sense the Ombudsman's "first and most essential task must be to establish whether" an institution "has acted lawfully."[95] This broad definition of maladministration, including fundamental rights, has been attentively followed throughout the years of operation.[96] Whereas maladministration may be broader than illegality,

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[91] *European Ombudsman Annual Report 1995*, at 22 (Apr. 22, 1996), *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces.

[92] *Id*. at 23.

[93] *Id*. at 5.

[94] *Id*.

[95] *European Ombudsman Annual Report 1997*, at 24 (Apr. 20, 1998), *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces.

[96] *See* P. Nikiforos Diamandouros, *The European Ombudsman and Good Administration Post-Lisbon*, *in* THE EUROPEAN UNION AFTER THE TREATY OF LISBON 210, 212–13 (Diamond Ashiagbor, Nicola Countouris & Ioannis Lianos eds., 2012).

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"illegality necessarily implies maladministration."[97] In this context, one can plausibly place the Ombudsman into the sphere of legal accountability, in so far as the admissibility and the investigatory part of the complaint are concerned, but more importantly in relation to the final assessment of the Ombudsman after the completion of the inquiry.[98] Now, the absence of legally binding decisions is indeed to be counterweighted by the exercise of a certain political pressure upon the institutions to comply. Despite this, the author submits that the fact that the Ombudsman's decisions are not legally binding does not entail that the accountability control performed by him or her is not "legal," or, in other words, based on law or the EU rule of law.[99]

II. The Institutional Position of the Ombudsman After the Lisbon Treaty and its Comparative Advantages

As a preliminary clarification, it should be underlined that the Ombudsman cannot supervise or even declare complaints admissible on the substance of the European Council's conclusions, declarations, etc. For the purposes of the Ombudsman's mandate, these should be viewed as policy decisions and, as such, they escape the field of his or her action. Thus, in regard to the soft law instruments adopted by the European Council, the Ombudsman's position is almost comparable with the CJEU's position. Despite this, the following paragraphs will illustrate the possibilities opening up for the Ombudsman's mandate post-Lisbon, thereby unraveling the flexible nature of his or her mandate.

At first glance, the Treaty of Lisbon does not change dramatically the competences of the European Ombudsman. However, indirect changes merit examination. The Ombudsman highlighted these amendments in both the 2009 and 2010 Annual Reports:[100] First, the upgrade of the European Council to an institution means that it falls under the Ombudsman's mandate because the latter can investigate all EU institutions, offices, bodies, and agencies and, second, the abolition of the "pillar-structure"[101] means that the

[97] *European Ombudsman Annual Report 2009*, at 27 (Apr. 19, 2010), *available at* http://www.ombudsman.europa.eu/activities/annualreports.faces.

[98] *Cf.* also the delineation of legal accountability by Hofmann, *supra* note 17, at 48.

[99] Relevant here is Harlow's understanding of legal accountability as "accountability through law", where she *inter alia* discusses the link between accountability and the rule of law, even though she does not directly refer to the Ombudsman. *See* HARLOW, *supra* note 14, at 145 *et seq*. Bovens would classify the European Ombudsman's control among the instruments of "administrative accountability", "[n]ext to the Courts", as a "quasi-legal forum". See Bovens, supra note 14, at 456. Thus, while Bovens recognizes a certain degree of overlap, it has been shown in this account why the placement of the European Ombudsman among the instruments of legal accountability is still plausible).

[100] The European Ombudsman Annual Reports are available at http://www.ombudsman.europa.eu/activities/annualreports.faces.

[101] Panos Koutrakos, *Primary Law and Policy in EU External Relations—Moving Away from the Big Picture*, 33 EURO. L. REV. 666, 668–69 (2008) (stating that despite this, the "legal characteristics" of CFSP remain "intact").

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Ombudsman can deal with complaints falling under the CFSP and the CSDP.[102] Taking into account the CJEU's marginal role in CFSP and CSDP,[103] the scope of the Ombudsman's mandate addresses a very important gap in legal accountability. There is no exemption in the Treaties preventing the Ombudsman from dealing with these fields of EU action.

Furthermore, an important feature of the Ombudsman is that the complainant - a natural or legal person, citizen, or resident in the EU - does not need to demonstrate that he or she is directly and individually affected.[104] The *Pringle* case may be interpreted as demonstrating that the prerequisites of Art. 263 TFEU cannot be easily overcome by an individual.[105] Individual accessibility therefore appears to be a significant advantage of the Ombudsman. Related to this is the special relationship the Ombudsman has developed with civil society organizations and NGOs.[106] In the area of transparency and access to documents, which traditionally leads the subject matter of opened inquiries,[107] one could argue that a decision of the European Council not to disclose a document could constitute an act of direct and individual concern and, therefore, the citizen/legal person could access the CJEU. If the document was drafted in the context of CFSP, where the Court lacks any jurisdiction - except for the two instances presented above - the answer might be less straightforward.[108] Furthermore, transparency as a concept is broader than access to documents,[109] and is therefore broader than the scope of application of Regulation

[102] See *European Ombudsman*, *supra* note 97, at 23; *European Ombudsman Annual Report 2010*, at 14 (Feb. 18, 2011), *available at http://www.ombudsman.europa.eu/activities/annualreports.faces.*

[103] *Compare* supra notes 51-53.

[104] As is the case with the CJEU; *cf.* TFEU art. 263.

[105] *See supra* note 88.

[106] *See* Peter Bonnor, *When EU Civil Society Complains: Civil Society Organisations and Ombudsmanship at the European Level*, *in* CIVIL SOCIETY AND LEGITIMATE EUROPEAN GOVERNANCE 141 (Stijn Smismans ed., 2006) (stating that just as civil society organizations benefit from the ombudsman's presence, they may equally prove considerable aids to the ombudsman herself by providing her with "input").

[107] *See for example European Ombudsman Annual Report 2010*, *supra* note 102, at 37 (stating that 33% of cases, or 107 out of 326, dealt with requests for information and access to documents (transparency)).

[108] It might be so because, contrary to the Nice Treaty and quite regrettably, there is no CFSP provision in Lisbon referring to Art. 15.3 TFEU (access to documents). For more on the pre-Lisbon status, see Ramses A. Wessel, *Good Governance and EU Foreign, Security and Defence Policy*, *in* GOOD GOVERNANCE AND THE EUROPEAN UNION: REFLECTIONS ON CONCEPTS, INSTITUTIONS AND SUBSTANCE 215, 228–39 (Deirdre M. Curtin & Ramses A. Wessel eds., 2005).

[109] *See also* Pierpaolo Settembri, *Transparency and the EU Legislator: "Let He Who is Without Sin Cast the First Stone,"* 43 J. OF COMMON MKT. STUD. 637, 640 (2005) ("a broader [than access to documents] definition of transparency is proposed, to be understood as the availability of all information required by an actor in order to fulfil a specific function in a given context.").

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1049/2001.[110] Examples could include the minutes of the meetings,[111] conflicts of interest,[112] etc. In these cases, the complainant now benefits from the ability to register a complaint with the Ombudsman. To return to an aforementioned example, it could be easier for the Ombudsman to supervise the transparency of the appointment of the President of the European Council, moving beyond the specific "act" or decision on the appointment and examining the various steps of the procedure.

Another challenging aspect of the Ombudsman's work is that he or she can start an own-initiative inquiry; this ability derives from Art. 228 TFEU and Art. 9 of the Implementing Provisions.[113] Even though both texts essentially indicate that this power is limitless, the Ombudsman has consistently followed a practice suggesting that an own-initiative inquiry may be optimal when a series of complaints concerning a particular institution or a "particular type of administrative activity" have been received.[114] Recent figures suggest, however, a tendency to increase its use.[115]

Differences do not end there. In what follows, one of the elements that reveal the flexibility of the Ombudsman's institutional position will be further discussed - namely the fact that the Ombudsman can investigate *activities* of EU institutions,[116] which is certainly a broader formulation when compared with an *act*. The Treaty does not specify the notion of "activity", nor does the Statute of the Ombudsman,[117] but it can be claimed that the European Code of Good Administrative Behaviour could serve as an indication; the Code refers to the relations of the Institutions with the public.[118] Some examples provided below

[110] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L145/43).

[111] This is probably what Settembri calls "transparency of the debates." *See* Settembri, *supra* note 109, at 642.

[112] The European Ombudsman treats conflicts of interest as a separate category of complaints, even though one could argue that they are inter-connected with transparency questions to a considerable extent.

[113] Decision of the European Ombudsman Adopting Implementing Provisions, adopted on 8 July 2002 and amended by decisions of the Ombudsman of 5 April 2004 and 3 December 2008, *available at* www.ombudsman.europa.eu/en/resources/provisions.faces; *id.* art. 9 (stating that both the powers of investigation and the procedures in own-initiative inquiries are analogous to the ones followed further to the submission of a complaint).

[114] *See European Ombudsman Annual Report 1995*, *supra* note 91, at 11.

[115] Certain examples are provided, see *infra* notes 120–42.

[116] *See* TFEU art. 228.

[117] *See* Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, 1994 O.J. (L 113) art. 2, *available at*, www.ombudsman.europa.eu/en/resources/statute.faces.

[118] Art. 1 of the European Code of Good Administrative Behaviour, *available at* http://www.ombudsman.europa.eu/resources/code.faces#/page/1.

will shed light as to the possibilities that are opening up after the Lisbon Treaty in relation to the activities of the European Council.

III. Relevant Cases Against the Council of the European Union

Two previously decided, and suggestive, cases against the Council of the European Union (hereinafter the Council) could provide further insights as to what the Ombudsman could achieve vis-à-vis good administration and transparency at the European Council.[119]

The first example concerns a recently closed own-initiative inquiry on the Council's practice of extending the deadline of confirmatory applications vis-à-vis access to documents, requested on the basis of Regulation 1049.[120] It should be underlined that Regulation 1049 states that, "in very exceptional circumstances", an institution can extend the deadline of 15 days to handle a confirmatory application by another 15 days, but in that case it must provide "detailed reasons."[121] The Council responded by pointing out that it was in the process of improving its efficiency, and that it had adopted relevant measures, such as increasing the staff of the Transparency Service - which is responsible for the handling of the initial application - and advancing more simplified procedures for the Working Party on Information - a body responsible for briefing the Council and the Coreper on confirmatory applications.[122] The Ombudsman assessed positively the abovementioned measures, but promised to re-examine their "practical effect" in 2013 by opening another own-initiative inquiry.[123] Nothing precludes an analogous application of this case to the practice of the European Council, should such need arise.

The second suggestive case concerns a complaint on the sponsorship of the Irish Presidency of the Council by private companies.[124] The complainant raised objections in regard to potential conflicts of interest: "[P]rivate companies should not be allowed to sponsor the leadership of the EU," not least because this could affect the EU legislative process.[125] He further argued that the interests of national firms or international

[119] *See also* Diamandouros, *supra* note 96, at 211 (discussing that transparency is an area the Ombudsman himself considers pertinent when discussing the expansion of the mandate towards the European Council).

[120] *See* European Ombudsman Case OI/3/2011/KM, *available at* http://www.ombudsman.europa.eu/cases/home.faces.

[121] *See* Regulation 1049/2001, *supra* note 110, art. 8.2 (providing examples of "a very long document" or "a very large number of documents").

[122] *See* European Ombudsman Case OI/3/2011/KM, *supra* note 120, at ¶¶ 9–15.

[123] *Id.* at pt. C.

[124] *See* European Ombudsman Case 2172/2005/MHZ, *available at* http://www.ombudsman.europa.eu/cases/home.faces.

[125] *Id.*

corporations should not find a platform for promotion among the EU institutions. The Ombudsman opined that the matter fell under the Council's responsibility and invited the Council to clarify the legal framework by adopting measures that would prevent potential conflicts of interest, not least because the citizens' trust of the EU institutions was at stake.[126] The Council remained unconvinced and the Ombudsman decided to inform the Parliament and the Permanent Representatives of Member States, but to take no further formal action because a special report had already been submitted to the European Parliament in the context of another inquiry concerning the Presidencies of the Council.[127] The author is convinced that the case could analogically be applied to the European Council and its summits in hypothetical instances of sponsorship, which could allegedly undermine the independence of the institution. The same could also apply to the activities of the High Representative.

IV. Registered Cases Against the European Council

The activation of the Ombudsman's competence vis-à-vis the European Council has already taken place. The first closed case concerned the use of service cars by the President of the European Council while on holidays.[128] The complainant considered that the President should have used his own funds when travelling and, additionally, he complained that the two replies submitted by the European Council - via the Secretariat General of the Council - were too short and inadequate. The Ombudsman indeed identified an instance of maladministration and used strong words when criticizing the European Council:

> In the Ombudsman's view, the way in which the European Council dealt with the complainant's questions is not acceptable under principles of good administrative practice and could lead citizens to believe that EU institutions completely ignore or even show contempt for their views and preoccupations. The questions raised by the complainant were clear and reasonable and both his letters were written by hand in a careful and courteous manner. The European Council's replies, on the other hand, were laconic, dismissive and disrespectful.[129]

[126] Id. at pt.3, 5–10 ("The Ombudsman's efforts to achieve a friendly solution").

[127] *Id.* ¶ 1.6–1.9 (The Ombudsman's "Decision").

[128] *See* European Ombudsman Case 808/2011/MHZ, *available at* www.ombudsman.europa.eu/en/cases/decision.faces.

[129] *Id.* ¶ 19.

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In terms of substance, the Secretariat provided the Ombudsman - but not the complainant in the first place - with an excerpt of the rules on the use of public vehicles, stating that, while Council officials are prohibited from using vehicles for private purposes, for security purposes and exceptionally, "the President of the European Council has the use of an official vehicle at all times."[130] The Ombudsman solved the case through a friendly solution, namely an apology from the part of the European Council, which the complainant accepted. The complainant was satisfied by the responsiveness of the Ombudsman and the latter praised the European Council for its decision to fill this gap with a citizen of the EU.

Nonetheless, cases of arguably significant constitutional dimensions concerning access to documents and transparency are on their way.[131] In April 2012, the Ombudsman opened an inquiry against the European Council for its refusal to grant access to documents, minutes and notes of meetings, and correspondence between the European Council and the Institute of International Finance "before, during and after the Euro-zone summits and the European Council summits of 21 July, 23 October and 26 October 2011."[132] Regardless of whether there will be a finding of maladministration or not, one can comprehend the implications of such complaint and it would be interesting, in any case, to observe the reasoning of the Ombudsman, once the case is settled.

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[130] *Id.* ¶¶ 17–18.

[131] The transparency regime of the European Council is regulated by art. 10 of its Rules of Procedure, entitled "Making public votes, explanations of votes and minutes and access to documents." It reads as follows:

> 1. In cases where, in accordance with the Treaties, the European Council adopts a decision, the European Council may decide, in accordance with the voting arrangement applicable for the adoption of that decision, to make public the results of votes, as well as the statements in its minutes and the items in those minutes relating to the adoption of that decision.
>
> Where the result of a vote is made public, the explanations of the vote provided when the vote was taken shall also be made public at the request of the member of the European Council concerned, with due regard for these Rules of Procedure, legal certainty and the interests of the European Council.
>
> 2. The provisions concerning public access to Council documents set out in Annex II to the Rules of Procedure of the Council shall apply *mutatis mutandis* to European Council documents.

European Council Decision 2009/882/EU, *supra* note 69, at art. 10.

[132] European Ombudsman Case 0531/2012/MMN, *available at* www.ombudsman.europa.eu/cases/caseopened.faces. Note also that another inquiry has been opened against the European Council concerning—again—access to documents. *See* European Ombudsman Case 0862/2012/RT, *available at* www.ombudsman.europa.eu/cases/caseopened.faces.

One could also consider a complaint by an MEP in 2008 on the access restrictions during the meetings of the European Council in the *Justus Lipsius* building, albeit formally formulated against the Council.[133] The Ombudsman declared the complaint admissible, notwithstanding the absence of rules on the conditions of access, given that good administration goes beyond the observance of legal rules. Additionally, even if a complaint regarding access of individual MEPs concerned inter-institutional relations—which was questionable, according to the Ombudsman—the Treaty does not preclude inter-institutional relations from the scope of maladministration.[134] On the substance, however, the Ombudsman accepted the Council's argument on safety and security reasons, while pointing out that he could not see why MEPs should be granted preferential status in relation to other delegations, given that they do not benefit from an institutional role during the European Council meetings.[135] The theoretical question on the competence of the Ombudsman to deal with a complaint admittedly concerning in its substance the European Council—not an institution at the time—is therefore of limited importance and was not raised in any case during the inquiry by the Council's line of argumentation. Despite this, in his very last remark, the Ombudsman pointed out that "[i]t would thus appear logical to assume that, in future, it will be the European Council's responsibility to make decisions relating to restrictions of access to its building, either alone or in conjunction with the Council."[136]

Further, for reasons that will be unraveled in a moment, an own-initiative inquiry concerning an EU mission should be discussed.[137] The case concerned a rejection of an application for the European Union Police Mission for the Palestinian Territories. The case is relevant in two ways. First, as the Ombudsman pointed out in his analysis, the Lisbon Treaty extended his mandate to the activities of the former second pillar, including the bodies set up in the context of CFSP.[138] Second, an issue that arose during the inquiry was to specify to which EU institution or entity the activities of the EU mission are

[133] European Ombudsman Case 3272/2008/(WP)BEH, *available at* www.ombudsman.europa.eu/cases/decision.faces.

[134] *Id.*¶¶ 12–15.

[135] *Id.* ¶¶ 33, 35.

[136] *Id.* ¶ 37. It may be relevant that the European Council is currently constructing its own building in Brussels, the, EUROPA Building. *See* EUROPA: A BUILDING FOR THE EUROPEAN COUNCIL (Aug. 4, 2013), www.european-council.europa.eu/the-institution/europa-building. This is certainly a positive development, which will hopefully provide the necessary administrative and operational independence from the Council in due time. For now, the Treaty states that the General Secretariat of the Council shall assist the European Council. *See* TFEU art. 235.4.

[137] European Ombudsman Case OI/I/2010/(BEH)MMN, *available at* www.ombudsman.europa.eu/cases/decision.faces.

[138] *See id.* ¶ 32.

attributable.[139] The Ombudsman essentially decided to open an additional own-initiative inquiry "in order to clarify, as a matter of principle, who takes responsibility for possible instances of maladministration in the activities of Missions under the auspices of the EU Common Security and Defence Policy."[140] In this specific case, neither the Commission, the Council, nor the High Representative considered themselves responsible for dealing with such complaints, leading the Ombudsman to declare that "this is a very unsatisfactory state of affairs," which he will attempt to solve via the aforementioned own initiative inquiry.[141] Equally as important, the High Representative opined that, because the Court's jurisdictional realm under Art. 263 TFEU does not cover the EU Missions, the latter cannot be the subject of scrutiny regarding maladministration. The Ombudsman rejected this claim by pointing out the flexible nature of his mandate:

> [T]he Ombudsman's mandate is determined by the TFEU without reference to the competences of the Court of Justice. The fact that the latter might not be in a position to deal with actions against Missions does not thus mean that the latter's administrative behaviour cannot be the subject of inquiries by the Ombudsman.[142]

In relation to the European External Action Service (EEAS), a "*sui generis*" body subject to the authority of the High Representative,[143] the Ombudsman has decided so far that no maladministration occurred in the substance (as opposed to the procedure) of a refusal to grant access to documents on EU-Russia visa matters, based on the "international relations" exemption in Regulation 1049.[144] Elsewhere, an apology was granted to the

[139] *See id*.¶¶ 33–39.

[140] *Id.* ¶ 35.

[141] *See id.* ¶ 39.

[142] *Id*. It should be acknowledged that an extensive analysis of cases against the High Representative might be relevant in a contribution discussing the European Council's legal accountability only to a certain extent, due to her institutional links with both the Commission (Vice President) and the Council (President of the Foreign Affairs Council), even though at the time of writing (May 2013) there were no registered cases against the High Representative by the Ombudsman's office.

[143] Bart Van Vooren, *A Legal-Institutional Perspective on the European External Action Service*, 48 COMMON MKT. L. REV. 475 (2011).

[144] *See* European Ombudsman Case 1051/2010/BEH, *available at* www.ombudsman.europa.eu/cases/decision.faces. The case was initially directed against the Commission and afterwards transferred to the EEAS.

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complainant due to the unsuitable way the EEAS dealt with his compensatory requests.[145] At the time of writing, several new cases were opened against the EEAS.[146]

V. Some Observations on the Ombudsman's Mandate Post-Lisbon

To sum up, it was argued in this section, on the one hand, that, albeit not immediately recognizable, the role of the European Ombudsman after the Lisbon Treaty contributes significantly to the cause of increased legal accountability regarding the European Council, not least because his or her mandate presents advantages when compared with the CJEU. The first registered cases against the European Council, as well as previously decided relevant cases against the Council, further demonstrate this potential. The Ombudsman is not constrained in the area of CFSP or CSDP, he or she is open to citizens and civil society organizations without the threshold of a "direct and individual concern," he or she can initiate inquiries on his or her own, and he or she is empowered with a broader mandate *ratione materiae*, because the Ombudsman can investigate the activities of EU institutions and not solely their acts, and this of course also applies to the European Council. It should be stressed, however, that the Ombudsman's findings are not legally binding, but the approach based on law adopted by the institution in the first place enables us to place the Ombudsman among the mechanisms of legal accountability.

D. Concluding Remarks

It is now appropriate to summarize the findings of this account. To begin with, the debate on the European Council's legal accountability is not only desirable but also highly relevant, as the brief introductory section demonstrated. If the European Council more than ever is constitutionally entrusted the significant policy decisions, if it "leads the European Union,"[147] then it is not permissible to "[place] itself outside the constitutional order and beyond legal and political responsibility."[148]

Building on the insufficient literature on the European Council's avenues for legal accountability, this paper has explored two prominent mechanisms that guarantee

[145] *See* European Ombudsman Case 0510/2011/JF, *available at* www.ombudsman.europa.eu/cases/decision.faces/en/11255/html.bookmark. *See also* European Ombudsman Case 1286/2011/TN, *available at* www.ombudsman.europa.eu/en/cases/decision.faces (discussing problems relating to the complainant's social security file).

[146] As is the case with the High Representative, it should equally be acknowledged that an extensive analysis of EEAS cases might not be entirely relevant in this contribution, precisely due to its *sui generis* nature.

[147] Editorial Comments, *supra* note 54, at 1383.

[148] Armin Von Bogdandy, *Founding Principles*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 34, 34 (Armin Von Bogdandy & Jürgen Bast eds., 2009).

compliance with the EU rule of law. It has done so through the examination of the role of the CJEU and the European Ombudsman after the Treaty of Lisbon.

As far as the CJEU is concerned, this paper explained why the possibilities for legal accountability are generally limited, whereas it is unknown to what extent the Court will effectively include the European Council under its jurisdictional umbrella further to Art. 263 TFEU. Notwithstanding the fact that the *Pringle* case constitutes a sole example, the Court's approach to confirming its jurisdiction in that case and considering the Conclusions of the European Council through its reasoning signifies a positive step, one that enables us to assume that in instances where the production of legal effects is unquestionable, the Court will not hesitate to include the European Council in its jurisdictional realm.

Nonetheless, in so far as the CJEU has yet to crystallize its general approach vis-à-vis the European Council, the Lisbon Treaty offers another opportunity for legal accountability: The European Ombudsman. It was argued that the Ombudsman's mandate presents specific strengths, in a number of ways: The jurisdictional realm of the Ombudsman extends to the CFSP and the CSDP; he or she can open an own-initiative inquiry against the European Council; he or she can collaborate with well-informed NGOs, citizens, and EU residents without the precondition of a direct and individual concern; and more importantly, the supervision on maladministration covers the *activities* of the European Council and not merely its acts. These points were highlighted through an exposition of suggestive cases against the Council—primarily concerning transparency because this is a field where the Ombudsman's action will most probably be required.[149] Moreover, the first registered case against the European Council was briefly presented,[150] as well as an own-initiative inquiry concerning an EU mission.[151]

Clearly, it must be emphasized that the aforementioned examples have also demonstrated that the Ombudsman cannot be the ultimate answer to the European Council's accountability problems—but he or she might be a good start. In other words, the involvement of the Ombudsman could enable citizens to perceive the European Council of an *institution*, instead of, or in addition to, an assembly of Heads of States, and ideally it would encourage citizens and civil society organizations to investigate - or demand - other possible avenues for accountability, including Court proceedings. Simultaneously, dealing with the most visible of EU institutions can only contribute positively to the image of the Ombudsman, especially if measurable outputs can be produced in the long run.

[149] As demonstrated by the recently opened inquiries against the European Council. *Compare* European Council Decision 2009/882/EU, *supra* note 69, at art. 10, *with* European Ombudsman Case 0531/2012/MMN. *See also* Diamandouros, *supra* note 96, at 211.

[150] *See* European Ombudsman Case 808/2011/MHZ, *supra* notes 128–30.

[151] *See* European Ombudsman Case OI/l/2010/(BEH)MMN, *supra* notes 137–42.

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