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The European Council: a self-proclaimed « sovereign » off the rails

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FOREWORD:

Too many sovereigns, not enough leaders!

The building of the European institutional cathedral has been more a matter of medieval craftsmanship than of scientific building engineering: it has been a matter of trial and error. The anxious quest for a balance between unity and diversity, which has been addressed in treaty after treaty, has not allowed us to escape the law of gravity, which continues to lean in favour of national sovereignties. Jean-Guy Giraud meticulously dissects how the European Council, conceived as a circle of wise men, providing impetus and broad guidelines during studious quarterly weekends, has irresistibly become the main decision-making body of the European Union. Robert Schuman predicted that Europe would only move forward in times of crisis. It remains for us to make sure that it moves in the right direction.

In Europe, the democratic tradition was borne of parliamentary power. It postulates the duality of supreme power: a monarch who embodies the unity of the nation, its continuity, its identity, its values; and the head of executive power, the sole master at the helm of the ship. The latter governs: he must be chosen by the people. The former reigns: his legitimacy may be of a different or even merely familial nature, if the popular consensus deems it as such. When the authors of the Treaty of Lisbon created two presidential functions, many feared the risk of personal discord: but in the end it only involved the transposition of this old national dualism to the level of the European family. A President of the European Council sitting at the top of an Olympus, prestigious but without powers; a President of the Commission in charge of the engine room. And indeed, it works.

It works, but not quite as expected. The President of the Council does not embody the Union any more than the President of the Commission exercises European power. The former is the Secretary-General of Olympus, more than its Jupiter. And despite her exceptional qualities, for the citizens of Europe Ursula von der Leyen remains a top international civil servant, but she is not their leader: they did not elect her. Custodians of national sovereignty, the heads of State and government are confiscating "European sovereignty" as European power for the benefit of their collective club. And the Union finds itself headless for too many crowns.

Jean-Guy Giraud proposes a particularly welcome set of adjustments for immediate implementation. Beyond that, the great rebalancing in favour of the strictly European institutions can only come from popular legitimacy. Exercised directly, therefore by the European Parliament. The spectacular, but still insufficient democratic progress achieved by the Parliament over the last twenty years gives reason to hope that the main parties which sit there can come to agreement regarding the finalisation of the project. Democracy is born the day when a Parliament, provided it is perceived as legitimate, dares to say "no".

To increase legitimacy, the method of electing the Members of the European Parliament in the 27 Member States must be harmonised, combining proportional representation and the personal choice of citizens (German-style preferential vote or "double vote"). The "no" vote must apply to any project that lacks the appropriate funding to cure the Union of its budgetary dwarfism. Finally, for the new legitimacy

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of the Parliament to be conferred to the head of the executive, the next European campaign must be organised around the candidates from each political family for the presidency of the Commission, so that it is clear to everyone that the winner is the result of a popular choice and not a combination of antechambers. None of this requires changing the current treaties. It is true that Europe will not yet have a sovereign, but the ship will have a captain, and European sovereignty will finally be expressed in a way other than by the paralysing sum of national sovereignties.

Alain LAMASSOURE

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Foundation's Scientific Committee.

During the health and economic crisis of the first half of 2020, observers were struck by the pro-activism shown by the European Council - as much as by its recurring difficulties in agreeing on common positions. Exceptional in 2020, due to the circumstances, this phenomenon has in fact developed over the last few years to the point of it becoming a new Community practice, which is not without its problems of various kinds.

The exponential growth of the European Council's role in Community affairs has first found reflection in the growing number of its meetings - even though the Treaty provides for only two meetings per six-month period - to which we might add the extraordinary meetings convened by the President "when the situation so requires" (Article 15(3) TEU).

In fact, in 2020, the Council has already met 12 times for a total duration of 21 days; three more meetings (i.e. a minimum of 5 days) are still scheduled between now and the end of the year. This gives an astonishing overall score of 15 meetings over 26 days.

In 2019, it already held 8 meetings over a 14-day period. Moreover, the use of "virtual" meetings (imposed by health measures) has in practice facilitated the organisation of successive summits and could be used more widely in the future, even outside exceptional circumstances.

At the same time, the range of issues addressed by the Council has expanded considerably and the habit has been established of "responding" to a wide range of topical issues of all kinds, both European and international. Moreover, the Council has often allowed itself to be drawn into the detail of the issues it has taken up. Finally, it has sometimes acted as a real legislator by taking up certain matters that fall within the direct competence of the other institutions - as shown by the case of budgetary decisions (Multiannual Financial Framework - Own Resources - Loans etc).

In doing so, the European Council has become the real nerve centre of the European Union, invading the field of competence of the other institutions at the same time as the landscape of the European media. It has transformed itself not only into a quasi-systematic body of appeal for any controversial issue - but also into an authority, whose prior green light is sought for the launch of any more or less sensitive initiative.

This interventionism should be assessed in the light of the precise rule laid down in the Treaty: "*The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines and priorities. It does not exercise a legislative function*" (Article 15(1) TEU).

HOW DID WE GET TO THIS POINT?

The simple explanation is of a functional nature: any organization is inclined by nature to extend the scope of its power sometimes even beyond the limits of the mandate set for it. Moreover, being a "supreme" body, this invasion encounters few obstacles and tends to become institutionalised. Another reason is that, for some members of the European Council, the "leading" role they play in the European Council is seen as a normal extension of their leading role in their own government. This is particularly true for a Head of State - for example in the case of France - whose constitutional powers are particularly broad and for whom European issues are a 'reserved' (and, for President Macron, a favourite) area which he intends to manage without intermediaries at both national and European level. For these high-ranking officials, any limitation, or even supervision

of their field of intervention is difficult to imagine. For them, therefore, the European Council has gradually become a kind of sovereign, omni-competent and quasi-permanent body - in contradiction with the letter and spirit of the Treaty.

Is such a development temporary, linked to circumstances - or has it become long-term or even irreversible?

As the second hypothesis seems the most likely, it may be useful to summarise its positive and negative sides - even if it means imagining possible adaptations or reforms.

THE POSITIVE ASPECTS

As devised and expressed by the Treaty when it was formalised by the Treaty of Lisbon, the functions of impetus, guidance and definition of general priorities entrusted to the European Council are certainly an asset for the definition and development of the Union's major strategic objectives - particularly in geopolitical terms. On the other hand, it can be a negotiating and arbitration body of last resort to bring governments views closer together on issues of major interest to the Union.

It is thus able to ensure at the highest level - within the Union - the necessary representation of the States (represented for the most part by the Heads of Government in office) in parallel with that of the peoples, entrusted to Parliament. State representation, the inadequacy of which must be recognised in the original institutional scheme of the Community, where the Council of Ministers only ensures sectoral and fragmented representation of the States.

For European opinion, as on the international stage, the European Council symbolises the unity of the "European bloc" - the only continental grouping whose leaders meet so regularly and in such a formatted framework. A bloc which, moreover, at present - because of the current disengagement of the United States - represents the only real supporter and defender of a certain liberal order among the major world powers.

THE NEGATIVE ASPECTS

However, in practice, certain excesses have meant that the European Council has gone beyond its initial role and, above all, has compromised its own functioning.

The first deviation has consisted in unduly interfering in the "ordinary" decision-making process - thus affecting the smooth running of the "Community method" entrusted by the Treaty to the Commission, the Council (of Ministers) and the Parliament. In so doing, it has in particular called into question the democratic aspect of the Union insofar as, unlike the European Parliament, it does not have direct legitimacy to decide on behalf of the European people as a whole.

On the other hand, the political culture and climate - as well as the working method - of the European Council have not really become "*communautaires*": it deliberates more like a classic diplomatic intergovernmental conference than as a Union institution. The exposure and unilateral defence of the different points of view of each government - for the benefit of the respective national public opinion - prevails over the sincere quest for common solutions.

Added to this are the problems posed by the frequent renewal of its members, their unpredictable preparation for the dossiers concerned, their sometimes fragile, internal political situation, their possible mutual rivalries and their [marginal interest](#) in European affairs.

Finally, the absolute requirement of unanimous and express consent of all members for any position taken - and *a fortiori* for any decision - is a frequent factor in blocking, diluting or [postponing](#). This, once again, contradicts the text of the Treaty which speaks of "*pronouncing decisions by consensus*" (Article 16(4) TEU), a Treaty whose authors certainly did not envisage giving each member of the European Council a genuine right of veto[1].

POSSIBLE DEVELOPMENTS

If the Treaty remains unchanged (or with minor adjustments), certain developments may be desirable

[1] See the legal definition of the term "Consensus" according to the dictionary of The Académie Française: "Law: Express or tacit agreement established between the members of a group, of a party, of a diplomatic conference, on the action to be taken, the policy to be followed. The recognition of consensus avoids recourse to the vote. By extension: tacit agreement of the majority of the citizens of a country on certain questions. Social consensus: this reform should obtain a broad consensus."

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so as to strengthen the positive role of the European Council and remedy certain abuses.

First of all, it would be preferable for it to stop interfering - almost mechanically and ever more deeply - in strictly legislative work which is not within its remit and for which it is less well equipped than the three competent institutions. It would be the role of its President, the master of the agenda, to limit this harmful involution, which is - let us repeat - contrary to the Treaty.

At the same time, it should also ensure that the frequency of two half-yearly meetings provided for in the Treaty (save in truly exceptional cases) is more closely adhered to. This would give the plenary session more time to better prepare its deliberations - thus giving more scope to reach a consensus and avoid too many blockages or repeated failures which, when widely publicised in the media, damage the Union's image.

In the area of foreign and security policy in particular - a privileged area for the European Council by its very nature - the latter would undoubtedly gain by giving its President, the High Representative, the Council of Foreign Ministers and the specialised working groups more room to prepare its debates, and even the "conclusions" it adopts. There is no point in the Council taking up in real time all the diplomatic or security problems of the moment if it is not able to adopt significant common positions. On the contrary, it should more readily accept that the High Representative (who participates in meetings *ex officio*) should provisionally take a decision on behalf of the Union on the basis of the Council's 'jurisprudence' and certain *acquis* and principles deriving from European and/or international law[2].

In this context, it might also be useful to formally extend the term of office of the President of the Council to 5 years (currently appointed for a renewable 2.5-year term) in order to give him or her more autonomy and authority within a college whose volatile and "diverse" composition is well known.

[2] Practice already used by successive High Representatives - but sometimes contested by certain Member States and marked by ambiguity regarding the representativeness and authority of these declarations.

[3] There are also some (rare) precedents in this area.

Similarly - and this is the main point - it seems important to remedy the paralysing constraint of the practice of unanimity, which allows a single Head of State or Government to oppose the common will of the 26 others. We should remember that the letter and spirit of the Treaty does not legitimise such a profoundly a-democratic practice (given the extreme disparity in the populations of the States). This is especially so since the Council's deliberations can, according to Article 15(1) TEU, only constitute "*impulses*" and "*guidelines*". It would therefore be easy to imagine a procedure in which the Council's "*conclusions*" would be considered as adopted once a (very) large majority of members had supported them[3]. The (extremely) minority positions of the other members (who would like to abstain or express their disagreement) would be included in the body of the conclusions. Here again, the President of the Council would have an important role to play in interpreting the common will of the Institution.

It therefore seems necessary to involve the European Parliament more closely in the work of the European Council. The Parliament has become accustomed to deliberating as often as possible *ex ante* on the subjects on the Council's agenda and the happy custom has been established of allowing its President to present the parliamentary point of view at the beginning of each sitting. While respecting the separation of powers between these two institutions, a way should be found to give more weight to this point of view which is, after all, that of the direct representatives of the European people taken as a whole. The President of the Council would have a role to play not only by consulting the President of the Parliament before each sitting (which is often the case informally) but also by systematically recalling the parliamentary position on each item on the agenda of the debates.

Finally, the role of the President of the Commission - who is an *ex officio* member of the Council but without deliberative powers - should be strengthened. On behalf of his Institution, he has the duty to "*promote the general interest of the Union*" - implicitly also *vis-à-vis* governments. Most of the dossiers submitted to the Council are accompanied by the Commission's own "proposals" or "positions", which

therefore inform and even structure the debates. Its President is therefore in the best position to suggest the most objective and constructive solutions. His or her influence in the midst of the debate depends in fact on personal factors (moral authority, commitment, mastery of issues) - but also on his or her independence, which is itself linked to the circumstances of his or her appointment by the same Council[4]. A "strong" and respected President must and can - with the support of the President of the Council - usefully enlighten and guide the debates - and even, when necessary, confront the Heads of State and Government with the possible consequences of their decisions or blockages.

principle, this innovation has proved difficult to adapt to a much less homogenous Union, in which the motto "Unity in diversity" is difficult to apply. Developments - or even reforms - would be necessary to prevent the excesses to which we have referred from causing more blockages than "impulses" and more uncertainties than "directions" - to the detriment of the continuation of European integration.

[4] See Jean Guy Giraud, *Appointment of the Commission: a broad interpretation of the rules of the Treaty, Schuman Report on Europe. The state of the Union, 2020.*

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The very existence of the European Council - envisaged by [Jean Monnet himself](#), put into practice by President Giscard d'Estaing as early as 1974 and then formalised by the Single Act and the Treaties of Maastricht and Lisbon - is an outgrowth of the original institutional system and balance. Although initially welcome in

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