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Research Article

## The Relative Influence of the European Council in EU External Action

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## Abstract

The European Council is the institution of the European Union (EU) in charge of defining and implementing European external action. Despite the prominent role assigned to it by EU law, studies have proposed two contrasting narratives. On the one hand, legal scholarship and some political scientists assert the relevance of the European Council in the field of the EU's external action while others, mostly political scientists, downplay its significance. This article seeks to advance the debate by offering a quantitative analysis of the European Council conclusions referred to in subsequent EU binding acts. The data are presented according to different variables in turn: (1) the European Council conclusion mentioned in the act; (2) the subject area of the European Council conclusion mentioned; (3) the year other institutions adopted the act; (4) and the subject per year. The reference period for this study is 1st December 2009 - 31st August 2017. The main finding of the study is a challenge to the orthodoxy in legal scholarship on this institution: the European Council leads European external action mainly on relatively uncontroversial issues; there is no evidence of its leadership in critical situations such as the Arab uprisings and the migration crisis. This result opens up promising avenues for research on agenda-setting strategies in time of crisis.

## Keywords

European council; common foreign and security policy; agenda setting; EU law

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The European Council, in the fifty-two meetings since the entry into force of the Lisbon Treaty in 2009, has dealt with many of the most relevant and topical issues in international relations. Thus, the European Council has expressed an opinion on the Arab uprisings, on the economic and financial crisis, on the 2015 'migration crisis', on the conflict in Ukraine; but also on less dramatic issues pertaining to the 'everyday' administration of EU foreign policy, such as the maintenance of its relationship with the neighbourhood, the establishment of a common defence market, and the EU strategy to tackle climate change in view of the 2015 Paris conference (see Annex 1).

EU law assigns a prominent role to the European Council, in particular in matters related to the Union's Common Foreign and Security Policy (CFSP) (Vanhoonacker 2011: 90; Craig and de Burca 2011a: 48; Piris 2010:67). This is one of the major formal innovations of the Lisbon Treaty in EU external action (Biondi et al, 2012; Craig and de Burca 2011: 49; Schutze 2012: 24; Hermann 2008: 25). In all areas of EU action, the European Council 'provides the Union with its necessary impetus and defines the general political directions and priorities thereof' (Article 15 TEU). The top role of this institution is also apparent from its power to decide on exceptional circumstances (what Schutze 2012: 103, 104 calls constitutional and arbitration powers): it has the final say on the breach of values of the EU by a MS (Article 7(2)), and may meet in extraordinary session if international developments so require (these exceptional meetings are discussed below). The leading role of the European Council flows also from its composition: it is constituted by the Heads of State or Government of the Member States. The President of the European Council and the President of the Commission also sit on it.

In CFSP, the European Council ‘defines and implements’ the policy, together with the Council. Member States shall consult within it in order to determine a common approach (Article 32 TEU). Exactly as in other areas of EU’s external action, decision of the European Council on strategic interests and objectives ‘may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.’ (Article 22(2) TEU). On the basis of these, the Foreign Affairs Council ‘shall elaborate the Union’s external action’ (Article 16(6) TEU), and with the High Representative shall frame and implement the CFSP (Article 26(2) and 27(1) TEU). Member States are under the obligation to ‘coordinate their action in international organisations and at international conferences. They shall uphold the Union’s positions in such forums’ (Article 34 TEU). The President of the European Council ensures external representation of the Union.<sup>i</sup> The European Council also decides on when the framing of a common EU defence policy will lead to a common defence (this is the wording of Article 42(2) TEU).<sup>ii</sup> Again with power to decide on exceptional circumstances, the European Council has the final say if a Member State opposes, for vital and stated reasons of national policy, the adoption of a decision by qualified majority in the Council.

Given the clarity of the legal framework, legal scholarship is almost unanimous on the role of the European Council in CFSP. Thus, the ‘orthodoxy’ in legal scholarship maintains that the European Council plays indeed the top-role in decision making that the TEU assigns to it. However, other authors, mostly political scientists, have pointed out that in reality the European Council influences only marginally the substance of EU’s CFSP.

With a view to advancing this debate, this article seeks to contribute to the legal scholarship on CFSP and on the European Council by exploring how institutions have interpreted the rules of EU primary law on CFSP. In particular, the aim of the article is to ascertain whether institutions have been deferent to the constitutional text that assigns to the European Council the power to decide the political priorities of the Union.

The main shortcoming of the existing legal scholarship on the European Council is that it has adopted a traditional doctrinal approach, while the present research, empirical in nature, aims to ground the analysis in quantitative data: how many acts of EU institutions, since the entry into force of the Lisbon Treaty, refer to European Council conclusions (not just in CFSP matters but in all areas of EU decision-making)? The reference in an EU binding act to a previous European Council conclusion, while not carrying legal value per se, is hereby taken as the proxy to measure the European Council’s influence. Precisely because it is not mandatory, the fact that other institutions mention an European Council conclusion is not a simple technicality: it is, instead, a concrete measure of the formal deference to the European Council’s choice. Indeed, the Court of Justice has affirmed that it would be against the principle of the balance of powers to make the adoption of binding acts conditional upon the European Council having defined guidelines (Rosas and Armati 2018).<sup>iii</sup>

## THE INFLUENCE OF THE EUROPEAN COUNCIL ON CFSP

Debaere and Haesebrouck (2015: 347) offer a comprehensive review of the literature on the European Council within the CFSP and regret a ‘lack of systematic review of European Council’s activities’. It is nonetheless possible to identify two trends in the literature. Lawyers have traditionally taken the view that the European Council has indeed played the prominent role that the drafters of the Treaty on the European Union envisaged for it (Chalmers, Davies, Monti 2010: 75; Craig and de Burca 2011a: 48; Craig and de Burca 2011b: 36, 55; De Schoutete 2012; Van Vooren and Wessel 2013: 369; Eeckhout 2013: 476; Koutrakos 2013: 427). This stream of scholarship

describes the European Council as an institution that assumes strategic leadership and offers political guidance (Wessel 2016; Vauchez 2016: 42), or that exercises the role of ‘collective head of state’ (De Schoutheete 2012), even within the paradigm of multi-level governance (Marks, Hooghe, Blank, 1996), which recognises that national governments are major players in the process of EU governance, but do not have a monopoly of control (Craig and De Burca 2011b: 22). It is worth noting that lawyers derive this view mostly from a purely doctrinal analysis of the institution, whereas an empirical legal analysis is missing.

Devuyst (2012: 333), instead, concentrates on how the European Council has handled an unforeseen event. He endorses the opinion expressed by former officials and commentators that for the first two years after the entry into force of the Lisbon Treaty, the European Council did not take strategic decision. National diplomats, instead, were in charge of drafting foreign policy documents which later would simply receive a seal of approval or an ‘upgrading’ by the European Council. He then builds a narrative that shows that Member States were not united in facing the ‘Arab uprisings’ – for example, over the role to be played by Mubarak in Egypt. Member States did not coordinate within the EU, and instead issued statements and pursued policies that were at times inconsistent with those of other Member States (Devuyst 2012: 334). This resulted in a major split in the UN Security Council of 17 March 2011, when France, the United Kingdom and Portugal voted in favour of the no-fly zone, while Germany decided to abstain. For Devuyst, this was the result of the failure by the European Council to find a common position. Scholars have thus indicated that the European Council may actually fail to lead in CFSP. This, however, is hardly an institutional failure, but may rather derive from the composition of the institution and the way discussions are prepared, which heavily load the dice in favour of national power rather than European unity (Sjursen 2011: 1078). The regular schedule of its meetings, together with the presence of many non-foreign policy issues to be discussed, hardly lends itself to tackling critical unforeseen events. Finally, the rule requiring unanimity is also a hindrance to effective decision-making.

## METHODOLOGY

The aim of this article is to contribute to deciphering the role of the European Council in EU external action in general, and in CFSP in particular. Two clarifications are needed. First, the role of CFSP in European Council meeting is roughly easier to ascertain (Puetter 2015). Out of the 39 formal meeting of the European Council that took place since the entry into force of the Lisbon Treaty, CFSP issues figure in all but seven of the conclusions thereby adopted (that is, in 82% of the meetings of the European Council). In addition to these, the European Council also holds informal or exceptional meetings of heads of state or government, sometimes with a third country. Following these meetings, leaders usually adopt a statement or declaration rather than official conclusions. Since the Lisbon Treaty, there have been 13 of these statements (Annex 2). In total, CFSP issues were discussed in 35 out of 52 European Council meetings. As we can see in the Data section below, 12 of the above conclusions have led to the adoption of common positions or other CFSP instruments (see table 1 below).

Second, previous studies answering broadly similar research questions conflated two issues: one being the original determination of a position and the other the influence of Council on that decision. But this may lead to a non sequitur: simply because the European Council was the first to arrive at a conclusion, it does not follow that the institution was influential. For example, based on the analysis of the European Council conclusions and on interviews with officials, Puetter (2012a: 161) suggests that the quest for consensus takes place in the European Council, as opposed to the Council, and from this would follow the prominence of the former. His research concerned specifically economic governance, an area of EU decision-making which shares some remarkable

features with CFSP law: the European Council has a steering role, and the Commission does not have the exclusive prerogative to begin the legislative process. Dijkstra considered a related issue, the influence of the High Representative on CFSP (Vanhoonacker et al. 2010), and studied, to this effect, Common Security and Defence Policy (CSDP) missions (Dijkstra 2013:454). Based on interviews with officials directly involved in the events, he concluded that CSDP missions in Aceh, Bosnia, Chad and Kosovo were put in place thanks to the High Representative incumbent at the time (Javier Solana). This happened owing to a loop of feedback whereby Solana was constantly involved in shaping CSDP operations. Vanhoonacker and Pomorska (2013:1316), building upon precedent theory, show how the narrative they build about the behaviour of High Representative Ashton and interviews with 14 EU officials supports the conclusion that some activities of Ashton have been more influential than others in agenda-setting. However, this methodology has the same potential shortcomings as Puetter's. Indeed, simply reading the European Council conclusions and asking people who were present at a given moment may not offer an accurate answer to the question on where the decisions were originally made. As far as direct witnesses are involved, there are epistemic shortcomings to which they are prone (Lamont and Swidler 2014:153; Riddervold 2016: 358). As far as European Council conclusions, even though that institution is the first to have officialised a certain policy it does not mean that the real discussion took place on that occasion, nor that the real decision was made in those circumstances. Nonetheless, it is not necessary to answer at this stage the question of where decisions are really made in CFSP: this will be the task of the historian, who will access, in several years, declassified materials; or, as Fletcher suggests, it is maybe the task of diplomats, whose mission depends on the ability to identify where power really resides (Fletcher 2016:104).

Therefore, to determine the influence of the European Council in CFSP, the variable to be considered is not where the original determination was made, nor is it the sheer presence or quantity of CFSP issues in European Council conclusions. This article counts, instead, how many acts of other EU institutions have referred, since the entry into force of the Lisbon Treaty, to European Council conclusions. And to get a sense of the weight of CFSP as opposed to other policies, the article counts the acts mentioning not just CFSP matters but all European Council conclusions, that is, all areas of EU law-making. By mention it is meant both when subsequent EU acts explicitly state that they are based on a certain European Council conclusion, and when they implicitly acknowledge this by adopting Article 26(2) TFEU as legal basis.

The study was conducted by retrieving on the EurLex database the basic binding acts of EU institutions that, since the entry into force of the Lisbon Treaty and until 31 December 2016, mention Conclusions of the European Council (available at <http://eur-lex.europa.eu/homepage.html>). By basic act it is meant new acts, and not those simply amending previous ones. Following the categorisation of acts provided for by Article 288 Treaty on the Functioning of the European Union, recommendations and opinions of EU institutions have no binding force, and therefore are excluded from the data. Naturally, the counting excluded merely preparatory work and staff working documents because the interest lies in what European Council conclusions actually resulted in a definitive and binding act. The data also excludes the cases decided by the Court of Justice of the European Union, given the qualitatively different nature of case law from other forms of decision-making.<sup>iv</sup> The data also excludes the yearly act implementing the Union's budget and those appointing Members of institutions. Rarely, EU acts refer to more than one European Council conclusion. This was mostly the case in Area of Freedom, Security and Justice (AFSJ) where reference was made to the first conclusion adopted in the area, in 1999, and subsequent developments. In that case, only the first reference was kept.

The author is aware of the shortcomings of this methodology. The fact that an institution mentions or even endorses a European Council conclusion does not mean that the act is based upon it, or owes its existence to the influence of the European Council. More importantly, this study does not

take into account all of the instances (theoretically, all other EU acts) in which the decision is based on a European Council Conclusion but the act does not mention it. Why would an EU institution adopt an act on the basis of a European Council conclusion without mentioning it, probably, a question worthy of exploration from a purely political science perspective. This point is discussed again in the conclusion. The count presented here offers nonetheless a quantitative, and therefore easily falsifiable, measure of the acts spawned by each European Council conclusion. The results are presented considering different variables in turn: (1) the European Council conclusion mentioned in the act; (2) the subject area of the European Council conclusion; (3) the year other institutions adopted the act; (4) and the subject per year.

The study endeavours to respect as much as possible the terminology used by the European Council conclusions, even though the use is inconsistent throughout the years<sup>v</sup>, and does not reflect the legal distinctions of the EU fundamental Treaties. Of particular interest for the present analysis is the fact that the European Council, in its conclusions, does not respect the distinction between CFSP and other external action competences. This is a distinction that appears in Article 24 TEU, which states that ‘The common foreign and security policy is subject to specific rules and procedures’, and is reinforced by a unique mechanism whereby the Court of Justice has the final say over the enforcement of the distinction between CFSP competence and other external action competences. Given the uncertainty hovering over the scope of CFSP in the practice of institutions and the case law of the Court of Justice (Wessel 2009:117), the radical solution of the European Council is the abolition of any distinction. It is submitted that the European Council has taken such a broad interpretation of CFSP that it has abolished the distinction, encompassing any external competence outside migration (which is treated under its own heading) under CFSP. In the conclusions of the European Council, external relation issues, countries, or geographical areas are called by their own names (eg: ‘Syria’, or ‘eastern neighbourhood’), rather than resorting to the legal label (see table 1). And the same happens for other policies (e.g. ‘inclusive growth’ is not the name of any official Union’s policy). Despite an anti-formalistic approach by the European Council, this article retains the formal division of competences that exists in EU law. Therefore, this article distinguishes, in the European Council’s conclusions, between subjects of ‘CFSP proper’ (such as Common Security and Defence Policy missions, or restrictive measures), and items relating to other areas of external action (such as enlargement or migration).

## DATA & DISCUSSION

The research yielded 204 EU binding acts.<sup>vi</sup> This means that since December 2009, on average three binding EU act are adopted every month on the basis of a European Council conclusion. The data includes acts which mention European Council conclusions adopted before the entry into force of the Lisbon Treaty.

## REFERENCES TO EUROPEAN COUNCIL CONCLUSIONS

The uneven distribution of references to European Council conclusions – analysed and discussed in this paragraph – requires an explanation of what factors make any given European Council conclusion more influential than others. The quest for this explanation informs the rest of this article.

**Table 1. European Council Conclusions after the Lisbon Treaty**

<b>Date</b>	<b>Subject mentioned in subsequent acts</b>
<b>20-21 October 2016</b>	Area of Freedom Security and Justice
<b>17-18 March 2016</b>	Economic growth
<b>18-19 February 2016</b>	Area of Freedom Security and Justice
<b>23 April 2015</b>	CFSP (2 mentions); Migration (4 mentions)
<b>19-20 March 2015</b>	Energy policy; CFSP (2 mentions)
<b>18 December 2014</b>	Internal Market
<b>23-24 October 2014</b>	Climate and energy policy (6 mentions); AFSJ
<b>26-27 June 2014</b>	CFSP
<b>20-21 March 2014</b>	CFSP (6 mentions)
<b>20 December 2013</b>	CFSP (CSDP)
<b>25 October 2013</b>	Public administration
<b>28 June 2013</b>	Growth
<b>14-15 March 2013</b>	Internal market
<b>7-8 February 2013</b>	Area of Freedom Security and Justice; Economic Growth; Multiannual Financial Framework (2 mentions); Finance (3 mentions)
<b>December 2012</b>	Internal market; CFSP
<b>28-29 June 2012</b>	Economic Growth (2 mentions); Internal Market; Taxation
<b>9 December 2011</b>	CFSP (2 mentions)
<b>23 October 2011</b>	Internal market; CFSP (3 mentions)
<b>23-24 June 2011</b>	Area of Freedom Security and Justice; Space policy (2 mentions)
<b>24-25 March 2011</b>	CFSP (2 mentions)
<b>4 February 2011</b>	Energy (3 mentions) + Economic Growth + Internal Market
<b>16-17 December 2010</b>	CFSP
<b>16 September 2010</b>	CFSP
<b>17 June 2010</b>	Economic growth (14 mentions); CFSP (8 mentions); Employment (4 mentions); Energy (2 mentions); Digital Communication
<b>March 2010</b>	Economic Growth
<b>February 2010</b>	Finance
<b>December 2009</b>	AFSJ (9 mentions); Finance

*Note: Total of mentions of European Council conclusions that took place since 1 December 2009: 98*

**Table 2. European Council Conclusions before the Lisbon Treaty**

Date	Subject mentioned in subsequent acts
October 2009	Energy
June 2009	Finance (3 mentions); AFSJ
March 2009	Finance
December 2008	Constitutional Affairs; CFSP
September 2008	CFSP (2 mentions); Area of Freedom Security and Justice
December 2007	Growth; Environment; CFSP
June 2007	CFSP (2 mentions) + Economics
March 2007	Energy (4 mentions)
December 2006	Energy
June 2006	Economics
March 2006	Employment
December 2005	CFSP (11 mentions)
December 2004	CFSP
November 2004	Area of Freedom Security and Justice
December 2003	CFSP (29 mentions)
Thessaloniki 2003	Enlargement (5 mentions); Environment
December 2002	Internal Market + CFSP
June 2001	CFSP (7 mentions); Economic Growth
Nice 2000	Enlargement (4 mentions)
Tampere 1999	Area of Freedom Security and Justice (18 mentions)
December 1997	CFSP (2 mentions)
April 1997	CFSP
December 1994	Competition
June 1993	Enlargement (2 mentions)
June 1985	Internal Market

*Note: Total of mentions of European Council conclusions that took place before December 2009: 111. Total mentions: 209*



The starting point of the analysis is the datum that references to European Council conclusions are unevenly distributed: more than half of the references are to European Council conclusions adopted before the entry into force of the Lisbon Treaty. Obviously, this uneven distribution could be due to the fact that there have been more European Council conclusions before 2009 than after (102 to 52), and so it would just be more likely that EU acts cite them. But EU acts do not cite European Council conclusions randomly: if it was so, there would be two references to conclusions pre-Lisbon for each one to conclusions post-Lisbon, and each European Council would receive, in the long run, an equal number of citation. This is not the case. Rather, the references to pre-2009 conclusions tend to be concentrated in few 'important' European councils: three of them make up more than half of the whole pre-Lisbon citations. These are Tampere 1999, December 2003, and December 2005 conclusions. The same holds for post-Lisbon European Council: the three most-cited, December 2009, June 2010, and October 2014 make up for almost half of the post-Lisbon citations. Thus, the 12% of European Council conclusions mentioned received 50% of the total references. Another aspect needs to be considered: since December 2009, the European Council has met 52 times. This means an average of once every 42 days, but nearly half of those meetings have taken place in the last two and a half years, since March 2015 (The 52 European Council meetings before Lisbon, by way of comparison, spanned over 13 years: almost twice as long a time). And yet there are only eight references in EU acts to European Council conclusions that took place since 2015 (4% of the total).

In other words, some European Councils are far more influential than others. While the article discusses possible explanations later, for the moment it suffices to state that the reason why some European Councils are more significant than other might be the simplest one: they discussed an important issue or introduced a new programme. For example, the conclusions of October 2014 proved influential in climate and energy matters because they introduced the 2030 climate and energy framework, also in view of the 2015 Paris conference on climate change. The European Council of February 2013 introduced the 2014-2020 Multiannual Financial Framework and other rules on European public finance. The June 2010 European Council, the third ever since the inception of the Lisbon Treaty and the one that was mentioned most often (29 times) introduced the Europe 2020 strategy for jobs and smart, sustainable and inclusive growth; and, in light of the financial crisis, it agreed 'on first orientations as regards the Stability and Growth Pact and budgetary surveillance'. The Tampere European Council of 1999 introduced the first programme on the newly created Area of Freedom Security and Justice. However, the innovative or salient character of the European Council conclusions is only a necessary condition of its influence, without being sufficient to ensure a high number of subsequent quotations. Indeed, it is not the case that every time an important issue is discussed in a conclusion, that conclusion is referenced in subsequent EU acts. This issue will be teased out in the rest of the article, but already at this stage an example may help illustrate the point: many European Council conclusions dealt with terrorism, yet hardly any new basic acts mention them.

## **SUBJECTS OF EUROPEAN COUNCIL CONCLUSIONS REFERENCED**

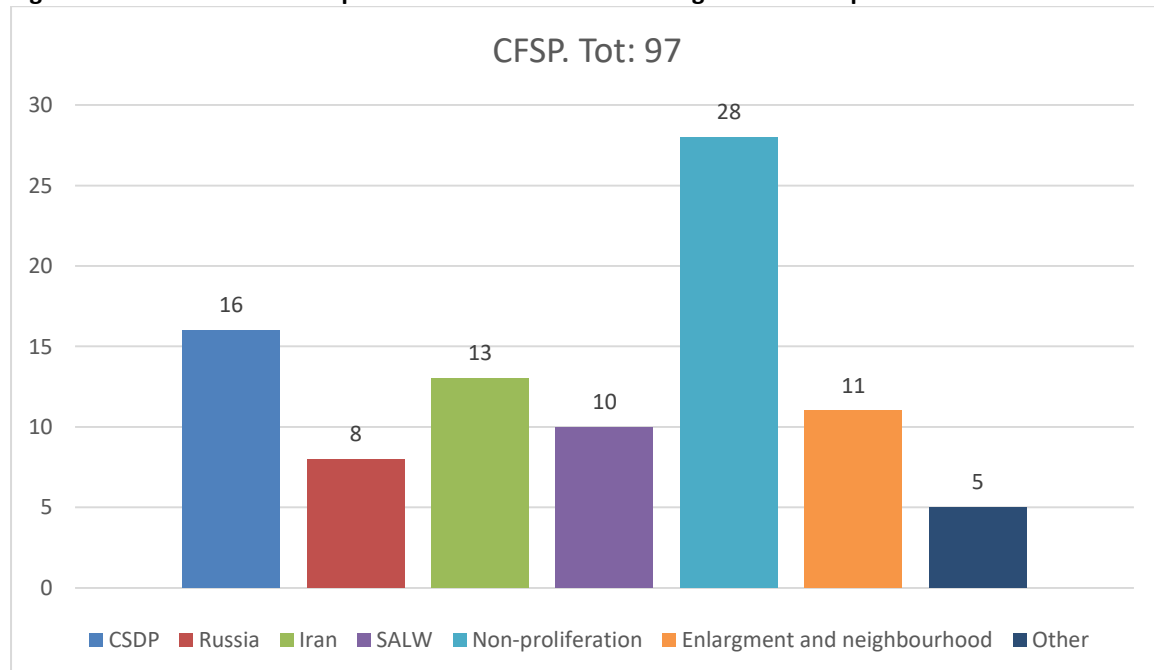
CFSP and economic governance are the two subjects of European Council conclusions that obtain citations in more EU acts (97 and 52, respectively). Economic matters, broadly understood so as to encompass EU and Member State finance, growth, employment, and internal market make up one quarter of all references. AFSJ constitutes 17% (two thirds of which concern matters of asylum, border checks, and immigration) of the references. 10% of the references concern matters of climate change and energy policy.

In order to answer the research question of this Article, special attention should be given to the score of European Council conclusions on CFSP in relation to other subject areas. Among the conclusions adopted after December 2009, CFSP is discussed in 35 of European Council, and is referenced in 30 EU acts.<sup>vii</sup> Economic matters figure in 36 European Council conclusions and received 41 references. 12 European Council mentioned energy and/or climate change, and they received 12 mentions. 18 conclusions mention migration, and these received 12 references. The important parameter here is the mention: this study did not calculate how much of each single European Council conclusion is devoted to CFSP, or to economics, or how much of an EU is devoted to the same subject (it would be impossible to do so), but simply the occurrences.

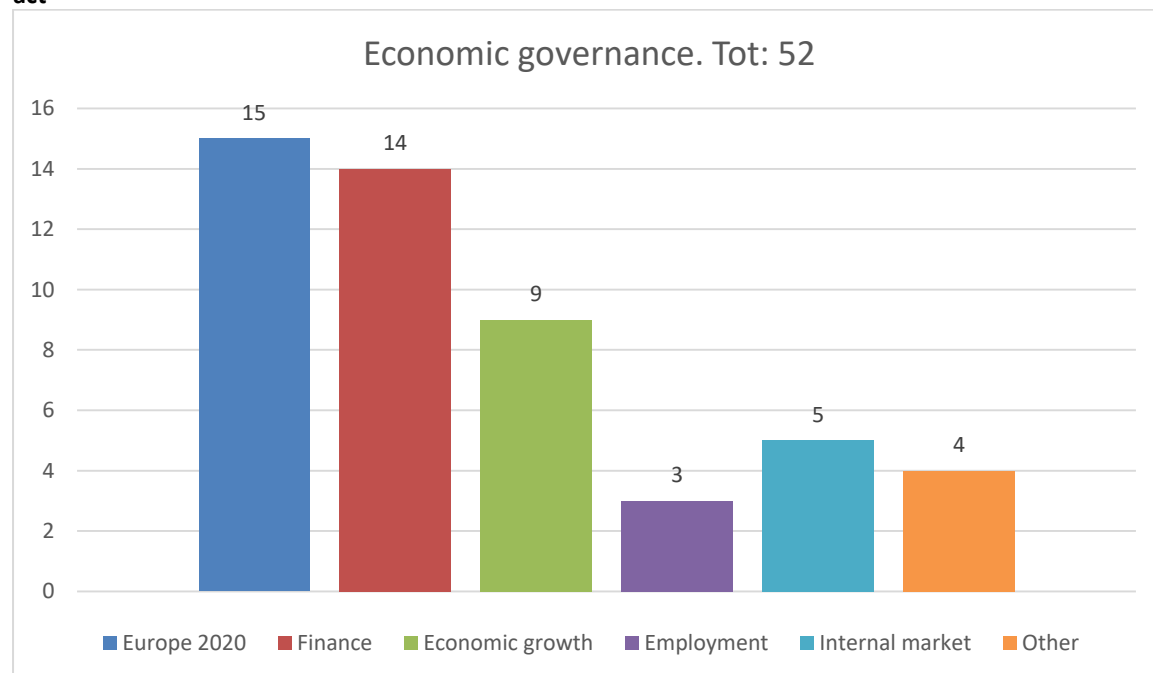
One might be led to conclude, given these figures, that the European Council after 2009 is influential in energy, climate change, and economic matters more than in CFSP and AFSJ. But this, again, would be only part of the picture, as it does not offer an explanation as to why this is the case. In order to get a clear understanding of whether the European Council has indeed had a saying in crucial events and has therefore injected vital political input in the EU mechanism, it is necessary to look at what European Councils conclusions are referenced, that is, what substantive issues was the legislation addressing.

It is already worth noting at this stage, however, how CFSP is the only subject-area in which the European Council after Lisbon has been referenced less than before Lisbon. It is a hint of the relatively low influence of the European Council in this critical area.

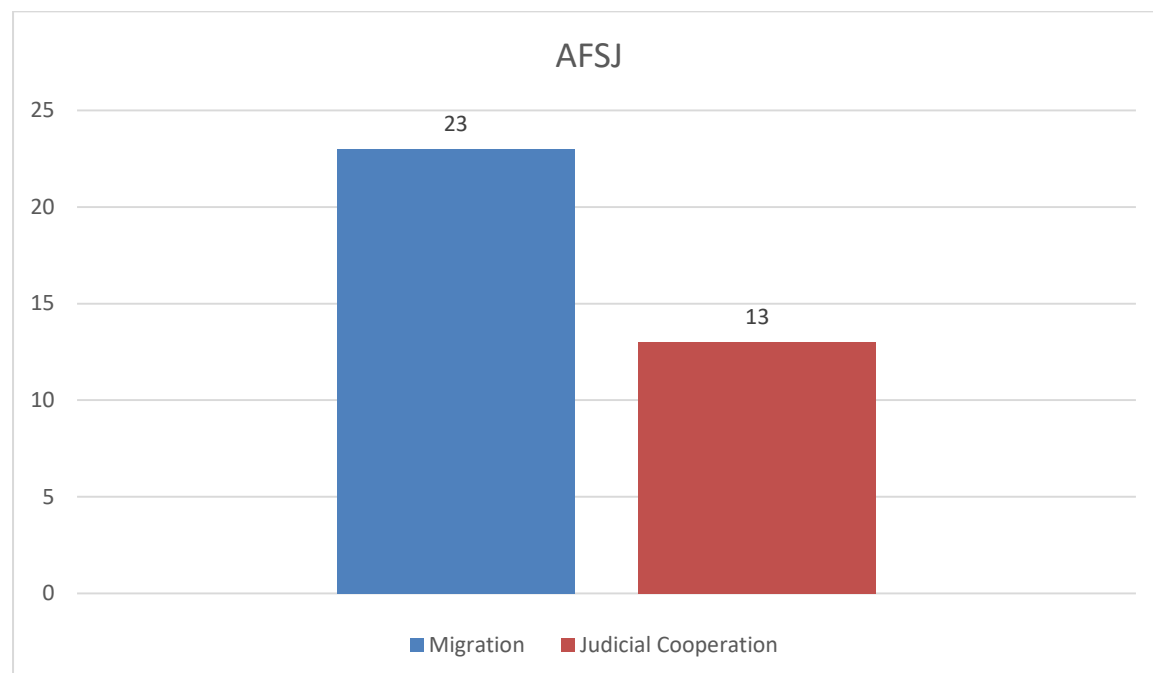
**Fig. 1 Total references to European Council conclusions dealing with CFSP topics in other institution's act**



**Fig. 2 Total references to European Council conclusions dealing with economic topics in other institution's act**



**Fig. 3 Total references to European Council conclusions dealing with Area of Freedom Security and Justice topics in other institution's act**



### YEARS OF ADOPTION OF EU ACTS MENTIONING EUROPEAN COUNCIL CONCLUSIONS

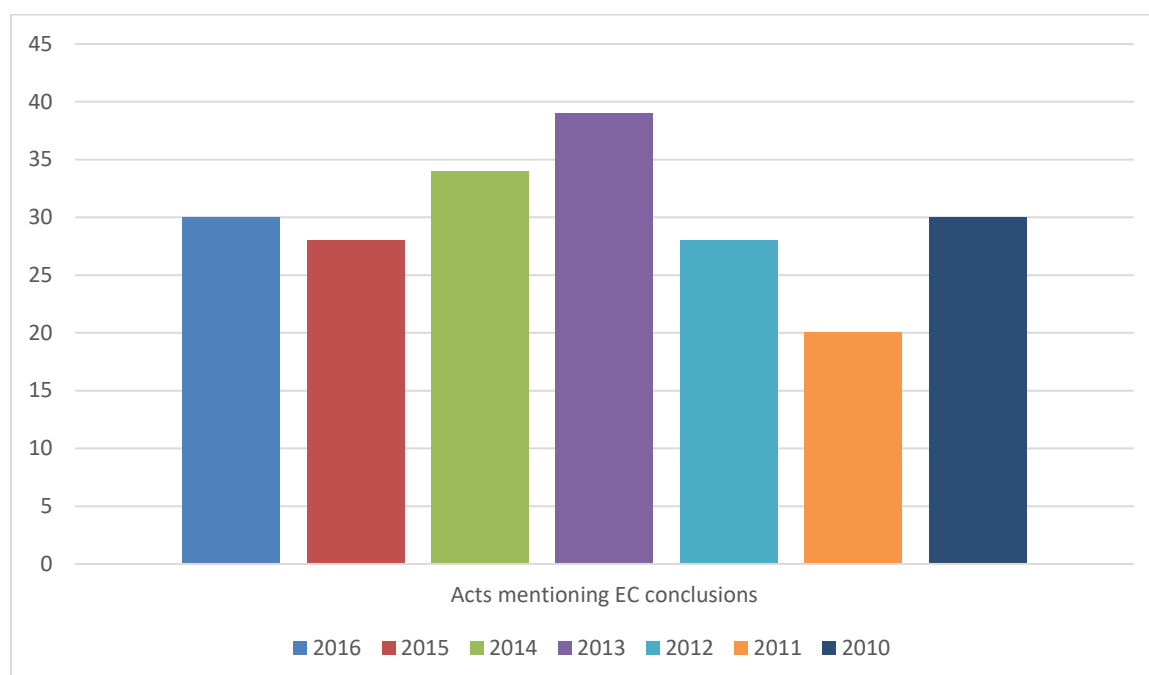
The most striking feature of fig. 4 is the remarkably small percentage of EU acts mentioning European Council conclusions, on the total of EU basic acts adopted: between 1.2 and 2.4%.

By assuming, as this study does, that the mention, in a subsequent act, of a European Council conclusion is a measure of the influence of that institution, the scant amount of references relative to the overall production of EU acts would suggest that, in general terms, the European Council does not in fact play the prominent role that EU law assigns to it.

This is highly significant, as it is an important instance of divergence between EU constitutional law and the way institutions have interpreted their role. If it is true that the European Council ‘provides the Union with its necessary impetus and defines the general political directions and priorities thereof’, then there is virtually no area of EU decision-making in which this institution does not have a say. And not just ‘a say’: the European Council should have the most influential steering role. Thus its conclusions, always on paper, should result in other binding acts. But this is not the case. Interestingly, the number of European Parliament resolutions based on European Council conclusions is almost threefold as the total of acts of the other institutions which reference European Council conclusions: however, these are not in the data as resolutions are not binding as they express a purely political will, a direction for future binding action.

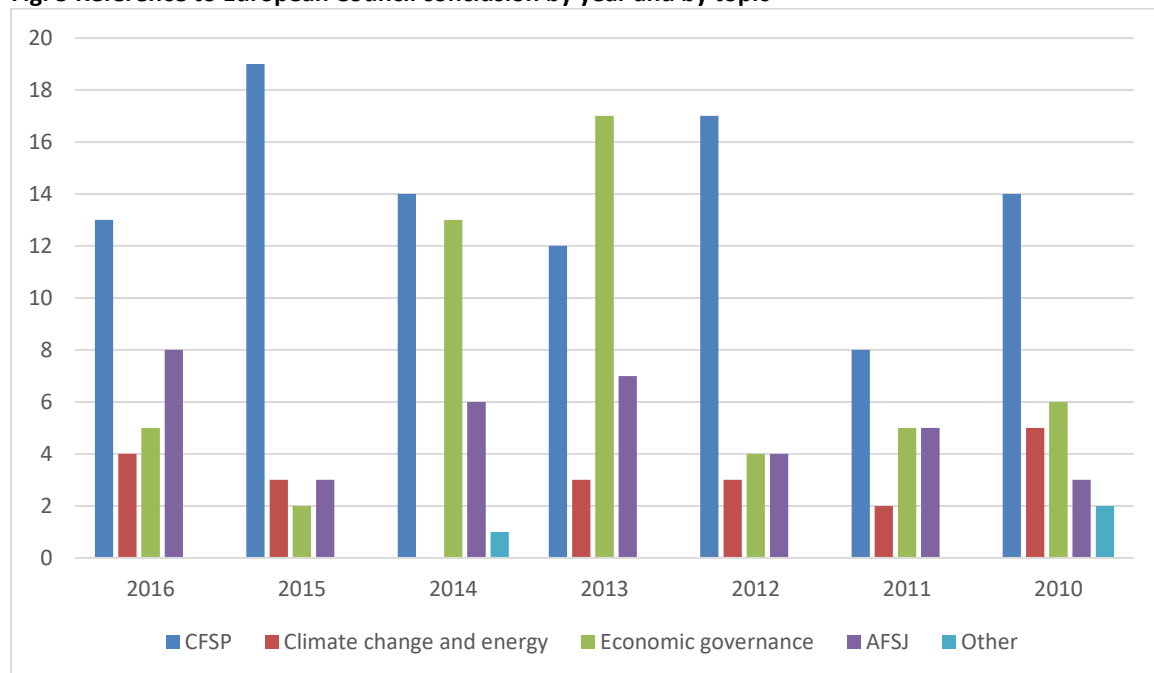
To continue the research of the explanation of the factors that justify the significance of any given European Council conclusion, it is worth noticing that there is a correlation between the year of adoption of an EU act and the subject area: for example, in 2013 and 2014, at the height of the Eurozone financial crisis, economic matters figure prominently in the references (which are highest in absolute terms and in percentage to the total of EU acts). The data thus gives us an idea of the most important junctures in European and international history: but, crucially, this is true on only for some subject areas, like economics or energy. The following paragraph discusses the relative influence of the European Council in CFSP and links it back to the question on whether that institution carried weight in pivotal events.

**Fig. 4 Number of other institution’s documents referencing European Council conclusion by year**



## SUBJECTS AND YEARS: WHERE, WHEN, AND WHY THE EUROPEAN COUNCIL IS MOST INFLUENTIAL

**Fig. 5 Reference to European Council conclusion by year and by topic**



The main significance of the data in fig. 5 lies in the scant influence of CFSP European Council conclusions adopted in critical situations: the Arab uprisings are an outstanding example of this.

More analytically: even though nearly half of the 209 references are to CFSP, these regard relatively uncontroversial issues such as the non-proliferation of weapons of mass destruction, or old European Councils, such as the 2005 conclusions on Small Arms and Light Weapons.

The European Council that received most references in CFSP is the one held in December 2003, which endorsed the second version of the European Security Strategy drafted by Javier Solana and the new non-proliferation strategy (28 references); the European Council of December 2005, which adopted the EU Strategy to combat illicit accumulation and trafficking of small arms and light weapons and their ammunition, obtained 10 references.

Seventeen out of the 98 European Council conclusions mentioned in CFSP acts concern CSDP missions – but references are not to newly established missions nor to measures adopted, within those mission, to face particularly urgent or critical situations. For example, in 2015 CFSP decisions were adopted to establish a Committee of Contributors for CSDP missions in Mali and in the Central African Republic (Political and Security Committee 2015a and 2015b). The cases of Ukraine and Libya are mentioned below.

Only four references were contained in international agreements: all with countries in Western Balkans. The treaty with Kosovo, adopted in 2015, might have been considered a major influence of the European Council, if one considers the declaration of independence of Kosovo in 2008 a major development in international affairs and given the substantial split between EU countries as to the status of that territory. However, not only the treaty was concluded several years after the independence of Kosovo and explicitly states that it is ‘without prejudice to positions on status’, thus cannot be regarded as reflecting a particularly innovative stance of the EU; most importantly, the European Council conclusion referred to is the one adopted in 2003 in Thessaloniki. More significant are the European Council’s stances against Iran and Russia (8 references each).

The only critical event in which the European Council conclusions seemingly had immediate influence is the conflict in Eastern Ukraine in 2014. During the tensions between the EU and Russia over an armed conflict in Ukraine, in March 2014 the European Council stated its support for the Ukrainian people and condemned Russia's behaviour. In June of the same year, following the fall of a civilian airplane in Ukraine allegedly caused by Russian technology, the European Council urged 'the Russian Federation to actively use its influence over the illegally armed groups and to stop the flow of weapons and militants across the border, in order to achieve rapid and tangible results in de-escalation'. Several provisions were adopted pursuant to this call: six in 2014 and two the next year.

There are, however, outstanding instances in which there is no European Council trace in EU acts. This 'silence' is all the more striking because the EU, instead, has passed binding acts with regard to those countries, so if the European Council tried to constrain institutions' behaviour in those cases, it failed (a point discussed in the conclusion). It is the case of Tunisia (Council 2011a); Egypt (Council 2011b); Libya (Council 2011c); Syria (Council 2011d); the self-styled caliphate in Syria and Iraq (Council 2016). Possible explanations as to why the European Council was more active in the developments in Ukraine than those in northern Africa are hardly due to legal factors. The EU fundamental Treaties, and thus the role of the European Council, did not change in foreign policy matters between 2011 and 2014. Accounts can be developed to study whether the High Representative increased the influence of the European Council – it would be quite counter-intuitive if this was the case. Or, possibly, the difference lies in the Arab uprisings being treated as purely political (i.e. under CFSP), whereas the Ukrainian conflict escalated out of trade negotiations carried out by the Commission – which may suggest that in the latter case, the MSs had already reached a common position.

The count of CFSP acts referencing European Council conclusions would be, in itself, of little value. By way of comparison, European Council conclusions on topical economic matters have received references in EU acts. The difference between CFSP and economic 'citations' lies not in the quantity, but so to say in the quality of citations. It is important to recall that less than a third of CFSP citations are to European Council conclusions held after Lisbon, while in economic matters 41 out of 52 refer post-Lisbon European Council conclusions. And even when the reference is to conclusions prior to the Lisbon Treaty, these are only few months old. By way of example, the creation of a European system of financial regulation in EU law – i.e. the establishment in 2010 of the European Systemic Risk Board, of the European Securities and Market Authorities, of European Banking Authority etc – references the relevant European Council conclusions of June 2009. Possible reasons for this difference may be that in financial crisis matters, the EU has a clear competence (which in relation to monetary policy, which was threatened by the crisis, is exclusive) and therefore EU measures are easier (and therefore more likely) to be adopted; or that some of the EU initiatives in financial regulation in fact originated from the G20 after the financial crisis (this is the case of, e.g., credit rating agencies regulation). Thus, the involvement of the European Council reflects the existence of pre-existing political consensus at the international level. What holds true for economic governance does not work for migration: 18 European Council conclusions discussed migration after 2009. These include, and this information is crucial, half of the extraordinary European Council meetings. There have been five ad hoc European Council meetings on migration – including two with Turkey – since 2015, and yet these have received only one explicit reference – and once case before the Court.<sup>viii</sup>

Finally, and most relevant for the present analysis, to be highly influential an European Council conclusion in CFSP must display the two following characteristics, cumulatively: (1) it introduces a policy innovation (2) in a non-controversial issue. As far (1) is concerned, the element of policy innovation is evident in European Council conclusions that received most references in EU acts: for example, the conclusions of December 2003. Those conclusions adopted the Security Strategy drafted by Javier Solana (in its December version, see Missiroli 2015), which was the first of its kind

for the EU. Crucially, the conclusions also introduced the strategy against the proliferation of weapons of mass destruction. The requirement that the council conclusions, to receive subsequent mentions, should introduce a policy change is a substantial one, in the sense that the conclusions must have some added value, and not simply re-state a well-established Union policy. As far as (2) is concerned, indeed, subsequent references to the December 2003 European Council conclusions concern almost exclusively the newly introduced strategy against the proliferation of weapons of mass destruction. Counter-proliferation, however, is hardly a contentious topic in the EU. By way of example, the very year 2003 had, instead, seen the highly divisive Iraq war, which had resulted in a major split in EU MSs, including within the UN Security Council – a war on which the December conclusions are silent. Nor was the counter-proliferation strategy by any means the only major policy innovation of those years: the ‘big bang’ enlargement of 2004 – despite not being labelled as new ‘strategy’ – being an outstanding instance of an important policy shift which was not officially named strategy (Missiroli 2015: 9).

The reason for the influence of the European Council conclusion is, again, not just due to legal factors. Instead, a suitable explanation seems to be the narrative, well-established in social sciences (Craig and de Burca 2011b: 60), of CFSP as a domain that Member States perceive as power-driven (rather than law driven) and in which they want to retain as much authority as possible (Dashwood and Hillion 2000; Koutrakos 2013), to the extent that they had originally even tried ‘to prevent the European Council from acting within the scope of the Treaties’ (Schutze 2012: 101). Previous studies have shown that the salience of an item influences whether it is discussed at top-executive level (e.g. ministerial level in the Council; Häge 2009). Member States prefer to act at intergovernmental level – rather than supranational – for controversial issues (a well-documented exception is the law of defence procurement: Blauberger and Weiss 2013). Possibly for this reason, Member States are reticent to pursue in binding acts the political statements formulated in the European Council. Thus, in times of crisis, the European Council has little influence EU’s external action.

## CONCLUSIONS

The data show that, in foreign policy, only the European Council conclusions that addressed a relatively uncontroversial matter were referred to in other EU law acts. This article adopted an empirical legal perspective to discuss the influence of the European Council on other institutions in the domain of CFSP. These findings can be discussed from other angles: for example, efficiency; or democracy (Sjursen 2011:1079) and accountability; or from a purely political perspective: why, for example, so little new basic acts on terrorism are adopted despite the matter figuring prominently in European Council conclusions? Has the EU failed to concretise these political declarations, and if so, does this confirm that the nature of European Council’s activity is political rather than legal? Or is it perhaps the case that such references to foreign policy matters in European Council statements were in fact influential in the framing of CFSP action but they were not referred to expressly? Why are European Council conclusions on the Western Balkans more cited than others?

The study partially confirms a conclusion of previous contributions on the role of the European Council: it is true that the European Council is influential in matters of CSDP and economic governance. However, this is only a partial picture. As Devuyst wrote (2012), the institution lacked impact during the Arab uprisings. The data collected appears to confirm and expand this finding: there is no evidence that the European Council has proved influential in crisis situations concerning the EU’s external relations, in CFSP as well as in migration matters. It is not impossible that it has

been influential, but this does not result from the acts adopted by other institutions. As mentioned in the methodology section, however, absence of evidence is not evidence of absence: a way through which the European Council might have influenced the political agenda is precisely through restraining rather than through coercing. As explained by Bachrach and Baratz (1962: 949) in their article 'Two faces of power', influence is not only exercised in a positive manner (the first face). The second 'face', instead, is the 'restrictive face of power' involving the 'dynamics of non-decision making': in the words of the Authors, this is the authority to 'limit decision-making' by other actors.

Therefore, while it is true that the European Council is influential in the external relations of the EU, this might be the case only on non-critical issues. Instead, it fails to express an influential position when highly divisive topics are on the table, and there is no evidence of its influence. But if really the European Council has only taken a leading role under normal conditions and has failed to provide input at critical junctures, it suggests that it does not work. Who would board a plane that stops functioning in case of unexpected turbulence?

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## ENDNOTES

<sup>1</sup> The Treaty says 'without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy'. The issue of representation of the EU should be resolved in the sense of granting the President of European Council representation at government level, and to HR representation at anything below that level (that is, exchanges between diplomats). PJ Kuijper et al., *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor* (OUP 2015) 26.

<sup>2</sup> 'The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides.'

<sup>3</sup> Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631 paras 145-50.

<sup>4</sup> Case C-348/12 P *Council v Manufacturing Support & Procurement Kala Naft* ECLI:EU:C:2013:776; Case C-176/13 P *Council of the European Union v Bank Mellat* ECLI:EU:C:2016:96; Case C-200/13 P *Council of the European Union v Bank Saderat Iran* ECLI:EU:C:2016:284; Case C-440/14 P *National Iranian Oil Company v Council of the European Union* ECLI:EU:C:2016:128; Case T 52/15 *Sharif University of Technology v Council of the European Union* ECLI:EU:T:2016:254.

<sup>5</sup> Matters of public finance fall, in the European Council conclusions, sometimes under the label of 'finance', sometimes under that of 'economic growth': in this study, they are grouped them under 'finance'. The European Council is also able to distinguish between jobs and employment: this study assumes the terms are perfect synonyms and always called it employment.

<sup>6</sup> If one included the non-binding acts mentioned in Article 288 TFEU, the total would be more than fivefold.

<sup>7</sup> I could not retrieve any data on the percentage of CFSP acts out of the total of EU acts.

<sup>8</sup> Case T 192/16 *NF v European Council* ECLI:EU:T:2017:128



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**ANNEX 1: EUROPEAN COUNCIL CONCLUSIONS SINCE 1 DECEMBER 2009, LIST OF TITLES OF ISSUES DISCUSSED.**

N.	N. per year	Date	Object
1	1	22-23 June 2017	Security and Defence; Paris Agreement; Jobs, Growth, and Competitiveness; Migration; Digital Europe
2	2	29 April 2017	Article 50
3	1	15 December 2016	Migration; Security; Economic Development; Cyprus; External Relations (Ukraine/Syria)
4	2	20-21 October 2016	Migration; Trade; Other Global and Economic Issues; External Relations
5	3	28 June 2016	Migration; Jobs, Growth, and Investments; External Relations (Libya); UK Referendum
6	4	17-18 March 2016	Migration; Jobs, Growth, and Competitiveness; Climate and Energy
7	5	18-19 February 2016	UK and EU; Migration; External Relations (Syria and Libya); European Semester
8	1	17-18 December 2015	Migration; Fight against Terrorism; EMU; Internal Market; UK; External Relations (Syria and Libya)
9	2	15 October 2015	Migration (including Syria and Libya); Other items
10	3	25-26 June 2015	Migration; Security and Defence; Jobs, Growth, and Competitiveness; UK
11	4	19-20 March 2015	Energy Union; Jobs, Growth; External Relations (Russia; Libya)
12	1	18 December	Investment in Europe; Ukraine
13	2	23-24 October 2014	2030 Climate and Energy Policy; Economic Issues; Other items (Ukraine; Moldova; Northern Cyprus)
14	3	30 August 2014	Next Institutional cycle; Economic Issues; External Relations (Ukraine; Syria; Libya; Ghaza)
15	4	16 July 2014	Next institutional cycle; External relations (Ukraine; Gaza)
16	5	26-27 June 2014	AFSJ; Jobs, Growth, and Competitiveness; Next Institutional cycle; Other items (Ukraine)
17	6	20-21 March 2014	Jobs, Growth, and Competitiveness; Industrial Competitiveness and Policy; Climate and Energy; Cyprus; External Relations (Ukraine; EU-Africa relations; Sri Lanka)
18	1	19-20 December 2013	CSDP; Economic and Social Policy; EMU; Migration; Enlargement and Stabilisation and Association Process; External Relations (Syria; CAF; Eastern Partnership); Other items
19	2	24-25 October 2013	Digital economy; Economic and Social Policy; EMU; Eastern Partnership; Migration.
20	3	27-28 June 2013	Youth Employment; Jobs, Growth, and Competitiveness; EMU; Other items

<b>21</b>	4	22 May 2013	Energy; Taxation
<b>22</b>	5	14-15 March 2013	Economic and Social policy; other items
<b>23</b>	6	7-8 February 2013	Trade; Arab Spring
<b>24</b>	1	13-14 December 2012	Economic Policy; Other items (CSDP; Syria)
<b>25</b>	2	18-19 October 2012	Economic Policy; Strategic Partners; Other items (Syria; Iran)
<b>26</b>	3	28-29 June 2012	Growth, Investment, and jobs; Report on EMU; Multiannual Financial Framework; Other Items (Syria; Iran)
<b>27</b>	4	1-2 March 2012	Economic Policy; International Summits; Foreign Policy; Other Issues
<b>28</b>	1	9 December 2011	Economic Policy; Energy; Enlargement; Other items (Syria)
<b>29</b>	2	23 October 2011	Economic Policy; G20; Climate Change; Foreign Policy
<b>30</b>	3	23-24 June 2011	Economic Policy; Migration; Croatia; Other items (Southern Neighbours)
<b>31</b>	4	24-25 March 2011	Economic Policy; Libya; Japan;
<b>32</b>	5	11 March 2011	Lybia
<b>33</b>	6	4 February 2011	Energy; Innovation; Economic Situation; External Relations (Egypt)
<b>34</b>	1	16-17 December 2010	Economic Policy; Other issues (Cote d'Ivoire)
<b>35</b>	2	28-29 October 2010	Economic Governance; G20; Cancun conference on climate change; Summits with 3 <sup>rd</sup> countries
<b>36</b>	3	16 September 2010	Relations with strategic partners; Economic governance;
<b>37</b>	4	17 June 2010	New strategy for jobs and growth; G20; Millennium Dev Goals; Climate Change; Other issues.
<b>38</b>	5	25-26 March 2010	New strategy for jobs and growth; Climate change
<b>39</b>	1	10 December 2009	Institutional issues; economic, financial, and employment situation; AFSJ; enlargement; external relations ( Iran, Afghanistan)

**ANNEX 2: INFORMAL EUROPEAN COUNCIL STATEMENTS OR DECLARATION SINCE 1 DECEMBER 2009.**

<b>N</b>	<b>Date</b>	<b>Object</b>
<b>1</b>	25 March 2017	Rome declaration in the 60 <sup>th</sup> anniversary of the Rome Treaties
<b>2</b>	9 March 2017	Jobs, growth and competitiveness, Security and Defence, Migration, Western Balkans
<b>3</b>	3 February 2017	External aspects of migration
<b>4</b>	15 December 2016	UK and Article 50
<b>5</b>	16 September 2016	Principles for the future of the European Union
<b>6</b>	29 June 2016	UK withdrawal referendum
<b>7</b>	22 March 2016	Terrorist attacks in Brussels
<b>8</b>	7 March 2016	With Turkey: migration
<b>9</b>	29 November 2015	With Turkey: migration and future accession
<b>10</b>	23 September 2015	Migration
<b>11</b>	23 April 2015	Migration
<b>12</b>	12 February 2015	Terrorism
<b>13</b>	11 February 2010	Greece