

# The European Council: a key driver in the Area of Freedom, Security and Justice.

## Migration crisis and beyond

### Points of discussion

- An often neglected role in a significant area of national competence
- Written words: Treaty Provisions on the role of the European Council in the Area of Freedom, Security and Justice (AFSJ): Art. 68 and 82,2 (TFEU)
- Real world: Main agreements 1975–2014, Main topics 2009–2016
- A model for an integration spiral: The EUCO as a driver in a fusion process

Dossier on the basis of: Wessels, Wolfgang (2016): The European Council, Palgrave Macmillan.

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October 2016

## An often neglected role in a significant area of national competence

The range of public policies with which the European Council concerns itself is increasingly broad and state-like. Besides economic and monetary issues and external affairs another area central to national sovereignty with which the European Council has become intensively involved is justice and home affairs (JHA). The Heads of State or Government have repeatedly and increasingly used the European Council to shape procedural and institutional opportunities for the Union's involvement in significant issues in this policy field, which the Amsterdam Treaty labelled as an 'area of freedom, security and justice' (AFSJ). Although such matters are traditionally regarded as 'domestic affairs', successive generations of European Council members have discussed a growing list of items from this domain of national policies (see for example Lavenex, 2010: 457; Monar, 2010b: 23). The record of the European Council shows that it has, with considerably increasing scope and intensity, been highly active in this area. The European Council has, moreover, promulgated significant system-making agreements within this traditionally sensitive area of governance. Through their activities and agreements the Union's political leaders have reacted to what they have perceived as a growing popular demand for coordinated trans-border cooperation, stating '[T]he area of freedom, security and justice is a key priority for citizens' (June 2008). The need for stronger involvement by the EU in this area is partly the consequence of a spill-over from other Community activities, particularly as a result of a Union without internal borders and from the Economic and Monetary Union (EMU). In part, it is also a reaction to external shocks, notably the terrorist attacks in New York and Washington (2001), Madrid (2004) and London (2005), Paris and Brussels (2015). The European Council's activities reveal a clear and proactive strategy in terms of the fight against and management of irregular migration of the last years.

## Written words: Treaty provisions on the role of the European Council in the Area of Freedom, Security and Justice (AFSJ)

### Article 68 TFEU

The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.

### Article 82 (3) TFEU

Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that **the draft directive be referred to the European Council**. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

## Real world: Main agreements 1975–2014: pre-constitutional and pre-legislative

Year and Place	Topic
December 1975 Rome	Launch of the TREVI Group of senior officials of Justice and Home Affairs ministries
1993 Maastricht Treaty	Creation of the (intergovernmental) 'third pillar': 'cooperation in the fields of justice and home affairs'
May 1999 Amsterdam Treaty	Revision of Maastricht provisions and partial communitarisation: Creation of the 'area of freedom, security and justice'
October 1999 Tampere	The Tampere Milestones: 'Towards a Union of Freedom, Security and Justice'
2003 Nice Treaty	Introduction of the flexibility procedure of enhanced cooperation
November 2004 Brussels	The Hague Programme: 'Ten priorities for the next five years'
December 2009 Brussels	The Stockholm Programme: 'An open and secure Europe serving and protecting citizens'
2009 Lisbon TEU/TFEU	Abolition of the pillar structure: The AFSJ as 'shared competence'
June 2014 Brussels	Definition of the strategic guidelines for legislative and operational planning for the coming years of the AFSJ

Source: Wessels, 2016: 229

## Main topics 2009 – 2016: migration and beyond

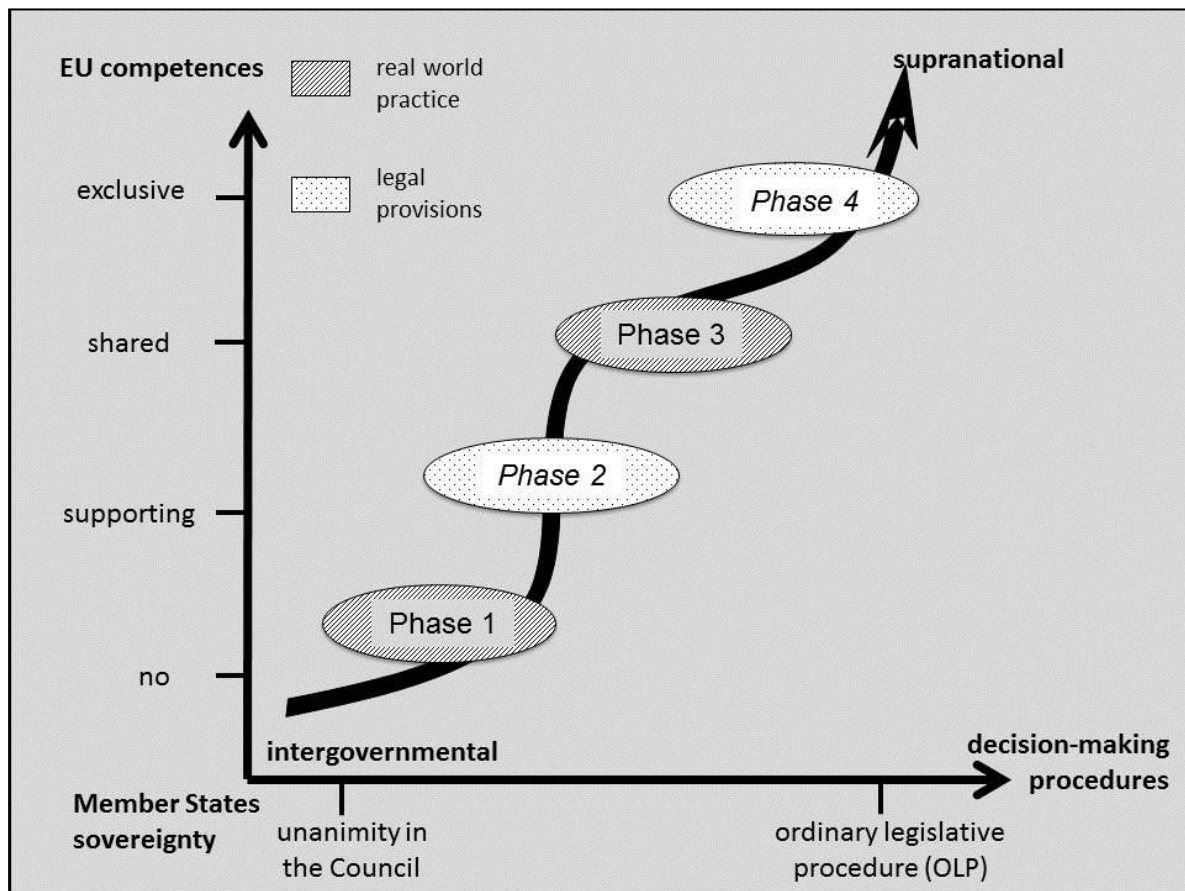
2009 – 10	<p><b>Migration and refugees:</b> Preparation and adoption of the Stockholm Program: Further development of the Area of Freedom, Security and Justice (2010-2014)</p> <p><b>Other:</b> Adoption of a strategy for the Baltic Sea</p>
2010 - 11	<p><b>Border management:</b> Reform of the Schengen Agreement</p> <p><b>Migration and Refugees:</b> Plans for a revision of migration policy and border security</p>
2011 – 12	<p><b>Migration and refugees:</b> The European Council welcomed the adoption of the Dublin-II-Regulation Plans for a common European asylum system Schengen Area: Recognition of continuous efforts of Bulgaria and Rumania, accession of the two countries possible.</p>
2012 -13	<p><b>Migration and refugees:</b> demands for a quick decision-making on a common European asylum system. Reinforced dialogue on migration, mobility and security in the states of the Southern Mediterranean.</p>
2013 -14	<p><b>Migration and refugees:</b> examination of the report of the Task Force Mediterranean; reinforced dialogue with third countries and stronger activities of FRONTEX</p> <p><b>Strategic guidelines:</b> Agenda for 2015-2020 for the Area of Freedom, Security and Justice</p>
2014 -15	<p><b>Home affairs:</b> Launch of a revision of the strategy for internal security:</p> <p><b>Fight against Terrorism:</b> Reinforced cooperation between European investigating authorities; decision of new measures</p> <p><b>Paris terror attacks:</b> Extraordinary meeting of the European Council</p>
2015 -16	<p><b>Common Security and Defence Policy:</b> Understanding on a reinforced cooperation in the armament policy. Presentation of the global strategy on foreign and security policy by the High Representative of the Union for Foreign Affairs and Security Policy Federica Mogherini</p> <p><b>Migration and refugees:</b> Inflow of migrants: regaining control of our external borders. Agreement with Turkey: Cooperation with Turkey in the Management of the inflow of Migrants. Distribution of Refugees: distribution of refugees according to quotas (only partly). Border controls: Strengthening of FRONTEX regarding the control of external borders as well as the cooperation with third-countries. Return of migrants: Cooperation with countries of origin regarding the return of rejected asylum seekers.</p>

Source: Compiled by CETEUS, University of Cologne, on the basis of Weidenfeld / Wessels (2009-2016).

Following Weidenfeld / Wessels (2009-2016) the time periods above contain the content of conclusions from June of one year to June the next year respectively.

## A model for an integration spiral: The EUCO as central driver of a fusion process

In an overall view, the activities, acts and agreements of the European Council in the area of Freedom, Security and Justice exhibit a significant evolution of the EU system as such and of the European Council more specifically. By framing, making and revising the constitutional and institutional set-up, the European Council has been the central driver in a spiral between phases of ineffective real-world practices on the one hand, and steps in a legal upgrading on the other hand. From initiating loose ad hoc forms of cooperation, particularly the TREVI-Group in the 1970s and 1980s, it has – via the establishment of a set of complex intergovernmental rules in the Maastricht Treaty – ‘communitarised’ the former third pillar in the Lisbon Treaty.



Source: Wessels 2015: 1307

Following an instinct to solve problems together the governmental heads have repeatedly and increasingly transferred items of justice and home affairs on the list of the Union’s shared competences and have thus opened the way to shifting the responsibility in a vertical direction from the national to the European level. With this treaty-based evolution they have also moved the horizontal balance towards the ‘ordinary legislative procedures’, reinforcing the Community method with strong powers for supranational EU institutions.

At the same time, the EU's national leaders have, however, reconfirmed their desire to preserve national sovereignty. The treaties underline that the articles regulating the AFSJ 'shall not affect the exercise of the responsibilities incumbent upon the Member States with regard to the maintenance of law and order and of safeguarding the internal security' (Art.72 TFEU; see also Art.4(2) TEU). Member States also introduced the above-mentioned prerogative for individual governments to use a veto as an emergency brake in case of voting for those few articles that affect fundamental aspects of the respective national judicial system (Art.82 and Art.83 TFEU). In these cases the members can use the European Council as the highest political instance of appeal.

The Lisbon provisions concerning the AFSJ thus outline the on-going dilemma faced by national leaders. In this traditional core area of public policies the Heads of State or Government still search an optimal way to balance the fundamental inclination to solve problems with an efficient and effective institutional architecture, and the reflex to, at the same time, protect national sovereignty. However, compared with the situation in the 1970s, national leaders have reached agreements which lead to a vertical and horizontal fusion of responsibilities, competences and instruments. For further research we need to test in other areas whether the patterns of this fusion process are typical for the EU's evolution.

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### **Imprint**

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### **Disclaimer**

This project has been funded with support from the European Commission. This publication reflects the views of the authors only. The Commission cannot be held responsible for any use which may be made of the information contained therein.

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