

SOME THOUGHTS ON THE ROLE OF THE EUROPEAN COUNCIL

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I. The Existing Role of the European Council

The European Council is de facto central to all aspects of the European Union's development, political, constitutional, social and economic. Nothing important happens in the EU without the approval of the European Council. Three further points should be stressed in this regard.

The degree of detail prescribed in conclusions of the European Council has increased over the years. One only has to look at the conclusions of European Council meetings over time to appreciate this. We see an increasing number of annexes, declarations, resolutions and the like, which set the detailed frame for policy initiatives undertaken by the other Community institutions.

The relationship between the European Council and the other institutions, especially the Commission, is symbiotic. It is no longer characterised by a simple tension between an intergovernmental European Council, and a federally-minded Commission. The European Council will often be an ally for the Commission, where the latter seeks legitimation from the European Council for a macro-shift in policy. This can be exemplified by recent changes in the conceptualisation of the single-market programme for the EU. The single market project did not magically come to an end in December 1992. There was a continuing flow of internal market legislation post-1992. This was matched by a number of reports that addressed various aspects of the Community regulatory process. These reports can be broadly divided into groups. In the first, the Commission focused on completion of the internal market in a relatively narrow economic sense. In the second group, the focus shifted. The concern for economic integration *per se* is still evident, but the internal market is consciously conceptualized in a broader, more holistic, manner. Consumer welfare, social policy, environmental policy and the like are all regarded as important facets of the internal market strategy.

There have been *many reports focusing on attainment of the internal market in the economic sense of the term.* In 1993 the Commission produced its strategic programme on *Making the Most of the Internal Market*¹ in which it reviewed macro-issues such as the completion of the legal framework, and the management and development of the single market. In 1996 the Commission undertook a wide-ranging study on *The Impact and Effectiveness of the Single Market*.² The study measured the economic gains from the internal market, in terms of increase in GDP, lower inflation, higher employment etc. It also confirmed areas where further action was required, such as public procurement, tax harmonization, company law, and the transposition of directives. The Commission developed these themes in its *Single Market-*

¹ COM(93) 632 final.

² COM(96) 520 final.

Action Plan,³ in which it identified four principal strategic goals for the development of the single market. These were: making the rules more effective, dealing with market distortions, removing sectoral obstacles to market integration and delivering a single market for the benefit of all citizens. The Amsterdam European Council officially endorsed these goals in 1997. The 1997 *Action Plan* led to further reports which focused on specific aspects of free movement. In the context of free movement of goods and services attention was given to the principle of mutual recognition.⁴

The Commission rightly regarded this as fundamental to the creation of the single market, and its report contained a number of recommendations designed to improve its operation in practice. There have been specific initiatives directed towards services. These have highlighted their importance in the Community economy as a whole, and have underlined the need to ensure that the single market functions effectively in this area.⁵ Particular attention has been given to financial services.⁶ Much work has been done in the context of free movement of people to improve the provisions on mutual recognition of professional qualifications, and a new simplified directive has been adopted.⁷ This directive was part of the more general Commission initiative designed to consolidate, codify and simplify EU legislation.⁸ *A broader conception of the internal market is however also to be found in a number of the major papers emanating from the Commission and the European Council.* The internal market is conceptualized in more holistic terms, to include not only economic integration, but also consumer safety, social rights, labour policy, and the environment. This shift did not occur at any single moment. It developed across time. Nonetheless certain important steps in this progression can be identified. The 1997 *Action Plan* is significant in this respect. The fourth strategic target was to deliver a single market for the benefit of all citizens. The Commission's introduction to the *Action Plan* consciously stressed that "the single market was not simply an economic structure", but included basic standards of health and safety, equal opportunities and labour law measures.⁹ This theme was carried over in the 1997 *Action Plan* itself. The strategic target of delivering a single market for the benefit of all citizens

³ Communication of the Commission to the European Council, *Action Plan for the Single Market*, SEC(97) 1 final.

⁴ Communication from the Commission to the European Parliament and the Council, *Mutual Recognition in the Context of the follow-up to the Action Plan for the Single Market*, 16 June 1999.

⁵ *An Internal Market Strategy for Services*, COM(2000) 888.

⁶ Commission Communication, *Financial Services – Implementing the Framework for Financial Markets: Action Plan*, COM(1999) 232; *Institutional Arrangements for the Regulation and Supervision of the Financial Sector*, January 2000; *Financial Services Priorities and Progress, Third Report*, COM(2000) 692/2 final.

⁷ *Professional Qualifications: Commission Welcomes Adoption of Simplification Directive*, 26 February 2001; Dir. 2001/19, [2001] OJ L206/1, *Directive of the European Parliament and of the Council on the General System of the Recognition of Professional Qualifications*.

⁸ Commission Communication on *Simpler Legislation for the Internal Market (SLIM): A Pilot Programme*, COM(96) 204 final; *Commission Report on the SLIM Pilot Project*, COM(96) 559 final; Report from the Commission to the European Parliament and the Council, *Results of the Fourth Phase of SLIM*, COM(2000) 56 final; T Burns, "Better Lawmaking? An Evaluation of Lawmaking in the European Community" in P Craig and C Harlow (eds.), *Lawmaking in the European Union* (Hague, Kluwer Law International, 1998), Chap. 21.

⁹ *Single Market Action Plan sets Agenda*, 18 June 1997, p. 2.

was particularised through action directed towards, *inter alia*, the protection of social rights, consumer rights, health and the environment, and the right of residence.¹⁰

The Lisbon European Council constituted another important stage in the reconfiguration of the internal market agenda. The meeting, held in March 2000, focused on employment, economic reform and social cohesion. It set a ‘new’ strategic goal: the Union was to become “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”.¹¹ Completion of the internal market was to be one way of achieving this strategy.¹² The modernisation of the European social model through the building of an active welfare state was to be another. This was crucial to ensure that “the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty”.¹³ This objective was further particularised in terms of better education, an active employment policy, modernising social protection and promoting social inclusion.¹⁴ These commitments were reiterated at the Feira European Council.¹⁵ The same theme permeated the Nice European Council.¹⁶ While it was mainly concerned with enlargement, the European Council also considered a “New Impetus for an Economic and Social Europe”. It approved the European Social Agenda developed by the Commission, which was characterised by the “indissoluble link between economic performance and social progress”.¹⁷ This link had been forged by the Commission, and endorsed by the European Parliament.¹⁸ A high level of social protection, coupled with services of general interest vital for social cohesion, constituted the common core of values for the Community: economic growth and social cohesion were seen as mutually reinforcing.¹⁹

The Stockholm European Council echoed the same idea. There was “full agreement that economic reform, employment and social policies were mutually reinforcing”,²⁰ internal market policies should take due account of services of general interest,²¹ and a “dynamic Union should consist of active welfare states”.²² The principal Commission reports concerning the internal market in 2000 pick up and develop the ideas articulated by the European Council. Thus the *2000 Review of the Internal Market Strategy*²³ took the strategic remit of the Lisbon European Council as its starting point. The internal market should be made as effective as possible in economic terms, but it must also seek to foster job creation, social cohesion and safety. This is reflected in the detailed list of legislative and non-

¹⁰ *Action Plan*, above n. 3, pp. 9-11.

¹¹ Lisbon European Council, 23-24 March 2000, para. 5.

¹² *Ibid.*, paras. 5, 16-21.

¹³ *Ibid.*, para. 24.

¹⁴ *Ibid.*, paras. 25-34.

¹⁵ Feira European Council, 19-20 June 2000, paras. 19-39, 44-49.

¹⁶ Nice European Council, 7-9 December 2000.

¹⁷ *Ibid.*, para. 15.

¹⁸ *Ibid.*, Annex 1, paras. 8-9.

¹⁹ *Ibid.*, Annex 1, paras. 9, 11.

²⁰ Stockholm European Council, para. 2.

²¹ *Ibid.*, para. 16.

²² *Ibid.*, para. 25.

²³ COM (2000) 257 final.

legislative initiatives appended to the report, many of which deal specifically with issues of consumer health and safety and the like.²⁴

The same stress on the interconnection between the economic and social aspects of the internal market is to be found in the later report on the *Functioning of Community Product and Capital Markets*.²⁵ In economic terms, a properly functioning internal market was seen as the key to prosperity for Community citizens. This meant breaking down barriers to trade where they existed, especially in the services sector. In social terms, the internal market was seen as the guarantee of specific rights to safe, high-quality products.²⁶ The Commission accepted the conclusions of the Internal Market Council of March 2000, that high levels of consumer protection and consumer confidence were needed for a well-functioning internal market.²⁷ It acknowledged also that environmental concerns required a “reinforced, symbiotic integration of environmental policy and economic reforms inside the Internal Market”.²⁸ The updated Commission Communication on *Services of General Interest*²⁹ consciously drew on the conclusions of the Lisbon and Feira European Councils, and stressed the economic and social aspects of such services.

II. The System of Institutional Balance between the Major Institutions as it operates now works reasonably well

This is of course a contestable conclusion both empirically and normatively. The argument would have to be sustained at a length that cannot be explored here. The essence of the argument is that empirically (in terms of getting things done) and normatively (in terms of a defensible allocation of power between institutions representing different types of interest), the existing institutional balance is not that bad. This is reflected in the fact that most proposals for institutional reform take the existing institutional structure and amend it in varying degrees. They do not propose a major root and branch re-thinking of the existing structure. This does not mean that the existing system is incapable of improvement. It does mean that the impact of any institutional change must be thought through. It also inevitably means that discussion of the European Council, and whether it should be reformed so as to be based on a President serving for 3 or 5 years, has implications for reform of other institutions, especially that of the Commission. The European Council has functioned as an essential part of the institutional balance that has until now been the meta-principle guiding the functioning of the European Council/Council representing Member State interests, the EP representing directly voter interests, and the Commission representing the Community interest.

²⁴ *Ibid.*, pp. 15-17.

²⁵ *Economic Reform: Report on the Functioning of Community Capital and Product Markets*, COM(2000) 881 final.

²⁶ *Ibid.*, pp. 3-4.

²⁷ *Ibid.*, p. 5.

²⁸ *Ibid.*, p. 5.

²⁹ *Services of General Interest in Europe*, COM(2000) 580 final. These are services that public authorities decide should be provided even though ordinary market forces may not do so, para. 14.

III. Roles, Names and Powers

It is crucially important in any discussion of the options for reform of the European Council, and of connected issues concerning the reform of the Commission, *not to lose sight of the link between roles/names, powers and the future conception of the Community*. Thus much, albeit not all, of the discussion as to whether there should be two Presidents, one of the Council, one of the Commission, takes place abstracted from the respective powers that any such two Presidents might have. The implications for future decision-making in Europe could be vastly different, even if there were two Presidents, depending on their respective powers. It is therefore inevitable that the choices that are made on these key issues will reflect normative judgments about the future conception of the Community, which judgments sit on a spectrum between the intergovernmental and the federal. The remainder of this paper will consider the reform options, keeping the link between roles and powers firmly in the forefront of the analysis.

IV. The Options for Reform

1. The option proposed by Ingolf Pernice

This is an extremely interesting proposal, which breaks out of the mould of much thinking in this area. I have however the following reservations about this proposal. It is doubtful whether this would be acceptable to the Member States for the following reasons.

- a) The larger Member States have favoured a President of the European Council. They are unlikely to accept only one President of the EU, where that post is attached to the Presidency of the Commission.
- b) The proposal would have significant implications for the balance of power between the Member States and the Commission, by increasing the power of the latter at the expense of the former. The effect of this proposal is that there would be only one President of the EU, who would be the President of the Commission. It is true that the President of the EU would not be President of the European Council, which would have its own Chair. However this Chair would be the same as for the Council, and continue to rotate every six months. The difficulties of a rotating Chair of the European Council would therefore continue, and be exacerbated in a Community with 27 states. It would moreover be difficult for the 'temporary' six-month Chair of the European Council to oppose the will of the 'long-term' President of the EU, who was also the Commission President and who would have the force of the Commission behind him/her.
- c) The proposal could also have significant implications for the balance of power between the EP and the Member States as represented in the European Council. The President of the EU, who is also President of the Commission, is to be elected by the EP. This means that the President will in all likelihood be a person acceptable to the dominant party within the EP, who will have a 'political platform or agenda' acceptable to that party. The President will then necessarily approach his role within the European Council with that agenda in mind.

- d) There are important issues to be resolved by calling the Commission the executive. There is a duality in the meaning of the term executive. In a micro-sense it simply means that the Commission is responsible for executing Community policy, agreed on by the Council and the EP. If that is what is meant it is unobjectionable. In a macro-sense it connotes the possession of the powers of a national executive, in terms of domestic policy formation, foreign policy and the like. It is however clear that the Commission is not *the* executive in this sense of the term, and never has been. The very rationale for, and modus operandi of, the European Council has been to accord the Member States control over these macro-issues and it would be pushing against the tide of history to pretend otherwise.

2. The dual Presidency model

On this model there would be a President of the European Council and a President of the Commission. This model has been favoured by the larger states. There are however three points to note about this conception:

- a) The tenure of the European Council President would still have to be decided, and it would still be possible in theory to have this model and combine it with the idea of states combining to form a joint Presidency of the European Council.
- b) The powers of the two Presidencies would have to be worked out, and, as stated above, the system could look *very* different depending upon the powers accorded to them respectively.
- c) The idea has been opposed by smaller states, who fear that they would be dominated by the larger states. Intra-state tensions of this kind were seen in Nice.