

THE NEW COUNCIL

Sir William Nicoll, retd Director General, Council of the EU

From Empire to Reformation.

1 The Council is moving from its drab 1960's building in the rue de la Loi to its custom-built but architecturally unremarkable seat across the road. The plans to acquire a new HQ, which had been around for years were "accelerated" when in 1977 M Simonet, then Belgian Foreign Minister, instituted an urgency procedure. (The vicinity was suffering from pre-development blight). The new building is called Juste Lipse, from the name of the street which used to run from the rue de la Loi down the hill to Etterbeck. Justus Lipsius was a reformer, a rough contemporary of Luther. Can one speak of a Council Reformation? (But did one impute an Empire to the Charlemagne?)

The Metamorphosis

2 The Council was the institution most profoundly affected, by its own fiat, by the Treaty on European Union.¹ It was now supported by one pillar hitherto concealed from sight (Justice and Home Affairs, JHA) and another effectively put in place by the Single European Act (SEA) but rebuilt from the ground up (Common Foreign and Security policy, CFSP). In the architecture, a passage-way was built from the third pillar to the first². Foundations were marked out, but no concreting begun, for another possible pillar, Common Defence Policy³. The hitherto unrecognised principle of variable geometry was sanctified⁴. Union legislation was circumscribed by the principle of subsidiarity (in English political parlance "national supremacy"⁵.) The Council resolved to make itself more transparent.⁶ Alone of the institutions, it changed its name, to "Council of the European Union".⁷

3 The Council was also required to remodel itself in accordance with the so-called single institutional framework⁸. This entailed integrating the distinct European Political Secretariat into the Secretariat General of the Council. The merger (or takeover) was symbolised by Art 151.2 of the TEU which is the first formal treaty mention of the existence of a General Secretariat and a Secretary General in the service of the Council in all its avatars.⁹

EPC goes into EU

4 The Political Secretariat formed after the entry into force of the Single European Act (SEA) was not part of the General Secretariat. It was housed in the same building, behind a security barrier, and paid a peppercorn rent. It was staffed by a handful of officials¹⁰ seconded from External Affairs Departments, under its

own Secretary General. It became the centre of the protected COREU communications net among European correspondents in External Affairs Departments. It worked for the Political Directors as they prepared the meetings of Foreign Ministers of the member states of the European Community, meeting in the framework of Political cooperation. This label was abbreviated to: the Council.

5 Although the General Affairs Council had usually made light of the passage to and fro in its meetings from its "EEC mode" to its "EPC mode", there were clearly possible complications when it wanted to adopt an overall approach to its relations with the outside world. Its economic policy decisions could not be amputated from its foreign policy postures and vice versa. The scribes could carry out their stipendiary function of putting the Council's handiwork into the proper compartments, but the formalistic *toilette de textes* if anything revealed a subclinical schizophrenia.

DG E enlarged....

6 It might have been possible to appoint a Deputy Secretary General with CFSP responsibility. The Commission, for its part, went part of this way in setting up a new Directorate General, 1 bis, for CFSP work¹¹. The Council authorities decided against what would have been the *de facto* perpetuation of the political-economic split. The CFSP would be serviced by the existing External Affairs Directorate General, DG E, enlarged for the purpose. The cross-over point would be the Director General¹².

7 This reorganisation gave rise to a number of problems, not all of them resolved.

...but not fully merged.

8 The two parts of the new Council Directorate General each had their own infrastructures. The working groups on political cooperation responded to the Political Directors (who were not Brussels residents). The working groups on economic matters responded to Coreper 2¹³. Coreper 2 for its part¹⁴ was responsible under the TEU for preparing all Council meetings. Unless liaison arrangements were made, the two substructures would not intersect until they reached the Director General, and from him the Coreper. But liaison encountered a cultural problem. The COREU is a security net, operating within confidentiality standards and on a "need to know" basis. The staff of the General Secretariat had not been screened for political behaviour. The only requirement in their recruitment process was that they should produce a "certificate of good conduct", which in several countries was a "nothing known" note from their police registration file (associated with their identity papers) and in others a dead letter.

Personnel security.

9 A suggestion that general service staff having access to political documents should be mildly vetted, without face-to face interviews, was seen off by the civil libertarians of the Staff associations. Although the different cultures of political and economic work are not the main reason, they contribute to the situation described by the Council in its report to the Corfu Reflection Group - that integration of the separate working groups is far from being carried through.¹⁵ It therefore needs special vigilance to ensure that when political and economic objectives are at issue, as they are in for example the provision of humanitarian aid, political and economic coherence are maintained.

Knowledge and power.

10 A further problem arises. So far as the first pillar is concerned, the General Secretariat has no need of an independent research and evaluation capacity because work is based on Commission proposals, with their explanatory memoranda and supporting factual material. The Commission has extensive sources, including its own "Foreign Service", whose members take part in local coordination under the chairmanship of the serving Presidency. But in the CFSP the General Secretariat does not possess a data base other than the "*acquis politique*" - the collection of decisions the Council has already taken.¹⁶ Moreover foreign affairs information is unevenly spread among the member states. Some have Rolls Royce service, others more modest vehicles (to borrow the language of a radical but generally unproductive "Think-tank" report which looked at the British Diplomatic Service in the 70s).

11 These disparities have provoked suggestions that the CFSP needs strengthened underpinning. Speaking at the Centre for European Policy Studies on 24 October 1994, Director General Brian Crowe, the man in the hot seat, suggested, among other things, that the Council's CFSP services should be equipped to carry out analysis and planning.¹⁷ Other suggestions are more radical. M Lamassoure, French Minister for European affairs, has resurrected the idea of a CFSP secretariat, with improved capacities. This would *prima facie* unbundle the "single institutional framework", or at least aggravate the problem of maintaining its single mindedness. The issue is one to be taken up in the Intergovernmental conference of 1996.¹⁸ If it is true, as the long-serving British politico Mr Tony Benn insists, that "Knowledge gives power to those who possess it"¹⁹ a CFSP secretariat with its own knowledge base would be a new animal in the Union collection. Its interaction with the other species - Presidency, Council members, Coreper, Political Directors, Commission - would bring its own problems. If a prime aim is the entrenchment of democracy, in the face of the alleged demands of efficiency,²⁰ then bureaucrats are part of the problem, not of the solution.

COREPER and the Political Committee, the unfinished business.

12 The relationship between the Political Directors and the Coreper was left undefined in the TEU.²¹ Day to day it has been established that while the Coreper prepares Council meetings, it does not second guess the Political Committee on political questions and the Political Committee keeps off the turf of institutional, legal and budgetary questions²². A hybrid body, the "CFSP Counsellors" keeps the two entities in touch. It deals with CFSP subjects, but is composed of Brussels residents on the staff of the Permanent Representatives.²³

Filling the democratic deficit: codecision.

13 In the first pillar the TEU inaugurated the legislative cooperation of Art 189b TEU. The Council had to learn how to manage conciliation with the EP and it congratulates itself on having learned well. Throughout it has maintained its cohesion. The EP has not - seeking to bring back in cherished legislative amendments not adopted in plenary and therefore not conciliable and repudiating its own representatives in conciliation (legal protection of biological inventions). This has inspired the suggestion that where conciliation produces an agreement, the EP plenary should be able to repudiate it only by a majority of its members, not the majority of those voting.

New instruments, better use.

14 In the second pillar the instruments are specific. Declarations are old hat: the EPC issued scores. Common positions and joint actions are new. Common positions (Art J.2 para 2) are legal acts, which bind all the member states. They require unanimity. Hitherto, almost all the common positions adopted have been for the "reduction of economic relations" with a designated country - eg Haiti under the junta. Joint actions (Art J.3) are also legal acts. The principle of a joint action requires unanimity, but implementing measures may, if the Council so decides unanimously, be decided by qualified majority. This at present theoretical possibility is of current interest because it involves the double key - x votes for and y member states.²⁴

15 Joint actions are a TEU innovation. So far they have been used sparingly - eight of them on ex-Yugoslavia, of which six on support for the conveying of humanitarian aid in Bosnia: seven others. It is early days to establish or discern a doctrine to distinguish common positions from joint actions. A first rule of thumb is that a joint action may involve expenditure. If it does, it creates another problem of democratic competition.

Money matters

16 When the Union has to pay a bill, it draws on the budget, provided there is a spending authority therein. In the

budget there are three actors. The EP has the say over "non-compulsory expenditure" (NCE)²⁵. The Council co-decides and fixes the level of compulsory expenditure (roughly, the CAP). The Commission executes the budget, so far as exogenous expenditure is concerned. If the Council wants to earmark funds for CFSP joint actions, it needs EP agreement to their inclusion in the NCE. But in the CFSP the EP is entitled only to information and consultation. It wants more and has asked for an interinstitutional agreement, which the Council has declined to enter into. But the EP can insert itself into the CFSP by using its budgetary powers. There is no prospect of declaring that CFSP expenditure could be "compulsory."²⁶ If the Council does not want to tangle with the EP in adopting joint actions, its only recourse is national financial contributions. Some member states are notoriously slow payers and no sanctions against non-payment are available. The problem of marrying money and policy will last as long as the EP feels itself insufficiently implicated in foreign policy decisions and execution.

Third Pillar

17 The third pillar is more egocentric than either of the others. It even excludes the Commission from making proposals on three of the fields in which it operates.²⁷ The EP is to be informed and consulted by the Presidency, its views then being "duly taken into consideration". The European Court of Justice has no standing unless a convention concluded within the third pillar confers it. This has not happened in the single convention so far adopted (facilitation of extradition). No other instrument employed by the member states in the third pillar can explicitly bring the Court into play.

18 If the CFSP has been tested and found wanting in its responses to the fighting in ex-Yugoslavia, the Cooperation on Justice and Home Affairs (JHA) has met its Nemesis in its inability to place the first building block in its project²⁸. The convention on controls at external borders, on which work began long before the TEU, remains blocked by the dispute between the UK and Spain over Gibraltar²⁹. Other subjects have been troublesome. The Convention on Europol, another of the centrepieces, has been delayed but is approaching conclusion. Will it provide for ECJ oversight? Two joint actions have been undertaken. No common positions have been adopted. Three decisions have been taken, two of them on personnel for Europol (or pre-Europol, the Drugs Unit). Otherwise the Council has acted by the traditional instruments for non-binding expressions of intent - Resolutions (14) and Conclusions (16). The reluctance to commit, illustrated by the retention of the word "co-operation" in the title, recalls that in this area the member states are uneasy about "pooling their sovereignty" if this means submitting to laws which are "made in Brussels, by foreigners, for foreigners and which can only be changed by foreigners"³⁰

Another deficit ?

19 The JHA handles questions which bear directly on the daily lives and liberties of individuals, whether they are European citizens or other. If the forces of law and order in each member state act collectively on the matters in question, they spill over into the jurisdictions of another member state. But no recourse is provided other than the invocation of a citizen's rights within the legal system of the state of his citizenship. The parliamentary ombudsman (not yet appointed under Art 138e 1)) has no remit to pursue third pillar maladministration, being limited to the activities of Community institutions. There seems to be another kind of control deficit in the further elaboration of policy and action in the third pillar.³¹

Democracy at Risk - not greatly.

20 The gravamen addressed to the Council is that it behaves as a Star Chamber. Most of what it does is opaque, but it passes a stream of laws which enter into national legislation via the primacy of Community law and its direct applicability. The lawmakers have removed themselves from public control or even sight. From this premise it is argued that the Council should meet in public when it is legislating. If this were wanted, material difficulties could easily be overcome. For instance, in the mammoth EP buildings (plural) in Brussels there is already ample space for Council members to sit in a chamber with an audience.

21 As they decided in Edinburgh in December 1992 the member states have made the Council somewhat more transparent³². In the year from February 1993 the Council held 21 televised sessions, 11 of them presentation of programmes, three of them presentation of Commission proposals. It publishes the results of votes taken. It allows access to its documents. Of 77 applications made between 20 December 1993 and 31 March 1995, 22 were refused, probably to protect the confidentiality of the Council's proceedings³³, which would seem to be a illogical codicil to a decision to be transparent.³⁴

22 The steps already taken seem to have done little to disarm the Council's critics. But the critics largely mislead themselves when they contend that a legislature must legislate in public if government of, by and for the people is to be upheld. When Mrs, now Baroness Thatcher, faced this question in the closing stages of the negotiation of the Single European Act "she expressed [the] balance candidly and well. MEP's, she said are democratic representatives. So are we. We have to take decisions for our own countries and in the Council for the Community as a whole. We must find the right institutional balance - one that does not make that process slower or more difficult. And so, in effect, it was agreed"³⁵

23 But does the balance include closed meetings ? It is artificial to seek to distinguish the legislating Council from the

council taking non-legislative decisions. In either case the participants are seeking competitive advantage, not necessarily at the expense of the others, but with the maximum gain to their own interests. Some of these interests can be quantified - how many fish can my boats catch, how much will my firms have to spend on clean air, how much competitive edge will my firms lose if they have to grant longer holidays ? Some of the interests are not quantifiable, but are people with clout - environmentalists, defence contractors, Europhobes. To maximise their gains in competition with their partners ministerial representatives have to negotiate. They do not negotiate by announcing their bottom line. If versed in multiple level game theory they may not even have to make a bid or one that comes remotely near what they intend to achieve. Watching the other players and trying to read their hands, they may elevate beyond measure what they ask for, or keep mum and their powder dry. But none of this would be understood by observers who have calculated their own interest to a nicety. Watching the Minister overshoot, undershoot, give ground or give away interest X to take a call option on interest Y, the observers sense betrayal. When in April the Council adopted quotas for the catch of Greenland halibut, it was at once negotiating and pre-legislating (the agreement with Canada needs to be complemented by a fishery regulation.) A moment's reflection shows that the matter could not possibly have been resolved in the open. Motivation theory also tells us that even gainers are rarely satisfied with what they obtain, looking for more, or more tomorrow.

24 Comparisons with the openness of the debates in the EP are fallacious. First, deputies' votes are not swayed by the eloquence of the argument but by the voting slips which the Group Secretariats give to their adherents³⁶. Second, the voting decisions are not taken in public but in party caucus. Third, the speakers and voters, at any rate in the mass parties, are not in the main arguing for identifiable national advantage, but for a party cause, which changes the texture of the argument and positively requires public presentation. Fourth, interparty compromises (such as the Pact of Steel which determines the political affiliation of the President of the EP) is not hammered out in public but in private negotiation and compromise - criticised by the minor parties. Fifth the parliamentary option is virtually invariably for more Europe - which is not synonymous with European democracy (vide the referenda in Denmark and France, the close debates in Britain and the apparent German disenchantment with the ECU).

Democracy at the Summit.

25 When the European Council opens, there is a period in which the President of the EP sits in company with the Heads of State and Government. Even the most ardent populist would have to acknowledge that around the table the weight of democratic responsibility is carried not by the President of the Parliament but by those who from moment to moment may face censure in their national parliaments and media and who have to justify to their own

supporters,pro and anti,what they do about the "destiny henceforward shared"³⁷

26 Public sittings of the Council,except when they are in the nature of "orientation debates",without decisions,are a blind alley. They would simply drive the real interaction further underground. But privacy does not diminish the task borne by governments of mobilising support at home,where it matters to them, through the democratic process for what they do or refuse to do.³⁸

The tyranny of voting majorities.

27 Democracy may be said to be at risk to the extent that a member state is outvoted in Council discussion. The losing minister is not open to criticism at home if he fought the good fight. But another definition of European democracy makes light of the "tyranny of the majority", predicting paralysis if consensus rules. All constitutional orders are a balance between conflicting objectives and priorities. In the European Union of the close of the century,the states are the lead players. Their interactions are the driving force,or cut-out mechanism. They may not perform in public,but they are under constant scrutiny. In the light of their responsibilities,they do not forget that:

"..the business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with an axe to grind"³⁹.

Axe-grinding is an occupation enjoying full employment around Juste Lipse.

1.Nicoll "Representing the States" in Duff,Pinder,Price eds, "Maastricht and Beyond" Routledge,1994, p 190

2.Arts K9 and 100c

3. In the first pillar,the more or less classic Community, a common policy is specifically one in which competence passes to the Community: Common Commercial Policy,Common Agricultural Policy, Common Transport Policy (there are no others). Although the existence of a common policy does not occupy the terrain to the exclusion of supplemental national actions,it does have the effect of reserving to the Community actions within the exercise of the

common policy itself. Compare the opinion of the European Court of Justice in the case 1/94, Uruguay Round. In the second pillar "common policy" does not have this meaning. A policy action is common only if the member states agree, unanimously, that it is. If they do not agree, they are free to take national action, even when the matter is indisputably one within the parameters of the common policy. Member states routinely talk of "foreign policy cooperation", a Freudian disregard of the supersession of Title III of the Single European Act by Title V of the TEU. The operation of a common policy with uncommon outcomes - "having your cake and keeping it" has been finely described by Eileen Denza in "Groping for a Foreign Policy" in "The Institutional Dynamics of European Integration" pp 575-593, Kluwer, 1994

4. Nicoll, "Maastricht revisited: a critical analysis of the Treaty on European Union" in Cafruny and Rosenthal eds "The state of the European Community" vol 2, Riener, 1993

5. Rt Hon John Major, MP, House of Commons, Official Report, Dec 17 1991 col 1743.

6. Meeting of the European Council Edinburgh 1992, Presidency Conclusions, Annex 3 to Part A.

7. Decision 93/591 of 8 November 1993, OJ L 28/18 1993. A misnomer, since the Union possesses no institutions. At the same time the Commission changed its formal name from "Commission of the European Communities" to "European Commission" to show that it too was not confined to the "Community/ies". This had long been its informal name, just as the change in the SEA in the title of the European Parliament (hitherto formally "Assembly") caught up with established usage.

8. Art C TEU

9. The Council, being the authority invested with the power of nomination of its Secretary General and his Directors General, takes formal decisions on their appointment. The name of the Secretary General also appears on Council minutes. The names of Directors General appear on copies of acts which they certify to be valid. Prior to the TEU, the General Secretariat and the Secretary General existed legally only in the Rules of Procedure of the Council, eg OJ no L 268 of Oct 25 1979, Art 17. The Political Secretariat had a Treaty foundation in Art 30 g of the SEA.

10. The duration of the attachment was a kind of extended troika : five half years, in which for three an attached official served the troika to which his country belonged.

11. When M Santer combed his Commission in 1994 he integrated political relations with third countries and the economic relations which he subdivided among four Commissioners. DG 1 bis survived for overall CFSP matters.

12. The organisational change co-incided handily with the impending retirement of the veteran Director General, M Andre Dubois.

13. The Committee of Permanent Representatives, meeting at ambassador level.

14. Art 151 TEU

15. The Council report, which will be the first to appear, awaits publication at this writing.

16. Including the decisions taken by its predecessor, the Ministers of Foreign Affairs meeting in the framework of Political Cooperation. Same cast, new title.

17. Agence Europe, October 24/25 1994, p 3.

18. The article on the Greek Presidency which appears on pp 9-11 of the ECSA Newsletter of Fall 1994 needs reappraisal. Contrary to what it suggests, the CFSP and the EC did not suffer from schism January - June 1994. Although Greece, like some other countries, has both a minister of foreign affairs and a minister for European affairs, the Greek Presidency did not allocate foreign policy to the former and Community affairs to the latter. They chaired General Affairs Council meetings according to their availability.

19. The title of his "Discovery" lecture at the University of Dundee, Scotland, April 1994

20. From his review of the work of the second pillar, Trevor Salmon concludes that it has been a failure and one which does not provide the underpinning for a defence policy. "The common Foreign and Security Policy and Defence" University of Hull series on the IGC, 1995.

21. Declaration no 28, annexed to the TEU: " The conference agrees that the division of work between the Political Committee and the Committee of Permanent Representatives will be examined at a later stage....."

22. Budgetary problems have been pressing. See para 16 below.

23. The organisation for CFSP is extensively described in Galloway, The Common Foreign and Security Policy: Intergovernmentalism donning the mantle of the community method ?" in Westlake ed, "The Council of the European Union", to be published later in the year by Longmans

24. This is of current interest in view of proposals that in a modernised form of QMV there should be a double key. See Federal Trust Paper 1, "State of the Union" February 1995, p 27.

25. This is not the place for a disquisition on the Community Budget. Any of the standard textbooks do their best to explain compulsory and non-compulsory expenditure.

26. The trend is the other way, towards strengthening EP control over expenditure by abolishing the distinction between NCE and CE. This is one of the matters to be evoked in the 1996 IGC. See the Interinstitutional Agreement of 1993 (Delors II, revised financial perspectives).

27. Art K.3. The exclusions are judicial cooperation in civil matters, customs cooperation (!) and police cooperation as defined.

28. Art K.1 (2) rules governing the crossing by persons of the external borders of the Member States....

29. On March 26 1995, availing themselves of the variable geometry provisions on Art K.7, seven Member States created a single travel area under the terms of the Schengen Agreement of 1985. It is not a Union act.

30. Thus Rt Hon Peter Lilley, Secretary of state for Social Security at the Conservative Party Conference, October 1993.

31. From her review of the third pillar, Juliet Hodge concludes that it is the "failure of Maastricht". "Justice and Home Affairs" University of Hull series on the IGC, 1995

32. Conclusions of the Presidency, Annex A part 3.

33. Council decision of 20 December 1993 on public access to documents, 93/731/EC Art 4.2. OJ no L 340/43 of 31.12.93.

34. In a test case the writer submitted a reasoned request under the code to ask for the record of the Council's discussion and decision on the new Mediterranean approach. This was refused for the reason given in the text. A similar request addressed to the Commission for the record of its discussion of the proposal was also refused.

35. Geoffrey Howe "Conflict and Loyalty" Macmillan, 1994, p 455.

36. W. S. Gilbert said it all in the Guardsman's song in "Iolanthe"

37. Preamble to the Treaty establishing the European Coal and Steel Community, 1951, fifth indent.

38. For a masterly account of indirect democratic control see Alan Dashwood, "The role of the Council in the European Union" in "The Institutional Dynamics of European Integration", p 117 et seq., Kluwer 1994

39. Lord Reid in Conway v Rimmer, House of Lords (ie supreme court) 1968.