

THE DILUTION OF THE COMMUNITY METHOD AND THE DIVERSIFICATION OF INTERGOVERNMENTAL PRACTICES

Delphine Dero-Bugny

Université Paris Descartes

The strengthening of the European Council and the multiplication of international agreements between the Member States seems to be undermining the Community method. However, the diversification of intergovernmental practices within the European Union need not lead to calling the Community method into question. Intergovernmental methods are often used for only a temporary period, after which the areas concerned generally wind up integrating the Community method. The Intergovernmental is thus not necessarily opposed to the Community. It may even strengthen the Community method. The development and diversification of intergovernmental methods does, however, reveal a need to bring the Community method up to date. This involves rethinking the role of the European Council and integrating emergency procedures in order to be able to respond quickly in case of a crisis.

Since European integration got underway, the Community method has demonstrated its efficiency and its capacity to adapt to changes in the Community and subsequently in the European Union. The current context, which has in particular seen a stronger role for the European Council and its President as well as the conclusion of international agreements between the Member States outside the EU and within the EU, seems to be challenging this method, which appeared unable to provide a quick response to the problems posed by the current crisis.

There is a debate today about the need to replace this method with a new method that would accord more prominence to inter-

governmental practices. In the context of a speech on 2 November 2010, German Chancellor Angela Merkel supported the introduction of a new method, the EU method, which would supersede the conventional opposition between Community method and inter-governmental method. This new method would imply, Merkel said, “coordinated action in a spirit of solidarity, each of us in the area for which we are responsible (that is to say, the institutions and Member States) but all working towards the same goal.”¹

The advantages of the Community method and its importance for European integration argue instead, in our opinion, for consideration of an updated Community method. Indeed, as will be shown, while the diversification of intergovernmental practices in recent years has helped to highlight certain limitations in the Community method, this should not lead to calling this method into question, given that the strengthening of intergovernmentalism seems to be closely related to the current context and does not necessarily reflect the Member states’ lack of confidence in the Community method.

1. Community method and intergovernmental method

The Community method was defined by the European Commission in its White Paper on European governance. According to the European Commission, “The Community method guarantees both the diversity and effectiveness of the Union. It ensures the fair treatment of all Member States from the largest to the smallest. It provides a means to arbitrate between different interests by passing them through two successive filters: the general interest at the level of the Commission; and democratic representation, European and national, at the level of the Council and European Parliament, together the Union’s legislature.”² The Community method is thus characterized by a number

1. Speech given on the occasion of the opening ceremony of the 61st academic year of the College of Europe in Bruges, 2 November 2010.

2. European Governance – A White Paper, /* COM/2001/0428 final */ [http://ec.europa.eu/dgs/communication/pdf/comm-initiatives/2001-european-governance-white-paper-com2001_0428_en.pdf] On the Community method: R. Dehousse, *The Community Method. Obstinate or Obsolete?*, London, Palgrave Macmillan, June 2011; *Séminaire sur la méthode communautaire* organized by Notre Europe and the Bureau des conseillers de politique européenne (BEPA). Brussels, 28 February 2012.

of elements: a monopoly on initiative that belongs to the Commission (representing the general European interest); the adoption of acts by the Council of the European Union, which usually decides by a qualified majority (representing the interests of the Member States), and by the Parliament (representing the interests of the citizens); and control exercised by the Court of Justice. This constitutes the common law method of European Union law,³ even though this has always coexisted with other procedures for adopting legislation within the Community and the European Union, which are sometimes also treated as the Community method, but understood here in a broad sense, insofar as they require the intervention of EU institutions but do not necessarily involve the Commission, the Council and the European Parliament and do not necessarily recognize a decisive role for the Commission.

The Community method has often been opposed to the intergovernmental method, which is a decision-making process that is based on the sovereign will of the Member States and involves their achieving a consensus on issues of common interest. Unlike the Community method, the intergovernmental method aims to reconcile the interests of the Member States only and so does not require them to consider the consequences of their decisions for the general European interest.

For a long time it was easy to make the distinction between the Community method and the intergovernmental method, since the Community method could be regarded as the method applicable under the Community treaties while the intergovernmental method was to be used only when acting outside these treaties. The Single European Act, which legally consecrated the existence of the European Council in the Treaty establishing the European Economic Community, and in particular the Maastricht Treaty, which created a European Union based on pillars and provided for the implementation of an intergovernmental method for the second and third pillars, led to blurring the distinction between the two methods by integrating intergovernmental practices within the European Union. The construction of a European Union in pillars can thus be explained by the mistrust of the

3. This is illustrated today by the ordinary legislative procedure.

Member States with regard to the Community method, since it reflects the desire of the members not to subject certain sensitive matters to this method.

The entry into force of the Lisbon Treaty should have led to strengthening the Community method, as the Treaty provides for a merger of the pillars,⁴ which in principle implies a generalization of the Community method to all areas covered by the Treaty on the Functioning of the European Union and by the Treaty on the European Union (TEU). But the onset of the crisis has led instead to the growth and diversification of intergovernmental practices, which seems to call into question the Community method.

2. The development and diversification of intergovernmental practices

The diversification of intergovernmental practices since the onset of the crisis has been reflected in two main ways. It was manifested first in the growing strength of institutions representing the Member States, and in particular the European Council and its President. It could then be seen in the multiplication of international agreements between the Member States on the basis of EU law or sometimes outside it.

The growing role of the European Council and its President: The European Council, as an initiating body, has long played an important role in European construction. But the Lisbon Treaty, which established its institutional capacity and gave it a permanent President, together with the specific context of the euro crisis, have significantly strengthened the role of this institution to the detriment of other institutions, particularly the European Commission. A certain number of decisions have been taken directly at the level of the Heads of States and Governments, and the European Council quickly emerged as the leading institution in resolving the European crisis.⁵ The importance taken on by the European Council seems to have relegated the European Commission to a secondary role and exposed a lack of confidence in it. Some of the

4. In reality the merger is only partial, as the domain of foreign policy and common security are still governed according to an intergovernmental method.

5. See on this aspect P. de Schoutheete, "Conseil européen et méthode communautaire," *Policy Paper*, no. 56, Notre Europe, July 2012.

studies and proposals that previously fell to the Commission have been transferred to the European Council.⁶ The role now held by the European Council has come to alter the function of the Commission with regard to initiatives. Today the Commission tends to follow the Council's conclusions, as it passes along the latter's formulations of legislative proposals.⁷ This perceived weakening of the European Commission also seems to be corroborated by the importance acquired by the European Parliament which, since the entry into force of the Lisbon Treaty, must now be considered as a genuine legislative and budgetary authority. The early conclusion of agreements between the European Parliament and the Council of the European Union also tends to weaken the prerogatives that the European Commission holds under its power of initiative.

Conclusion of international agreements between the Member States: The present context also reveals a drift towards the multiplication of international agreements between the Member States, sometimes in lieu of laws that should have been adopted within the European Union using the Community method.

The euro zone crisis that began in 2009 has led to the adoption of a number of very different types of legal acts that fall sometimes under the law of the European Union and at other times under international law. A number of agreements have thus been concluded by the Member States either based on European Union law or law lying outside the European Union.

The need to develop emergency financial solidarity mechanisms led the Member States to act initially outside the framework of the Treaties on the European Union. On 9 May 2010, at a special summit in Brussels of the Heads of State and Government of the euro zone, the members created the European Financial Stability Facility (EFSF), which became operational on 4 August 2010, following the ratification of its statutes by all the euro zone countries. The spread of the crisis to new Member States quickly led the euro zone countries to reach another international agreement, but this time on the basis of the law of the European Union area. The

6. J.-P. Jacqu , "Le nouveau discours de la m thod", *Tribune*, Notre Europe 2011.

7. P. de Schoutheete, "Conseil europ en et m thode communautaire", cited above, p. 8 and 42.

Member States, acting within the European Council, thus used the simplified revision procedure provided for in Article 48 paragraph 6 of the TEU to amend Article 136 of the Treaty on the Functioning of the European Union (TFEU), which provides that the Council may adopt specific measures with regard to Member States whose currency is the euro. They added a paragraph to this provision in virtue of which, “the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole and stating that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality”. On the basis of this provision, the 17 euro zone members then concluded the Treaty establishing the European Stability Mechanism, which was signed on 2 February 2012 and entered into force on 27 September 2012. This mechanism has replaced the European Financial Stability Facility.

Another international treaty was concluded between the Member States of the European Union, but this time outside the EU framework, in an effort to strengthen economic governance. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was signed on 2 March 2012 between 25 Member States, the United Kingdom and the Czech Republic having refused to participate.

A new intergovernmental agreement should be agreed in 2014 on the Banking Union.⁸

The development of these international agreements concluded between the Member States within the EU framework or outside it reveals the limits of the Community method and more generally of the EU’s decision-making system. The creation of the European Financial Stability Facility outside the law of the European Union can thus be explained by the slowness of the European decision-making process, which is not always able to respond to crisis situations. The conclusion of the Treaty on Stability, Coordination and Governance is justified, in turn, by the inability to use the mechanisms set up by the treaties on the European Union. The Member States had originally wished to integrate the content of this agree-

8. This governmental agreement will concern the functioning of the single resolution fund.

ment into the Treaty on the Functioning of the European Union. But the refusal of the United Kingdom and the Czech Republic to participate prevented this, since it involved a revision of the Treaty on the Functioning of the European Union, which under Article 48 of the Treaty on the European Union requires the unanimous agreement of all the Member States.

While the growth in intergovernmental practices seen in recent years may raise concerns, it does not however seem to reflect the Member States' distrust in the Community method, but rather points to the need to consider how to bring the Community method up to date.

3. Calling into question the Community method?

Contrary to what one might initially think, the proliferation of international agreements concluded between the Member States, and more generally the diversification of intergovernmental practices that has been observed in recent years, does not necessarily lead to calling the Community method into question.

First, the use of intergovernmental methods is often temporary and the matters covered by these methods are generally intended subsequently to integrate the Community method. The construction of the European Union in pillars is a good illustration of this phenomenon. The areas initially contained in the third pillar, which originally focused on cooperation in the area of home affairs and justice, were progressively transferred into the Community pillar and are now integrated into the area of freedom, security and justice, which is governed by the Community method. Here the use of the intergovernmental method has ultimately allowed the application of the Community method. With the Maastricht Treaty, the Member States agreed to transfer their authority to the Union in the areas of home affairs and justice, but based on an intergovernmental method. Then they realized the need to apply the Community method to these matters. This awareness grew gradually. The Treaty of Amsterdam enacted a partial Communitization of the third pillar. It was not until the Treaty of Lisbon that the entire third pillar was transferred under the Treaty on the Functioning of the European Union into the area of freedom, security and justice. The same observation can be made with regard to the

emergency financial solidarity mechanisms set up since 2010. The euro zone members initially took action outside the institutional framework of the European Union to set up the European Financial Stability Facility. But the spread of the crisis led them to deal with the problem within the European Union by establishing the European Stability Mechanism, which shows that in the minds of the Member States the European Union mechanisms were more suitable. Under this same logic, the conclusion by the Member States of the Treaty on Stability, Coordination and Governance cannot be explained by a desire of the members to act outside the framework of the European Union, but rather because it was impossible, due to the refusal of the United Kingdom and the Czech Republic to participate in this project, to use the mechanisms provided by EU law, and in particular the revision procedure set out by Article 48 of the TEU, which presupposes the unanimity of the Member States. Furthermore, the content of this agreement is intended to be integrated into the legal framework of the European Union, as its Article 16 provides that, "Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union."

Second, the use of intergovernmental methods can lead to strengthening the Community method by consolidating the role of the EU's institutions, which play a fundamental role within the framework of this method. The Treaty on Stability, Coordination and Governance and the Treaty establishing the European Stability Mechanism thus contain a number of provisions that lead to strengthening the role of the Commission and the Court of Justice. The Intergovernmental should therefore not necessarily be opposed to the Community, and may even strengthen it. However, the growth and diversification of intergovernmental methods does reveal a need to revise this method.

4. For an updated Community method

From the time the Community method was established by the ECSC Treaty in 1951, it has demonstrated its ability to adapt to the evolution of European integration. It has survived the gradual strengthening of the powers of the European Parliament, the enlargement of the European Union and the establishment of a differentiation within the European Union. By giving institutional recognition to the European Council, by strengthening the role of the European Parliament as well as national parliaments, and by creating a citizens' initiative, the Lisbon Treaty has called for new changes in the Community method. The diversification of intergovernmental methods in recent years has demonstrated that the Community method needs in particular to adapt to the European Council's new role and to be able to deal with emergencies.

The stronger role played by the European Council and its President, which seems to be leading to relegating the Commission to a secondary role, is revealing a problem of confidence in the Commission and its President that needs to be addressed. But it also demonstrates the need to integrate this new institution, which is composed of Heads of State and Government, but also the President of the Commission, into the framework of an updated Community method. The importance acquired by the European Council in recent years seems to be closely related to the economic nature of the crisis, which has led to putting the Heads of State and Government and the institution representing them into the foreground, as economic policy at the EU level is based primarily on the coordination of national policies. This poses the question of what role should be recognized for the European Council under the Community method once the crisis is over. The Lisbon Treaty regulates the role that the European Council should be required to play under the Community method since, under Article 15 of the Treaty on the European Union, the European Council "shall not exercise legislative functions."

The handling of emergencies also needs to be integrated into the Community method. The example of the Treaty establishing the European Solidarity Mechanism shows the value of providing the European Union with accelerated procedures, since it was by implementing the simplified revision procedure set out in Article 48 paragraph 6 of the Treaty on the European Union introduced by

the Lisbon Treaty that the euro zone was able to set up this mechanism so quickly.

The Community method thus needs to be maintained, but must once again adapt to the changing law of the European Union.

5. Conclusions

- The diversification of intergovernmental practices within the European Union does not necessarily lead to calling into question the Community method. The use of intergovernmental methods is often temporary and may, in some cases, lead to strengthening the Community method.
- This diversification does, however, reveal the need to update this method.
- The Community method has always shown its ability to adapt to the evolution of European integration. It must now adapt to the new role of the European Council and integrate the management of emergencies.