Notre Europe
Thinking a united Europe
Policy Brief
No.24
April 2011

Decision-making in the Union

Philippe de Scoutheete

Philippe de Schoutheete is a former Belgian diplomat who has been Ambassador to Spain, director general of the Ministry of Foreign Affairs, and who was Belgium's Permanent Representative to the European Union from 1987 to 1997. He has also been special advisor to European Commissioner Michel Barnier, and visiting professor at the Catholic University of Louvain and at the European College in Natolin (Poland). Philippe de Schoutheete is a member of the board of directors of the Egmont Institute (Royal Institute for International Relations) and of the board of directors of Notre Europe.

The first few months since the Lisbon Treaty's implementation show that a substantive change in the Union's working methods is taking place, raising questions and prompting reservations. To grasp its full importance, we need to take a look at the past and to trace the origin of these changes.

The European Economic Community

Everything was far simpler in the good old days! Treaties clearly defined the European Community's tasks and areas of authority, and within that framework decisions were made by the common institutions on the basis of the so-called Community method comprising an initiative launched by the Commission, the European Parliament's opinion, and a decision on the part of the Council. All cooperation occurred outside the legal and institutional framework of the Treaties, in accordance with the traditional procedures of multilateral diplomacy in what it became customary to call the intergovernmental method.

On both sides, jealous watchdogs kept a close watch to ensure that neither of the two «methods» was polluted by contagion from the other. The natural watchdog for the Community method was the Commission, while one could usually rely on the French Government's watchfulness where the intergovernmental method was concerned.

What we need to remember, because it will be important later on, is that the difference in the nature of the two approaches lies in the fact that in one instance the decision-making process is entrusted to institutions, among which the Commission plays a crucial but by no means an exclusive role, and that in the other instance it is entrusted to government representatives. In addition to this, a vote may be taken in the institutions, while government representatives decide by consensus.

Ambassador Van der Meulen, who was Belgium's permanent representative for a quarter of a century and a veritable pillar of the COREPER, used to explain that one should never talk about the «Ministers' Council», which would describe an intergovernmental meeting, but about a «Council of Ministers», in other words a Community institution comprising cabinet ministers. I used to consider this distinction somewhat artificial at the time because the Council, subdued by the Luxembourg compromise, did not dare to use the treaty provisions that would have allowed it to vote by qualified majority. Yet with the wisdom of hindsight, I now see that it is a very important distinction indeed.

The fact remains, however, that this binary vision underpinned the European debate for several decades, in any event until the Single Act came along in 1986. In introducing political - i.e. intergovernmental - cooperation into the Treaty, that act was, for excellent reasons, risking a certain ambiguity.

But even before then, it needs to be said that the political reality on the ground did not always reflect the clarity of the underlying concepts. There were factors for confusion:

Many ministers always considered issues of legal formality to be merely accessory. They did not always react with the same stringency to the distinction between their intergovernmental meetings and the Council meetings. They considered the demands of Michel Jobert, who wanted them to meet in Copenhagen in the morning wearing their intergovernmental garb, and in the Council in Brussels in the afternoon, to be excessive and irksome. They gradually began to agree that they were meeting to make decisions, and that they would leave it to their functionaries to decide in what capacity they were making those decisions. The choice was not always clear.

The Commission, for its part, rightly thinking that it was impossible to totally separate politics from economics in the field of external relations, set in motion a long-term campaign, in particular with Belgian support, to attempt to get itself gradually co-opted into the political coopera-

tion structures. This caused political cooperation to shed something of its hitherto purely intergovernmental character.

Then, from 1975 on, we have the European Council. This entity, whose creation Jean Monnet had always hoped to see, was not a Community institution, thus it was intergovernmental. But the Commission's President had a right to sit on it, and it very rapidly acquired considerable clout in the Community's decision-making process. Moreover, as everyone knows, the irony of the whole thing is that this intergovernmental entity played a distinguished, nay crucial, role in the establishment of the internal market and in monetary union, which together form the very heart of the European Union.

Perhaps we should conclude that the apparent simplicity of the good old days concealed some very well hidden complexities.

From the Single Act to Lisbon

A quarter of a century and four Treaties separate the negotiation of the Single Act from the Lisbon Treaty's entry into force. The institutional system changed in depth, and the least that can be said is that it grew considerably in complexity. Where the decision-making methods, which is what we are interested in here, are concerned, there are several considerations that can be made in connection with this development:

- The European Parliament's power grew constantly, gradually moving away from an essentially consultative role towards a procedure providing for cooperation, then co-decision-making, with the Council.
- The European Council's power also grew apace. While it was not one of the Union's institutions before Lisbon, it gradually became the main, not to say the exclusive, source of political initiative and the ultimate decision-maker. This is where the key decisions regarding the implementation of the single market and of the common currency were made.
- The Union embraced the concept of important «subsystems» (the Euro zone, the Schengen area) which, of necessity, have their own distinct decision-making processes.
- The choice was made to assign priority to consistency in activity over uniformity of procedure. This was the choice between the Dutch and Luxembourger versions of the Maastricht Treaty. It went the way we all know, and it has been constantly renewed ever since. Member states have always wished to include new activities (political cooperation, the CFSP, the CSDP, justice, police, the currency, socio-economic issues, and so forth) within a common institutional context as far as possible, even if that has occasionally meant accepting radically different procedures.

The first result of this development was clearly to multiply existing procedures. On the eve of the Lisbon Treaty's entry in force, and without even considering strengthened cooperations, we had:

- the traditional Community method;
- a considerably different version of that method for cooperation in the police and justice spheres;
- the Central Bank's autonomous decision-making in the field of monetary policy;
- the open method of coordination for socio-economic policies (innovation, employment and so forth);
- a method based on the intergovernmental system for external policy, but with the Commission having the right to take initiatives, for external policy;
- and an even more intergovernmental variant (use of the WEU, no Community funding) for security issues with military implications.

These methods clearly have different levels of effectiveness, with sometimes surprising results. Thus we may argue that, in the security field, the most intergovernmental of all, fully 23 civilian or military operations since the beginning of the century are a positive record, while in the broader external policy field it is perhaps less so.

One second clear result has been that the old borders have become fuzzier:

- The Community method has been strengthened by the boost to the European Parliament's role, and by the opportunities for voting by qualified majority in the Council. It has been extended to cover such new areas asylum and immigration (Amsterdam Treaty). The political impact of the Luxembourg compromise has become noticeably weaker. On the other hand, the European Council's growing involvement in Community issues (financial packages, for instance) became impossible not to see. In some cases (the climate and energy package in 2008) the European Council has decided to handle at its own level, in other words by a consensus, issues which could have been decided by a qualified majority in the Council. The European Council's conclusions, as Jacques Delors has already pointed out, are a form of soft law which cannot be ignored by the other institutions, and certainly not by the Commission whose President has a seat on it. Thus the Community method is no longer the same thing as it was thirty years ago.
- Nor, for that matter, is the intergovernmental method. Virtually no decision of Europe-wide importance is made any longer in accordance with the modalities known as intergovernmental in the 1970s, in other words, decisions made outside the legal and institutional framework of the Treaties. The intergovernmental factor was introduced into the Treaties by the Single Act and, as of that moment, the «method» has gradually been «contaminated» by the Community factor, just as Michel Jobert feared it would be, through a growing presence on the Commission's part, reference to Parliament, dependence on the Community budget, and the role of the High Representative.

This has led to the disappearance of the distinction between a ministerial (intergovernmental) meeting and a meeting of the Council (a Community institution). Current analysis too often considers every ministerial decision to be an intergovernmental decision. That is clearly wrong: the Community method involves a final decision by the Council, which is comprised of ministers. And those with experience know that sitting at an institutional table or at an occasional meeting does make a difference on the debate and on the interlocutors' positions.

We may conclude that, even before the Lisbon Treaty came into force, the difference between the two methods was no longer really a matter of their nature but a matter of degree. The Community method has been contaminated by the intergovernmental method, while the intergovernmental method has become contaminated by the Community methods, with intermediate methods leaning now one way, now the other. We may miss the clarity of the good old days, but we cannot afford to ignore change.

The Lisbon Treaty

The new Treaty's entry into force, and the trials and tribulations surrounding its birth, have clearly increased the confusion in categories and procedures.

- The European Council is no longer a mere meeting of government leaders. It is an institution that determines the Union's general guidelines, under the direction of a president who is himself no longer a government leader but who calls meetings, sets the agenda and handles follow-up. This institution's role and areas of authority are defined by the Treaty. In procedural terms, at least, it is subject to the control of the Court of Justice. The European Council is thus no longer intergovernmental.
- The considerable weakening of the revolving presidency's role and visibility has also weakened the «intergovernmental» aspect of the system. Permanence has given the presidency a certain degree of autonomy, which varies according to the moral authority which the incumbent manages to build up. Controlling the agenda, chairing debates, controlling the execution of decisions and, above all, an ongoing presence in the chair all help to consolidate a presidency's autonomy. It can afford to take a medium-term view. The presidency is not a distinct institution like the Commission, but neither is it any longer a mere reflection of the momentary position of a majority of governments. By the same token, given that Council meetings are chaired by a vice-president of the Commission, we may wonder whether the term intergovernmental is still applicable.
- The entire external relations aspect, with Lady Ashton's triple function (member of the Commission, member of the Council, High Representative) and the external service's triple origin, no longer fits into the former categories either. The Commission's delegations have not suddenly become intergovernmental just by changing their name. But then neither are they exclusively «Community-based» any more. They are delegations of the Union.
- Progress in integration, particularly the common currency, entails a growing need for coordination on economic and social policy issues in connection with which authority has not been transferred to the Union. This is what has spawned the open coordination method. The fact that this method does not work satisfactorily does not change the legal position: the Community method cannot be applied.
- The European Parliament's authority has increased in terms of legislative procedure, establishment of the budget, and political oversight. Everyone, with the European Parliament members heading the list, acknowledges this as representing progress in the integration process. But the allotment to national parliaments of a priori oversight in the name of subsidiarity has introduced into the Union's legislative procedure a factor which, while it would be difficult to call it «intergovernmental» because we are talking about parliaments, is quite clearly not «Community-based».
- Nor is the Commission exactly the same animal as it was before, either. The team spirit that was such a feature of the institution is clearly suffering from the growing number of its members. Dogged insistence, during negotiations over the Lisbon Treaty, on the absolute need for each member state to have one commissioner has fuelled the opinion (possibly also with certain incumbents themselves) that in fact they are representing their own countries. The abolition of a second commissioner for the larger countries has created such an imbalance that voting by simple majority on a substantive issue would appear to undermine the legitimacy of any decision adopted. So the team no longer votes. It decides by a consensus. In the early years of European construction, majority decision-making was hailed as the crucial feature of a Community institution, as the very thing that made the difference between it and traditional diplomatic procedures that worked by a consensus.

Conclusion

What this analysis shows once again is that we need to beware of old words in a European context. Their meaning changes over time: from 1959 to 1985, «intergovernmental» meant any decision taken outside the institutional framework; until the Amsterdam Treaty, it was applied to the activities spawned by the Schengen agreement; from

Notre Europe
Thinking a united Europe

www.notre-europe.eu / info@notre-europe.eu
19 rue de Milan -75009 Paris - France
Tél. : 33 (0) 1 44 58 97 97 / Fax : 33 (0) 1 44 58 97 99

Policy Brief Notre Europe
2011/no.24

1985 to 2010, it was applied, in particular, to the European Council's decisions; and today? These old words' meaning also differs according to the user uttering them: it has almost become necessary to abandon the word «federal» because it conjures up different concepts in London and in Berlin, not to mention the adrenalin attacks that some people suffer whenever they hear it. When all is said and done, it is perfectly normal for words to change their meaning when the political system they serve to describe also changes: Tocqueville's democracy is a very different proposition from our own. Now, the European political system has undergone fundamental changes over the past fifty years in terms of the issues it addresses, of its institutional structures, of its active participants, and of the spirit driving them. This system today is the result of a series ofTreaties whose acknowledged common features are ambivalence and ambiguity. So why should it surprise us that the terms themselves are no longer clear and unmistakable?

The trouble is that we also need to beware of new words, because we are not sure that everyone understands their meaning and scope in the same way. When Professor Helen Wallace describes the open coordination method as being a form of «intensive transgovernmentalism», some people undoubtedly find it difficult to follow her. By the same token, the «Union method» referred to by Chancellor Merkel in her speech inaugurating the academic year at the College of Europe in Bruges also leaves one a little puzzled. This, on the one hand, because as we saw above, the Union already has not one but several different decision-making methods within its structure; and on the other, because of how she described it. Her description lends itself to numerous interpretations: «an effective combination of the Community method and of coordinated action among member states», or «coordinated action in a spirit of solidarity, with each one of us acting in the areas for which he or she is responsible, yet all working toward the same goal».

It would probably be wise not to revert to the old words but to the initial concept which made a clear distinction between those issues that were to be deliberated in the framework of the institutions, obviously including the Council, and those that were to be deliberated in the context of intergovernmental conferences. The institutional framework was seen as providing a guarantee of efficiency (through a majority vote in the Council), of balance (through the different weight carried by the member states), of the search for the collective good (through the Commission), of compliance with the law (through the Court), and of democratic oversight (through the European Parliament). An intergovernmental conference can guarantee none of those things. Basically this distinction is still valid today.

So let us talk about an «institutional mode» when a decision is taken, in accordance with to potentially varying modalities, by the institutions. And let us talk about an «intergovernmental mode» when a decision is taken outside of the institutional system. Given that the distinction is both clear and relatively simple to establish, it brings clarity to a debate that has become gradually murkier.

Three additional considerations:

- It can happen, indeed it already has happened on occasion, that an institution (the Council comes to mind, but there are others) drifts away from its institutional role: no political system is perfect. But it is obvious that all in all the system has worked well, otherwise we would not be talking about it today. As Monnet foresaw, it has imparted a lasting quality to an impulse that was initially spawned by the horrors of war.
- The «institutional mode» contains different methods. We may justifiably consider the Community method, with its variants, to be more productive than others: history proves this. But we would be wrong to argue that the cooperation method, with its variants, never works properly: history proves the contrary to be the case.
- Finally, we cannot ignore the fact that the institutional framework has changed; that it needs to adapt to the transformation of the European Council into an institution of the Union, a change which cannot fail to have an impact; and that it needs to adapt to the existence of a currency zone in which those countries taking part are subject to particular constraints that may lead to specific solutions: why should that surprise anyone?

Everyone knows full well that today's political mood favours the intergovernmental approach. Those in favor of a Community approach are understandably on their guard, for instance when jurisdiction is proposed with regard to patents, which the Court of Justice argues «lies outside the Union's institutional and jurisdictional brief» and that it «would distort the areas of authority assigned to the Union's institutions and to the member states, which are crucial for safeguarding the very nature of Union law». By the same token, we may ask ourselves whether it is wise to establish the future monetary «stability mechanism» by separate international treaty, without any link with Community law. In any event, within the framework that has served us well, we would be well advised to avoid doctrinal bickering often based on words whose meaning has changed. Let us use the diversity of methods that cater for a diversity of situations, and above all, let us try to push decisions forward ■

With the support of the European Commission
Education and Culture

design : *Notre Europe*
ISSN 2103-8635