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Avoiding conflict?
The EU legislative process in times of tension

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Abstract:

(EN) The current crisis could lead us to expect an overall increase of conflicts in the EU legislative process and eventually a shift from a consensual system to a majoritarian system. This paper aims to assess the evolution of the EU legislative process for the period 1996-2014 and shows that legislative actors still comply with the norm of consensus. We provide explanations for this resilience and analyse its effects. The paper demonstrates that in a context of greater divisions between EU actors, the systematic search for compromise and consensus contributes to modify the legislative regime in the sense of a greater Malthusianism and instability.

Key-words: EU legislative process; consensus; compromise.

Résumé :

(FR) En raison du contexte de crise, on pourrait s'attendre à ce que le processus législatif européen soit devenu plus conflictuel et à ce que la norme du consensus soit délaissée au profit d'un système majoritaire. Ce cahier tente d'évaluer l'évolution du processus législatif européen pour la période 1996-2014 et montre que les acteurs législatifs suivent encore la norme du consensus. Il tente d'expliquer cette résilience et d'analyser ses effets et montre qu'alors que les tensions entre les acteurs européens se sont accrues, la recherche systématique du compromis et du consensus contribue à modifier le régime législatif en le rendant plus malthusien et instable.

Mots-clés : processus législatif européen ; consensus ; compromis.

Introduction

Consensus and compromise have often been described as founding principles of the EU political system. They are considered as essential features of the EU at both the history-making decision level and the daily decision-making level. Overall, consensus and compromise are established principles and their predominance has been seen as an indication that the EU approximates a consociational model of democracy (Taylor 1991; Dehousse 1995; Costa and Magnette 2003). While many specialists expected that the big 2004 enlargement would jeopardize the culture of consensus, an analysis of legislative activity after 2004 has revealed the persistence of consensual decision-making (Dehousse and al. 2006; Wallace and al. 2006).

A quick look both at the European press and the specialised literature (see for instance Boffey and Davies 2017; Boerzel 2016; Dinan and al. 2017; Magone and al. 2016; Quatremer 2015) could let us think that this famous spirit of compromise and consensus has lived at the EU level. The Great Recession (2007-2012) has strengthened the gap between Northern and Southern Europe both economically and diplomatically. Anti-EU parties progressed at the 2014 elections and represent near one quarter of the seats in the European Parliament (EP). In most of the Member States, including the biggest one, populist parties have gained ground during the years 2010s, framing a large part of their platform on “EU bashing”. In some Member States, such as Hungary and Poland, the conflict is open with EU authorities on several files. On occasions, Prime ministers from those countries and other even seem to exacerbate the conflicts with EU institutions for domestic reasons. In 2015, the migration crisis made obvious the lack of solidarity between Member States as well as the different positions between Western and Eastern Europe. Last, in 2016, one of the key member, the UK, decided by referendum to withdraw from the EU.

Everything seems to indicate therefore that the EU has entered into an unprecedented age of tensions between EU actors and Member States. The increasing saliency of EU within domestic political debates as well as the politicisation of the EU policy-making process would result into more conflicts. However, this paper demonstrates that, if we consider the long-term trends, the EU legislative process has not become particularly more conflicting. A systematic look at behavioural data related to the legislative process over a period of 18 years (1996-2014) enables us to argue that: a. the on-going period of crisis has not changed much the way EU laws are adopted in terms of intra and inter-institutional consensus; b. a consequence for this enduring consensus lies in a major shift of the legislative regime of the EU. On the one hand, evidence shows that the spirit of consensus and compromise still characterises, to a large extent, both EU institutions and inter-institutional relations. On the other hand, the EU tends to adopt fewer and longer laws and shows patterns of destabilisation regarding its legislative regime.

We thus argue that the search for compromise and consensus in the EU policy-making process is remarkably resilient. Far from altering it, the context of crisis led EU actors to perpetuate previous organisational and behavioural norms of decision. However, the cost of this resilience of compromise and consensus in a context of (European) tension and (domestic) politicisation is a decrease in the legislative productivity of the EU. All seems to indicate that the EU actors have sought to limit conflicts between them both by legislating less and avoiding shifting their policy-making style to a majoritarian way. The process operates at the level of each EU institution with less legislative proposals from the Commission, open conflicts limited to a few files only in the Council and a convergence of pro-EU forces in the EP.

The paper provides an explanation for those complex, and even seemingly contradictory trends, based on the resilience of the style of legislative procedure, on the public merits of compromise-seeking strategies in times of tension and on the capacity of negotiating actors to differentiate official and secret strategies. While analysing those trends, this paper also discusses various methodological ways of measuring consensus and compromises throughout the EU legislative process.

Beyond the analysis of the changes of the EU legislative procedure, an analytical stake of the paper is to question the steadiness of consensus. According to some analysts, consensus is not only a shared reference or a useful guide for action but a norm of behaviour able to constrain the actors (see for instance the studies of the Council by Lewis (2003) and Wallace and al. (2006)). The recent context of greater saliency of EU issues and tensions between EU actors provides therefore a unique opportunity for testing the resistance of a norm to external shocks, an issue central to sociological neo-institutionalism.

The first section of the paper reviews studies of conflict and consensus in the EU legislative process and proposes an analytical framework to operationalize both concepts. The second section presents our two articulated hypothesis and the third one our data. Section four investigates compromise in the legislative procedure. Section five focuses on consensus on adopted legislative proposals. And section six depicts the on-going alteration of the legislative regime of the EU.

1. Consensus and compromise in the EU: a conceptual framework

While compromise and consensus are traditionally seen as founding principles of the EU, they have rarely been analysed and tend to be used interchangeably. Existing studies might refer to the culture of compromise and consensus to characterize the EU political system at large (see for instance Dehousse 1995; Abélès and Bellier, 1996; Hix 2007). In addition, a large part of the literature on compromise and consensus in the EU has focussed on the tendency of the two legislative institutions to decide without opposition. Furthermore, existing studies have tended to overlook conflict in the EU legislative process and the methodological issues its study raises. Studies of conflict in the EU have mostly focussed on the following three dimensions.

First, the issue of conflict has been approached through the lens of the *joint-decision trap* theorized by Scharpf (Scharpf 1988; Scharpf 2006; Falkner 2011). However, as noted by Falkner (2011, 56), legislative proposals are rarely rejected (according to her data, 5 to 6% of legislative proposals are rejected each year) and the most severe danger stemming from the joint-decision trap is suboptimal outcomes rather than stalemates. Therefore, the joint-decision trap theory aims to investigate conflict defined as the ability (or lack thereof) of legislative actors to make joint decisions and the quality of decisions.

Moreover, studies of conflict tend to primarily consider *inter-institutional conflict*. For instance, Jupille (2007) has studied inter-institutional conflicts over the legal basis of legislative acts. Norman (2013, 2015) investigated inter-institutional conflicts over the sharing of competences between the EU and the member states (on inter-institutional conflicts, see also König and al. 2007; Junge and al. 2014).

Last, other studies research conflict *within EU institutions*, but these intra-institutional studies are not pooled so that we could have a broader vision of conflict in the EU legislative process. Egeberg (2006) has investigated conflicts within the Commission. Hartlapp and colleagues (2014) examine the formation of positions within the Commission and the disagreements between the different Directorates-General. Studies of the EP reveal that the decision-making process is characterized by cooperation of the two main party groups (Costa 2001; Kreppel &

Tsebelis 1999; Kreppel et Hix 2003; Settembri & Neuhold 2009; Bowler & McElroy 2015; Bendjaballah 2016). The conflicting dimension of the legislative process within the EP has been investigated by Hix and colleagues (2006) and Burns (2006) who focuses on parliamentary committees. Lastly, several studies have attempted to explain the high rate of consensus and the distribution of negative votes and abstentions among the different member states in the Council of the EU (Mattila and Lane 2001; Zimmer and al. 2005; Wallace and al. 2006; Häge 2013; Novak 2013; Bailer and al. 2015).

When they do not attempt to explain the rationale for consensus, studies of the EP and the Council aim to analyse the reasons for intra-institutional disagreement on the basis of voting records. Otjes and Van der Veer (2016) study the lines of conflict in the EP and show that the crisis has led to a historical turn: While the main cleavage was between the right and the left and the secondary one between the pro- and anti-integration camps, the latter dimension has become the dominant cleavage (see also Braghiroli 2015 and Roger and al. 2017). Studies of conflict in the Council also aim to explain the rationale for conflicts – for instance by taking into account the geographical variable (Mattila and Lane 2001) or the budgetary variable (Zimmer and al. 2005; Bailer and al. 2014). These studies tend to assume that votes are the main indicators of conflict in the Council. However, research by Hageman (2008) shows that member states in the Council sometimes choose to express their opposition through formal statements instead of voting against a legislative act. Her research is thus contributing to refining our understanding of conflict in the Council. However, other existing studies do not really reflect upon how we should measure conflict.

To sum up, the existing literature suffers both from a lack of clear and operational definition of conflict, consensus and compromise at the EU level, and from a lack of a comprehensive approach because scholars tend to focus on a given institution rather than on the entire legislative process. We propose therefore to embrace the entire legislative process and to deconstruct the concepts of consensus and compromise by differentiating two elements: the course of the legislative procedure and the final stage of the procedure.

Regarding the legislative procedure, it seems more relevant to talk of compromise (which can refer to a process or a result) rather than consensus (which is always a result). Compromise can be defined by the willingness of decisional actors to find a solution acceptable by all the actors and to pay the price for it. The costs may be the time that the bargains take, the necessity for the actors to engage directly in the bargains and to make concessions and the possibility not to fully maximize their utility (for instance, in view of future deals). The search for compromise also calls for informal and secret bargains where deals can be realised. Comparative studies confirm that legislative compromises do take time. The time necessary to adopt laws tend to be more significant in consociational democracies: With one year and four months as a mean for Switzerland and the Netherlands vs. five months in the UK, France but also Germany (Bartolone & Winock 2016). Within parliamentary democracies, it has also been established that the duration of the legislative process depends largely on the government institutional capacity to control the legislative procedure (Tsebelis 2004). When no actor is dominant regarding the institutional rules, the procedure tends to be lengthier.

The second aspect is the most obvious as it regards the size of the final majorities approving the bills. A consensus is observable when high majorities support the final version. In national democracies, the extent of the consensus can derive from the large base of the parliamentary majority of the government (as for Chancellor Merkel supported by 80% of the MPs under the episodes of large coalitions) or from the decision of (fractions of the) minority groups to join the majority. For instance, roll call analyses realised at the US House of Representatives show an important share of bi-partisan agreement, a majority of Democrats and Republicans voting the same way in 44% to 56% of the cases in the period 1994-2009 (Bendjaballah 2013).

Table 1 sums up the two elements of the consensual and compromise style in law making and specifies as well some criteria for locating a political system according to both dimensions.

Table 1. A conceptual framework for investigating consensus and compromise in law making

<i>Dimensions</i>	<i>Principles</i>	<i>Criteria</i>
Compromise within the legislative procedure	Willingness of the actors to bargain in order to identify a mutually acceptable decision	- Long informal bargains - Several readings - Low delegation
Consensus in the final decision	High level of official support for the outcome	- Large majorities - Shifting coalitions

2. Hypotheses

The research question addressed by this paper deals with the effect of the last years of tensions, crisis and politicisation on the European legislative process. We would like to know if compromise and consensus as defined above still hold in this peculiar context. Our analytical as well as empirical effort bears on the recent changes of the legislative procedure rather than on the explanatory variables that might explain them (economic crisis, public opinion, diplomatic tensions, populist claims...). This is certainly a limit to our approach to which we will come back in conclusion. We just assume that the general context changed significantly for all EU actors over the last decade in a sense of enhancing tensions between them.

The paper seeks to demonstrate that the context of tension has paradoxically strengthened the consensus and compromise features of the legislation-making system of the EU (hypothesis 1). We also support the view that in a context of greater tension and lack of trust between EU actors, the resilience of consensus has contributed to modify the legislative regime of the EU on three key dimensions (number, length, stability) (hypothesis 2).

Three rationales support the first hypothesis. The first one is based on the continuity in the way preferences are aggregated when producing laws. Coherently with neo-institutionalist views, we assume that policy-makers change their way of taking collective decisions within the legislative process in an incremental way. The stability in legislation-making rests on the stability of legal rules as well as social norms framing their activity. If the point can be made for all political systems, it seems even more plausible within a regional organisation such as the EU marked by the lack of sudden alternation in the composition of the two legislative institutions and by the role played by bureaucrats and diplomats to the detriment of politicians. More deeply, as shown by Lijphart (2002), the consensual or majoritarian nature of political systems originates both in long-term heritage (for instance British colonisation) and in the degree of social homogeneity. It results from those two explanatory factors that the consensual nature of a system does not change easily, especially when the philosophy of constitutional rules remains unchanged.

The second claim in favour of the continuity of the policy style of the EU derives from the context of tension itself. We assume that the greater divisions between EU actors make even more necessary the patient and collective efforts to seek for a large compromise. The consensual and compromise features of a policy regime do not mean that the consensus is given before the opening of bargains but that established patterns of cooperation are likely to bring to a compromise. We assume therefore that EU actors will engage even more in bargains in reaction to the various kinds of pressure put on their shoulders.

The third claim has to do with the signal sent by EU actors in a context of constraining dissent (Bendjaballah and al. 2014). We assume that, in that case, most of the EU actors will be willing to make the collective demonstration that the EU works. The greater saliency of EU issues in domestic debates and the dynamism of Eurosceptic actors could indeed strengthen the appeal of consensus in the eyes of most of the EU actors. By taking decisions at large majorities or at the first reading, they would publicly demonstrate their maintained capacity to act. Ministers would especially show to their domestic constituents that they have not been defeated in the Council. In other words, 'playing against Brussels' by publicly contesting decisions would still concern a limited number of cases (Wallace and al. 2006). MEPs from main party groups and pro-EU forces would also like to demonstrate how efficiently they use the prerogatives obtained during treaty revisions (Costa 2001). Importantly, it should be noted that it is possible for EU actors to send those positive signals that there may be discrepancies between the secret positions taken during bargains and the official views adopted at the end. The EU is indeed characterized by the key role played by secret bargains. It has been demonstrated that the positions taken by ministers or MEPs on official records can be substantially different from the views supported at previous stages (see for instance Vaubel 2008 and Novak 2013 for the Council and Bendjaballah 2016 for the EP).

On the basis of those three rationales, we develop a first hypothesis of continuity of the consensual features of the law-making process in the EU, both within legislative institutions and between them.

H1 Over the last decade, EU legislators have maintained and even strengthened the consensus and compromise features in law-making despite the greater tensions and divisions between them.

We believe yet, that consensus has a cost in times of crisis. The refusal to follow a more majoritarian road has resulted in the transformation of key features of the legislative regime of the EU, especially regarding the number of laws adopted, their length and the stability of the legislative regime of the EU.

Regarding first the number of EU laws, it makes sense to assume that in periods of tensions, consensus-seeking can result in locks and falls in the number of adopted laws. In a Malthusian reflex, actors may first seek to avoid conflicts by putting less things on their plate, i.e. by discussing less bills and deciding to put aside some drafts. Furthermore, the possibility to hide publicly major parts of the legislative bargains allows the actors to follow discretely uncooperative strategies. It has indeed been established that political systems comprising many veto players tend to adopt less important laws (Baumgartner and al. 2014; Tsebelis 2004). If we compare the legislative production through time rather than across countries, it makes no doubt that a parliament is less likely to pass many laws when compromise has to be built and consensus to be shown among diverging political forces as indicated, for instance, by the unique episode of minority government in France in 1988-93 (Huber 1996).

Secondly, the length of legislative texts can be considered, after the founding work by Huber and Shipan (2002), as a good proxy for the level of trust within the legislative majority. The duration of the bargains generally results in longer texts (also Martin and Vanberg 2005). The parties engaged in coalitions also seek to fight moral hazard in the implementation phase by putting as many details as possible in the legislative text.

Last, consensus-seeking between actors placed under growing constraint can result in a destabilization of the policy-making style, especially within the framework of two-level games. The tensions between the search for consensus at the EU level and multiple constraints, especially domestic ones, would make more multidimensional the issues at stake and would generate, as a consequence, more instability in the way decisions are taken. Basic features

of a legislative regime such as the length of laws, the duration of the legislative procedure, the number of adopted laws as well as their entropy (Brouard and al. 2009) can be deeply and durably altered under such circumstances.

Those developments lead us to formulate a second hypothesis partly resulting from the first one.

H2 Over the last decade, the pursuit of a consensual style in a context of growing tensions between EU actors has contributed to alter key features of the legislative regime of the EU in terms of volume and stability.

3. Data

This paper investigates the evolution of conflict by adopting a broad perspective, thanks to the Europolix database that gathers data on all the legislative acts adopted between 1996 and 2014.¹ The database is composed of 3325 definitive legislative acts, each being related to 100 connected variables. The variables deal with descriptive elements related to the bills (size, policy fields...) and behavioural elements related to the legislative process (duration, votes within EU institutions...). A crucial methodological choice made has been to define as legislative an act that was regarded as such by the Council of the EU whatever the legal instrument used (directive, regulation and decision). Therefore, the primary source of the data collection has been the monthly summaries of Council acts. On that ground, a methodological challenge has been to feed data collection with the various un-related (and sometimes un-coherent) existing official databases: Eur-lex, Pre-lex and Oeil. The crossing of sources between those databases has enabled us to identify the numerous mistakes present in each of them.

Although being unique for the period considered, this database has some limitations – for instance some missing information due to a lack of availability of the data (e.g., on votes in the EP before 2004) or lack of a data collection (e.g., on statements by Member States). Furthermore, our methodological choice has constrained us to consider only adopted legislation to the detriment of withdrawn drafts² or pending ones. Neither are the steps related to the implementation of EU decisions under our focus.

4. Compromise within the legislative procedure

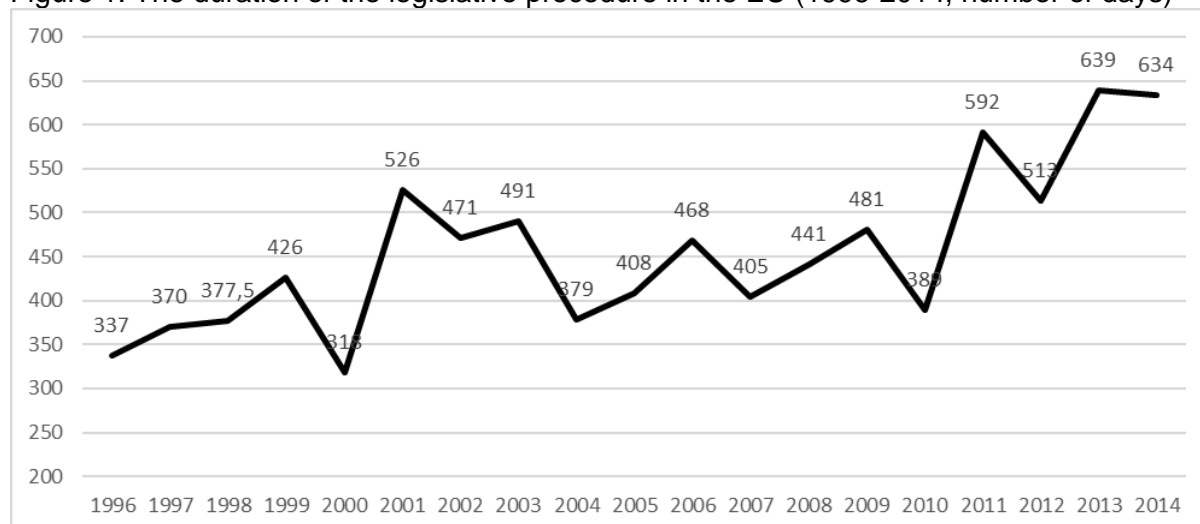
The compromise style of a legislative procedure is supposed to be time costly. Moreover, in the case of a bicameral legislator, several readings are expected. Lastly, the uncertainty of a bargain may lead to a direct commitment of top bureaucrats and politicians. In a majoritarian system by contrast, more delegation is likely during legislative talks. This section considers those three features successively.

Figure 1 presents the evolution of the duration of the legislative procedure, taking into account the yearly mean number of days necessary to adopt legislative acts.

¹ *Legislative production in the European Union 1996-2014* [base de données], Centre de Données Socio-Politiques (Sciences Po, CDSP, CNRS) et Centre d'études européennes (Sciences Po, CEE, CNRS) [producteurs], Centre de Données Socio-Politiques [diffuseur]. Financement Agence Nationale de la Recherche, France. Data are available in the CDSP website.

² However, when a piece of EU legislation has been modified, the previous norms appear in our database if it was adopted in 1996 or after 1996.

Figure 1. The duration of the legislative procedure in the EU (1996-2014, number of days)



Source for this figure and others (except figure 7): *Legislative Production in the European Union européenne 1996-2014 [base de données]*, Centre de Données Socio-Politiques (Sciences Po, CDSP, CNRS) et Centre d'études européennes (Sciences Po, CEE, CNRS) [producteurs], Centre de Données Socio-Politiques [diffuseur] ; Dehousse et al., forthcoming.

The trend related to the average length of the decision-making process is particularly neat. On average, an act was adopted after 385 days in 1996-1999; after 441 days in 1999-2004; after 426 days in 2004-2009; after 548 days in 2009-2014. The fact that the duration of the procedure has nearly doubled in less than twenty years is particularly significant given the incremental features of contemporary political systems on that aspect. On the basis of the comparative data mentioned above, the observed trends regarding the time necessary to adopt laws in the EU enables us to argue that the recent period has been characterized by a strengthening of the consensual feature of the EU.

The greater duration of the legislative procedure also suggests that EU legislators could be more influential when it comes to define the content of EU law. As established in the case of French legislative making, the longer the duration of the legislative procedure is, the more legislators tend to adopt amendments. In other words, the strategic advantage of the policy-setter is time contingent. At the EU level, it would mean that the Council of the EU and the EP would alter more the European Commission policy proposal. This interpretation (that our data does not enable us to verify yet) suggests that the context of crisis has strengthened the consensual feature of the EU policy-making process: the final outcome being hypothetically closer to the legislators' ideal points than before.

Second, the number of readings within bicameral settings can also be regarded as an organisational consequence of the patient search for compromise, and seems intuitively correlated with the length of the procedure. Figure 2 indicates the number of readings necessary to adopt EU acts and offers a puzzle in that respect³.

³ The agreement of the EP on the position of the Council, sometimes called "early second reading" as been included in the first reading as the EP, in that case, does not amend the first reading position of the Council and as no time limit applies.

Figure 2. Stage of agreement in the ordinary legislative procedure (%)

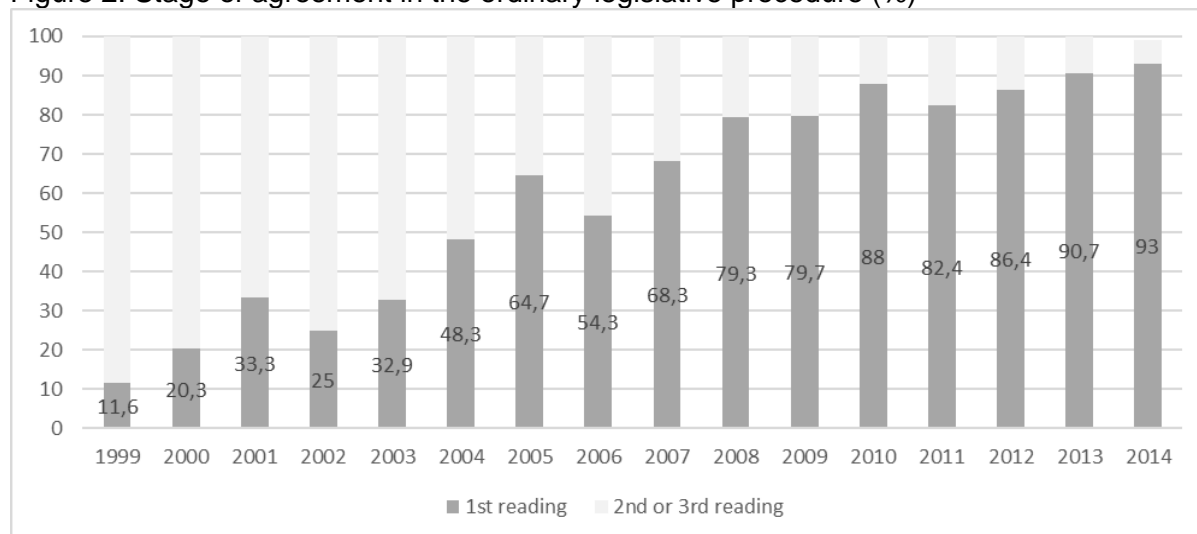


Figure 2 indicates that the adoption of legislative proposals at the first-reading stage has become the norm (Bressanelli and al. 2014). This result may seem incoherent with our claim that the compromise and consensual style of the EU has been strengthened over the last years. Yet, a closer look indicates that it is not exactly the case. Actually, empirical research (Costa and al. 2011; inquiry OI/8/2015/JAS of the European Ombudsman) shows that the institutional constraints relative to the second reading of the ordinary legislative procedure explain the preference given to the first reading⁴. In the case of a second reading, the majority should be larger in the EP, a time limitation applies to the bargains and the European Commission holds at each further step a possibility to select amendments and influence the outcomes. In a way, the legislators' preference for the first reading makes the procedure less consensual: the views of the Commission can be overlooked more easily and the size of the majority in the EP can be smaller.

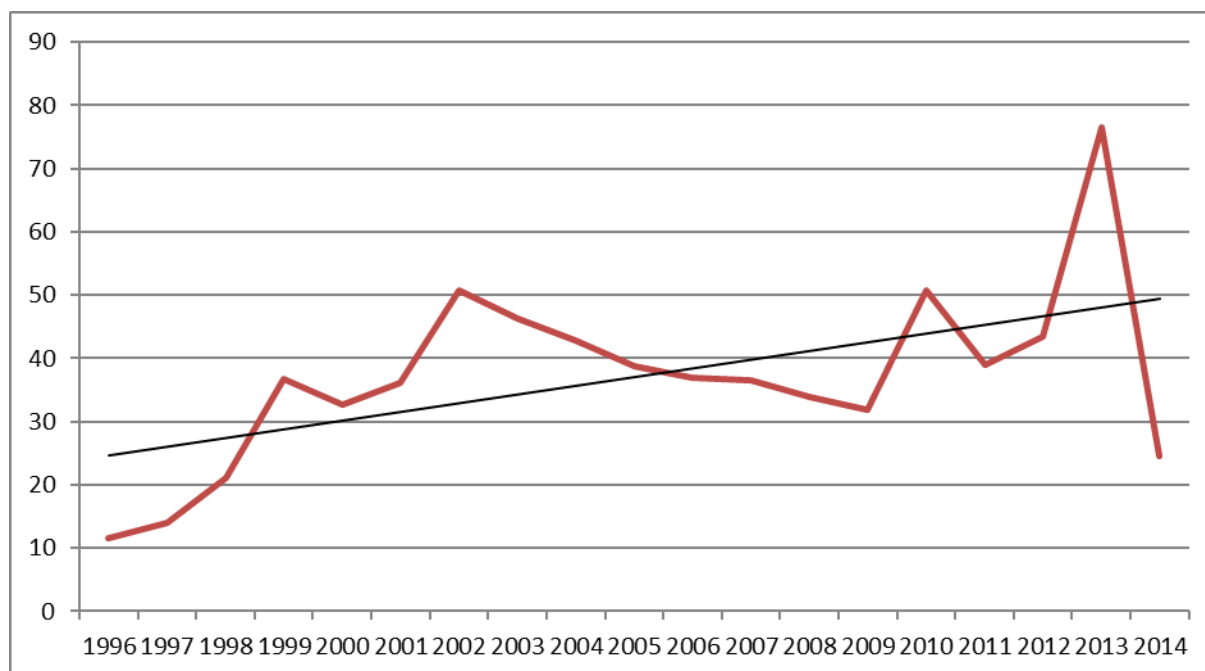
However, two points make this trend compatible with hypothesis 1. First, the preference for agreeing at first reading entails the organisation of numerous and decisive trilogue meetings. The limited institutional constraints of the first reading enable for the patient search for compromises (see also Bressanelli and al. 2016). Second, coherently with the analytical framework developed above, it can be noted that an agreement reached at the first reading stage enables the actors to demonstrate publicly their capacity to agree on legislative outcomes and to limit therefore the reputation costs, for them or for the system, of a public inter-institutional disagreement. The EU looks more consensual if the Council and the EP avoid formal, public and incoherent votes.

Lastly, the search of compromise would contribute to limit the delegation of legislative talks to subaltern bureaucrats. This is a feature noted by comparative studies of contemporary democracies (Bendjaballah 2016; Salmond, 2011): top decision-makers are more involved in the informal talks if the latter matter for the policy outcomes. At the EU level, it is difficult to gather systematic data on the degree of genuine involvement of politicians and decision-makers in the policy-making process. Existing studies offer assessments of the share of files decided at the Coreper (Håge 2008) but, to our knowledge, we lack a recent systematic data collection on this aspect. The analyses realised on the identity of the participants to the Council of the EU indicate that the presence of ministers depends mainly of the bureaucratic style of a given Member State and of the policy fields considered (Johansson and Naurin 2011; Gron and Salomonsen 2015). Yet, the share of text considered as B points in the Council can be

⁴ In terms of type of majority required in the EP, as time limitation and of capacity of the European Commission to select amendments.

regarded as a good proxy for the extent of delegation. As a general rule, permanent representatives attempt to find agreements at the level of Coreper and send the legislative proposals as “A-points” to the ministers for official approval. In those frequent cases, ministers do not debate upon the acts and only formally adopt them. However, when Coreper officials cannot reach an agreement on a given proposal, they send it as a “B-point” to the ministers who can then debate directly⁵. Figure 3 presents the proportion of legislative acts discussed as B points and reveals that it has slightly increased.

Figure 3. Proportion of legislative acts discussed as B points (% , 1996-2014)



The increase of B Points could indicate that legislative talks are more conflicting as the state representatives were unable to find acceptable compromises at the bureaucrat level. However, it also indicates that politicians are directly involved in the search for compromise and that this limited delegation does not prevent legislation from being adopted since, as mentioned above, our data only take into account adopted acts.

5. Consensus in the final decisions

Consensus can also be assessed through the level of support within each legislative EU institutions for the final version of the bills. In the case of the Council, we decided to take into account acts for which qualified majority voting was the decision rule because they represent 79% of the legislative acts adopted from 2004 to 2009 and 90% of the legislative acts adopted from 2004 to 2014. Abstention must be considered as a form of opposition since when the rule is qualified majority voting, abstaining amounts to voting against. In that case, abstaining is just a more diplomatic way to oppose an act. Figure 4 presents the voting patterns within the Council, the contested acts being those for which there has been at least either one abstention or one negative vote.

⁵ A proposal can have one, two or several B-points and Coreper can send over the same proposal several times as B-points to the ministers.

Figure 4. Voting patterns in the Council of the EU (% of adopted acts)

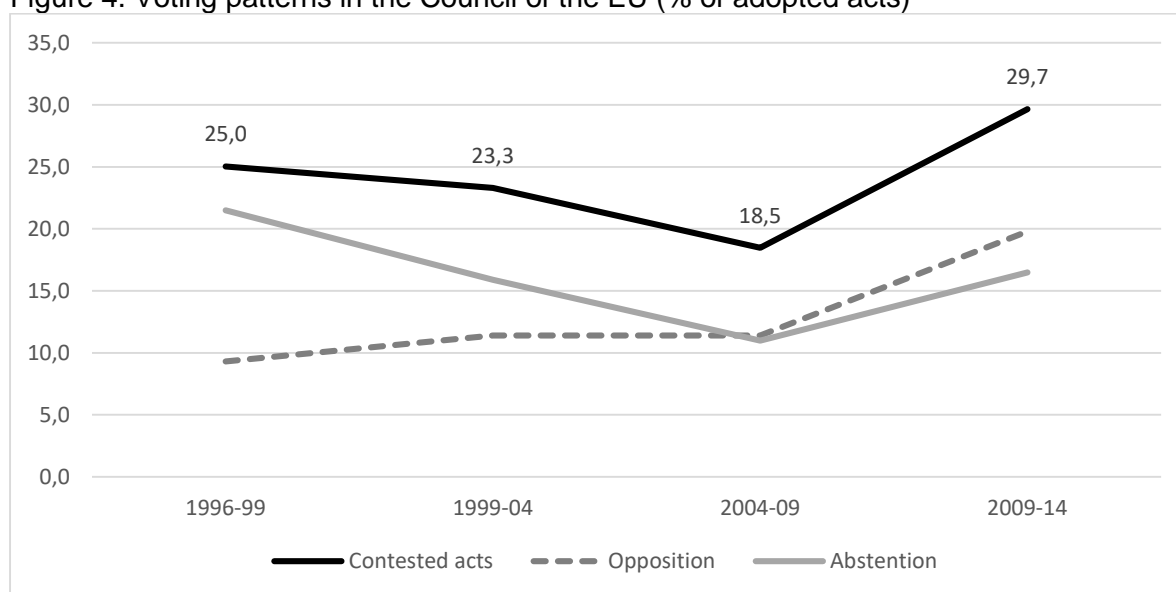


Figure 4 indicates that contestation increased within the Council during the last legislative term but that it remained limited. Both abstention and opposition have progressed during the 2009-14 period. However, with nearly 30% of acts adopted with at least one opposition or one abstention, the contestation within the Council is close to the level registered during the Prodi period when Member States were twice less numerous. This means that in a period of greater saliency of EU issues, the 27-28 ministers have been able to decide by consensus in 70% of the cases. This level of consensus illustrates the maintained capacity of the Member States to reach common positions.

A further point related to the resilience of consensus at the final legislative-making stage in the Council can be made through investigating the size of the coalitions of ministers opposing or abstaining decisions. These coalitions are presented in figure 5.

Figure 5. Size of the opposition within the Council (% of acts for which one, two or more Member States opposed or abstained)

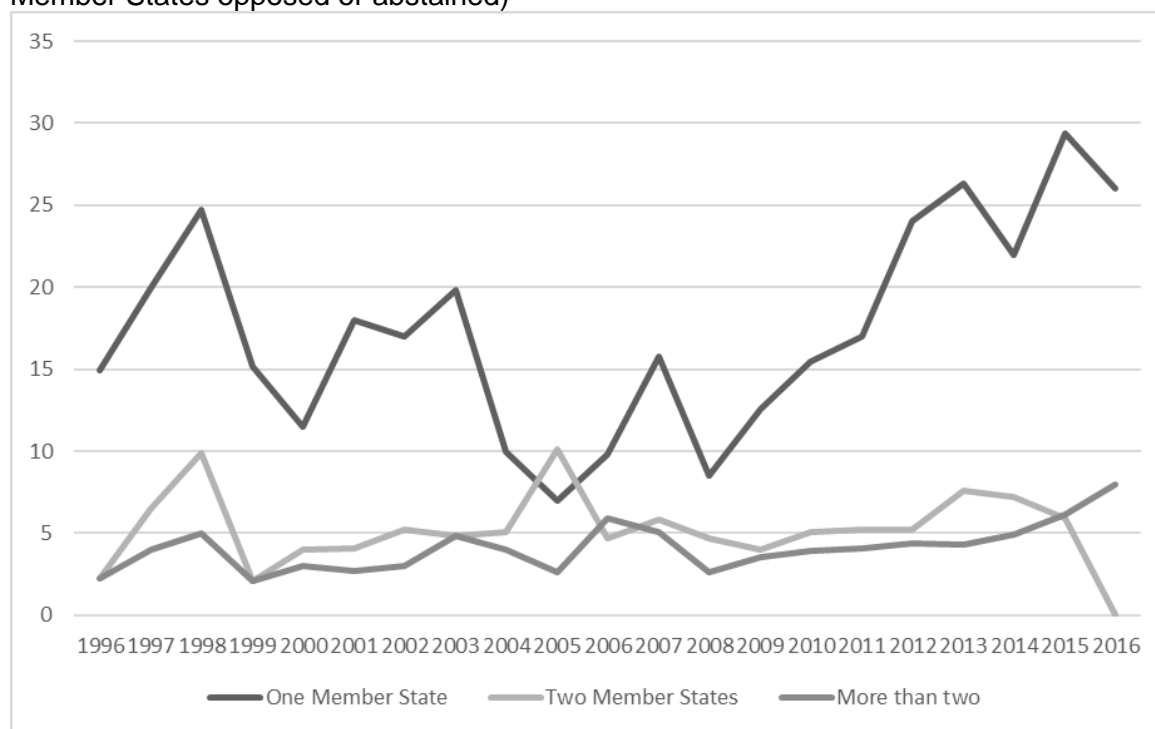


Figure 5 shows that the slight increase of contestation during the period is based, most of the time, on the voting decision of one Member State only. For instance, in 2014, out of 42 contested acts, 10 were contested by UK alone. The proportion of allied Member States opposing or abstaining on QMV votes is both remarkably stable and low. On the average, no more than 5% of the votes received the opposition or abstention of more than two Members States. The fact that this threshold has not evolved throughout the period despite the arrival of new countries is a strong point in favour of the continuity of the organisation and behavioural norms of decision-making within the Council. However, there are differences between Member States regarding their voting behaviour. If we consider the entire period, German ministers rate first in terms of opposition and abstention (23% of their votes were not positive) and are followed by their British colleagues (16%).

The same kind of data can be considered regarding the final votes on the definitive version of the EU bills in the EP⁶. From 2004 to 2014, the majorities in the EP represented between 65% and 76% of the seats, and the opposition between 6% and 11%. On average, every year, less than 50 MEPs opposed adopted acts. This number is remarkably stable throughout the period. The spirit of consensus thus appears to be even greater than in the Council. To a large extent, it derives from the decision of the two main groups from the centre right and centre left (which represent more than half of the seats) to ally. A roll call analysis based on all the thousands of registered floor votes (and not on the final votes only) indicates that a majority of the MEPs from the European People Party group and a majority of the Socialist and Democrat group voted along the same lines in 69% of the cases in 1994-99, in 65% of the cases in 1999-04, in 70% of the cases in 2004-09, and in 73% of the cases in 2009-14⁷. Contrary to some predictions (Hix and al. 2005), the EP has not shifted to a majoritarian pattern and is still characterized by remarkably strong consensual features. As already said, roll call analyses in the US House of Representatives show lower patterns of inter-party compromise over the same period. The consensual features go beyond the mainstream political forces. During the

⁶ We only consider adopted acts. Yet, the EP hardly ever decided to block a draft proposal.

⁷ Source: VoteWatch.

2009-2014, when the Eurosceptic or Europhobe MEPs represented about 15% of the seats of the assembly (excluding the Confederal Group of the European United Left/Nordic Green Left (GUE)), the yearly opposition to the final version of EU bills represented between 4 to 8% of the seats depending on the year. This indicates that a part of the anti-EU forces decided to play the game of compromise.

To sum up, the behavioural data related to the European legislative procedure indicate that the troubled decade experienced by the EU has not deeply affected the capacity of the legislative actors to agree on outcomes that are largely supported by both the Council and the EP. The greater tensions between EU actors and the greater saliency of some debates at the domestic level certainly explain some trends – for instance the lengthier bargains, the preference for the first reading or the increase of B points. However, far from shifting the policy-process to a majoritarian pattern, those elements contribute to deepen the spirit of compromise and consensus, as predicted by Hypothesis 1, although the practices related to the different readings have not evolved as expected.

6. A shift in the legislative regime of the EU

This section aims to analyse hypothesis 2 by assessing how the institutional preference for consensus and compromise affects the legislative regime of the EU in a context of tensions and conflicts. The legislative regime of a political system can be characterised by the number of laws adopted, the time it takes to adopt them, the size of the legislative acts, the entropy (i.e. the spreading of the policy fields) and the way those elements evolve through time (Brouard and al., 2009). We claim that the willingness to avoid open conflicts through legislation resulted in fewer and lengthier laws, in longer bargains and in a destabilisation of the general patterns of law-making. The point related to the duration of the bargains has already been made (see Figure 1). Figure 6 presents the number and types of EU laws adopted.

Figure 6. The number of adopted EU laws (1996-2016)

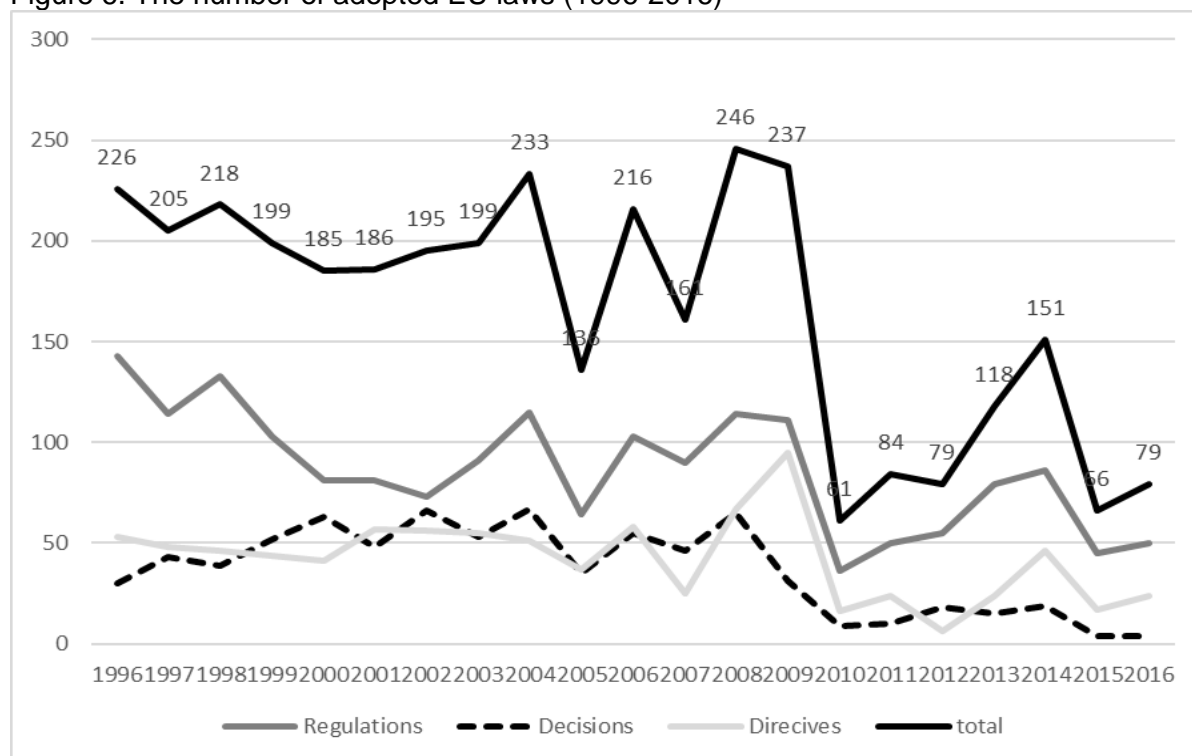
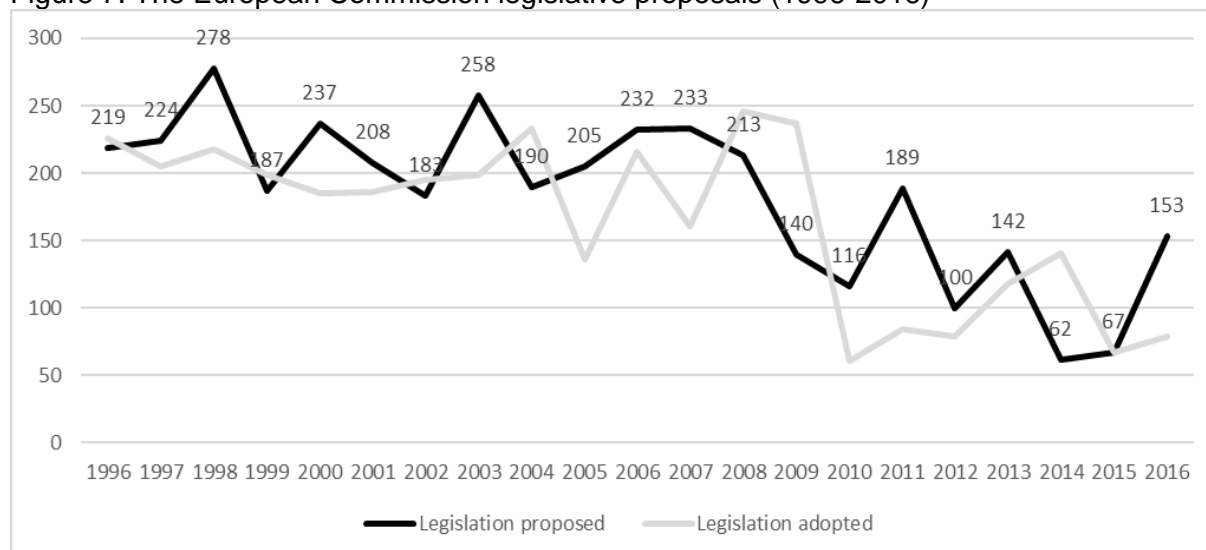


Figure 6 indicates that the number of EU laws declined suddenly in 2010. In general, after European elections, less laws are adopted (see the years 2000, 2005 and 2015). Yet, the decrease is more pronounced for 2010 and regards all legislative instruments. The other striking feature is that the quantity of EU laws is still very inferior to the pre-2010 level. On average, more than 200 legislative texts were adopted every year before 2010 while since 2010, on average, less than 100 acts are adopted every year. Such a gap is also noteworthy because the legislative agenda of the EU is supposed to be characterised by a marked stability resulting from both the incomplete capacity of the EU to act on any issue and the long-term budgeting through the financial perspectives (Brouard & Grossman, 2006). EU public policies are supposed to be more independent of politicians' shifting of attention than domestic ones. Long term records of EU legislation analysed by previous studies confirm the continuity in the use of legislative instruments. The number of EU laws progressively grew in the wake of the making of the common market. A correlation has indeed been observed between the number of laws, trade within the EU and ECJ decisions from the 60s to the 90s (Stone Caporaso 1998). After the making of the single market in the early 90s, a stabilisation of legislative activity and even a decrease in the use of some legal instruments have also been pointed to (Häge 2011). Yet, those trends were far more gradual than the ones that are observable for the recent period.

The aim of the paper is not to develop a comprehensive explanation for the decrease in the number of adopted acts only. Several elements of explanation related to the higher number of Member States, the greater involvement of the EP and the general public mistrust vis-à-vis the EU can be mentioned. A key explanation has also to be found in the strategy of the European Commission. As indicated at figure 7, the Commission tends to propose quantitatively fewer legislative drafts.

Figure 7. The European Commission legislative proposals (1996-2016)



Source for proposals: <https://ec.europa.eu/transparency/regdoc/?fuseaction=search> and Häge 2011

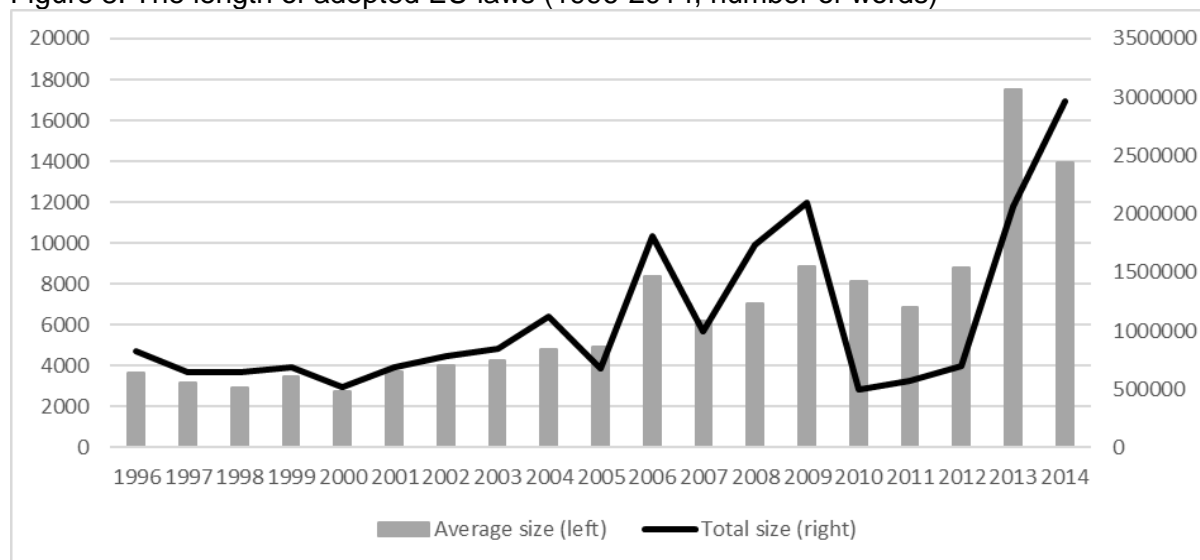
Note: those figures include proposals that have not or not yet been definitively adopted by the Council and/or the EP

Figure 7 shows a gradual decrease of the legislative proposals. The trend is logically similar – although being more gradual – to the trend related to the adopted legislation. Therefore, the official priority given to the better regulation agenda by the Juncker Commission cannot be regarded as responsible for this shift. Under Barroso, the Commission had already started to

initiate less legislative proposals, a decision made possible by the greater leadership of the presidency and the general secretariat over the institution (Kassim and al. 2017).

The Commission is less central to the trend related to another feature of the legislative regime under consideration, the length of the adopted laws, presented in figure 8.

Figure 8. The length of adopted EU laws (1996-2014, number of words)



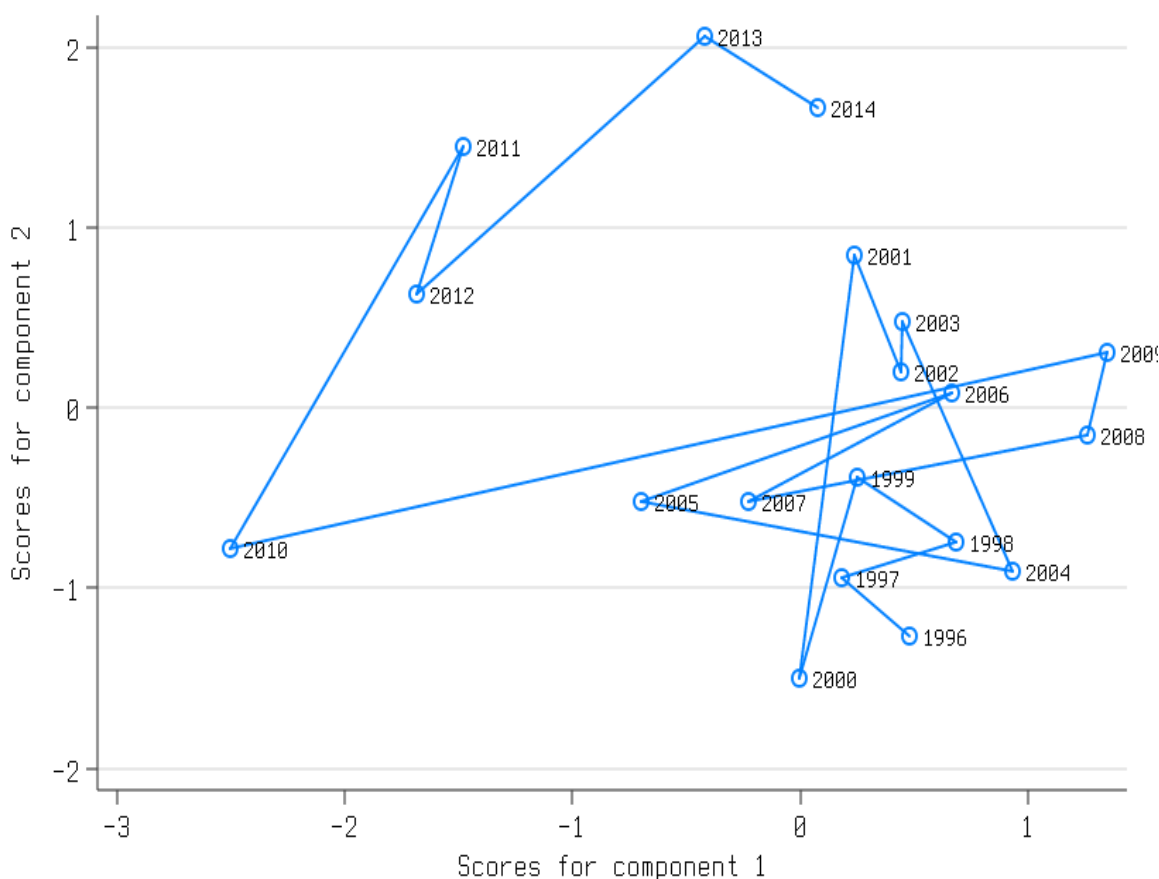
Note: annexes excluded

Figure 8 makes clear that, over a period of 19 years, the length of EU laws has considerably increased. The global volume of legislation has increased slowly but not continuously given the legislative fall of 2010. The progression of the average size of legislative acts is a more recent trend but is strongly marked over the last two years. This trend can be regarded as a source of surprise since comparative data tend to indicate, again, that political systems are generally stable on this dimension. Huber and Shipan (2002) demonstrated that, in Western democracies, legislative length translated two kinds of feature of a given political system: long-term ones (corporatism, federalism, legal tradition) and middle-term ones (parliamentary basis of the government). Therefore, sudden shifts are unusual. It is true that in the US, the number of pages of public laws have been multiplied by more than three but within a span of time of more than 40 years going from less than 2000 pages (84th Congress) to 5200 for the 113th Congress (Congress 2008).

Lastly, a global picture of the trends related to the legislative regime of the EU can be depicted through a geometrical analysis of most of the trends considered. We ran a principal component analysis with four series of data: the number of laws, the duration of the procedure, the length of laws and their entropy⁸. The PCA covers 19 years from 1996 to 2014 included. Two main factors emerge from it and are presented in figure 9.

⁸ The spreading of EU laws between policy fields (or entropy) is more complex to address as each piece of EU legislation is characterised by one to four unhierarchized policy fields by the Eurolex database. We therefore considered the name of the main EP committee in charge of reporting on draft legislation as a proxy for entropy. The trends (not shown here) indicate that the legislative agenda shifted in 2010 in the sense of more concentration.

Figure 9. A geometrical analysis of the legislative regime of the EU (1996-2014)



The striking element from figure 9 is the lack of stabilisation of the legislative regime since 2010 as indicated by the distance between the years for the period 2010-2014. So far, the EU has not shifted from one pattern of legislative productivity to another. Rather, the traditional way of legislating in the EU has entered into a period of trouble that has not ended yet.

Therefore, as indicated by Hypothesis 2, there is an alteration of the legislative regime of the EU in the sense of a greater Malthusianism and instability. We interpret the post-2009 phase as the conjunction of greater tensions between EU actors and the continuity of a consensual policy style. Faced with those contradictory trends, EU legislators have progressively decided to reduce the scope of legislation, to take their time in behind-closed-doors bargains and to be more specific on what they agree on, as shown by the increase in the length of the adopted laws.

7. Conclusion

The analysis of different features of the EU legislative activity over the last two decades leads us to a balanced conclusion regarding the effect of the multi-crisis context how EU laws are prepared. On the one hand, most EU actors have kept committed to seeking compromises in order to reach a large level of consensus. On the other hand, the search for consensus has often been tedious. Those trends translate in a deep alteration of the legislative regime of the EU in the sense of a decline of productivity and of a greater instability.

Although we provide detailed accounts for those developments, largely based on comparative literature, we acknowledge that in-depth investigation of the explanatory factors remains to be

done. In the contemporary context, it is not clear yet what pushed, for instance, the Commission to propose fewer bills or the Council and the EP to avoid open internal or inter-institutional conflicts. We suggest that those trends are coherent with key features of the EU policy-making system: the resilience of the previous organisational style, the willingness to avoid public conflicts and deadlocks, and the possibility to differentiate public positioning from secret bargains.

As said in Introduction, a more theoretical issue associated with our study has to do with the concept of consensus. It is not easy from our observations and analyses to conclude on the constraining power of the consensual style of policy-making. On the one hand, we have shown a great stability regarding the level of agreement within the two EU legislative bodies. The fact that, for instance, supposedly Eurosceptic or populist Prime ministers did not decide to systematically oppose Council decisions, is a strong case in favour of the great impact of the norms of consensus and compromise. On the basis of that result, it would not make sense to assume that journalists and bureaucrats are wrong when they describe major episodes of tensions within the European Council. The striking feature of our results is actually that when acting as law-makers, Member States often succeed in putting aside other matters of division between them. The same can be said with large shares of MEPs able to agree despite the electoral competition. There appears to be an asymmetry between the ability of the legislators to contain conflicts and the greater tendency of the heads of states acting in the European Council to explicitly mention their divisions. However, we should make two caveats.

First, the disjunction between informal bargains and official positions taken in the EU enables some actors to play complex double games. Some influential Member States may decide for instance to follow uncooperative strategies by pressing the Commission not to act or by refusing to deal with the Council Presidency and finally join the majority once a political agreement has been found. Unfortunately, quantitative behavioural data based on official records do not allow us to distinguish between a facade of consensus and genuine cooperation. Second, a reason for the resilience of compromise could precisely be the need for it in a period of tensions. In other words, EU actors could spend more and more time on secret bargains not because they are induced to do so by existing rules and previous norms of behaviour, but simply due to the remoteness of their initial positions.

In conclusion, it can be said that the stakes related to the changing patterns of the legislative procedure are high. The resilience of consensus or the blocking effect of conflict question the capacity of the EU to produce public policies able to be both efficient and widely accepted. In times of crisis, a regional organisation seems to face more directly (than an old country) the classical trade-off between representativeness and action. The search for compromise and consensus in the making of European laws appears to be dictated by the need to legitimate EU policies. In a period of rising populism and Brexit, it makes sense to circumscribe divisive decisions to a few issues only – for instance refugees' reallocation or the control over public deficits. Yet, the price of consensus is high in terms of policy efficiency. With an average of nearly two years of bargains in order to pass laws, EU legislators lack reactivity – at least through law-based policies. They also accept not to legislate in some policy fields. Therefore, they run the risk of being criticized on the one hand and, on the other hand, of leaving the responsibility for decisions to other authorities such as judges or bureaucrats, or to other levels of governance. Pusillanimous consensus is a risky strategy of legitimation.

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