EUROPEAN POLICY ANALYSIS

COVID-19: The EU legislative process proves resilient and adaptable, but democracy has suffered

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Summary

This paper looks at the long-term trends in EU legislative affairs and the consequences of the pandemic on the working methods of EU institutions. More specifically, it analyses the resilience and adaptation of the legislative process in the COVID-19 crisis as well as whether it still meets the same democratic standards as before.

We show that the number of adopted legislative acts was exceptionally low in 2020. And while the number of legislative proposals by the European Commission continued to decline, the average duration of the legislative process, which had reached an all-time high in 2016, decreased and deviated from the previous trend in the past four years. The pandemic did not allow the EU to work in the same way as before. Both the institutional preparedness and the responses of the major EU institutions (the European Commission, the European Parliament, the Council of the EU, and the European Council) varied to a great extent. To some extent, the EU institutions and the legislative process have become less accessible, less transparent, and less accountable. Certain formal procedures have had to be replaced by alternative means of reaching decisions. This has shifted power within institutions and also in the inter-institutional game.

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1. Introduction

The COVID-19 pandemic has hindered the EU institutions from working in the same way that they had previously done: physical meetings were too dangerous, travel was impossible. Decision-making processes have been affected in every part of the world, but the EU – as an entity that consists of 27 member states, has 450 million inhabitants and covers a multitude of policy areas – has probably been more affected than smaller and more limited political systems or organisations. Besides, the EU political system heavily depends on negotiations and compromises—the success of which relies on face-to-face contacts. All EU institutions have tried to continue 'business as usual' as much as possible in a pandemic. Their working methods have changed with big steps in digitalisation and, for example, the formalisation of video conferences.

The following analysis will be guided by three key words which are defined below: *resilience*, *adaptation,* and *democracy*.

In the pandemic, *resilience* has become a buzzword. Both as a virtue and an objective, the term resilience had previously been used in ecology, physics, psychology, public policy, and international relations. Even the European Union embraced resilience as a concept in the 2016 European Union Global Strategy. Designating the ability to recover its initial form after a big shock, resilience refers among other things to the governance resources of societies and organisations that allow them both to prevent shocks and to cope with them, not by passively absorbing them, but by strengthening themselves. Resilience includes reorganising and renewing. To be resilient is to be able to change in response to external shocks, retaining core functions while at the same time acquiring new features and assets through reorganisation and renewal (Walker et al. 2004).

Adaptation, in turn, has also been used widely. For behavioural approaches to politics, political systems are comparable to biological systems in terms of their adaptation to the environment. They also adjust to environmental conditions. While many insights can be generated from analysing the EU as a political system, the focus of our analysis is merely to examine the legislative process in the EU during the pandemic while taking into account how it has developed over a longer timeframe. Since the beginnings of European integration, the different institutions have evolved substantially, but they have also shown a high degree of stability.

The EU is, finally, governed by the principle of representative *democracy*. Citizens are directly represented at the EU level in the European Parliament. Member states are represented in the European Council and the Council of the EU via their governments which are themselves democratically accountable either to their national parliaments or to their citizens. These three EU institutions are, together with the European Commission, the key actors in EU decision-making. The EU's democratic deficit has been the subject of lively debates, but its legislative process can generally be considered legitimate and democratic.

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The ability of the EU's legislative process to cope with the pandemic and to strengthen and adjust itself in an incremental way is at the centre of the analysis in this paper. The first part of this paper relies on data collected at the Observatory of European Institutions and analyses if the legislative machinery has (or has not) gathered pace in 2020. Subsequently, the second part examines how the European Commission, the European Parliament, the Council of the EU, and the European Council reacted in terms of their working practices and if they, for instance, changed their respective Rules of Procedure. Based on the previous findings, the third part of the paper, finally assesses the consequences that the pandemic has thus had on the EU's legislative process in democratic terms.

2. An acceleration of the trend towards a lengthier and less productive legislative process

The pandemic has forced the EU institutions to work remotely, which represents a significant challenge for all actors. As a direct consequence, the institutions did not have the opportunity to negotiate and find compromises on a face-to-face

Figure 1. Yearly number of legislative acts proposed and adopted
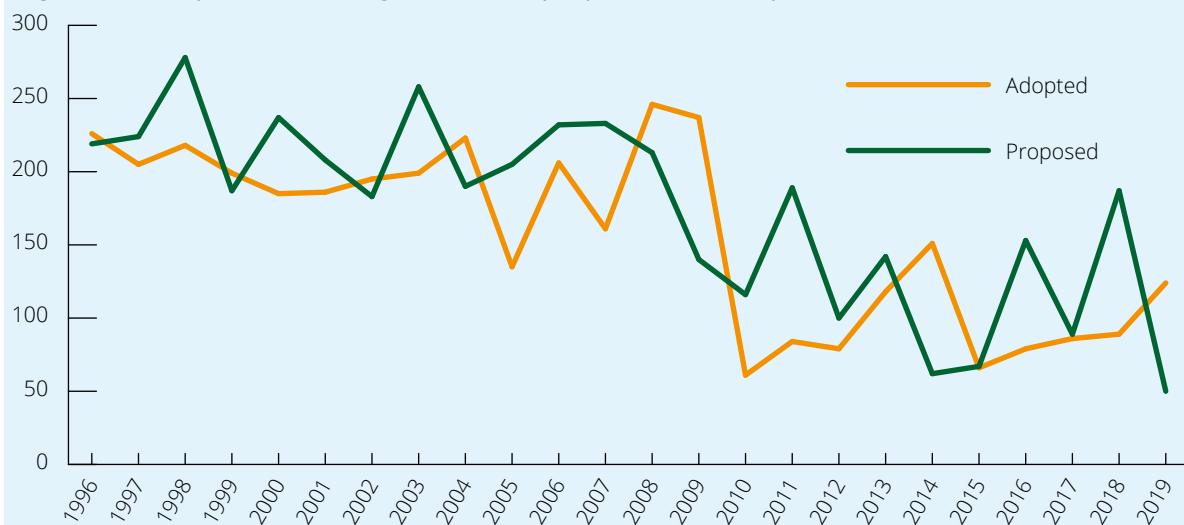
Source: Monthly Summaries of Council Acts, Observatory of European Institutions.

basis. Therefore it is not a surprise to see that the number of legislative acts adopted with the ordinary legislative procedure in 2020 is exceptionally low.

This trend towards a significant drop in the number of legislative acts adopted intensified with the pandemic but is far from completely new. It has been regularly observed since 2010. The pandemic is thus not a disruptive event in that respect.

2.1 A drop in the number of legislative acts adopted

The trend towards the drop in the number of legislative acts adopted during the pandemic is to be put in perspective. Indeed, as the data of the Observatory of European Institutions[1] show, the number of legislative acts proposed has also been significantly dropping since 2010 (see Figure 1).

The post-2009 period has seen the emergence of some types of institutional self-restraint: the European Commission has issued fewer proposals. This institution has become less collegial, with increased internal leadership from the President. Since 2004, in a climate which is increasingly

hostile to 'Europe', Barroso and then Juncker believed that only strong presidential leadership could restore respect for the EU. It was also thought of as an effective path following the expansion of the College after enlargement (Kassim et al. 2017). The increased leadership of the President made it easier to block some legislative proposals from its services with less difficulty than before. Legislative drafts were filtered to avoid matters of conflict and proposals presumably have been circumscribed to what is strictly necessary.

The decreasing number of legislative acts also seems to be related to the use of comitology, the set of procedures through which the European Commission exercises the implementing powers conferred on it and is assisted by committees of representatives from EU countries.

Over the past 20 years, there were indeed strong inter-institutional tensions and disagreements as the result of non-legislative rule making. Arguably, these disagreements have captured the interests of the legislative institutions and had the potential for disrupting legislative decision-making. Since

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[1] Centre de Données Socio-Politiques [dataset] (CDSP, CNRS–Sciences Po) and Centre d'Études Européennes (CEE, CNRS-Sciences Po) [producers], Centre de Données Socio-Politiques [distributor]. Unless otherwise specified, we use this dataset. The Observatory of European Institutions includes all EU definitively adopted legislative acts as they are listed in the Monthly Summaries of Council Acts between 1996 and 2019. Each act is related to 100 connected variables. The variables deal with descriptive elements related to the legislative acts (for instance their size or the policy field) and behavioural elements related to the legislative process (such as the duration or the votes within EU institutions).

the Lisbon Treaty, comitology has been revised and now affects the fundamental aspects of all EU policies. The 'delegated act' procedure allows the Commission to adopt 'non-legislative acts of general application to supplement or amend certain non-essential elements' of a legislative act. The reform of comitology under the Lisbon Treaty strengthened the role of the EP and the Member States in the delegation process. Article 290 places the Parliament and the Council at strict parity in their control of delegated acts. Together with the Council, the EP now enjoys not only the right to veto but also to revoke the Commission's delegated competence. Similarly, under Article 291 the EP becomes equal co-delegator with the Council where the ordinary legislative procedure applies and is responsible alongside the Council for setting the terms of delegated authority (Stratulat and Molino 2011).

2.2 A rise in the number of written procedures

One of the most significant changes in institutional practices in reaction to the pandemic was the decision to resort to, and simplify, the use of the written procedure in the Council of the EU. In this procedure, the General Secretariat of the Council puts in writing a decision for adoption of an act and asks the members of the Council to respond in writing within a deadline as to whether they accept, object, or abstain.

Written procedures are not new in the decision-making process. The extensive resort to written procedures during 2020 shows that the Council prefers using a well-known procedure, instead of creating a new possibility to vote and decide remotely/digitally. This can be explained by the strong advantages of the written procedure. Essentially, it goes faster than the normal process. It is also a procedure already well-known and already used by Ministers. One can assume that ministers and civil servants preferred resorting to the written procedure (that they already know) instead of initiating a new (digital) tool.

Table 1 and Figure 2 show the extensive use of written procedures in the Council particularly during the two periods of lockdown (April–June

2020 and September–October 2020). The drop in the period between June and September can obviously be explained by the summer break. The data show that written procedures have been used continuously throughout 2020.

Many acts that usually are adopted through the ordinary legislative procedure are now adopted through written procedures. Therefore, it must be emphasised that the EU did not stop working on legislative files. There was not a complete halt, in normal times, however, many of these acts would have been placed in the 'legislative acts' category. The Council of the EU itself (in the Monthly Summaries of Council Acts) considered very few items as 'legislative' in 2020, because they were not adopted at in-person meetings of ministers but via the written procedure in COREPER. In addition, it is important to stress that items related to budget are also not considered 'legislative' *stricto sensu* by the Observatory of European Institutions.

Table 1: Adoption of legislative acts and non-legislative acts in 2020

	Written Procedure	Legislative Acts	Non-Legislative Acts
January	8	1	15
February	6	4	40
March	n.a	n.a	n.a
April	49	-	-
May	80	-	-
June	123	-	-
July	55	2	15
August	9	-	-
September	38	-	13
October	86	2	37
November[2]	n.a	n.a	n.a
December	148	-	-
TOTAL	602	9	120

Source: Monthly Summaries of Council Acts, Observatory of European Institutions, data for March 2020 and November 2020 not yet available.

[2] The monthly summary of Council acts for March and November 2020 are not yet made available on the EU Council website.

Figure 2. Number of written procedures in the Council of the EU (2020)
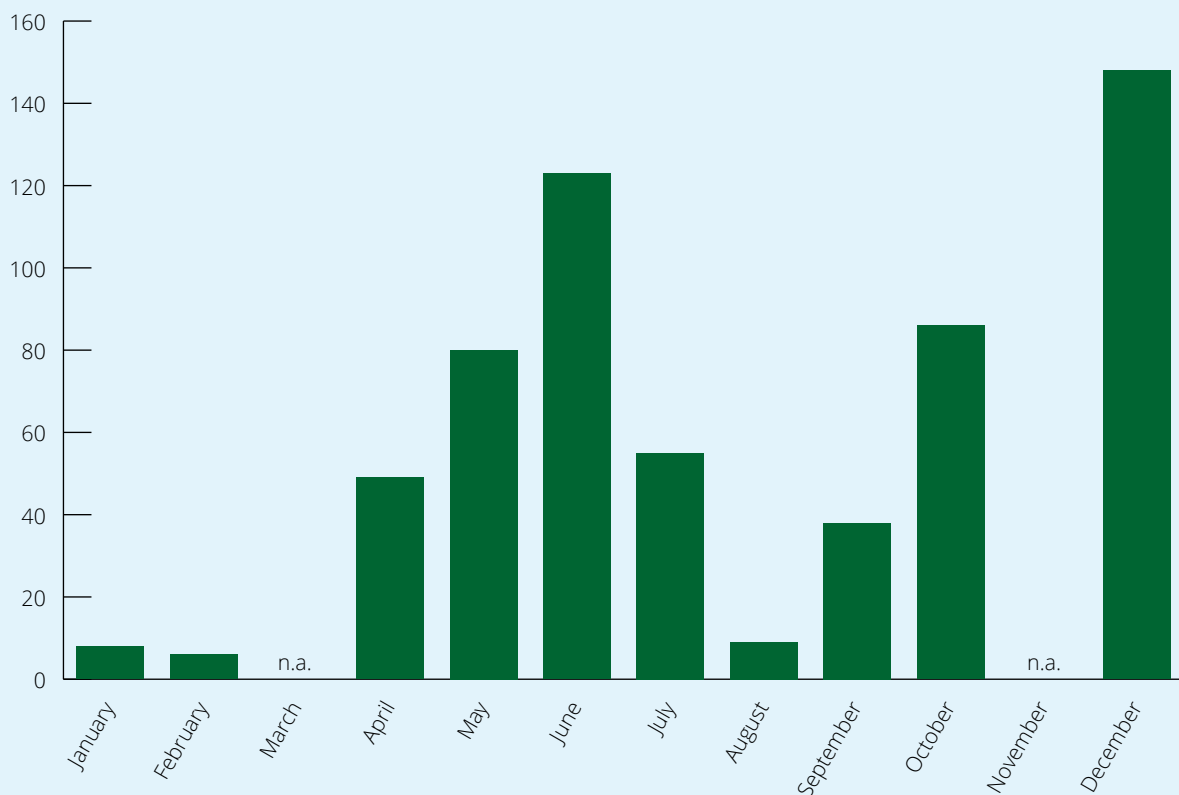
Source: Source: Monthly Summaries of Council Acts, Observatory of European Institutions, data for March and November 2020 not available.

As stated above, the agreement on the derogatory extension of the written procedure was difficult to adopt as EU capitals were somehow reluctant to let COREPER have power. Some observers were prompted to claim a victory for the community method (Bodson 2020). However, this interpretation raises some doubts. The massive resort to written procedures and its simplification can probably be more linked to the overall drop in the number of legislative acts adopted through the ordinary legislative procedure and to the fact that institutions use more unorthodox procedures to adopt acts. Because it might be too cumbersome to bridge all the positions, institutions might be more inclined to use ways other than codecision to pass texts. So the trend towards the massive use of written procedures is obviously to be referred to the pandemic context, but it might also suggest a deeper trend towards less use of codecision.

Since 2009–2010, many decisions (e.g. Next Generation EU, environmental issues) agreed by the EU institutions have to some extent bypassed the ordinary legislative procedure. Such new practices have become the norm and limit the role of the European Parliament.

2.3 A general slowdown of the legislative process

Another striking trend in the legislative process has been an increase in the duration for concluding legislation, from the proposal to the successful entry-into-force of legislative texts. While the legislative process took about 350 days in 1996, it doubled to more than 700 days in 2016. Since then the duration of the legislative process has decreased significantly.

Of course, the pandemic has sped up the process, with the necessity to respond quickly to urgent matters. In 2020, only around 35 days were needed for the adoption of the nine legislative acts adopted over the period January to October 2020 (compared to around 550 days in 2018). This calculation excludes files under the written procedure as well as files related to Brexit matters and EU budget, listed as non 'legislative'.

Figure 3. Duration of the EU legislative process (average number of days). 1996–2019
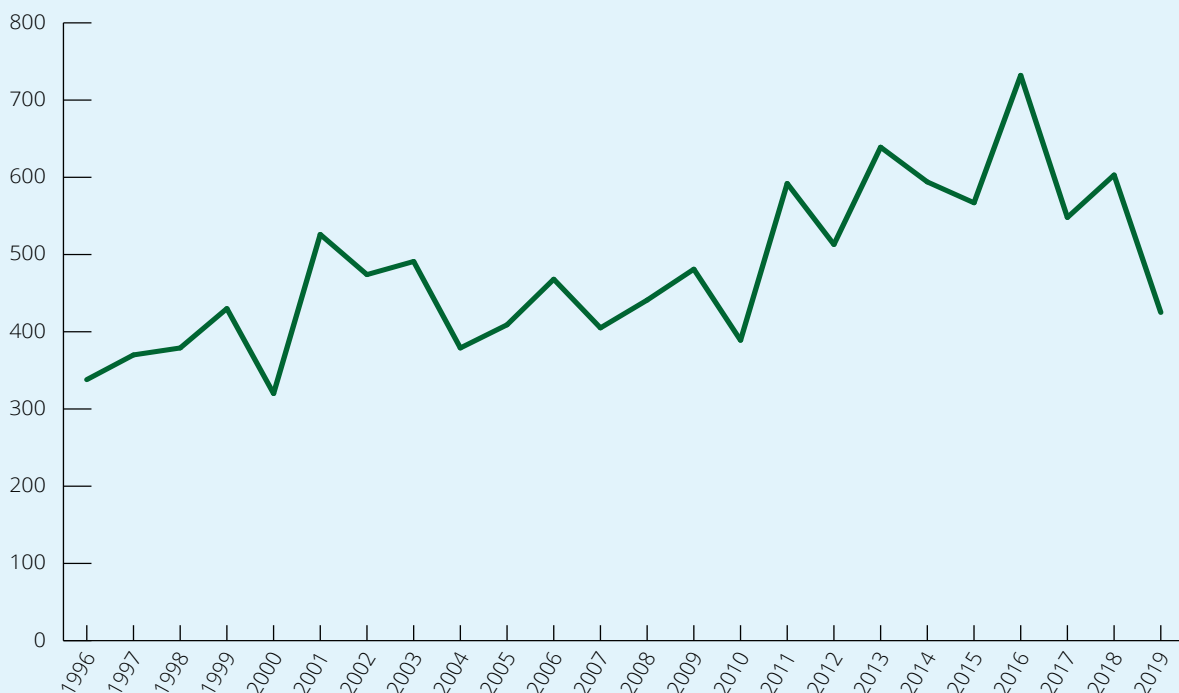
Source: Observatory of European Institutions.

As far as issues not related to the pandemic are concerned, the initiatives scheduled in the Commission's work programme continued at a slower pace. This trend confirms the long-term perspective, where, as shown above, the overall duration of the legislative process has become longer over the past 25 years.

2.4 A narrower legislative output
2.4.1 Sectoral breakdown
The EU's legislative output has been the subject of a trend that could already be observed for some years with a concentration on a limited number of policy fields. Figure 4 shows that over the period 1996–2014, the EU policy output was fragmented in terms of policy fields.

In the period 2014–2019, nearly 30% of the overall legislative output was concentrated in the policy fields of Home Affairs and the Internal Market (probably as a result of both the migratory crisis and the changes introduced by the Lisbon Treaty).

The topics of the acts that the EU institutions adopted in the year 2020 are also of crucial importance. During the pandemic the legislative process has stayed formally intact. However, ministers actually voted on and adopted legislative acts in only six Council meetings. These acts (see Table 2) were arguably not extremely salient and dealt with topics like the labelling of tyres or crowdfunding. The major policy fields of 2020 (such as the immediate reaction to COVID-19, setting up instruments for the economic recovery or preparing for a no-deal Brexit as well as the legal changes after the future relationship between the EU and the United Kingdom was agreed) were not formally decided by Ministers at in-person meetings. Instead these topics were handled by civil servants in COREPER via the written procedure and many of the major policy decisions at the EU level in relation to COVID-19 or the recovery were negotiated between the Heads of State or Government at European Council meetings.

The few legislative acts adopted in 2020 show a high concentration in terms of policy fields. As Table 2 (above) shows, the acts adopted were implemented mostly in finance and environmental policy fields. Without doubt, this concentration of policy fields was highly exacerbated by the pandemic.

Figure 3. Yearly evolution of legislative acts' sectoral repartition (1996–2014)
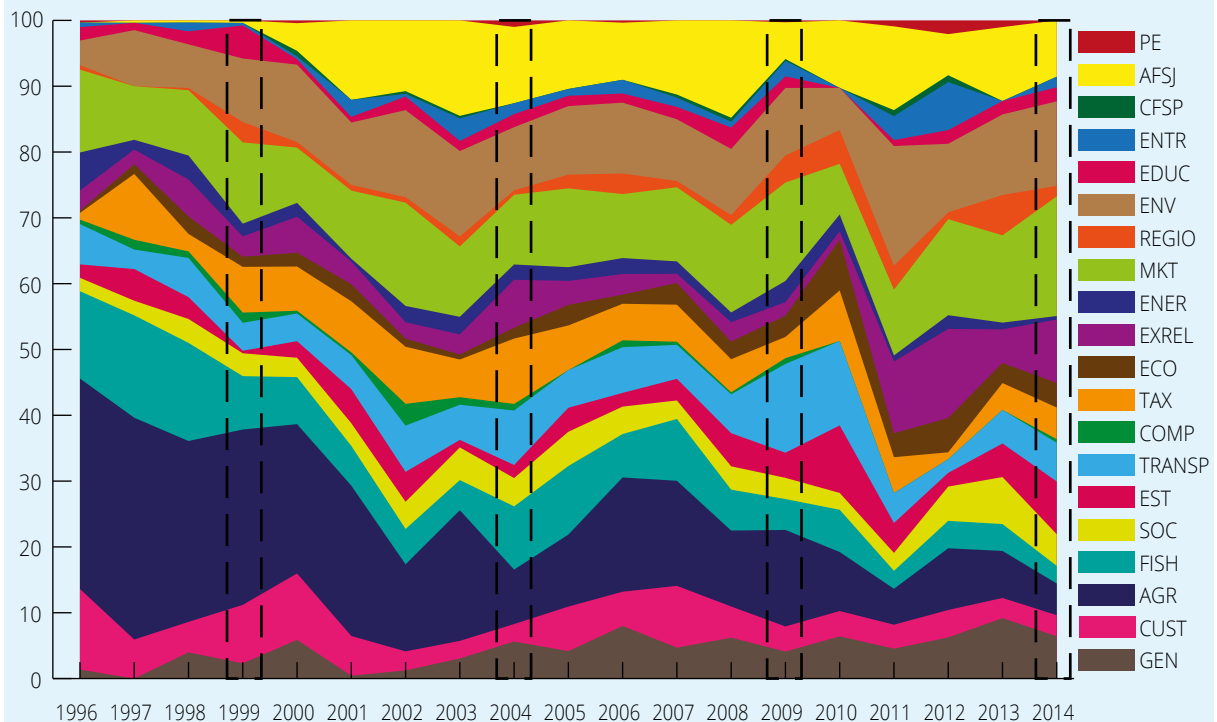
GEN-General, financial, and institutional matters. CUST-Customs Union and free movement of goods. AGR-Agriculture. FISH-Fisheries. SOC-Freedom of movement for workers and social policy. EST- Right of establishment and freedom to provide services. TRANSP-Transport policy. COMP-Competition policy. TAX-Taxation. ECO-Economic and monetary policy and free movement of capital. EXREL-External relations. ENER-Energy. MKT-Industrial policy and internal market. REGIO-Regional policy and coordination of structural instruments. ENV-Environment, consumers, and health protection. EDUC-Science, information, education, and culture. ENTR-Law relating to undertakings. CFSP-Common Foreign and Security Policy. AFSJ-Area of freedom, security and justice. PE-People's Europe. In detail, the Figure shows the percentage of acts adopted each year, for each policy field (here represented by a specific colour). There is a high yearly variation of the policy agenda which is rather equally dispersed: no specific policy field attracts more than 12–15% of the overall total of the EU legislative output. As examples, 17% of the overall output goes to Agriculture, 13% to the Internal Market; 10% to Environment, 9% to Fisheries, and so on.

2.4.2 More consensual proposals?

The second key point to be observed is that most of the legislative acts that were adopted at in-person Council meetings in 2020 had been initiated in previous years. With the exception of the regulation on organic production and labelling of organic products (introduced in September 2020), the other acts were mostly introduced in 2018 or 2019. This does not really come as a surprise as in times of a pandemic the legislative machinery has slowed down. The concrete capacity of the Commission to introduce new legislation was also affected by the preparation of its massive fiscal response to the pandemic for which a range of different services in the Commission had to draw up plans and create new structures, for instance in order to be able to advise member states on their Recovery and Resilience Plans.

The legislative acts adopted in 2020 (see Table 2) can also be considered as rather consensual. This trend towards introducing less controversial legislation is a general one and is not specific to the pandemic, even if it was surely exacerbated in 2020. The post-2009 period has seen the emergence of a more active Commission, filtering legislative drafts to avoid matters of conflict (see above). It puts aside the most controversial drafts or focusses on a limited number of them, for example the migrant reallocation scheme in case of the Juncker Commission (Kassim et al. 2017). This can be assessed in a more quantitative manner. There are high levels of variation in success between policy fields. More 'regulatory areas' carry high rates of adoption (for instance, the Internal Market where 48% of proposals have been adopted). By contrast, there are lower success rates in areas that concern investment,

Table 2: List of legislative acts adopted at in-person Council meetings in 2020

Regulation (EU) 2020/127 of the European Parliament and of the Council of 29 January 2020 amending Regulation (EU) No 1306/2013 as regards financial discipline as from financial year 2021 and Regulation (EU) No 1307/2013 as regards flexibility between pillars in respect of calendar year 2020
Council Directive (EU) 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers
Council Regulation (EU) 2020/283 of 18 February 2020 amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in order to combat VAT fraud
Council Directive (EU) 2020/285 of 18 February 2020 amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises and Regulation (EU) No 904/2010 as regards the administrative cooperation and exchange of information for the purpose of monitoring the correct application of the special scheme for small enterprises
Regulation of the European Parliament and of the Council of 25 May 2020 on the labelling of tyres with respect to fuel efficiency and other parameters, amending Regulation (EU) 2017/1369 and repealing Regulation (EC) No 1222/2009
Directive of the European Parliament and of the Council of 7 October 2020 amending Directive 2014/65/EU on markets in financial instruments
Regulation of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937
Regulation (EU) 2020/1693 of the European Parliament and of the Council of 11 November 2020 amending Regulation (EU) 2018/848 on organic production and labelling of organic products as regards its date of application and certain other dates referred to in that Regulation
Directive of the European Parliament and of the Council of 16 December 2020 on the quality of water intended for human consumption (recast)

Source: The list is compiled from the Monthly Summaries of Council acts, available on the EU Council website. Information for November 2020 not yet available.

spending, and re-distribution (in the area of jobs, growth and investment, only 28% of envisaged proposals have been adopted) or in areas where responsibility is shared with the Member States, such as trade policy, where only 10% of envisaged proposals have been adopted (Dawson 2019)[3].

2.4.3 What happened to initial time plans in the Work Programme of the von der Leyen Commission?

In July 2019, as the candidate for Commission President appointed by the European Council but not yet elected by the European Parliament, Ursula von der Leyen had presented her political guidelines in which she had made four explicit pledges for her first 100 days in office: to propose a European Green Deal, to propose a legal instrument that every worker in the EU has a fair minimum wage, to table measures for binding pay transparency

measures aimed at gender equity, and to put forward legislation for a coordinated European approach on the human and ethical implications of artificial intelligence (European Commission 2019). By 8 March 2020, after 100 days in office, the Commission had put forward the European Green Deal, but it had only started a consultation to fight wage dumping, published a gender-equality strategy featuring mainly existing legislative plans which are blocked in the Council, and only tabled a White Paper spelling out preferred options for legislation.[4]

The European Commission presented its initial 2020 work programme on 29 January 2020. Five months later, an adjusted 2020 work programme was published on 27 May (European Commission 2020b). A significant number of legislative and non-legislative files were postponed by several months while only one file was accelerated: the

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[3] See EPRS report; out of the 547 envisaged proposals, 85 have been either withdrawn or not submitted.
[4] POLITICO Europe, The Commission's 100-day report card, 8 March 2020, https://www.politico.eu/article/the-commissions-100-day-report-card/

publication of a 'joint communication on tackling disinformation - getting the facts right' was moved forward to the second quarter of 2020 and separated from the European Democracy Action Plan, scheduled for the fourth quarter of 2020.

According to the Commission, its 2021 work programme shifts 'from strategy to delivery' and puts an emphasis on new legislative initiatives and revisions of existing legislation. This includes initiatives that were previously planned for 2020 but had to be postponed due to the pandemic. In December 2020, the Council, Commission, and Parliament subsequently set out the EU's legislative priorities for 2021 in a Joint Declaration. They also agreed Joint Conclusions on Policy Objectives and Priorities for 2020–2024. For the first time, such a multiannual perspective has facilitated long-term planning beyond the annual priorities. The EU institutions have thus chosen to try to address the backlog in the legislative machinery that has been caused by COVID-19 by increasing their inter-institutional coordination.

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One can summarise that the legislative programme and overall planning of the EU institutions has thus been disturbed and fundamentally changed by the pandemic. The previous double phenomenon of a drop in the number of legislative acts proposed by the Commission, on the one hand, and of a general slowdown of the legislative process with an increase in its duration, on the other, has essentially continued: the exceptionally low average duration for the adoption of legislative acts in 2020 in conjunction with the very low number of legislative acts adopted in 2020 can be explained by the high number of written procedures and must be seen in the broader context. A new Commission has entered office, many legislative acts are still 'in the pipeline', even from the previous Juncker Commission, and many legislative initiatives were postponed in the 2020/2021 work programmes by the von der Leyen Commission.

3. The large impact of COVID-19 on working methods of the EU institutions

The EU institutions have tried to continue as much 'business as usual' as possible in the pandemic. There has been a high degree of continuity, even if COVID-19 posed a huge challenge to how the EU institutions had been working before. All EU institutions moved parts of their activities online in order to continue their work. In general, the working methods changed with big steps in digitalisation and, for instance, the formalising of video conferences.

Both the preparedness and the responses of the institutions examined in this paper (Commission, Parliament, Council and European Council), however, varied to a great extent. Beyond these four EU institutions, the internal rules of the European Central Bank provide its bodies with handy procedures regarding teleconferencing, written procedures, and remote voting. This is similar to what the European Court of Auditor's own rules of procedure and their implementation foresee. The Court of Justice of the EU had to make changes to its working arrangements.

3.1 European Commission

Only four months after the institutional renewal of December 2019, the pandemic hit the European Commission when it was preparing to roll out its agenda for the next years. The Rules of Procedure of the European Commission did not contain a provision on video conferencing, but they were modified in April 2020 in order to allow for members of the College to attend via video conference or teleconference: 'In exceptional circumstances, if part or all of the Members of the Commission are prevented from attending a meeting of the Commission in person, the President may invite them to participate by means of telecommunication systems' (European Commission 2020a).

As an institution, the European Commission was affected by COVID-19 when Commissioner Phil Hogan had to resign because he had not followed the COVID-19 rules in his home country Ireland. This led to a small reshuffle in which Valdis Dombrovskis took over the trade portfolio while Mairead McGuinness became the new Commissioner for Financial Markets. Quite a few

(legislative) proposals were delayed or had to be postponed, but the Commission also tabled new proposals (on the Resilience and Recovery Fund, for instance).

Several members of the College, including the Commission President (twice) have had to self-isolate after being in contact with people who have later been diagnosed as infected with COVID-19. Von der Leyen left a European Council meeting in October 2020 in order to go into quarantine. However, her conduct was questioned after it emerged that she had still travelled to her home country Germany. Also in October 2020, two Commissioners, Mariya Gabriel and Margaritis Schinas, tested positive for the Coronavirus.[5]

3.2 European Parliament
After the May 2019 European Parliament elections, the institutional renewal was only completed in December 2019. As an institution that relies on the physical presence of a large number of persons and numerous meetings with frequent traveling to and from MEPs' constituencies, the functioning of the European Parliament has subsequently been particularly affected by COVID-19. In addition, the European Parliament has its seat in Strasbourg where, according to the EU Treaties, all plenary sessions must be held while other work takes place in Brussels. The March 2020 plenary session in Strasbourg was the first plenary session that was reduced to just two days for the reason of 'force majeure' and took place in Brussels.

In order to allow for the Parliament to function and continue its participation in EU decision-making and because the Rules of Procedure neither provide for remote voting nor for virtual meetings, an alternative electronic voting procedure was put into place. The Bureau of the Parliament decided to allow, upon a decision by the President, a derogation from the usual voting procedures: MEPs now receive a voting paper by email which must be returned (with a simple yes or no vote, and their signature), scanned or photographed.

To sum up, MEPs have not returned to Strasbourg since the start of the pandemic, where the last plenary session took place in February 2020. Moreover, MEPs have been able to participate and speak in plenary sessions remotely from the liaison offices of the European Parliament in member states since October 2020.[6] Parliamentary committees and other bodies had already been meeting virtually for months.

> 'As an institution that relies on the physical presence of a large number of persons [...], the functioning of the European Parliament has subsequently been particularly affected by COVID-19.'

3.3 Council of the European Union
The Council was only subject to its routine changing-of-the-guard in early 2020 when the Croatian Council Presidency entered its six-month term. It maintained essential meetings while non-essential or non-urgent Council meetings were cancelled or postponed. Increasingly video conferences were held, but decisions have only been taken by written procedure in COREPER (Council of the European Union 2020).

The Rules of Procedure of the Council provide that the presence of a majority of the members of the Council is required to enable the Council to vote (Article 11, Rules of Procedure of the Council) and they do not foresee virtual meetings. The COVID-19 travel restrictions, however, made it difficult for ministers to meet physically and to reach the quorum.

However, the Rules of Procedure state that acts of the Council on urgent matters may be adopted by a written vote and that it is for COREPER or the Presidency to decide to use that procedure. Under the ordinary written procedure, a decision for

5 EU Commissioner Margaritis Schinas tests positive for coronavirus, https://www.politico.eu/article/eu-commissioner-margaritis-schinas-tests-positive-for-coronavirus/
6 European Parliament: Q&A on extraordinary remote participation procedure, Plenary session, 19 October 2020, https://www.europarl.europa.eu/news/en/press-room/20200325BKG75805/

adoption of an act is put in writing by the General Secretariat, asking the members of the Council to respond in writing within a deadline whether they accept, object, or abstain. The rules also state that unanimity is required for all decisions to use the written procedure.

In March 2020, the Council adopted a temporary derogation from the requirement that each use of the written procedure in COREPER must be authorised by a unanimous decision in the Council or COREPER. Instead, the decision rule applicable in the Council for the respective legal act applies (Bodson 2020, 2–3). The derogation was valid for one month but has been renewed regularly since then. The Council is therefore able to take decisions via the written procedure in COREPER under unchanged decision-making rules. Nevertheless, the decision to resort to the written procedure was not an easy road as there was quite a dispute between capitals and COREPER on the derogation related to the unanimous vote. The challenge was to let COREPER decide on lifting the unanimity requirement necessary to process by written procedure. The debate was indeed about deciding where the power would lie during the crisis: among the Permanent Representatives in Brussels, or in the 27 EU capitals (Bodson 2020).

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Furthermore, the Council decision specifies that any Council act concerned 'should, where possible and relevant, be subject to prior political discussion by ministers, for example by informal videoconference, in order to ensure to the maximum extent possible, among others, national coordination, public transparency, and the involvement of national parliaments in accordance with the practices of Member States' (Council of the European Union 2020).

An embarrassing diplomatic incident took place in November 2020 when a Dutch reporter intruded into an informal Council meeting of EU Defence Ministers and thereby exposed the flaws in the Council's video conferencing system after a member of one minister's cabinet accidentally shared a photo which contained the URL including five out of six digits of the passcode.[7] The introduction of a new and more secure video conferencing system is (still) under discussion in the Council.

3.4 European Council

In the European Council, President Charles Michel had only started his term in December 2019. All in all, the European Council held 13 meetings in 2020, about twice as many as usual.[8] Two of them were ordinary European Council meetings. Three meetings (including the summit from 17 to 21 July 2020 to agree the Multiannual financial framework and the Next Generation EU Recovery Fund) were labelled as 'Special European Council' meetings. The Heads of State and Government met virtually another eight times and received written 'Conclusions of the President' afterwards.[9] As the Rules of Procedure do not foresee virtual meetings or video conferences, those eight meetings were held as 'informal' meetings without formal Conclusions of the European Council. After their virtual meeting on 26 March 2020, Heads of State and Government published a 'Joint statement of the members of the European Council', but generally there were no lengthy negotiations on the phrasing of formal Conclusions in the first half of 2020 (Bodson 2020, 3).

The repeated absence of formal Conclusions has increased the importance of (digital) press

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[7] Dutch reporter gatecrashes EU defense ministers' videoconference, https://www.politico.eu/article/dutch-reporter-gatecrashes-eu-defense-ministers-videoconference/

[8] In comparison, there were six meetings in 2016, nine meetings in 2017 (one of them to celebrate the 60th anniversary of the Rome Treaty and one of them solely dedicated to Brexit / Article 50) and seven meetings in 2018 (one of them solely dedicated to Article 50).

[9] Own calculation based on https://www.consilium.europa.eu/en/meetings/calendar/?Category=meeting&Page=1&dateFrom=2020%2F01%2F01&dateTo=2020%2F12%2F31&filters=2031

conferences and press briefings. It has also strengthened the role of President Charles Michel who has issued 'Conclusions of the President' after informal meetings in 2020. Compared to the usual Conclusions, these are shorter and more accessible as a result of the use of slightly easier language. The President's Conclusions were called 'Oral conclusions of the President' in 2021, were published in writing, and deviated from the actual remarks at his usual press conference. All this might be a sign of the possible further Presidentialisation of the European Council and an evolution of the role of its President from a mere chairperson towards exercising more leadership. It has also reinforced the role of the European Council as a whole in the decision-making process.

More recently, in early 2021, the European Council has started to resort to 'Statements of the members of the European Council', for example after the virtual meetings of 25–26 February 2021 and 25 March 2021. This novel type of document seems to have a lower status than formal Conclusions of the European Council. It could alter the role of the European Council in the medium-term and affects the potential of some national parliaments to scrutinise their Head of State or Government. Above all, however, it moves some (re-)drafting and amending power back to the member states which are involved again and asked to confirm when all members of the European Council issue a statement.

The two physical meetings of the European Council in autumn 2020 were affected by COVID-19: initially planned for 26 September 2020, a special European Council meeting was postponed by Charles Michel who was quarantined after being in contact with an infected person.[10] In addition, both Ursula von der Leyen and Finnish Prime Minister Sanna Marin left the summit on 15 and 16 October 2020 in order to self-isolate.[11] The final summit of the year, the European Council meeting on 10 and 11 December 2020, subsequently took place as a physical meeting again. Despite the pandemic situation at the time, certain issues such as relations with or sanctions against third countries

cannot be discussed in virtual meetings. The final negotiations on the Next Generation EU package and the rule of law mechanism also required an in-person meeting.

3.5 Institutional relations

The four main EU institutions thus faced particular challenges when dealing with COVID-19. Rules of Procedure are an important instrument for all EU institutions, because they codify and clarify the inner workings of each institution beyond what is written down in the EU treaties.

> 'Interestingly, the Commission was the only one of the four institutions that amended its Rules of Procedure.'

Interestingly, the Commission was the only one of the four institutions that amended its Rules of Procedure. The European Parliament, the Council of the EU, and the European Council have instead put special arrangements in place. They did not modify their Rules of Procedure, but each of these three institutions has put a great emphasis on the temporary nature of the adaptation to COVID-19. The European Parliament continues to stress that it will return to Strasbourg as soon as the pandemic situation allows; the Council of the EU's 'derogation' is only valid for 30 days and then needs prolongation. Finally, the format of European Council meetings mostly depends on the pandemic situation in Brussels and the member states. Consequently, the latter three institutions that did not amend their Rules of Procedures did not see a procedural risk linked to using informal or alternative means for their deliberations and decision-making.

4. What are the consequences in democratic terms?

These times of pandemic have certainly had an effect on the democratic quality of the overall decision-making process. This is most significantly the case for MEPs who had less opportunity to

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[10] EU summit postponed as Charles Michel goes into coronavirus quarantine, https://www.politico.eu/article/eu-summit-postponed-as-charles-michel-goes-into-coronavirus-quarantine/

[11] Finnish PM leaves EU summit to self-isolate, https://euobserver.com/tickers/149779

exchange, negotiate compromises, and so on. Additionally, the European Parliament has been partly bypassed in the response to the crisis. MEPs were not able to be as active in their role of amending proposals as they would have been in normal times. Trilogue negotiations were also hampered by restrictions to meet physically.

This observation confirms a trend that was already observed during the Eurozone crisis. The European Parliament did not really find its role and place in the legislative organisation, despite an overall increase of its powers and functions. Long seen as an ascending institution (Héritier et al. 2019), it is struggling to shape the crisis response and overall policy outcomes. The relative decline of the role of the European Parliament since the fate of the Spitzenkandidaten procedure after the 2019 election seems to continue. Ursula von der Leyen's early promise to forge a 'special relationship' between Commission and Parliament is not only unfulfilled in terms of its key elements such as Spitzenkandidaten, transnational lists, and the indirect right of initiative, but the Commission's work in the COVID-19 crisis response looks like a joint Commission-Council roll-back against a Parliament which had become too assertive (Kreilinger 2020) and which has not proven capable of meeting the expectations placed on it.

The use of written procedures by the Council of the EU is also an important development. Although the chain of accountability remains in place, the political responsibility of national ministers becomes diluted when the legislative process is altered in this way. As mentioned earlier, the different Council formations continued to meet virtually and held informal video conferences. The different legislative files were therefore at least discussed by ministers. Nevertheless, it becomes easier for governments to blame 'Brussels' or their own civil servants in case of parliamentary scrutiny or criticism. The publicity of livestreamed Council meetings also disappeared. This also raised the attention of the European Ombudsman who opened a strategic inquiry in July 2020 on whether the changes fulfilled the requirements of openness and transparency. The conclusions stress that more progress should be made, be it on the necessity to hold remote meetings in public or to make Council

preparatory bodies' discussions public (European Ombudsman 2021). Officially, the use of written procedures will apply until at least July 2021. It will be interesting to see after the pandemic if the agreement obtained in March 2020 will open the door to a more frequent use of written procedures, or if a 'back to normal' scenario – with less power for COREPER – will transpire.

> 'From this perspective, the European Parliament proved to be one of the most capable EU institutions in terms of adapting in the direction of more openness.'

However, the legislative process also became somehow more transparent, because in the European Parliament all digital votes are taken by 'roll call'. When MEPs vote by 'roll call' or 'recorded vote', the services of the European Parliament record and publish which MEPs voted which way. The official statistics of the Presidency show that the number of digital voting operations grew significantly throughout the year 2020.[12] The Parliament met the logistical challenges relatively quickly (Welle 2020). From this perspective, the European Parliament proved to be one of the most capable EU institutions in terms of adapting in the direction of more openness.

5. Conclusions

How resilient was the EU's legislative process, how did it adapt to the challenge of COVID-19 and did its democratic legitimacy and accountability suffer?

Resilience – the governance resources of societies and organisations allow them both to prevent shocks and to cope with them, not by passively absorbing them, but by strengthening themselves – includes reorganising and renewing. With regard to legislative activity, the key EU institutions have proven their capabilities of being resilient. They were able to change in response to the external shock of COVID-19, retained their core functions and, in parallel, acquired new features and assets through reorganisation and renewal (see Walker et al. 2004).

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[12] From 128 in April to 1500 in October 2020: https://www.europarl.europa.eu/news

Just to name one key issue for each institution: the European Commission changed its Rules of Procedure to allow for remote meetings of the College, the European Parliament invented digital voting, the Council of the EU relied on the written procedure and empowered COREPER and, lastly, the European Council met digitally and, in those cases, issued 'Conclusions of the President'.

Resilience also refers to the continuity of a trend that has been observed since 2010 towards a lengthier and less productive (in terms of number of legislative acts adopted) legislative process. The number of adopted legislative acts was exceptionally low in 2020 but this was already the case since 2010. And while the number of legislative proposals by the European Commission continued to decline, the average duration of the legislative process, which had reached an all-time high in 2016, has decreased and deviated from the previous trend since then.

It was also possible to observe *adaptation* to the (pandemic) environment by EU institutions and the legislative process. They also adjusted to new environmental conditions. Taking into account a longer timeframe, we see that the EU legislative process has evolved substantially, but we also see a high degree of stability in the process of European integration. For example, the Council of the EU did not invent a new procedure alongside the written procedure; the European Parliament did not change its rules. The long-term trends that characterise the EU's legislative process remained intact.

Even if COVID-19 posed a huge challenge to the way the EU institutions had been working, there was a certain degree of continuity in crisis management, also with respect to the legislative process. Compared to the Euro crisis and other crises, the pandemic has (again) put the European Central Bank into a powerful role while the European Council remained in charge of de facto decisions on the response to the pandemic.

EU *democracy* or, more precisely, some key democratic credentials of decision-making and legislative processes have suffered. The European Parliament has been facing particular challenges with its own meetings, the mobility of MEPs, or trilogue negotiations. Some other challenges had existed before but were exacerbated by the pandemic. The marginalisation of the European Parliament in designing the executive crisis response had also existed in the Euro crisis and it was very optimistic to expect that the new Commission would be able to deliver its inter-institutional promises to the European Parliament quickly.

The developments in the EU legislative process examined in this paper lead to the following further conclusions: the European Commission dealt with Brexit, the multiannual financial framework, the recovery fund and vaccine orders; it had little time and resources left for its core business, but it had the task of distributing €1.8 trillion to member states over the subsequent seven years and of borrowing money on the financial markets. The European Parliament could meet the internal organisational challenges but was sidelined in the broader inter-institutional game. The Council of the EU mostly became an informal remote-working ministerial body with officials as the formal in-person decision-makers in COREPER. Finally, European Council President Charles Michel was able to strengthen his position of leading the Heads of State and Government through the distinct nature of video conferences and Special European Council meetings in 2020.

> 'It remains to be seen which of these institutional changes will be permanent and which ones will disappear after the pandemic.'

It remains to be seen which of these institutional changes will be permanent and which ones will disappear after the pandemic. Because of all these changes, the EU could become more negotiation-oriented. Switching to virtual meetings has made the necessity of compromises even greater and one can assume that this might be something that persists even after the pandemic.

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