

CONSENSUS UNDER PRESSURE

The evolution of conflict in the EU legislative process

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[p. 44-70]

Consensus under pressure: The evolution of conflict in the EU legislative process.

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 conflict in the EU legislative process in order to test this expectation. It constitutes a first attempt to deepen our understanding of conflict in the EU legislative process thanks to the database of the Observatory of European Institutions. We first define several intra-institutional and inter-institutional indicators of conflict. Then we assess the evolution of conflict for the period 1996-2014. The data show a limited increase of conflict in the legislative process. However, the legislative actors still comply with the norm of consensus; the EU political system has not shifted from a consensual system to a majoritarian system. In order to explain this trend and apparent lack of change, we suggest several hypotheses: The institutions' adaptation by stealth; the inter-institutional drive towards legislative productivity; institutional patriotism.

Le consensus sous pression : l'évolution du conflit dans le processus législatif de l'Union européenne

La crise actuelle pourrait nous conduire à anticiper une augmentation du conflit dans la procédure législative de l'UE, et, *in fine*, une évolution d'un système consensuel à un système majoritaire. Cet article entend tester cette hypothèse à travers une évaluation de l'évolution du conflit dans la procédure législative de l'UE. Il constitue une première tentative d'utiliser la base de données de l'Observatory of European Institutions pour approfondir notre compréhension de la conflictualité au sein du processus législatif européen. D'abord, nous proposons plusieurs indicateurs inter et intra-institutionnels de conflit. Puis, nous analysons l'évolution du conflit sur la période 1996-2014. Les données montrent une augmentation limitée du conflit. Cependant, les acteurs législatifs continuent de se conformer à la norme du consensus. Le système politique de l'UE n'a pas évolué d'un modèle consensuel vers un système majoritaire. Afin d'expliquer cette pérennité apparente, nous proposons plusieurs hypothèses: une adaptation furtive des institutions; une incitation inter-institutionnelle à la productivité législative; un patriotisme institutionnel.

Consensus under pressure

The evolution of conflict in the EU legislative process

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Consensus has often been described as a founding principle of the EU political system. Consensus is seen as an essential feature of the EU at both the history-making decision level and the daily decision-making level. Overall, consensus is considered as an established principle and its 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 *et al.*, 2006; Toshkov, 2017).

However, a decade after the major enlargement, one could wonder whether the ongoing and multi-faceted crisis is eroding this founding principle since we observe an increased difficulty in getting European leaders to agree on a common response to the economic crisis, the Eurozone crisis or the refugee crisis, combined with the multiplication of open conflicts between heads of state and government.

This paper aims to track down conflict in the legislative process – that is the main decision-making procedure in the EU. While the history-making decisions that European leaders currently have to make in order to respond to the crises reveal deep conflicts, this paper focuses on conflict in the daily decision-making process: Has the legislative process become more conflictual with the crisis?

We define conflict as the situation in which legislative actors – that is the Council of the EU, the European Parliament and the members of both institutions – disagree with the proposals of the Commission and therefore ask for amendments. Of course, disagreement can lead the actors to prevent the adoption of the Commission’s proposals but opposition very rarely leads to an explicit rejection of a proposal by the Parliament or by the Council. When disagreement is quite intense, debates are usually suspended for an indefinite period of time. Our subject of study is not only inter-institutional conflict, contrary to the perspective of many studies of legislative conflict (see the next section) and we take into account two dimensions that are often neglected by studies of the legislative process. First, we investigate the evolution of conflict by adopting a long-term perspective, thanks to the Observatory of European Institutions (OEI) database that gathers data on all the legislative acts adopted between 1996 and 2014.¹ We do not consider the legislative process after the seventh legislative term (2009-2014) because we made the choice to consider full legislative terms. Second, we attempt to refine our usual view of conflict in the EU legislative process: While existing studies mainly investigate legislative conflict on the basis of the voting records of the Council and the European Parliament (henceforth “EP”), we argue that these indicators are only partially informative and suggest a series of inter-institutional and intra-institutional indicators to assess the overall rate of conflict in the EU legislative process. Therefore, we assume that to account for conflict in the EU legislative process, we cannot only rely on the data on which most existing studies are based and need to consider the expression of dissent ahead of the formal votes. Though dependent on the available data, the indicators we put forward in order to assess conflict have the merit to broaden our perspective on conflict and consensus in comparison to what existing studies offer.

An underlying question relates to the evolution of the EU political system. Recent studies argue that the EU political system is facing a profound change and focus on the role of the main institutions: Is the EU political system becoming more intergovernmental, through the expanding role of the European Council (Bickerton *et al.*, 2015; Fabbrini, 2015)? Has the crisis

1 *La production législative de l’Union européenne 1996-2014* [base de données], Centre de Données Socio-Politiques (CDSP, CNRS-Sciences Po) et Centre d’études européennes et de politique comparée (CEE, CNRS-Sciences Po) [producteurs], Centre de Données Socio-Politiques [diffuseur]. Financement Agence Nationale de la Recherche, France. See *the presentation of the database in this special issue*.

led to an increase in the power of the Commission (Bauer and Becker, 2014; Dehousse, 2015; Nugent and Rhinard, 2016)? Is a “new parliamentarism” emerging (Schmidt, 2016)? This paper is also asking to what extent the crisis has led to a deep change of the EU political system. However, what it seeks to examine is whether the political system, traditionally seen as close to a consociational system (Lijphart, 2012), is evolving into a majoritarian system.

The paper will show that conflicts have moderately increased. Furthermore, while the Council has become more conflictual, we do not observe such change in the EP. However, in both institutions, the actors apparently still tend to comply with the norm of consensus. The paper will put forward a few hypotheses in order to explain this relatively modest increase in conflicts. We suggest that this trend might be due to the institutions’ adaptation by stealth; to the inter-institutional drive towards legislative productivity; and to an intra-institutional logic of institutional patriotism. This paper constitutes a preliminary attempt to deepen our understanding of conflict and consensus in the EU legislative process on the basis of the OEI data and does not pretend to test these hypotheses.

The first section of the paper reviews studies of conflict and consensus in the EU legislative process. The second section presents intra- and inter-institutional indicators of conflict. The third section describes the initial findings that show a limited increase in conflicts. The fourth section of the paper then puts forward hypotheses to explain these results.

Studies of conflict and consensus in the EU legislative process

While consensus is traditionally seen as a founding principle of the European Union, it has rarely been analysed at the systemic level. In a way, when we talk about consensus to describe the EU political system, we are close to using a “magical concept” (Pollitt and Hupe, 2011) rather than an analytical tool. To contribute to the analysis of this opaque notion and pave the way for a better understanding of its role as a founding principle of the EU, this paper aims to study the evolution of conflict in the EU legislative process and attempts to offer an operationalization of this concept. Our approach differs from other approaches adopted by existing studies.

First, the issue of conflict has been approached through the lens of the famous *joint-decision trap* theorized by Scharpf (Scharpf, 1988, 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 every year) and the most severe danger stemming from the joint-decision trap is suboptimal outcomes rather than stalemates. The joint-decision trap theory does not aim at investigating conflict as defined in this paper – the opposition of legislative actors to the Commission proposals– but 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 (2015) investigated inter-institutional conflicts over the sharing of competences between the EU and the member states (on inter-institutional conflicts, see also König *et al.*, 2007; Junge *et al.*, 2015).

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.

In the European Parliament, conflict has been tracked down in a rather orthodox way through the amount of tabled amendments (Kreppel, 1999; Hix *et al.*, 2003) ; on inter-committee conflict (see Burns, 2006); or, more recently, through the behavior of Eurosceptic MEPs (Brack, 2015). Because of the crisis, authors have tried to challenge consensus as a norm (on the consensus norm, see Bendjaballah, 2016). Studies of the Parliament tend to assume that the crisis has generated conflicts among the different groups of the EP for two main reasons. First, the measures adopted in response to the crisis are ideological because they delegate more power to the EU level (see the cases of the Fiscal Compact and of the Sixpack), which would trigger a divide between the pro-integration and anti-integration camps. Furthermore, the measures adopted during the crisis have led to a cleavage between creditor states and debtor states. For instance, Moury and De Giorgi (2015) show that the opposition between the left wing and the right wing matters in the economic and financial sectors (see also Roger *et al.*, 2017 who also consider the opposition between the pro-integration and anti-integration

camp). However, according to Braghiroli (2015), it is the fact that one's country belong (or does not belong) to the Eurozone that mostly determines the positions of the MEPs. These different studies of conflict and consensus in the EP are in line with previous studies of the "normalization" of the EP (Hix *et al.*, 2006) or its tendency to become more similar to national parliaments. The crisis has also led scholars to ask whether conflicts are due to exogeneous parameters or to the saliency of debated measures. Several rational-choice studies underline that the high level of consensus within the EP is due to the balance between the member states and to their relative weight in the Council. MEPs would be constrained by the priorities and the interests of the country to which they belong (Bressanelli *et al.*, 2016; Finke, 2012).

Lastly, several studies have been devoted to consensus and conflict in the Council. They have attempted to explain the high rate of consensus and the distribution of negative votes and abstentions among the different member states (Mattila and Lane, 2001; Zimmer *et al.*, 2005; Wallace *et al.* 2006; Häge, 2013; Novak, 2013; Bailer *et al.*, 2015). Most studies focus on legislation adopted by qualified majority because it constitutes the bulk of the Council's legislative activity. However, more recently, Smeets (2015) has attempted to explain how vetoes are averted when the decision rule is unanimity. Scholars explain the rationale for conflicts by taking into account the geographical variable (Mattila and Lane, 2001; Mattila, 2009), the ideological variable (Hagemann and Hoyland, 2008), the budgetary variable (Zimmer *et al.*, 2005; Bailer *et al.*, 2015) or the euroscepticism of domestic public opinion (Hagemann *et al.*, 2017). With few exceptions, these studies tend to assume that votes are the main indicators of conflict in the EP and in the Council. However, research by Hagemann (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 in the Council.

Moreover, to our knowledge, existing studies have rarely explored the evolution of conflict at a systemic level and have not really dealt with the expression of conflict in the course of the legislative process, that is before votes are officially cast. The issue of conflict and consensus has often been reduced to the acknowledgement of the predominance of consensual final votes in the Council and in the EP. The following section attempts to build more complete indicators in order to assess the evolution of conflict in the legislative process.

Indicators of conflict

As noted by Hayes and colleagues, in the EU legislative process, “some dogs do not appear to bark” (Hayes *and al.*, 2006, 172). In other words, dissent sometimes does not occur beyond the closed doors of the Council or the secrecy of informal trilogues. For this reason, the final votes of the Council and of the EP are not a sufficient source of information for assessing legislative conflict. To generate a more comprehensive image of conflict in the EU legislative process, we need to take into account not only the legislative output but also the conflicts taking place before the final adoption of legislative acts. We put forward a list of complementary conflict indicators that takes into account these different aspects.

We should first note that we do not propose an indicator on conflict in the Commission where grasping conflict is highly challenging. The Observatory of European Institutions collects variables on the way the Commission adopts each legislative act (written procedure, oral procedure, enforcement procedure). However, after carrying out interviews in the Commission, we believe that this criterion is not reliable when it comes to assess conflict.

In the case of the Council, our first indicator is *voting results*. We only take into account acts for which qualified majority voting was the decision rule because acts decided by unanimity represent a very small proportion of the legislative output². Abstention must be considered as a form of opposition since when the rule is qualified majority voting, abstaining amounts to voting against. When the rule is qualified majority, abstaining is a more diplomatic way to oppose an act. However, when the rule is unanimity, abstaining does not amount to opposing³.

Although this first indicator is an obvious and widely used indicator of conflict, it is partially informative for at least two reasons. First, votes are public only for adopted legislation – we do not have data on rejected acts. However, as already noted, legislative proposals are rarely explicitly rejected. Second, delegations sometimes decide not to vote against a text in public even if they opposed it behind closed doors (Vaubel, 2008; Novak, 2011 and 2013). When ministers decide not to signal their disagreement through a

2 Data available upon request.

3 See Article 238 of the *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*.

public vote, they have usually concluded that voting against (or abstaining from) a given measure is useless if it is going to be adopted anyway – since votes are public only if legislative proposals are adopted. On the contrary, a more consensual process can end with public opposition or an abstention. For instance, delegations sometimes choose to abstain because they have not managed to agree on a common position at the domestic level and prefer abstaining rather than slowing down the legislative process (this is sometimes the case for federal states such as Germany or Belgium, see Novak, 2011); or because the national parliament has not exercised its right to scrutiny yet (as it can be the case for Denmark and United Kingdom).

Therefore, to enrich this indicator, we decided to take into account the *number of states in the minority* when acts were adopted by qualified majority. Our indicator is more complex than the usual reference to the opposition rate because it allows us to measure the intensity of opposition.

The second indicator for the Council relates to the proportion of legislative proposals that were submitted as *B-points* to the Council of ministers. This indicator takes into account all the legislative acts adopted between 1996 and 2014. 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 directly. 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.

B-points are a reliable indicator of conflict. Sending an act as a B-point to the ministers entails high organisational costs: It slows down the procedure since it becomes necessary to wait for the next meeting of the competent ministers; moreover, after discussion, the ministers usually forward the proposal to Coreper again. Our data show that on average, the legislative process is longer for acts submitted as B-points than for acts directly submitted as A-points to the Council⁴.

In order to have a more complete picture of conflict in the Council, one should also include the *formal statements* by member states (Hagemann,

4 Data available upon request.

2008). However, the Observatory of European Institutions' database does not include formal statements for the studied period⁵ – it would be necessary to code each of them separately since a formal statement can also be a mark of support for an adopted measure.

As for the European Parliament, we propose two indicators of conflict. The first indicator is the *average number of tabled amendments and the average number of adopted amendments* for each act, per year and per legislative mandate. The amendments are public since 2004. The second indicator is the *size of the opposition* to adopted acts. To use both indicators, we rely on all the legislative acts adopted by the EP since 2004. These indicators are not necessarily satisfactory for the reasons exposed above. However, they might be insightful if filtered by policy sector (especially when applied to economic and monetary affairs). Obviously, more in-depth research would be needed to better capture conflict in the EP. In this regard, a first study led on the impact of the rapporteur's partisan affiliation on the composition of winning majorities since the crisis has shown some interesting results.

Lastly, at the transversal or inter-institutional level, we propose two indicators. The first indicator represents the *number of readings* necessary to adopt a legislative proposal in the framework of the ordinary legislative procedure – second and third readings are viewed as signs of a difficulty in getting the Council and the EP to agree on an act. However, legislative proposals are increasingly adopted at first reading, thanks to the multiplication of informal trilogues between the Parliament, the Council and the Commission (Costa *et al.*, 2011; Huber and Shackleton, 2013).

In this context, we propose adopting the *length of the decision-making process* as a complementary indicator. To use this indicator, we take into account all the legislative acts adopted between 1996 and 2014. We assume that a greater difficulty to reach agreement slows down the legislative process. Our data reveal that the average length of the legislative process is systematically longer when acts are contested by a public vote (see table 1).

Table 1. Comparison between the average length of the legislative process (number of days) for non-contested acts (in the Council) and the average length of the legislative process for contested acts (in the Council)⁶

	1996- June 1999	June 1999- June 2004	June 2004- June 2009	June 2009- June 2014
Average length for non-contested acts	358	435	419	528
Average length for contested acts	480	470	463	606

The full list of indicators of conflict is summarized in Table 2.

As exposed in the Introduction of this special issue, the database includes *adopted* legislative acts. For this reason, we cannot use two relevant indicators: (a) We cannot consider legislative proposals rejected by the Council. As noted above, these cases are traditionally rare since institutions tend not to formally reject legislative proposals (see for instance the data reported by Falkner 2011, 56 or Novak, 2011, 47). It would be important to know whether since the crisis, the Council has started rejecting measures more often. However, the institution does not deliver official data on “failed” acts and, on the basis of our interviews, we can hypothesize that the Council’s working methods have not changed so deeply that the old norm according to which measures should not be explicitly rejected would have decayed. (b) Furthermore, we cannot consider legislative proposals that belong to the Commission’s agenda but that the Commission never sent to the Council and the Parliament⁷. One can suspect that in these cases, consultations with the different actors and an early disagreement between actors in the legislative process deterred the Commission from going further.

Moreover, a relevant indicator would be the member states’ votes against the common positions of the Council. Since final votes in the Council do not necessarily reflect disagreement behind closed doors, votes against common positions could provide us with useful complementary information. However, data on those votes are not systematically published. When available, these data have been included in the OEI database. However, they are available for only 10% of definitive legislative acts over the period 1996-2014. For this reason, we cannot take this indicator into account.

6 *La production législative de l’Union européenne 1996-2014, op. cit.*

7 Thank you to Philippe Pochet for suggesting this indicator.

Table 2. Indicators of conflict in the EU legislative process

Council	European Parliament	Inter-institutional
Percentage of public votes and size of the voting minority (number of states voting against or abstaining)	Average number of tabled amendments and average number of adopted amendments per act	Percentage of acts adopted after more than one reading
Percentage of acts discussed as B-point	Percentage of MEPs voting against	Length of the adoption process (number of days)

Preliminary findings

This section will present our findings on the evolution of legislative conflict. It should be noted that these first results do not take into account variation across sectors and aim to give an overview of the evolution of conflict in the entire legislative process.

First, if we analyse the *voting results* (see Table 3), the decision-making process within the Council is marked by an increase in conflicts for the term 2009-2014.

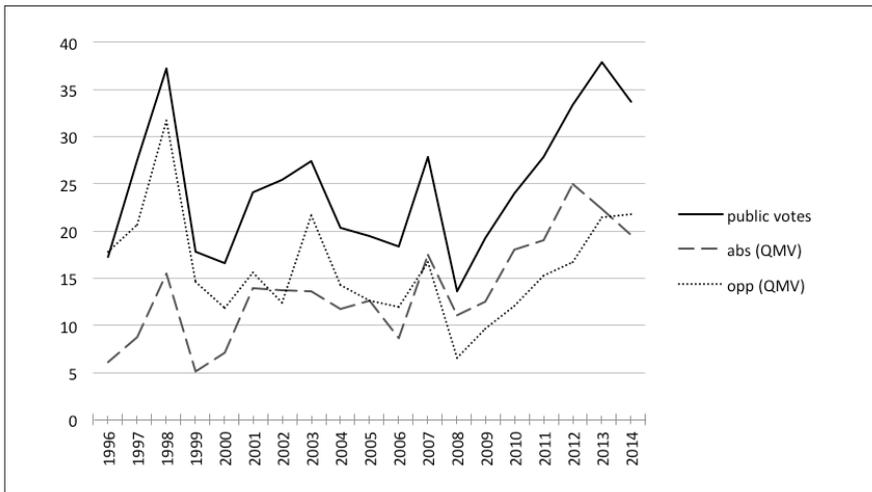
Table 3. Percentage of contested acts in the Council per term (decision rule: QMV)⁸

	January 1996- June 1999	June 1999- June 2004	June 2004- June 2009	June 2009- June 2014
Percentage of contested acts	25,04	23,31	18,47	29,65

Figure 1 shows that the year 2013 is the most significant in terms of conflict but this increase should be relativized because if we consider the evolution of conflict for the period 1996-2014, we notice that the year 1998 was marked by an increased proportion of negative votes and abstentions that was even more dramatic than the 2013 increase. In 1998, 37,2% of the adopted acts were contested and in 2013, 37,8% were contested, but the year 1998 was

marked by a more frequent recourse to the negative vote (31,7% of the acts were contested by negative votes) while in 2013, 21,4% of the adopted acts were contested by negative votes. In 1998, abstention was registered for 15,6% of the adopted acts while in 2013, abstention was registered for 22,3% of the adopted acts. For this reason, 1998 appears to have been even more conflictual than 2013.

Figure 1. Votes in the Council (January 1996- June 2014. Decision rule: QMV)



Furthermore, if we compare the evolution of abstentions and negative votes per term (see Table 4), we notice an increase in the recourse to abstention (from 11,4 for the terms 1999-2004 and 2004-2009 to 19,8% for the term 2009-2014). The rate of negative votes has increased in the term 2009-2014 (16,5%) in comparison to the term 2004-2009 (11%) but this rate is barely superior to the rate for the term 1999-2004 (15,9%) and it is inferior to the rate for the period 1996-1999 (21,5%). Therefore, for the term 2009-2014, the increase in the recourse to abstentions is superior to the increase in the recourse to negative votes.

However, what is also striking when we look at the votes cast in 2009-2013 is the steady increase in conflict. This progressive increase is a new phenomenon: The year 1998 appeared as an exceptional peak while the peak of 2013 is the result of a gradual increase. At this stage though it is not possible to conclusively determine whether this pattern is indicative of an overarching change in voting practices and a progressive turning away from the norm of

consensus. Year 2014 shows a slight decline with a 33,7% rate of contested acts (excluding the acts adopted after the end of the seventh term).

Table 4. Rate of abstention and rate of opposition per term (Decision rule = QMV)⁹

	January 1996- June 1999	June 1999- June 2004	June 2004- June 2009	June 2009- June 2014
Abstention	9,3	11,4	11,4	19,8
Negative votes	21,5	15,9	11	16,5

If we now examine the average proportion of acts sent as *B-points* to the ministers per term (see Table 5), we see that the recourse to B-points has increased from 35,3% for the term 2004-2009 to 41,8% for the term 2009-2014 but that the latter rate is comparable to the rate for the term 1999-2004 (42,6%).

Table 5. Average proportion (%) of adopted acts submitted as B-points¹⁰

Jan. 1996- June 1999	June 1999- June 2004	June 2004- June 2009	June 2009- June 2014
18,5	42,6	35,3	41,8

The evolution in the recourse to B-points is not parallel to the evolution in the recourse to negative votes and abstentions. While the recourse to negative votes and abstentions steadily increased from 2009 to 2013, the recourse to the B-point procedure tremendously varies for the same period (see Figure 2), 31,8% in 2009, 50,8% in 2010, 39% in 2011, 43,4% in 2012, 76,6% in 2013, 24,6% in 2014. This irregularity is difficult to interpret and, if we exclude the peak of 2013, the rates of recourse to the B-point procedure for the period 1996-2014 are constantly variable without steady increases or decreases. Lastly, for the year 2014, the decrease in the proportion of contested acts is parallel to a decrease in the recourse to B-points (73,6% in 2013 versus 24,6% in 2014). Because of these parallel trends in 2014, one

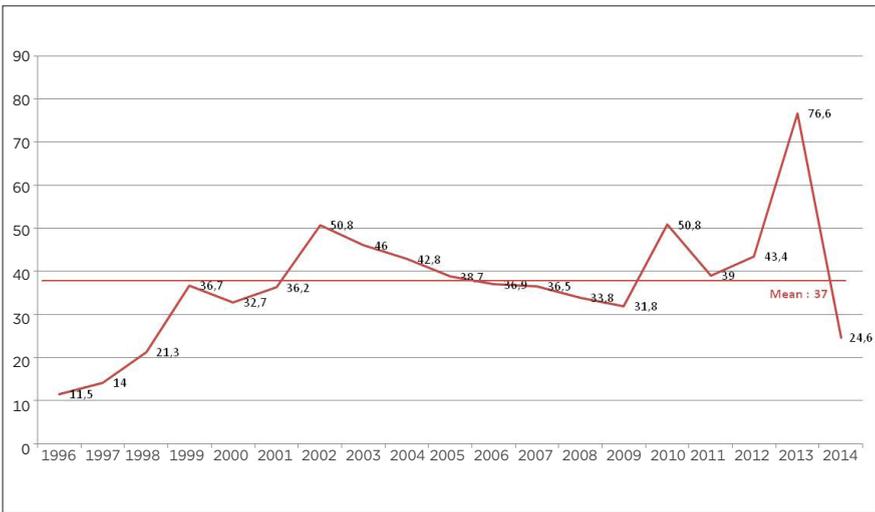
9 *La production législative de l'Union européenne 1996-2014, op. cit.*

10 *Ibid.*

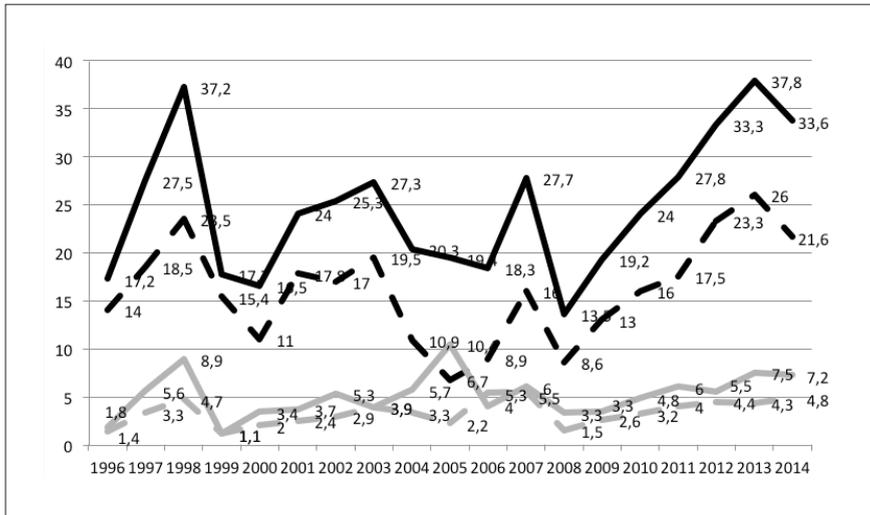
might hypothesize that the period 2009-2013 was exceptional and is being followed by a return to the norm of consensus.

However, the data on the average number of outvoted member states lead us to qualify the increase in conflict (see Figure 3). Even if the proportion of contested acts has increased, the average size of the voting minority has not really increased and remains small. In 2013, 37,8% of adopted acts were contested but 68,7% of those acts were contested by only one member state; 19,8% were contested by two member states; and only 11,3% were contested by more than two member states. For instance, in 2014, out of 42 contested acts, 10 were contested by UK alone. Furthermore, for the period 1996-2014, the proportion of acts contested by two or more member states is quite weak in spite of enlargements.

Figure 2. Percentage of legislative acts discussed as B points (1996-2014) ¹¹



11 *La production législative de l'Union européenne 1996-2014, op. cit.*

Figure 3. Size of the minority in the Council (1996-2014)¹²

Legend :

- All opp. and abs.
- - - 1 MS
- 2 MS
- - - More than 2 MS

As for the European Parliament, amendments are made public by the OEIL Office since 2004¹³ which means that we can compare only two mandates. The average number of amendments per act remains quite stable (see Table 6): For the 2004-2009 mandate, on average 43 amendments were tabled – that is four less than for the mandate 2009-2014 (with on average 47 amendments tabled per act). However, the proportion of adopted amendments decreases between the sixth mandate and the seventh mandate, since in 2004-2009 on average 34 amendments were adopted per act, while in 2009-2014 the average is 17 adopted amendments per act. Interestingly, the year 2013 is also marked by a peak, with an average of 63 tabled amendments and 17 adopted amendments per act. As in the case of the Council, this peak is followed by a decrease, leading to an average of 36 tabled amendments and 5 adopted amendments per act in 2014 (see Figure 4).

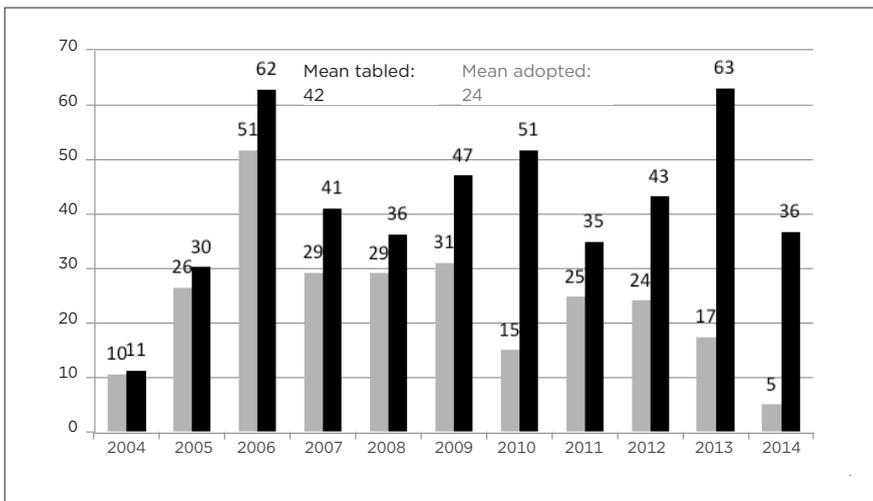
12 *La production législative de l'Union européenne 1996-2014, op. cit.*

13 Even if the information is available in other databases.

Table 6. Average number of tabled amendments and of adopted amendments per act and per term¹⁴

	June 2004- June 2009	June 2009- June 2014
Tabled Amendments (average per act)	43	47
Adopted Amendments (average per act)	34	17

Figure 4. Average number of tabled amendments and of adopted amendments per act and per year (2004-2014)¹⁵

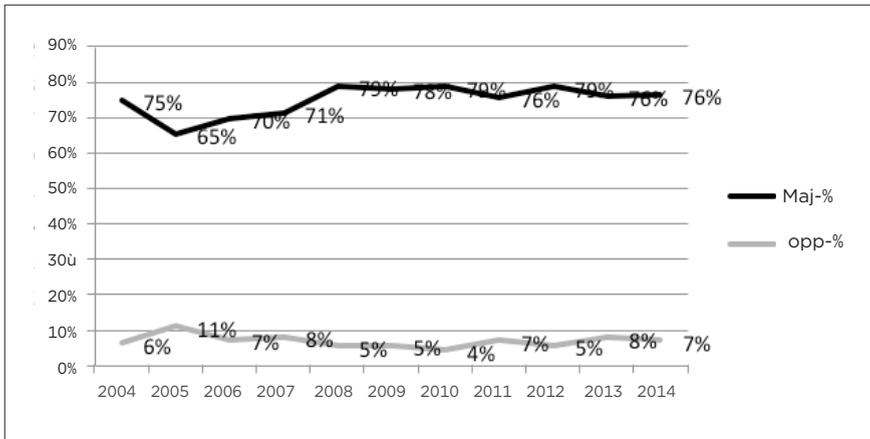


The second indicator for the EP, related to the size of the opposition, does not show an increase for the period 2004-2014 (see Figure 5). The opposition is quite weak, with a modest peak in 2013, as it was the case in the Council. Therefore, both indicators do not show an important increase in conflicts.

14 *La production législative de l'Union européenne 1996-2014, op. cit.*

15 *Ibid.*

Figure 5. Opposition in the EP (2004-2014. For each year, the number of votes has been weighted by the overall number of MEPs)¹⁶



Lastly, we should take into account our two inter-institutional indicators, relating to the number of readings when a legislative proposal is decided by the ordinary legislative procedure and the length of the decision-making process.

The data for the period 1999-2014 show that the adoption of legislative proposals at the first-reading stage has become the norm (see Figure 6). Proposals are rarely adopted after a second or a third reading. Therefore, while the indicators related to the legislative activity in the Council reveal a limited increase in conflicts and the indicators related to the activity of the EP show relative stability, the increase in early agreements actually reveals an apparent drop of inter-institutional conflicts.

As for the average length of the decision-making process, we can observe a neat trend: The length of the legislative process is steadily increasing (see Figure 7). On average an act was adopted after 385 days during the period 1996-1999; after 441 days in 1999-2004; after 426 days in 2004-2009; after 548 days in 2009-2014. The data show again a peak in 2013 followed by a decrease in 2014.

Figure 6. Percentage of acts adopted at first reading (1999-2014)¹⁷

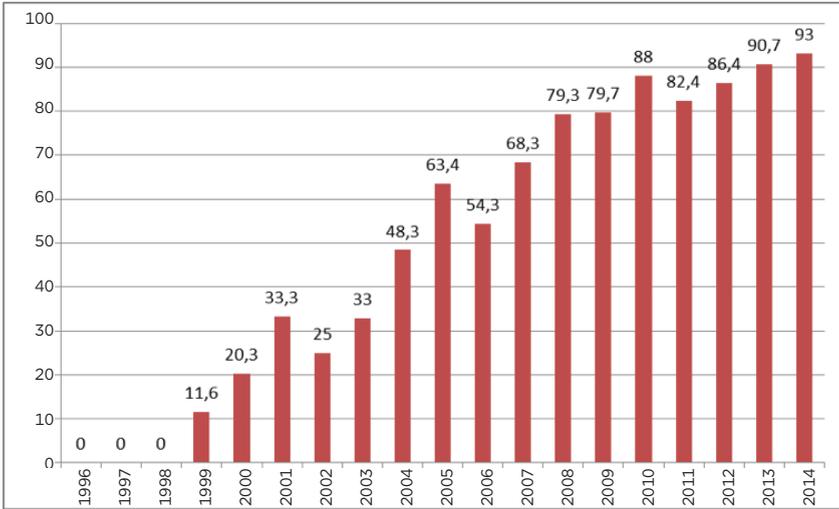
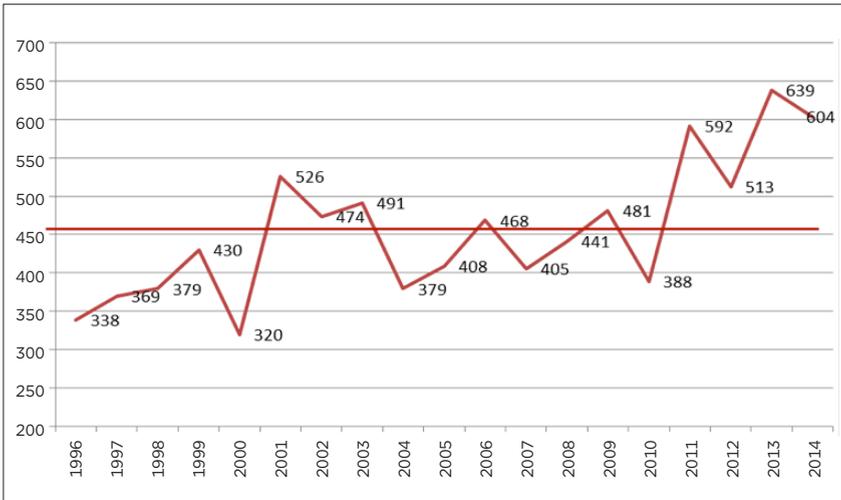


Figure 7. Length of the legislative process (number of days. 1996-2014)¹⁸



17 *La production législative de l'Union européenne 1996-2014, op. cit.*

18 *Ibid.*

Discussion

While we observe a limited increase in conflicts in the Council - which could prove exceptional since 2014 was marked by a drop in conflicts - the data on the EP do not show an increase in conflicts and we even observe a rise in early agreements. Even if some evolutions are at play in the EP (see the first section of this paper) and even if the decision-making process has slowed down, the overall picture for the recent period does not appear as radically different from past trends. These results are, to some extent, ambiguous but reveal a persistent tendency towards consensus within institutions and at the inter-institutional level. Even if the Council has apparently become more conflictual, we should not dismiss the fact that the intensity of opposition is often weak - at least according to the voting records. Votes are often cast by isolated member states rather than by coalitions, which could be explained by the fact that ministers tend to use public votes in order to send signals to their domestic constituency, as noted by Hayes and colleagues (Hayes *et al.*, 2006; see also Novak, 2013 and Hagemann *et al.*, 2017). Furthermore, as shown by the paper by Dehousse in this special issue, the fact that even in the two sectors hardest hit by the crisis - the social sector and the financial and economic sector -, the intensity of opposition remains weak tends to show a relative persistence of consensus at the daily decision-making level.

Therefore, how can we explain this limited increase in conflicts in spite of the crisis? How can we explain that despite its breadth, the crisis has apparently not caused a major change in daily decision-making practices? We will sketch a few hypotheses that we do not pretend to explore in depth here given that this paper aims at giving a first insight of how the OEI database can provide us with new tools to explore conflict in the EU legislative process.

First, we can hypothesize that *the institutions - the Commission, the Council and the Parliament - have adapted by stealth to the greater risk of conflicts*. Conflicts might stay limited thanks to increased interventions of the ministers in the legislative process - as shown by the more frequent recourse to the B-point procedure - and a multiplication of informal trilogues - as shown by the increase of early agreements, which is correlated with an increase in the length of the decision-making process. Through a slowing down of the legislative process, the institutions are able to stick to the norms according to which legislative proposals should not be explicitly rejected and should be adopted by consensus.

To thoroughly explain the recourse to the B-point procedure, interviews at the Council Secretariat would be necessary. First, this increase might be due to the greater number of political difficulties encountered by Coreper when negotiating the legislative proposals. When ministers have to intervene in the negotiation, it is usually implied that some aspects of a proposal were deemed too political to be decided at the Coreper level. Secondly, the increased recourse to the B-point procedure could be explained by the fact that in a context of crisis and tensions between governments, permanent representatives are more reluctant to take initiatives at their level and prefer shifting the responsibility to the ministerial level (see Häge, 2008). Thirdly, we could assume that the greater number of member states makes the reaching of an agreement more complex and leads Coreper to appeal to the ministers.

Another institutional adaptation by stealth might take place at the Commission level: The relative stability of consensus might be due to the lower number of legislative initiatives issued by the Commission. Data show a decrease in the number of legislative initiatives (Ponzano *et al.*, 2011). This decrease might be at least partly due to the fact that the Commission would pre-emptively issue proposals that would not generate strong opposition. Actually, the goal of the pre-consultations with national delegations, generalized after the Luxembourg compromise, is to avoid conflicts.

A second hypothesis would be that the drive towards legislative productivity (which is for instance characteristic of the Council presidency, see Novak, 2011; see also Costa *et al.*, 2011 on codecision) is such that institutions strive to find *inter-institutional* agreements. The increase in early agreements seems to suggest such tendency.

A third hypothesis is related to the *intra-institutional* logic and draws on the tendency to *institutional patriotism*, that is the propensity of individuals to be protective of and loyal to the institution to which they belong. If we observe opposition in the Parliament, we can note that this institution seems to stick to the norm of consensus when it comes to casting final votes. An overview of standing committees' RCVs (which have been recently made public by the European Parliament) confirms this trend. Therefore, the EP would not turn away from a well-established practice. The composition of the Parliament elected in 2014 constitutes a test of this tendency towards institutional patriotism. In the framework of the inter-institutional relations and in order to stand against the other institution, both the Council and the Parliament have been said to favour consensual votes on final legislative

proposals, since this would avoid the risk of seeing the other institution exploiting internal divisions in the long run (on the EP, see Kreppel and Hix, 2003; on the Council, see Novak, 2011). Since the crisis, the EP seems more and more squeezed by the compromise found among *ministers* in the Council. In the case of the Council, the stickiness of this norm might seem less clear because of greater signs of conflict. However, as noted, the moderate intensity of the opposition despite the growing number of members and the recent decrease in contestation, leads us to qualify this diagnosis.

We should note that the relevance of our hypotheses and of our conclusions are limited by a lack of transparency of public data. First, even though we attempted to refine our approach to studying conflict by adding new indicators, public data allow us to only partly grasp existing conflicts. As mentioned earlier, votes in the Council do not accurately reflect conflicts that take place behind closed doors. Furthermore, we have no data on the disagreements that are overcome in the framework of informal trilogues and on the number of informal trilogues. To obtain a more reliable image we could also take into consideration the formal statements of the ministers (Hagemann, 2008). By taking into account these different aspects (disagreement behind closed doors not reflected by a public vote in the Council; number of informal trilogues; formal statements of the member states), we might paint a less consensual image of the decision-making process.

However, even if the available data might lead us to underestimate conflicts, one should note that the crisis has not led the legislative actors to give up the norm of apparent consensus (Peterson and Bomberg, 1999, 58): They do not extensively use negative votes to single themselves out more frequently – as shown by the fact that negative votes are often cast by only one member state. Furthermore, the size of the opposition in the Parliament has not significantly increased. Even if conflicts behind closed doors might be more frequent since the beginning of the crisis – as the increased recourse to the B-point procedure might suggest – the actors do not seem to have infringed the norm of consensus.

Astonishingly, while heads of state and chiefs of government have become less reluctant to express their disagreement in public and even use internal conflict in the European Council to send signals to their constituency, this change does not seem to have affected the habits of the legislative actors – which does not exclude that occasionally, ministers use negative votes or abstentions to respond to their constituents (see Hagemann *et al.*, 2017).

Moreover, the drop in conflicts that occurred after the 2013 peak does not suggest that the legislative actors will follow a trend comparable to the trend that we observe at the highest level.

However, even if the data do not reveal a change of paradigm and tend to show that the existing rules of the game have been reinforced with the growth in early agreements, interviews with the legislative actors are necessary to fully understand whether the crisis has had an impact on decision-making practices. The most noteworthy change is manifested in the more frequent interventions of the ministers through an increased recourse to the B-point procedure. While the dominantly consensual final votes in the Council and in the Parliament reveal the stickiness of the consensus norm, the increased interventions of the ministers *in the course of the legislative process* have to be analysed in order to understand how the decision-making mechanisms that underlie the search for consensus have evolved. It would also be mostly pertinent to look at the relationships between the Council and the EP and assess the assumption of an increased pressure on the shoulders on MEPs.

Conclusion

This analysis of the evolution of the legislative process between 1996 and 2014 on the basis of our indicators of conflict reveals signs of tension in a context of increased pressure. However, it also shows an astonishingly stable picture. We do not observe a real change of paradigm from a consensual system to a majoritarian system. The discrepancy between the evolution of the ‘high’ intergovernmental sphere in which the heads of state and government appear more prone to express their dissent and talk openly about internal conflicts, and the persistence of the consensus norm in the framework of daily decision-making, is remarkable. However, one might argue that even if conflicts are apparently not that much stronger, the institutions are not impervious to the crisis since the lines of conflict have evolved (Otjes and van der Meer, 2016). Moreover, the legislative actors might keep complying with the consensus norm at the cost of a change in decision-making practices – as the more numerous interventions of the ministers and the increased length of the legislative process seem to suggest. Further research is needed in order to understand whether a change in decision-making practices underlies the persistence of observable consensus.

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