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HOW INSTITUTIONS DOUBT REFORMING THE LEGISLATIVE PROCEDURE OF THE EUROPEAN UNION

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This contribution endeavors to explain several dysfunctions in the European Union's legislative procedure: the drop in the number of legislative decisions, the high degree of consensus in the European Parliament, the opacity of the Council of Ministers, the generalisation of premature agreements in co-decision, and the granting of symbolic rights to national parliaments. These phenomena are interpreted as symptoms of the crisis of confidence afflicting different European institutions' ability to govern effectively and legitimately. To confront this existential doubt, we conclude by suggesting several mechanisms aimed at a better public awareness of intra- and inter-institutional conflicts.

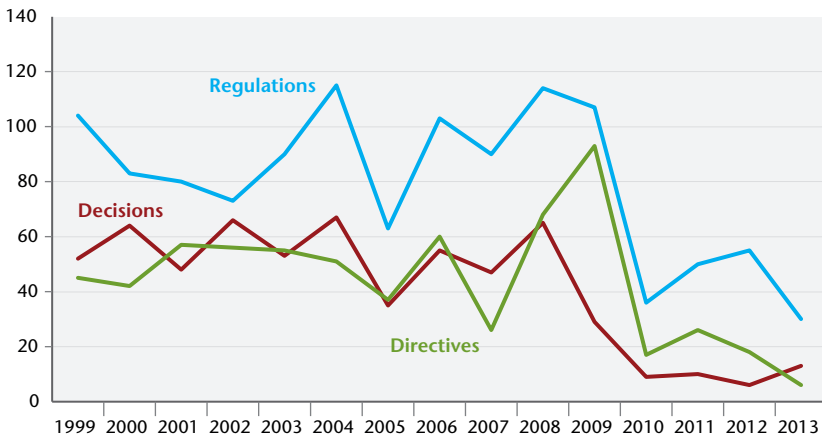
An original feature of the EU is the fact that its law is both constraining and extensively developed. Public action at the European level consists mostly in legislative output relying on the EU Treaties. This paper argues that the legislative process is marred with weaknesses that have triggered a decrease of legislative outputs and deteriorated the legislative process itself. These flaws originate in a phenomenon that one may designate as the “existential doubt” of EU institutions. The fact that the institutions have not found satisfying solutions to the economic crisis, the rise of populism, abstention during European elections and the

repeated rejections of EU treaties by popular referendums leads the institutions to have doubts over their legitimacy and capacity to act. This paper contends that because of a lack of self-confidence, the institutions do not legislate well – that is, their legislative outputs have dramatically lowered and they act in an opaque fashion and, at some stages, with improper haste. On the basis of this analysis, the paper puts forward several recommendations aiming at a better expression of political and institutional divides entailed by the negotiations of directives and regulations.

1. The European Union is less and less able to enact legislation

Since 2009, the proportion of definitive legislative acts adopted has decreased by a third (Figure 1).

Figure 1. Adopted definitive legislative acts (1999-2013)



Note: Decisions = Decisions from the Council; Directives = Directives from the European Parliament and the Council and/or Directives from the Council. For 2013, all the data are related to a period from January to October (included).

Source: CDSP and CEE, EU Legislative Output 1999-2010*.

* EU Legislative Output 1999-2010 (05/06/2010) [database], Centre for Socio-political Data (CDSP, CNRS - Sciences Po) and Centre for European Studies (CEE, Sciences Po) [producers], Centre for Socio-political Data [distributor]. All the data displayed in this article originate from this source except when another is mentioned.

This decrease is partly due to technical factors. Before the Lisbon Treaty, 24% of EU legislative activity dealt with agriculture and fisheries affairs (2002-2008). Now, following the enactment of the Treaty of Lisbon, these acts have lost their 'legislative' nature.

Besides, all the regulations, directives and decisions adopted without the European Parliament's participation are now considered as non-legislative acts (article 289).

Nevertheless, these technical factors alone cannot explain this one-third decrease. Some political explanations could also be proffered. First, the Better Regulation and Smart Regulation Programs implemented by the Commission as of 2000 are producing results. By reducing administrative costs and the number of impact assessments, these programs have certainly simplified EU law. They also have made legislative activity more hazardous.

Second, facing the Eurozone crisis since 2008, member states are increasingly reluctant to enact legislation. Whereas on average five acts were adopted per year at the request of national governments from 1999 to 2009, no single act has been adopted at the request of a member state since 2010. Lastly, year after year, the European Commission has made both internal and external consultation procedures more cumbersome in the stage preceding the adoption of proposals. This automatically leads to a decrease in the number of adopted acts.

It seems as though EU institutions, obsessed with the political agenda set by the economic crisis and the difficulty in facing it, have turned away from ordinary legislative activity. It has seemingly become more urgent to agree on deficit-control rules than to deepen the internal market or to regulate the CAP.

2. The European Parliament consistently seeks consensus

Despite the direct election of MEPs in 1979, consensus rules the European Parliament. Since 1979, three out of four MEPs have sided with the majority. To focus on the two major groups, the European People's Party (EPP) and European Socialist Party (ESP) MEPs vote in the same way 70% of the time (Table 1). This trend has been accelerating since 2004.

All policy fields are ruled by consensus, even those expected to be the most conflictive. From 2009 to 2014, when it comes to voting on employment and social affairs, the EPP and ESP MEPs agree 72% of the time.¹ Both organisational and institutional

1. Source: VoteWatch.

explanations might be considered to account for this trend. From an institutional point of view, O. Costa evokes a “raison d’institution” (Costa 2001). The search for consensus reveals MEPs’ effort to offset the decisional weakness of the EP. Consensus-seeking is a show of rational behaviour, in turn rewarded by an increase in formal powers.

Table 1. Proportion of EPP and ESP MEPs voting in the same way (1979-2014)

In %

1979-1984	1984-1989	1989-1994	1994-1999	1999-2004	2004-2009	2009-2014
61	68	71	69	65	70	73

Sources: Hix *et al.* 2007, p. 151 and, for 2007-2014: <http://www.votewatch.eu/en/epg-coalitions.html/#/0/0/2009-07-14/2014-07-14/11/9>

EP rules and regulations also lead to consensus. When a text is dealt with during a second reading in codecision, an absolute majority from MEPs is required. At a more organisational level, the management of parliamentary groups also explains the search for consensus: leaders of parliamentary groups cannot foster the interests and career goals of their members. Leaders can promote neither the re-election of their colleagues nor their national careers. Hence MEPs can join concurrent parties coalitions without any risk for their own career.

Lastly, the daily tasks of committees drive MEPs to search for consensus. Two factors may be emphasised. First the technical content of committee discussions favours the negotiation of compromises. Furthermore, the most prestigious positions, such as rapporteurs or group coordinators, are allocated in committees to those MEPs most adept at building and maintaining consensus (Bendjaballah, 2011). These positions are, indeed, prized because they offer the most ambitious MEPs a representational role in inter-institutional negotiations.

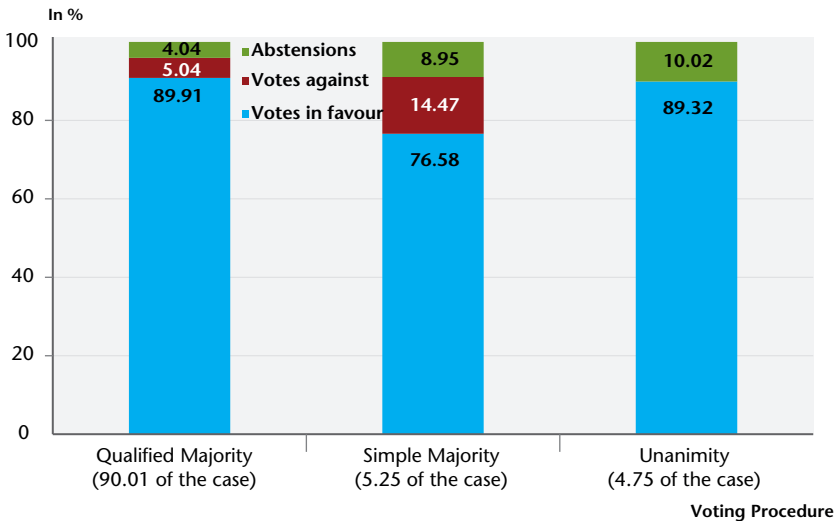
Finally, this obstinate search for consensus, whatever its source (rules and regulations, committees’ organisation, parliamentary group management), does not only reflect the aim to display strength and power to the Council. Is rooted above all MEPs’ insecurity concerning their own legitimacy (Rozenberg 2009). MEPs’ shared views that their institutions cannot afford a lasting division and has to prove its value amendment by amendment, explain that they vote in the same way most of the time. The uncertain

legitimacy derived from their election pushes MEPs to assert their position by participating in policies of compromise.

3. The Council of Ministers avoids displaying its divisions

Council members often argue that efficient negotiations require the ability to discuss behind closed doors. The Council avoids displaying its divisions. Firstly, votes are published only when legislative acts are adopted. When the Council does not find an agreement, the voting positions of ministers are not published. Furthermore, public votes sometimes differ from positions taken behind closed doors. When ministers are not satisfied with an adopted act, they tend to join the majority (Novak 2013). For this reason, public votes do not accurately reflect the real amount of dissent and give an overly consensual image of the Council: as shown by Figure 2, the average rate of opposition to adopted legislation is about 10%.

Figure 2. Voting behaviour in the Council in function of the voting rule (1995-2010)



Source: Van Aken, 2012, p.42.

Lastly, legislative proposals are mostly negotiated by diplomats and not by ministers. Diplomats are overall reluctant to voice disagreement, which facilitates the search for compromise but can be costly in terms of transparency. One should also note that the

search for compromise behind closed doors and through bilateral negotiations (between national representatives and the Presidency or the Commission) facilitates the adoption of ambiguous legislative texts that allow national administrations to interpret and implement them in their preferred fashion. If voting positions were made public during the negotiation process, it would become more difficult to adopt deliberately ambiguous laws (*cf.* Piris 2005).

These different factors entail that political debates and divides within the Council are not well known by the public. Moreover, they prevent one from identifying the responsibility of the different actors in the decision-making process. Since the beginning of the 1990s, the Council has adopted several transparency rules. However, the actors can avoid complying with these rules, for instance when they manage not to make public the position that they supported behind closed doors. Because their implementation is not controlled by an external actor, these rules poorly contribute to the improvement of the accountability of ministers.

Such opacity prevents journalists, national MEPs and citizens from being informed of the legislative debate. Once again, the fact that the Council has doubts over the legitimacy of the process fosters the tendency to hide conflicts – the high level of consensus being seen as a source of the legitimacy of law.

4. European institutions do not air their disagreements

The co-decision procedure now applicable in the majority of cases foresees the possibility for the Council and the Parliament to reach an agreement after several readings. In effect, bicameral systems have a ‘shuttle’ arrangement meant to progressively reduce divergences of opinion between institutions through negotiation, the revelation of the degree of their respective preferences, and quite simply, the desire to finish with disagreements. The system thus anticipates several readings. Yet, increasingly, the Council and the Parliament tend to agree after only one reading (Table 2).

The increased occurrence of agreements reached on the first reading does not mean that the EU legislates too hastily since, as César Garcia Perez de León explains in his contribution to this issue, its average time spent on the adoption of legislative acts is comparatively greater than in national democracies. The Council

and the Parliament can take their time in order to reach an agreement on the European Commission’s proposal; they tend, however, to do so in advance of the official decision-making system during formal or informal meetings and other ‘trilogues’ between institutional representatives (Costa *et al.* 2011).

Table 2. Agreements following the first reading during co-decision

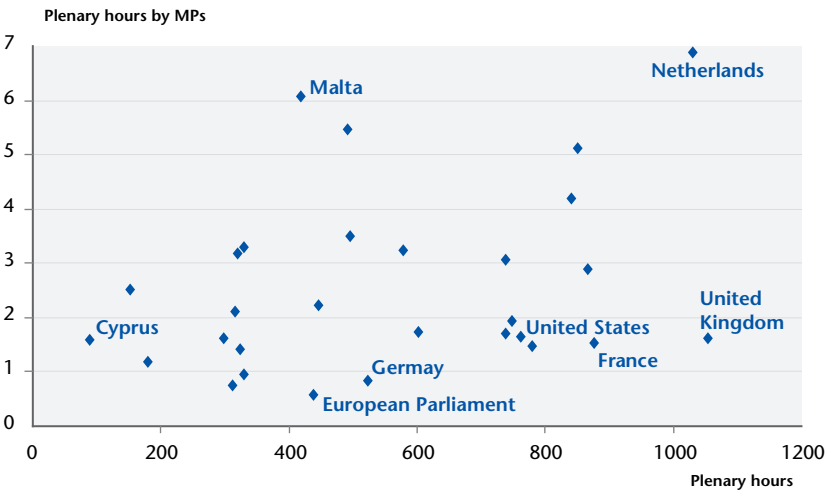
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
%	17	25	30	20	36	69	65	58	74	80	88	86	82	86
n	10	15	31	27	44	75	51	64	70	146	170	71	78	80

Note: 1999 = 1999-2000.

Source: CDSP and CEE, *EU Legislative Output 1999-2010*.

The prevalence of first-reading agreements is the product of the imperative to be legislatively productive (to agree as soon as possible, see Novak 2011, p. 51sq) combined with a practice of opacity (to hide conflict). This tendency evinces the will to demonstrate the system’s efficacy – a proof all the more necessary, it seems, since each actor is unsure of the credit he or she gets. However, the prematurity of agreements presents a problem to the institutional structure as a whole (since the gradual unveiling of

Figure 3. Duration of sessions in the lower chambers of various parliaments (European Parliament, national parliaments in the EU, American Congress), yearly averages for 2010-2012



Source: Observatory of National Parliaments after Lisbon (OPAL).

preferences is excluded) as well as to each of its components. The pluralist and deliberative European Parliament especially suffers from having to organise plenary sessions celebrating the validity of their compromises rather than tranquilly and forcefully acknowledging the diversity of viewpoints. The sluggishness of the exchanges explains in part the fact that such little time is devoted to in-session debates, as Figure 3 indicates.

5. National parliaments are offered collective participation procedures that are at best unrealistic, at worst dangerous

Doubts concerning the democratic legitimacy of the EU have led to suggestions for new procedures of collective participation in national parliaments, beyond their individual European activities. Two modes of association are planned: interparliamentary conferences and collective expression of opinions. Put to the test, these two methods seem to us at best unrealistic and at worst dangerous.

Interparliamentary conferences, whether they assemble the members of European affairs committees, specialists of the CFSP or, from 2013 on, of the budget, encounter the difficulty of inducing their members to agree, a challenge complicated by the MP's lack of authority to speak for his or her colleagues. As useful as they are for socialising or the exchange of good practices, these para-diplomatic meetings are not determinant; all the less so since the European Council's anxiety to create such organisations sometimes overrules the need to make them effective, as is the case for the budget conference, whose number of participants is not even set (Kreiling 2013).

Another original solution: parliaments are invited since Lisbon to regulate compliance with the subsidiarity principle via Commission proposals. The so-called "early warning mechanism" proves, once again, quite ineffective as it imposes thresholds that are difficult to reach within several weeks and does not obligate the Commission to review its copy if the thresholds are attained. Since 2009, assemblies have enacted an average of a little more than one opinion per year. Only two yellow cards were issued in this way, the Commission upholding its proposal in the second case. This procedure, an institutional gimmick, is nonetheless potentially dangerous for three reasons. First, its functioning is highly uncer-

tain. Second, it implicitly places national parliaments in a position to block integration. Finally, it opens the way to unfortunate proposals that aim to accord red cards or individual opt-outs to the national parliaments.

6. A few recommendations

Agree to disagree in the European Parliament

MEPs must express their disagreements, at least at the start of the procedure. Special debates on floor could not only give birth to discordant voices, but also give them a better audience.

Two kinds of debates could be considered:

1. "Orientation debates", before committees look into the text. These debates already exist in many member states. According to this procedure, each group would present its formal position on the text. Therefore, the group as a whole, and not only the specialised members of the committee, would be involved. The conclusion of compromises would hence be more costly. It would be more difficult to conclude early agreements.
2. Special debates on minority reports, as it is the case for instance in the US Congress. MEPs could then submit a minority report divergent from the report of the responsible committee. Consensus-building would become harder.

Publicising political divides within the Council by providing national parliaments with an increased power to monitor the activities of the Council

In spite of an ambitious policy of transparency, diplomats and ministers have found ways to sidestep the transparency rules within the Council. The ECJ's recent decision to compel the Council Secretariat not to black out states' positions on the public minutes² could paradoxically entail an impoverishment of the minutes. Rather than creating new transparency rules, it would be more efficient to institute an external control that would compel ministers to reveal their positions during the negotiation process.

2. Case C-280/11P *Council of the European Union v Access Info Europe* [2013].

National parliaments, who control their governments and can vote for their dismissal (with the exception of Cyprus), could play such a role.

For this reason, it is necessary to provide them with the right to mandate their ministers – a right that already exists in a few member states. Previous experience shows that such reform would not lead to institute national parliaments as the actual decision-makers. The Danish parliament often orally consents to mandates prepared by the government. German ministers have the possibility of distancing themselves from their mandates when the negotiating process within the Council makes it necessary. However, if ministers' voting positions depended upon the explicit approval of their MPs, it would become more difficult for ministers to play double games and to register a public vote different from the negotiating position adopted by their representatives behind closed doors. When a minister must comply with the opinion of her parliament, she is more constrained to account for her position behind closed doors.

The correlation between negative votes and abstentions within the Council on the one hand, and, on the other hand, the degree of lower houses' formal competences in the field of European policy is about 0.28.³ It is slightly higher – 0.39 – when one considers the actual European activities of lower houses. In those member states in which parliaments are the most active in the field of European policies, ministers tend to approve of adopted laws less frequently (Hayes-Renshaw *et al.* 2006, p. 171). However, the low rate of negative votes (on average 1.2%) and abstention (1.5%)⁴ and the moderate level of the correlation show that ministers receiving mandates from their national parliaments would not necessarily be obstructionist. Some of the countries with a powerful parliament in the field of European policy have a comparatively low level of opposition, as shown by the cases of Finland and Lithuania.

3. Pearson's r for the period from 2010-2012, i.e. about 300 votes. The statistics do not include the UK because its opposition rate is much higher than other member states'. The data on votes are taken from www.votewatch.eu. The data on national parliaments are taken from: OPAL and (Auel *et al.*, forthcoming).

4. Even in countries with powerful parliaments in the field of European policy (6.1% of negative votes or abstentions for Germany, 5 % for Denmark).

In addition to the right to mandate their ministers, parliaments should systematically develop their capacity to control the legislative process before the meetings of the Council. Rather than furthering the tendency toward specialisation and bureaucratisation of parliamentary control on European activities, one should favour the core of political work: the oral exchange of points of view through the systematic public hearing of ministers before Council sessions. Parliaments' competences, motivation and audience would increase if they organised these hearings within their standing committees rather than within their committees for EU activities. Lastly, if standing committees were organised along the sectoral lines of the Council, the control by parliaments would be all the more efficient. The diminution of the number of ministries in Germany and Italy might open the possibility of a greater homogeneity between the Council, the ministries and the parliamentary committees.

A Council presidency more independent from member states

In the Council, the current system of rotating presidency is both short-term and endogenous, which contributes to the opacity of the Council and to the generalisation of early agreements with the EP. Presidencies want to pass as many laws as possible during their semester. Governments know that they preside over the EU only for a few months and fear retaliation from their peers if they do not play the game of opacity. Their working method increases the asymmetry of information, for instance when they multiply bilateral exchanges. The rotating presidency has advantages, but the institution of a supranational presidency more independent from member states, such as the presidency of the European Council, would partly reduce the strategy of opacity and contribute to avoiding systematic early agreements in codecision.⁵

5. We are grateful to César García Pérez de León and Valentin Kreiling for helpful comments.

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