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Discontinuity

Another Source of the EU's Democratic Deficit?

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ABSTRACT

This study evaluates discontinuity induced by the two-stage law-making process of EU directives, which is discussed in the jurisprudential literature as another source of democratic deficit. Directives must be transposed into national law, but lengthy deadlines raise normative questions about the extent to which governments of today can politically and reliably commit domestic majorities of tomorrow. The potential for discontinuity is analysed using transposition data in 15 member states and preference indicators over the last 20 years. The findings reveal that parliaments are largely excluded from this process and that the preferences of the previous and the newly elected representatives often differ considerably, particularly in countries where public support for European integration has declined in recent years.

KEY WORDS

- democratic deficit
- discontinuity
- EU legislative studies

Discontinuity in two-stage EU law-making

This article investigates a constitutional element of democratic government, namely the temporal restriction of political authority and power, which has been disregarded in the political science literature on the EU's democratic deficit (see, for this debate, e.g. Dehousse, 1995; Majone, 1998, 2000; Moravcsik, 2002; Follesdal and Hix, 2005; Rittberger, 2005). Much of this literature focuses on the distribution of power in EU legislative decision-making, in particular on whether the European Parliament (EP) is involved or not, but it remains an open question whether and to what extent representatives of today can commit the representatives of tomorrow, who can hardly block, change or amend the decisions of previous representatives (Pernice, 2005). In contrast to the provisions in the member states, in which the authority and the policy-making activities of elected representatives usually end with dissolution, or the ending of parliamentary sessions or the conclusion of the legislative term, and in which pending initiatives usually die in order to prevent discontinuity between the mandate and policy-making (for more details, see Döring, 1995: 242), Commission proposals do not die, nor does EU law-making allow for the direct control of representatives in a temporally limited fashion. In particular, the implementation of directives induces a potential for discontinuity by conventionally establishing a two-year transposition period, in which newly elected representatives may be obliged to implement decisions of the previous government without having a realistic chance of amendment or revision in a timely fashion.¹

From a normative perspective, discontinuity poses a legitimacy problem, particularly in systems with strong checks and balances. It also threatens high agency loss when the principal – the directly elected parliamentary representatives of voters – lacks control over the governmental agents and is unable to learn about their preferences. However, a positive evaluation of the empirical impact of discontinuity first requires identification of the extent to which:

- (i) governments of today can politically and reliably commit majorities of tomorrow,
- (ii) previous and current representatives differ in their preferences, and
- (iii) these new majorities are able to learn about the implementation process.

Hence, the following analysis of discontinuity may point to another possible source of the democratic deficit in the EU. Discontinuity is directly related to the discussion about the involvement of the EP because, although moral hazard and adverse selection problems usually give the (parliamentary) principal incentives to gather information about the (governmental) agent

(Lupia, 2003: 4), such learning is seriously restricted in the two-stage process of EU law-making. In this two-stage process, the EP is still not completely involved, and 'governmental' agents can increase their discretionary power by hiding their preferences in secret Council negotiations as well as bypassing their parliaments when they implement legislative decisions (König et al., 2005). This suggests that discontinuity allows for power to expand over time, and neither the parliamentary majority nor the voter can find out whether and how the government was unwilling or unable to support the preferences of the principal.

The following analysis will provide empirical insight into the potential for discontinuity in the two-stage decision-making process of EU directives. The major empirical challenges are to find out whether and to what extent the parliamentary principal can learn *ex ante* and *ex post* about the governmental agent's behaviour, and to identify discontinuity problems by changing coalitions and preferences during the implementation process in all member states. For this purpose, longitudinal information is used on the transposition history of all directives in 15 member states and on governmental preferences from January 1986 to February 2003 (the entry into force of the Nice Treaty). In addition to information on Commission proposals and EP participation, the database includes 1569 directives and their transposition records in the member states.² This sample of more than 8000 observations will provide a solid empirical answer to two questions on the amount and extent of

- (i) domestic parliamentary inclusion in EU law-making by directives, and
- (ii) discontinuity with respect to member state elections as well as changes in government and coalition preferences.

The analysis attempts to answer whether and to what extent EU law-making suffers from a parliamentary deficit at the EU and domestic level, and whether and to what extent the EU requires the implementation of directives adopted by a previous government, possibly by another coalition with quite different preferences. In addition to the potential for change via elections, the analysis also specifies whether and how often governmental composition changed in the period between the adoption of the directive and notification of national transposition measures as reported by the member states. However, since governmental composition can change despite preferences remaining the same, and, conversely, governmental composition can remain stable despite changes in preferences, this study proposes the use of party manifestos to identify sector-specific and EU-related governmental (coalition) preferences.

The study then introduces the problem of discontinuity and discusses the lack of direct control of governmental agents, while also providing insight

into parliamentary involvement in the law-making of directives. Furthermore, the conventional domestic rules established to prevent discontinuity are included as a web appendix for the 15 member states,³ revealing a large discrepancy between domestic and EU provisions. Finally, discontinuity is empirically examined with respect to electoral events, governmental coalition and preference changes. The findings show that the two-stage process associated with directives not only curtails *ex ante* and *ex post* parliamentary control but also establishes a notable potential for discontinuity. In the period between the adoption of a directive and the specified transposition deadline, elections and governmental change are found in about one-third of all cases. More importantly, governmental preferences change within the course of most national transposition processes, even though these changes primarily refer to sector-specific policy-making. In some countries, such as Austria, Sweden and France, we find notable preference changes between the government that agreed to Community legislation and the one responsible for implementing it, suggesting a high potential for discontinuity problems.

Democracy and discontinuity – A comparative view on temporal power

The continuity of representative democracy requires the temporal specification of authority and power. In contrast to inheritance, which ties the hands of newly elected governments with existing legislation and previously adopted programmes (Rose and Davies, 1994), this temporal specification is designed to avoid discontinuity in a formal and material sense as well as among personnel (Pernice, 2005). In almost all democracies, discontinuity in personnel is conventionally prohibited by displacing the president and the dissolution of parliament, which usually includes all activities and parliamentary committees. Material discontinuity concerns legislative decision-making and is usually avoided by settling initiatives at the end of the term, except for those cases not requiring formal adoption (Döring, 1995). In some countries, such as the United Kingdom, this kind of parliamentary supremacy is more of a 'gentlemen's agreement with constitutional character', whereas in countries such as Germany scholars interpret this practice as common law. These provisions attempt to guarantee the temporal aspect of democracy and are, thus, a fundamental constitutional element of representative democracy in the member states of the EU.

In particular, in the normative jurisprudential literature, the central assertion is that discontinuity threatens to violate this principle (Pernice, 2005). The most important facet of discontinuity concerns legislative

decision-making, which sometimes involves institutions and legislative bodies with permanent representation, such as the Austrian and German Bundesrat as well as the Council of Ministers. These bodies often represent (part of) the regional constituents of the political system, even though their delegates may change and are sometimes replaced after elections. However, owing to their permanent representative function, initiatives made within these bodies are not necessarily settled at the end of the legislative term, either in the German or in the EU case. Other examples of possible discontinuity exist in only two EU countries, Luxembourg and the Netherlands. According to Grey (1982), bills die at the end of the legislative term or with parliamentary dissolution in Austria, Belgium, Germany, Finland, Greece, Ireland, Italy and Portugal (every four years), as well as in France (every five years). In three of these countries (France, Ireland and Portugal), a provision exists for carrying a bill over after dissolution or expired legislative period. In Denmark and the United Kingdom, where parliamentary sittings are divided into sessions ranging from six months to a year, bills die at the end of the session or with dissolution. Sweden has a unique provision leading to the expiry of bills if they are not decided upon within one year of their introduction.

The web appendix supplements and specifies the information provided in Grey's (1982) survey. With the exception of Luxembourg and the Netherlands, time limits are generally imposed on the passage of bills, and these are usually restricted to the current legislative term or session. In Denmark, the United Kingdom and Sweden, bills die at the end of session. Belgium, Germany, Finland, France, Greece, Italy, Austria and Portugal usually limit legislative activities at the end of the legislative period or dissolution. In Germany and Austria, dissolution and continuity apply only to the Bundestag. In France, the Senate can still adopt a proposal from the dissolved national assembly under closed rule, whereas governmental and parliamentary bills usually expire with a change of government (Schorn, 2000: 43–54). Belgian bills can survive dissolution or the end of the legislative period if they have already found approval in one of the Houses.

Although these formal hurdles exist for national legislation to prevent discontinuity, the EU has established a two-stage law-making process that allows for the exclusion of parliaments and the shifting of political accountability over time. The most common example of this two-stage process in the EU is the transposition of directives, which defines binding and enforceable guidelines for policy-making that have to be implemented by the national legislator within a given period (König and Luetgert, 2005). From a political science view, the conventional two-year transposition period of EU directives – which may be extended to several years in the event of successive treaty violation procedures or successful member state petition to extend the official

deadline – risks a Jack-in-the-Box effect. Although there are several reasons for continued transposition delay, including political, economic or administrative restrictions, the possibility of governmental and/or preference change begs the question of how much this obligation matters for the newly elected government.

In principle, such requirements do not necessarily threaten the legitimacy of a political system, because the newly elected government can usually revise or amend the previous government's decision. However, compared to a few member states where discontinuity problems may also arise, the EU has established a restrictive voting system that makes revisions and amendments by the newly elected government almost impossible. This system requires not only that the Commission submits an initiative in the interests of the newly elected representative, but also that the Council adopts the proposal by either unanimity or a qualified majority of about 72% of Council votes in an enlarged EU, sometimes followed by the necessary support of the EP. This increases the potential of a Jack-in-the-Box effect, which threatens to dilute democratic accountability and legitimization for political decisions, because parliament and voters are unable to control the policy-making of their delegated representatives with their electoral vote. Even if the results of the directive are not supported by the current majority, both the government and (sometimes) the parliament are obligated to adopt the measures appropriate for implementing the directive and are hardly able to initiate amendments or to change this policy.

Compared with the political and scholarly debate on the EU's democratic deficit, which has drawn attention to the powers of the EP, few insights and – to my knowledge – no empirical study exist on the discontinuity potential induced by the two-stage process of EU directives. Some might argue that the increasing participation of the EP is sufficient guarantee of the direct link between principal and agent in EU law-making. Figure 1 shows the number of binding legislative cases (regulations, directives and decisions) together with EP involvement from the mid-1980s to the coming into force of the Nice Treaty in 2003 (König et al., 2006). A quick inspection seems to confirm Hix's (2005) finding of a significantly higher inclusion of the EP. However, the absolute number of cases involving EP participation has hardly increased in recent years. The rate of parliamentary participation is increasing only because the number of regulations and decisions has drastically decreased since the Maastricht Treaty in 1993, whereas the number of directives has remained constant over time.

These findings on the relatively low participation rate of the EP and the higher relative importance of directives raise doubts about the EP's ability to guarantee accountability, and draw attention to the second stage of EU law-making, where national parliaments can be involved in the implementation process. To reduce agency loss and to identify the discontinuity potential, the

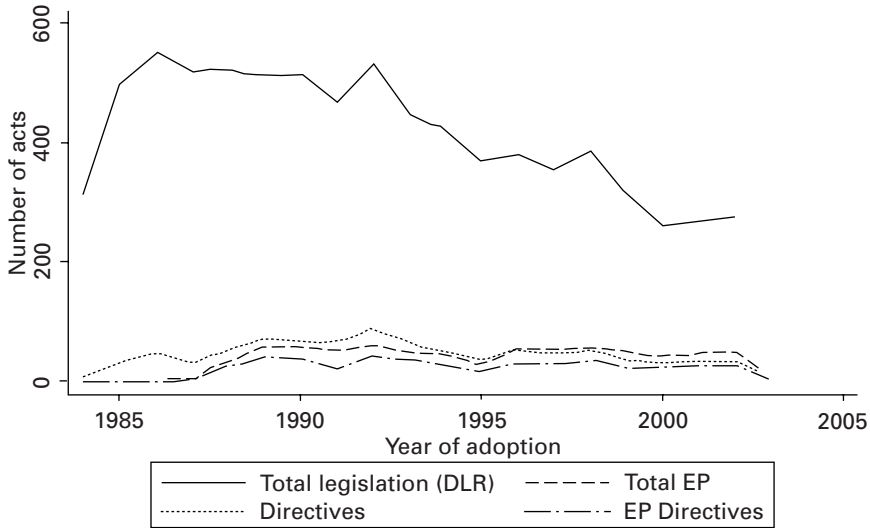


Figure 1 Participation of the EP in EU legislation passed between 1984 and 2002. *Notes:* These data refer to the 8475 decisions (D), directives (L) and regulations (R) proposed by the Commission and documented in König et al. (2006). The applied legislative procedure is documented in PreLex.

question is to what extent this implementation process includes national parliaments, particularly when the coalition and/or the preferences of the majority have changed. Put differently, if a parliamentary majority of tomorrow could control and revise the decisions of today's governments, discontinuity should pose no problem for the legitimacy of law-making; if parliaments are able to learn about this process, discontinuity should pose a minor problem because parliaments could make attempts to develop a counter-strategy. However, if parliaments lack control and even information about this process owing to their exclusion from policy-making, the question is to what extent this process forces a member state to implement decisions when the coalition and/or the preferences of the majority have changed. When the majority neither knows what its governmental agent has promoted, nor is informed about the implementation of the previous agent's decision, discontinuity will increase agency loss and raise a serious legitimacy problem induced by the (growing) importance of directives.

Discontinuity without parliamentary control

The two-stage process of directives formally offers national parliaments ex ante and ex post influence when the legislation is adopted at the EU level and

when it is implemented at the national level. However, although criticism of the EU's legitimacy centres around the parliamentary deficit, and although the Amsterdam Treaty declares that domestic parliaments have an important role in legitimizing the positions of governmental representatives in the Council, a number of studies suggest that the member states vary little in the modest extent to which they allow parliaments to participate in the preparation of their governmental position on Commission proposals. In a recent study on domestic preference formation on Commission proposals, Baltz et al. (2005) find that only the 'Scandinavian' model offers parliaments some access to this *ex ante* coordination process, whereas other countries rarely include their parliaments and prefer to coordinate their national position on Commission proposals among their ministries. Similarly, König and Finke (2005) demonstrate for the EU constitution-building process that this executive model also dominates national position formation for the preparation of constitutional policies.

This suggests that the member states themselves made a significant contribution to the parliamentary deficit in EU legislative decision-making. The governments of the member states have considerable discretion in deciding about the *ex ante* inclusion of their own parliament, but most parliaments are excluded from this process and receive little information about EU legislative decision-making, which induces – in the terminology of the principal-agent literature – problems of moral hazard (Lupia, 1992). Accordingly, the national parliaments, as directly elected representatives and principals, regularly lack information about the governmental agent's action, thus allowing the agent to choose her/his own views, including the possibility of adverse selection owing to the secret nature of Council negotiations (Brehm and Gates, 1997). As a result, parliamentary *ex ante* control and influence on the making of directives are very limited, whereas governments have significant discretionary power in the relevant EU negotiations.

A second possibility for parliamentary involvement in EU legislative decision-making may exist *ex post* during the implementation stage of directives, which could offer the opportunity to learn about agent actions from others. Whereas parliamentarians are directly elected, are more politically concerned about voters' interests and will amend legislation accordingly, the executive prefers usually to focus on the technical problems of policy-making. For Majone, the EU is a regulatory agency addressing market failures, which by definition produces Pareto-efficient outcomes and lacks not democratic foundation but credibility (Majone, 1993, 2000). However, since this agency will implement prior (Pareto-efficient) legislation even in the event of major preference change, the exclusion of parliamentary involvement should increase the risks of discontinuity. The exclusion of 'regulatory'

directives is particularly problematic in terms of potential discontinuity: these directives are adopted by either the Commission, the Council, or the Council and the EP and require transposition into the domestic law of member states, which is formally monitored by the Commission. According to Article 249, a directive is binding, as to the result to be achieved, upon each member state to which it is addressed, but leaves the choice of transposition instrument to the national authorities. If the Commission decides that a member state has failed to fulfil an obligation, it delivers a reasoned opinion on the matter after giving that state the opportunity to submit its observations. If the state does not comply with the opinion within the period laid down by the Commission, the Commission may bring the matter before the European Court of Justice (Article 226), and significant sanctions can be imposed, according to Article 228, in the event of further violation.

Member states typically have to notify the implementing measures intended to achieve the results of the directive within a two-year period, even if it contradicts national law. Formally, member states cannot justify delay by domestic problems or restrictions because the supremacy of EU legislation and the obligation to implement directives dominate any national provision, even if this provision is a constitutional element (Prechal, 1995). This means that the implementation of directives does not require any additional ratification procedure and forces domestic legislative bodies to act in the interest of the directive's results. Not only are delay and ineffective implementation punishable by monetary sanctions or provisions for liability, but the principle of direct applicability also obliges national courts to rule in conformity with the directive. Yet member states differ in their implementation record, and the Commission does not prosecute all infringements (König, 2005; König et al., 2005). Table 1 lists the number of adopted directives and the notification record of each member state.

Based on the Celex Sector 7 database, Table 1 lists in detail how many directives applied to each member state, whether these member states reported a transposition measure or not, the number of pending directives at the time of data collection, the number of directives with a missing transposition deadline, as well as the number of measures lacking a machine-readable date of transposition despite member state notification. Between 730 and 1600 directives in total required transposition (resulting in 21,387 country*directive observations), and between 454 (Austria) and 1229 (Portugal) directives document transposition with at least one measure. At the time of data collection, 18 directives were still pending, and member states failed to indicate a national transposition deadline for between 57 and 193 directives. Between 12 and 155 cases had no adoption date for reported measures, and for between 63 and 279 cases we lack reported data on the transposition measure despite

Table 1 EU member states' response to EU directives, 1986–2002

Member states	Total number of EU directives ^a	Pending on 1 Nov 2004 ^b	No available transposition deadline	No adoption date for measure available	Non-transposition No measure reported	Measure passed prior to directive or after deadline	Total measures considered
Austria	730 (3)	18 (8)	58	78	111	175	279
Belgium	1599 (3)	18 (9)	190	38	232	510	599
Denmark	1600 (4)	18 (9)	190	89	210	287	793
Finland	730 (1)	18 (8)	58	54	63	104	424
France	1600 (3)	18 (9)	190	12	215	472	681
Germany	1599 (3)	18 (9)	189	99	279	435	567
Greece	1600 (3)	18 (9)	190	88	216	590	486
Ireland	1600 (3)	18 (9)	190	126	227	446	581
Italy	1600 (4)	18 (9)	190	56	199	569	555
Luxembourg	1600 (0)	18 (9)	193	19	183	628	550
Netherlands	1599 (3)	18 (8)	189	97	268	316	700
Portugal	1600 (1)	18 (9)	192	24	127	701	528
Spain	1600 (2)	18 (9)	191	75	104	472	729
Sweden	730 (4)	18 (8)	57	30	97	273	243
United Kingdom	1600 (3)	18 (9)	190	155	209	349	667
Total	21,387 (40)	270 (131)	2457	1040	2740	6327	8382

Notes: These data were extracted from Celex Sector 7 (downloaded 1 November 2004). For Austria, Finland and Sweden the data include only directives enacted during the period of their membership (1995–2002).

^a Figure in brackets indicates transposition not required.

^b Figure in brackets indicates no match in Celex 3.

the expiry of the deadline. To investigate all 'regular' cases, this study considers only those transposition measures that were reported in the period between the adoption of the directive and the notification deadline. Upon closer inspection, this sample comprises 8382 member state transposition responses (country*directive) passed on time between 1 January 1986 and 1 February 2003 and having a transposition deadline prior to the date of the data collection in 1 November 2004.⁴ Note that only directives passed after the accession of Austria, Finland and Sweden on 1 January 1995 are included in this sample.

Since neither the inclusion of third parties in 'fire-alarm oversight' nor 'policy patrol oversight' – where the principals undertake most of the oversight themselves – can remedy the parliamentary information deficit, the question is how often parliaments are involved in the transposition stage, and how little ex post control parliaments have over their governmental agents. Figures 2 and 3 refer to the instruments notified by member states within the prescribed transposition period. For some directives, a member state notified several instruments, in particular a series of secondary instruments such as regulations, decrees and circulars. To distinguish between the bureaucratic nature of this process and the question of whether or not parliaments are excluded, Figure 2 shows the annual share of parliamentary and non-parliamentary instruments used to implement directives, while Figure 3 illustrates the extent to which parliament was or was not involved.

Unsurprisingly, some member states, in particular the United Kingdom and Ireland, exclude their parliaments almost completely from this second stage and transpose directives wherever possible with non-parliamentary instruments, such as regulations and statutory instruments. According to Figure 2, more than 85% of all measures used for the transposition of directives in the member states are non-parliamentary instruments, and less than 15% directly involve domestic parliaments. This trend towards bureaucratic implementation of directives is visible for almost all member states over time and across most policy sectors (König et al., 2005). Even in countries that officially emphasize parliamentary participation, governments more and more refer to previous legislation as the legal basis for amendments and use non-parliamentary instruments in the transposition of directives.

Figure 3 shows changes in the annual aggregate statistics of national parliamentary involvement for individual directives. As with the relative share of involvement illustrated in Figure 2, we see that parliaments have little to say in absolute numbers too. Only in Austria, and to a lesser extent in Denmark, Finland and Germany, do we find parliamentary participation in almost half of the implementation cases; the average participation rate is only about 15%. These figures clearly demonstrate that parliamentary ex post

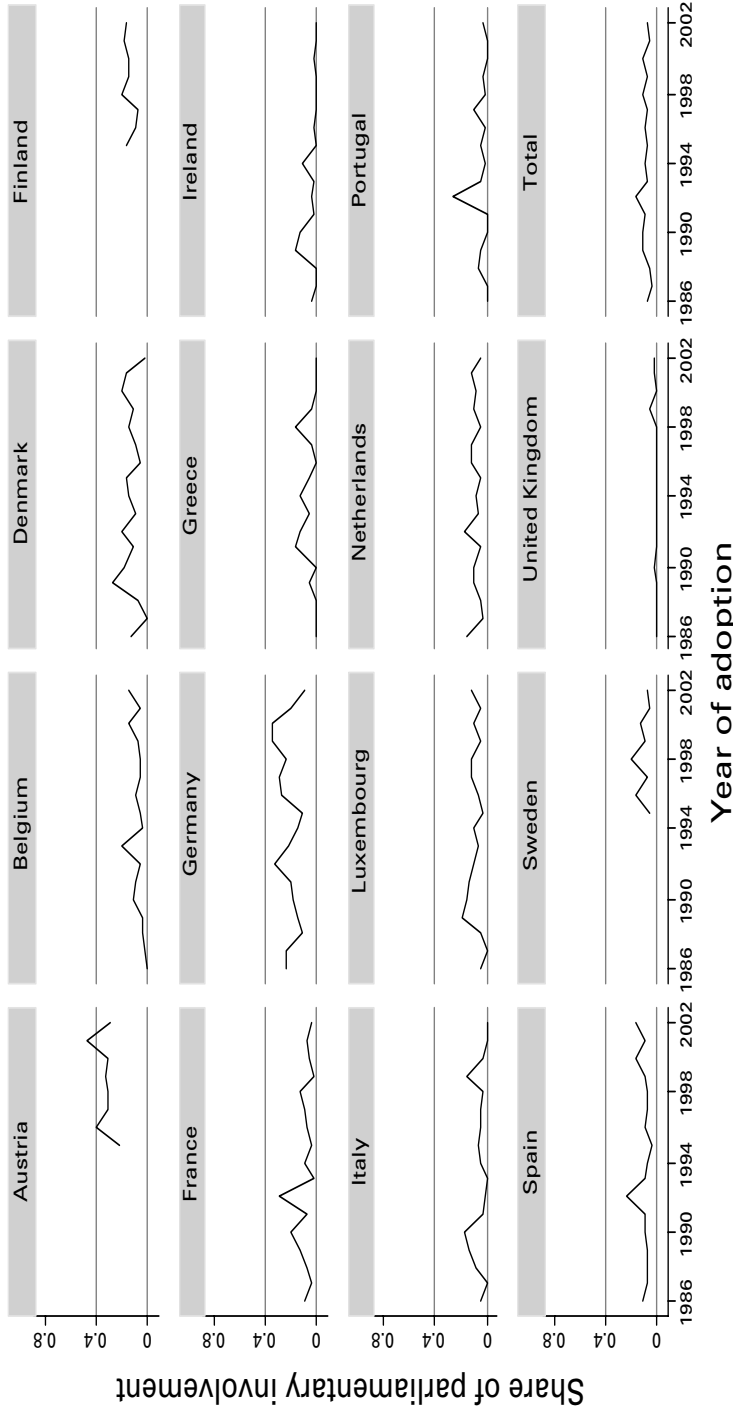


Figure 2 Relative share of parliamentary involvement in the transposition of EU directives, 1986–2002.
Notes: These data were extracted from Celex Sector 7 and include all transposition measures adopted between the promulgation of a directive and its deadline (downloaded 1 November 2004). For Austria, Finland and Sweden, the data include only directives enacted during the period of their membership (1995–2002).
 N = 8382 transposition measures.

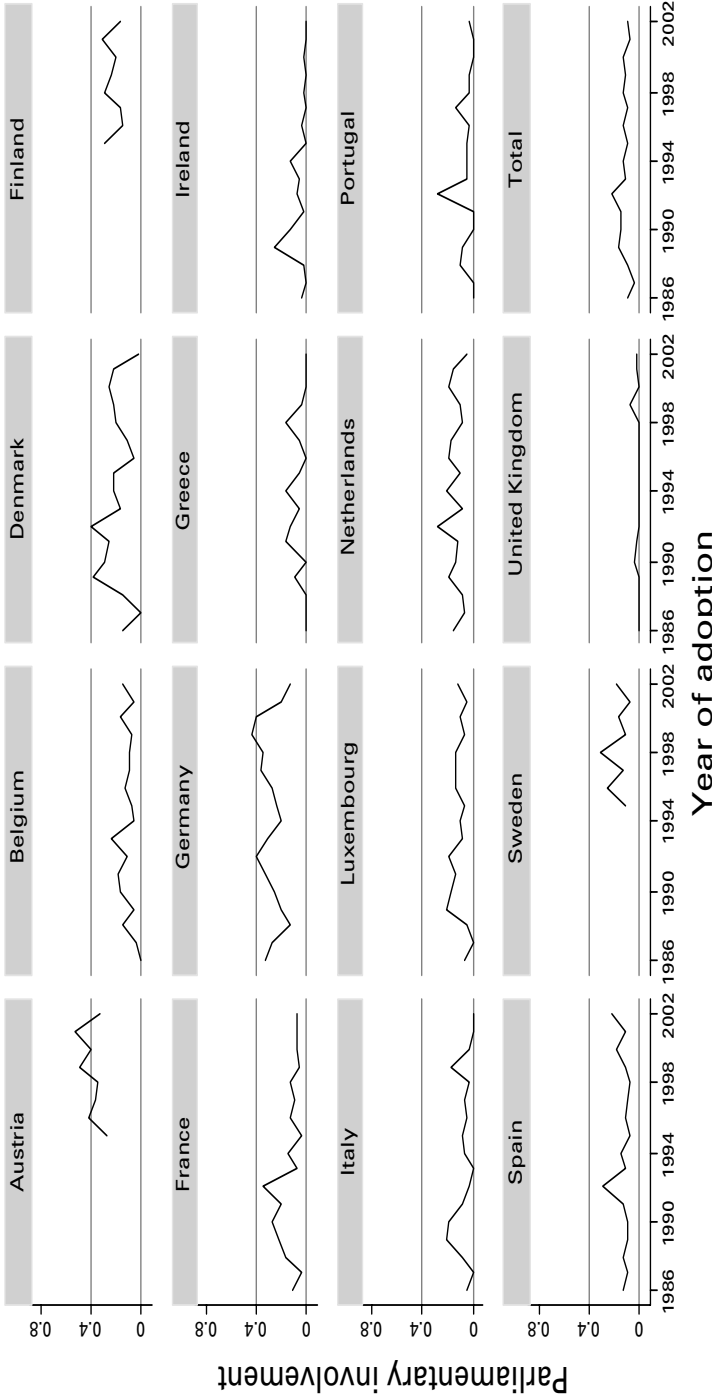


Figure 3 Parliamentary involvement (No/Yes - 0/1) in the transposition of EU directives, 1986–2002.

Notes: These data were extracted from Celex Sector 7 and include all transposition measures adopted between the promulgation of a directive and its deadline (downloaded 1 November 2004). For Austria, Finland and Sweden, the data include only directives enacted during the period of their membership (1995–2002). N = 8382 transposition measures.

control hardly exists, revealing a large potential for agency loss, in particular when the governmental agent is unwilling or unable to serve the parliamentary principal's interest. Only if the principal were to have complete information about the governmental agent's actions could agency losses be minimized, but the high degree of parliamentary exclusion prohibits the acquisition of information on EU law-making. As an extreme example, a 'liberal' policy that was contested by the opposition in a national electoral campaign and rejected by the voters could be implemented by bureaucratic means without parliamentary knowledge.

Directives: Electoral, governmental and preference change

With regard to the very limited possibilities for parliamentary control, the identification of potential discontinuity in EU law-making demands empirical evaluation of the two-stage law-making process, which is an ambitious task for 15 countries over time. In general, the two-stage nature of this process implies that the results are determined by two developments: (i) the number of directives and the number of domestic elections, and (ii) government and preference change in the member states. A quick inspection of the EU legislative record has already revealed that the number of directives has remained relatively constant over the past 20 years, whereas the annual number of regulations dramatically decreased from about 500 at the beginning of the 1990s to well under 100 by the beginning of this century (see Figure 1). Without considering the qualitative nature of EU legislation, this suggests that directives – and thus discontinuity in the implementation process – are becoming relatively more important for the evaluation of EU law-making.

Looking at the number of directives and the number of domestic elections, 2539 national responses from the total sample of 8382 cases were potentially subject to discontinuity via elections. In Denmark, Austria, Portugal, Germany and Italy in particular, many cases were subject to elections during the transposition period. On closer inspection, 2145 cases experienced governmental change, a few without elections owing to a change of coalition partners during the legislative term. This potential for discontinuity empirically affects almost 30% of all member state transposition efforts. Table 2 reveals much variation between the member states: as a result of coalition instability, more than half of the Italian cases and almost one-third of the Austrian cases were subject to governmental change, whereas only 4% of British, 10% of Finnish and 15% of German cases experienced governmental change during the process. Unsurprisingly, the amount of governmental change is lower than the number of elections, but every member state experienced governmental change during the transposition of some directives.

Table 2 Member state transposition instruments subject to national elections and changes in government, 1986–2002

<i>Member state</i>	<i>Total</i>	<i>No election</i>	<i>Election</i>	<i>No change in government</i>	<i>Change in government</i>
Austria	279	156	123	189	90
Belgium	599	429	170	451	148
Denmark	793	481	312	399	394
Finland	424	371	53	381	43
France	681	488	193	448	233
Germany	567	364	203	484	83
Greece	486	326	160	396	90
Ireland	581	410	171	404	177
Italy	555	359	196	277	278
Luxembourg	550	403	147	493	57
Netherlands	700	553	147	517	183
Portugal	528	320	208	321	207
Spain	729	559	170	641	88
Sweden	243	153	90	198	45
United Kingdom	667	471	196	638	29
Total	8382	5843	2539	6237	2145

Notes: These data were extracted from Celex Sector 7 (downloaded 1 November 2004). For Austria, Finland and Sweden, the data include only directives enacted during the period of their membership (1995–2002).

However, as already mentioned, elections and governmental change are rather crude indicators of discontinuity. For example, governments might be re-elected and have similar preferences in the following legislative term, and this would raise little concern about a potential democratic deficit or lack of legitimacy. A more important indicator of discontinuity would be a change in governmental preferences, i.e. the preferences of the previous government differ from those of the newly elected government that is responsible for the implementation of the previous government's activity. Although there is no indicator for governmental preferences on each directive, I propose using party manifestos to identify governmental (coalition) preferences across policy sectors and over time (König, 2007). To control for the possibility that a previous government might have been outvoted under Council qualified majority voting and that preference change from the previous to the current government might even include the preferences of the newly elected government in the directive's policy, Tables 3 and 4 list the number of national transposition responses related to directives adopted under unanimity in

parentheses. These unanimity cases also demonstrate how difficult a change of decision would be for the next government if it had different preferences from the previous government.⁵

Using party manifestos for the identification of governmental preferences requires several steps. First, national party manifestos are merged with data on the party composition of the corresponding governments, including the date of their inauguration and dismissal. Secondly, in order to relate these data to policy areas, party positions are computed for specific EU policy sectors such as agriculture, trade and internal market policies.⁶ The resulting

Table 3 Sector-specific governmental preference change affecting national transposition measures, 1986–2002

	<i>No change</i>	<i>Minimal change</i>	<i>Moderate change</i>	<i>Maximum change</i>	<i>Total</i>
<i>Direction and extent of change across all member states</i>					
No change	5860 (1752)	0	0	0	5860 (1752)
Positive change	0	296 (98)	377 (166)	532 (271)	1205 (535)
Negative change	0	336 (82)	460 (177)	521 (251)	1317 (510)
Total	5860 (1752)	632 (180)	837 (343)	1053 (522)	8382 (2797)
<i>Extent of change by member state</i>					
Austria	163 (45)	13 (1)	35 (12)	68 (32)	279 (90)
Belgium	417 (118)	68 (13)	85 (54)	29 (16)	599 (201)
Denmark	530 (167)	42 (10)	79 (33)	142 (72)	793 (282)
Finland	339 (86)	27 (9)	5 (3)	53 (32)	424 (130)
France	493 (148)	29 (4)	57 (22)	102 (45)	681 (219)
Germany	369 (108)	79 (19)	47 (22)	72 (42)	567 (191)
Greece	328 (104)	17 (5)	44 (9)	97 (48)	486 (166)
Ireland	419 (105)	35 (9)	47 (26)	80 (33)	581 (173)
Italy	368 (101)	37 (5)	77 (32)	73 (36)	555 (174)
Luxembourg	409 (140)	24 (10)	80 (31)	37 (19)	550 (200)
Netherlands	484 (157)	44 (10)	71 (22)	101 (49)	700 (238)
Portugal	323 (98)	57 (32)	88 (27)	60 (25)	528 (182)
Spain	567 (184)	38 (12)	55 (14)	69 (35)	729 (245)
Sweden	177 (54)	11 (5)	2 (0)	53 (33)	243 (92)
United Kingdom	474 (137)	111 (36)	65 (36)	17 (5)	667 (214)
Total	5860 (1752)	632 (180)	837 (343)	1053 (522)	8382 (2797)

Notes: These data were extracted from Celex Sector 7 (downloaded 1 November 2004). For Austria, Finland and Sweden, the data include only directives enacted during the period of their membership (1995–2002). Cases in parentheses indicate application of unanimity voting in Council as extrapolated from the Celex data.

set of cases was completed with a European integration dimension, referring to the pro- and anti-European attitude of political parties (Hix, 1999; Gabel and Hix, 2002; Hooghe et al., 2002; Pennings, 2002). This dimension is coded for all proposals in addition to the sector-specific dimension, which varies across all directives to incorporate party preference changes in the respective area of agriculture, common rules, energy/environment or internal market. To estimate coalition governmental positions, the positions of the coalition parties are averaged. Independent from other coding possibilities, the main advantage is that these positions vary across policy areas and over time. More specifically, the positions provide information on which sector-specific outcomes are preferred by governments over time, and the EU dimension should cover whether a government favours policy-making at the domestic or the EU level.

Looking at the two-stage process and preference change, the top panel of Table 3 shows how often and to what extent the sector-specific preferences of the previous government diverged from those of the government that transposed the directive. No preference change existed in about two-thirds of cases, and minimal change (measured as one standard deviation from the mean) is observable for 632 cases. However, moderate and maximum change⁷ existed in almost 2000 cases, and this governmental preference change occurred in both directions. For the unanimity cases (given in parentheses) maximum change existed for 522 out of the total of 2797, meaning that the percentage of major changes is even higher under the unanimity rule. Moreover, we find changes in about 60% of all unanimity cases, which is notably above the average of about 30% for all cases. Looking more closely at the sector-specific cases of maximum preference change, the bottom panel of Table 3 reveals that Austria, Denmark and Sweden most frequently registered such drastic changes, whereas Belgium, Luxembourg, Spain and the UK experienced fairly minimal changes during most national transpositions.

Finally, Table 4 shows governmental preference change regarding whether national legislative competences should (in general) be delegated to the EU level. Compared with Table 3, the number of cases with maximum change is slightly lower, and moderate preference change exists more often with respect to EU affairs. Interestingly, we find more maximum and moderate preference changes in favour of EU integration than against it. This also holds true for cases under unanimity. Applied to the individual member states, Austria, France and Sweden are the outliers in terms of maximum changes, followed by Denmark. Some countries, such as the Netherlands or Finland, almost lack cases of transposition exposed to maximum governmental preference change in European affairs.

Table 4 Direction and extent of governmental EU preference change affecting national transposition measures, 1986–2002

	<i>No change</i>	<i>Minimal change</i>	<i>Moderate change</i>	<i>Maximum change</i>	<i>Total</i>
<i>Direction and extent of change across all member states</i>					
No change	5837 (1748)	0	0	0	5837 (1748)
Positive change	0	216 (86)	502 (210)	506 (228)	1224 (524)
Negative change	0	348 (154)	523 (195)	450 (176)	1321 (525)
Total	5837 (1748)	564 (240)	1025 (405)	956 (404)	8382 (2797)
<i>Extent of change by member state</i>					
Austria	163 (45)	0	20 (8)	96 (37)	279 (90)
Belgium	417 (118)	63 (32)	84 (32)	35 (19)	599 (201)
Denmark	530 (167)	0	101 (50)	162 (65)	793 (282)
Finland	339 (86)	45 (25)	36 (17)	4 (2)	424 (130)
France	493 (148)	2 (0)	0	186 (71)	681 (219)
Germany	369 (108)	0	142 (53)	56 (30)	567 (191)
Greece	328 (104)	41 (17)	89 (35)	28 (10)	486 (166)
Ireland	419 (105)	62 (26)	31 (9)	69 (33)	581 (173)
Italy	368 (101)	1 (1)	134 (50)	52 (22)	555 (174)
Luxembourg	409 (140)	0	49 (25)	92 (35)	550 (200)
Netherlands	484 (157)	82 (28)	134 (53)	0	700 (238)
Portugal	323 (98)	128 (55)	57 (20)	20 (9)	528 (182)
Spain	567 (184)	82 (32)	37 (8)	43 (21)	729 (245)
Sweden	154 (50)	0	36 (20)	53 (22)	243 (92)
United Kingdom	474 (137)	58 (24)	75 (25)	60 (28)	667 (214)
Total	5837 (1748)	564 (240)	1025 (405)	956 (404)	8382 (2797)

Notes: These data were extracted from Celex Sector 7 (downloaded 1 November 2004). For Austria, Finland and Sweden, the data include only directives enacted during the period of their membership (1995–2002). Cases in parentheses indicate application of unanimity voting in Council as extrapolated from the Celex data.

Discontinuity and change: Another source of the EU's democratic deficit?

Before examining parliamentary deficit and discontinuity of EU law-making in the member states over a period of more than 15 years, it has been shown that continuity is a central feature of democratic government in all member states, in which political authority and power are temporally limited. Voters assign authority and policy-making power to representatives for a limited period and, in almost all member states, the authority and policy-making activities of the representatives formally end with parliamentary dissolution or the end of legislative terms; thus, pending initiatives usually expire to

prevent discontinuity between the political mandate and policy-making. Moreover, the newly elected representatives may more easily change the decisions of the previous representatives because domestic voting systems are less restrictive and allow the newly elected majority to initiate, amend and adopt their programmatic issues. In contrast to the situation in the member states, the voting system of the EU allows for hardly any policy change and the two-stage process of EU law-making leads to a high potential for discontinuity between the governmental representatives who adopt directives and those (newly elected) governments that are obliged to implement the decisions of their predecessors.

With respect to the risk of agency loss, we find that parliamentary control is almost absent in this two-stage process of adopting and implementing directives. Except for the Scandinavian countries, the parliaments of the member states have no *ex ante* control over their governmental agents and are rarely included in the *ex post* transposition stage. This suggests that only the parliaments of the Scandinavian countries can make attempts to develop a counter-strategy. The empirical analysis reveals that most countries use non-parliamentary instruments to transpose directives, even though they could go through parliament. Parliaments, as the principals, accordingly have little chance to learn about their agents' actions, and agency loss is very likely in the event of a divergence between the interests of the principal and those of the agent. This lack of parliamentary control and involvement threatens to intensify the problems raised by discontinuity because voters and their representatives lose their right to receive valuable information about policy-making when their representatives are *de facto* excluded from law-making.

The findings from over 15 years of national transposition confirm that the EU carries this risk of discontinuity. In almost one-third of all cases, election and governmental change occur during the time-lag between adoption and transposition. Moreover, in a similar number of cases the preferences between the previous adopting government and the subsequent implementing government sometimes change drastically, but EU law-making obliges the successor government to implement policies supported by the previous government. Because it could be argued that a previous government has been outvoted under qualified majority voting and perhaps pursued the 'wrong' interests of the following majority, this result is controlled for by the fact that such drastic changes also occur under unanimity rule. In particular in Austria and Sweden, and to a lesser extent in Denmark, Greece, France and the Netherlands, the successor government had to implement sector-specific decisions that were supported by a previous government with very different preferences. In these countries, public support for European integration has also decreased in recent years.

Under these conditions and with respect to the increasingly restrictive voting system of the EU, as well as the growing importance of directives, discontinuity seems to pose a considerable problem for the accountability and legitimacy of EU law-making. On closer inspection of the policy domains, we find that discontinuity hits the internal market domain particularly hard, where the most drastic preference changes occur, followed by common rules. In these domains, there is a large gap between the actors deciding on policies and those who are forced to bear responsibility in the implementation process. At the same time, governments prefer to exclude their parliaments and most frequently use executive instruments to transpose directives. As such, discontinuity may not only create another source of the democratic deficit of EU law-making but also contribute to its increasingly bureaucratic nature.

Notes

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- 1 According to König (2007), the median time-lag between the proposal and adoption of EU initiatives has increased and slowed down decision-making in the last 10 years. In particular, controversial proposals that provide for unanimous voting in the Council and parliamentary participation significantly increase the duration of the legislative process.
- 2 The 10 new members are excluded from this study because their membership began in May 2004. Thus, their transposition record is too short for a meaningful empirical examination.
- 3 The appendix is available at www.uni-konstanz.de/eup/issues.htm.
- 4 Because the average transposition period is two years, the tables and graphs refer to directives passed between 1986 and 2002. The directives from late 2002 and early 2003 were largely pending at the time of data collection.
- 5 Studies on the Council's voting record report a significant trend towards consensus decision-making among member states and dispute the effective application of qualified majority voting (Mattila and Lane, 2001; Mattila, 2004; Heisenberg, 2005).
- 6 In order to avoid missing data, the manifesto calculation procedure is applied. This a mix of policy positions and weights (see Laver, 2001).
- 7 The categories describing the amount of governmental preference change refer to the first and second standard deviations around the absolute value of mean sector-specific and mean EU preference change.

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