

Discontinuity: Another Source for the EU's Democratic Deficit?

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Abstract: This study evaluates discontinuity that is induced by the two-stage lawmaking process of EU directives and discussed in the jurisprudential literature as another source for the EU's democratic deficit. While directives must be transposed into national law, their lengthy transposition period has raised the normative question about the extent to which governments of today can politically and reliably commit domestic majorities of tomorrow. From a political science perspective, this jack-in-the-box-effect is particularly critical in systems with restrictive voting procedures and high agency loss because the parliamentary principal is unable to learn about the behaviour of the governmental agent and can hardly change or amend the decision of the former government. Hence, the empirical task is to identify the potential for discontinuity in EU lawmaking which requires measuring the governmental activities in the implementation process and to compare the preferences of the former and current majorities.

This is the first study which empirically analyzes the potential of discontinuity by combining statistics on the implementation process in the 15 member states with preference indicators for their governments over a period of almost 20 years. The findings reveal that parliaments are almost excluded from this process. On closer inspection, the results show that the preferences of the former and the newly elected representatives differ drastically in about one third of all cases, in particular in Austria, Denmark, France, Sweden – and to a lesser extent – in Ireland, Greece and Luxembourg where public support for European integration has also notably decreased in recent years.

Discontinuity in Two-stage EU Lawmaking

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, i.e. Dehousse 1995, Majone 1998, 2000, Moravcsik 2002, Follesdahl and Hix 2005, Rittberger 2005). Much of this literature focuses on the distribution of power in EU legislative decision making, in particular 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 bloc, change or amend the decisions of the former on time (Pernice 2005). Compared to the provisions in the member states, in which the authority and policy-making activities of elected representatives usually end with dissolution, the end of parliamentary sessions or the conclusion of the legislative term, and in which pending initiatives usually die to prevent discontinuity between the mandate and policy making (see for more detail, Döring 1995: 242), Commission proposals neither die, nor does EU lawmaking allow for the direct control of the representatives in a temporally limited fashion. By contrast, in particular the implementation of directives induces a potential for discontinuity by conventionally establishing a two-year transposition period, in which the (newly elected) representatives might be obliged to implement the decision of the former without having a realistic chance to amend or revise it in a timely fashion.¹

Although discontinuity normatively poses a legitimacy problem particularly in systems with strong checks-and-balances and high agency loss when the principal – in terms of the directly elected parliamentary representatives of voters - lacks control of the governmental agents and is unable to learn about it, the evaluation of the empirical impact of discontinuity requires the identification of the extent to which governments of today can politically and reliably commit majorities of tomorrow, to which former and current representatives differ in their preferences, and to which these new majorities are able to learn about this process. This empirical examination is the main goal of the following analysis of discontinuity that may point to another possible source for the EU's democratic deficit, which is directly related to the discussion about the involvement of the EP: while moral hazard and adverse selection usually give the (parliamentary) principal incentives to gather information about the (governmental) agent (Lupia 2003: 4), parliamentary learning is heavily restricted in

¹ According to author (2007), the median proposal/adoption-time lag of EU initiatives has increased and slowed down decision making in the last ten years. In particular conflictual proposals, which provide for unanimous voting in the Council and parliamentary participation significantly increase the duration of the legislative process.

the two-stage process of EU lawmaking, in which the EP is still incompletely involved, and governmental agents can increase their discretionary power by hiding their preferences in secret Council negotiations and bypassing their domestic parliaments when they implement legislative decisions. This suggests that discontinuity allows expanding power 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.

For the empirical analysis of discontinuity, 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, this study uses longitudinal information on the transposition history of all directives in 15 member states and the 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 (15 countries times about 1569) shall provide a solid empirical answer to two questions on the amount and extent of

- i) domestic parliamentary inclusion in EU lawmaking by directives,
- 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 lawmaking 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 former government, perhaps 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 time between the adoption of the directive and the 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 remainder introduces the problem of discontinuity, discusses the lack of direct control of governmental agents providing insight into parliamentary involvement in the lawmaking of directives. Furthermore, the conventional domestic rules established to prevent

² The ten 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.

discontinuity are presented for the 15 member states, 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 it also establishes a notable potential for discontinuity. In the time 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 who agreed to Community legislation and the one responsible for implementing it, suggesting a high potential of discontinuity problems.

Democracy and Discontinuity – A Comparative View on Temporal Power

The continuity of representative democracy specifies authority and power temporally. Compared to inheritance, which ties the hands of newly elected governments by existing legislation and formerly adopted programs (Davis and Rose 1994), this temporal specification is designed to avoid personnel, formal and material discontinuity (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," while in countries like 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, due to their permanent representative function, initiatives made within these bodies are not necessarily settled at end of the legislative term, i.e. neither in the German nor the EU case. Other examples for possible discontinuity only exist in 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 a provision exists for carrying a bill over after dissolution or expired legislative period (France, Ireland and Portugal). 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 disposed of within one year following introduction.

Table 1 about here

Table 1 supplements and specifies the information provided by Grey's survey (1982). With the exception of Luxembourg and the Netherlands, time limits are generally imposed on the passage of bills, and these are usually limited 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 only apply to the Bundestag. In France, the Senate can still adopt a proposal from the dissolved national assemble under closed rule, while governmental and parliamentary bills usually expire with governmental change (Schorn 2000: 43-54). Belgian bills can survive dissolution or the end of the four year period, if they have already found approval in one of the Houses.

While these formal hurdles exist for national legislation to prevent discontinuity, the EU has established a two-stage lawmaking-process which allows to exclude parliaments and to shift of political accountability over time. The most common example for this two-stage process in the EU is the transposition of directives, which define binding and enforceable guidelines for policy making that have to be implemented by the national legislator within a given (sometimes extensive) period of time (author). 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 – begs the danger of 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 the question is to which extent does this obligation matter for the newly elected.

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 decision of the former. But compared to a few member states, where discontinuity problems may also arise, the EU has established a restrictive voting system which makes revisions and amendments by the newly elected government almost impossible. This system not only requires that the Commission would make an initiative in the sense of the newly elected representative, but the Council must also adopt the proposal by either unanimity or a qualified majority of about 72% in an enlarging EU, sometimes followed by the necessary support of the EP. This increases the potential of a Jack-in-the-Box-effect, which risks to dilute democratic accountability and legitimisation 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) parliament are obligated to adopt the measures appropriate for implementing the directive and hardly able to initiate amendments or to change this policy.

Compared to the political and scholarly debate on the EU's democratic deficit that has raised 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 sufficiently guarantees the direct link between the principal and the agent in EU lawmaking. On closer inspection, figure 1 lists the number of binding legislative cases (regulations, directives and decisions) and EP involvement from the mid-1980s to the coming into force of the Nice treaty in 2003. A quick inspection of the numbers seems to confirm Hix (2005) findings on a significantly higher inclusion of the EP, but the absolute number of cases with parliamentary participation has hardly increased in recent years. Similar to the number of directives, the number of cases with parliamentary participation remained almost constant over time. However, the number of regulations and decisions drastically decreased since the Maastricht treaty in 1993. Thus, the rate of parliamentary participation is only increasing due to lower legislative activities, while the number of directives remains constant over time.

These findings on the relatively low participation rate of the EP and the higher relative importance of directives raise doubts on the EP's ability to guarantee accountability, drawing

the attention to the second stage of EU lawmaking where national parliaments can be involved in the implementation process. To reduce agency loss and to identify the discontinuity potential, the 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 lawmaking; 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 due to their exclusion from policy making, the question is to what extent does this process force a member state to implement decisions when the coalition and/or the preferences of the majority have changed. When the majority knows neither what their governmental agent has promoted nor is informed about the implementation of the former's agent decision, discontinuity will raise agency loss and beg 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 the 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 legitimising the positions of the 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, while all other countries rarely include their parliaments and prefer coordinating their national position on Commission proposals among their ministries. Similarly, author (2006) 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 a significant contribution to the parliamentary deficit in EU legislative decision making is made by the member states themselves. The governments of the member states have a good deal of discretion in deciding about the *ex ante* inclusion of their

own parliament, but most parliaments are excluded from this process and only modestly informed about EU legislative decision making, which induces principal-agent problems from 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 own views, including the possibility of adverse selection due 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 is very limited, and governments have significant discretionary power with the respective EU negotiations.

A second possibility of parliamentary involvement on EU legislative decision making may exist *ex post* during the implementation stage of directives, which could offer learning about agent actions from others. While parliamentarians are directly elected, more politically concerned about the interests of the voters and will amend legislation, the executive rather focuses on the technical problems of policy making. For Majone, the EU is a regulatory agency addressing market failures, which produces by definition pareto-efficient outcomes and does not lack democratic foundation but credibility (Majone 1993, 2000). However, since this agency will implement prior (pareto-efficient) legislation even in the event of drastic preference change, the exclusion of parliamentary involvement should increase the risks of discontinuity. In particular in the case of "regulatory" directives, which are adopted by either the Commission, the Council, or Council and EP, and require transposition into the domestic law of the member states, which is formally monitored by the Commission, this exclusion generates discontinuity problems. According to Article 249, a directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods. If the Commission decides that a member state has failed to fulfil an obligation, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations. If the state does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the 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 in the case of contradicting national law. Formally, member states cannot justify delay by domestic problems and restrictions, because the supremacy of EU legislation and the obligation to implement directives dominates any national provision even if this provision is a constitutional element (Prechal 1996). 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. Delay or ineffective implementation is not only punishable by monetary sanctions or provisions for liability, direct applicability also obliges national courts to rule conformably with the directive. Yet, member states differ in their implementation record, and the Commission does not prosecute all infringements (author 2005). Table 2 lists the number of adopted directives and the notification record of each member state.

Table 2 about here

Based on the CELEX Sector 7 database, table 2 lists in detail, how many directives applied to each member state, whether these member states reported a measure of transposition or not, the number of pending directives at time of data collection, the number of directives with a missing transposition deadline and the number of measures lacking a machine-readable date of transposition despite member state notification. Between 730 (Sweden) and 1600 (Luxembourg) 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. 18 directives were pending at the time of data collection; between 57 and 193 fail to indicate a national transposition deadline. No adoption date for reported measures affects between 12 and 155 cases, and for between 63 and 279 cases, we lack reported transposition measure despite expiration of the deadline. To investigate all "regular" cases only transposition measures are considered which are reported in the period between the adoption of the directive and the notification deadline. Upon closer inspection, this sample includes a total of 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 2004.³ 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 do the majority of the oversights themselves - can remedy the parliamentary information deficit, the question is how often are parliaments involved in the transposition stage, and how little *ex post* control parliaments have over their governmental agents. Figures 2a and 2b illustrate the numbers of all instruments notified by the member states within the prescribed transposition period. For some directives, a member state notified

³ Due to the average transposition period of two years, the tables and graphics refer to directives passed between 1986 and 2002. The directives from late 2002 and early 2003 were largely pending at the time of collection.

several instruments, in particular a series of secondary instruments such as regulations, decrets, circulars, etc. To distinguish between the bureaucratic nature of this process and the question whether parliaments are excluded or not, figure 2a lists the annual share of parliamentary and non-parliamentary instruments used to implement directives, while figure 2b illustrates the extent to which parliament has been involved or not.

Figures 2a and 2b about here

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 2a, more than 85% of all measures used for the transposition of directives in the member states refer to non-parliamentary instruments, while less than only 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 (author). Even in countries that officially emphasize parliamentary participation, governments more and more refer to previous legislation as the legal basis for amendments and the use of non-parliamentary instruments in the transposition of directives.

Figure 2b shows changes in the annual aggregate statistics of national parliamentary involvement for individual directives. Compared to the relative share of involvement illustrated in figure 2a, we also see that parliaments have little to say in absolute numbers. Only in Austria, and to a lesser extent in Denmark, Finland and Germany, do we find parliamentary participation in about half of the implementation cases; the average participation rate is only about 15%. These numbers clearly demonstrate that parliamentary *ex post* 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 share of parliamentary exclusion prohibits acquiring information on EU lawmaking. In the extreme, a "liberal" policy that was contested by the opposition in the national electoral campaign and refused 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 lawmaking demands empirical evaluation of the two-stage lawmaking 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 amount of directives and number of domestic elections, 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 last twenty years, while the annual number of regulations dramatically decreased from about 500 in the beginning of the 1990s to less than 100 regulations by the beginning of 2000s (see figure 1). Without consideration of 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 lawmaking.

Table 3 about here

Looking at the amount of directives and number of domestic elections, 2539 national responses were potentially subject to discontinuity via elections from the total sample of 8382 cases. Particularly in Denmark, Austria, Portugal, Germany and Italy, many cases were subject to elections during the transposition period. On closer inspection, 2145 cases experienced governmental change, a few without elections due 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 3 shows that there is variation among the member states: due to coalition instability, more than half of the Italian cases and almost one third of the 279 Austrian cases were subject to governmental change, while 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.

However, as already mentioned, elections and governmental change are rather crude indicators for discontinuity. For example, governments could 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 for discontinuity should be change in governmental preferences that is when the preferences of

the former government differ from those of the newly elected government that is responsible for the implementation of the former government's activity. While there exists no indicator for the governmental preferences on each directive, this study proposes using party manifestos for identifying the governmental (coalition) preferences across policy sectors and over time (author). To control for the possibility that a former government might have been outvoted under Council qualified majority voting and preference change from the former to the current government might even include the preferences of the newly elected government in the directive's policy, tables 4 and 5 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 a decision would be for the following majority with different preferences from the former.⁴

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 like agricultural, trade and internal market politics.⁵ The resulting 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 that varies across all directives to incorporate party preference changes in the respective area of agricultural, common rules, energy/ environment or internal market. To estimate governmental coalition positions, the positions of the coalitional 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, while the EU dimension should cover whether a government favors policy making at the domestic or EU level.

Looking at the two-stage process and preference change, table 4a lists how often and to what extent the sector-specific preferences of the former government diverge from those of the government that transposed the directive. No preference change existed in about two-thirds of all cases, while minimal change (measured as one standard deviation from the mean)

⁴ 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 200, Mattila 2004, Heisenberg 2005).

⁵ In order to avoid missing data, I applied the manifesto calculation procedure – a mix of policy positions and weights (Laver 2001).

is observable for 632 cases. Moderate and maximum change, however, existed in almost 2000 cases, and this governmental preference change occurred in both directions. The lower number of unanimity cases reveals that maximum change existed for 522 of 2797 cases, meaning that the percentage of drastic changes is even higher under 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 on the sector-specific cases of maximum preference change, table 4b reveals that Austria, Denmark and Sweden most frequently registered such drastic changes, while Belgium, Luxembourg, Spain and UK experienced rather minimal changes during most national transposition.

Finally, tables 5a and 5b show governmental preference change on whether national legislative competences should (in general) be delegated to the EU level. With reference to table 4a, the number of cases with maximum change is slightly lower than the number of cases with sector-specific change, and moderate preference change exists more often with respect to EU affairs. Interestingly, we find more maximum and moderate changes in favour of EU integration than against it. This also holds true for cases under unanimity. Applied to the member states, Austria, France and Sweden are the outliers with 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.

Discontinuity and Change: Another source for the EU's democratic deficit?

Before examining parliamentary deficit and discontinuity of EU lawmaking 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 former, 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 member states, the voting system of the EU hardly allows for policy change and the two-stage process of EU lawmaking induces a high potential of 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 losses, 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 they 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 have accordingly little chances to learn about their agents' actions, and agency loss is very likely in case of disagreement between the principal's and agent's interest. This lack of parliamentary control and involvement threatens to intensify the problems raised by discontinuity because voters and their representatives are losing their right to receive valuable information about policy making when the latter are de facto excluded from lawmaking.

The findings on 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, a similar number of cases documents that the preferences between the previous adopting and the subsequent implementing government sometimes change drastically, but EU lawmaking obliges the successor to implement policies supported by the former government. While it could be argued that a former government has been outvoted under qualified majority voting and perhaps pursued the "wrong" interests of the following majority, this result is controlled for 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 following government had to implement sector-specific decisions that were supported by a former 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 lawmaking. On closer inspection of the policy domains, we find that discontinuity hits the internal market domain particularly hard, where 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 the responsibility in the implementation process. At the same time, governments prefer to exclude their parliaments and most frequently use executive

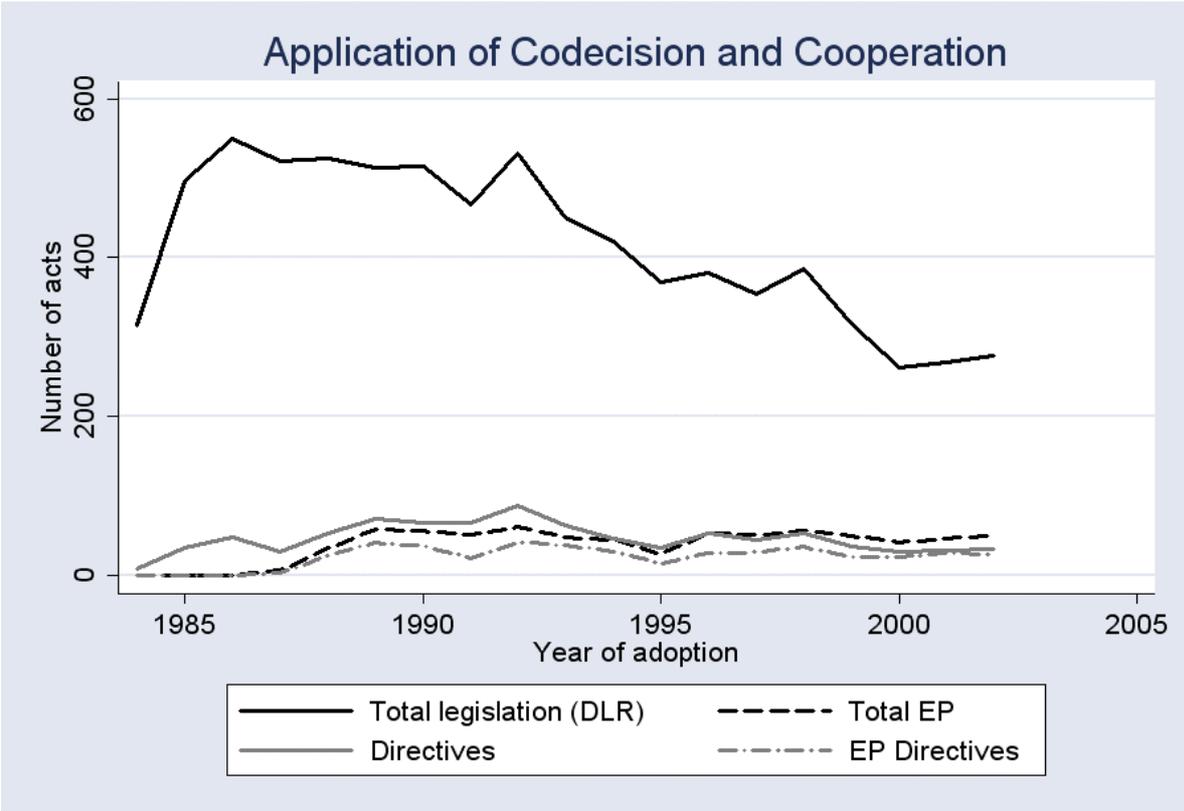
instruments to transpose directives. Insofar, discontinuity may not only pose another source for the democratic deficit of EU lawmaking, but it also contributes to its increasing bureaucratic nature.

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Figure 1: Participation of the EP in EU legislation passed between 1986 and 2002



Source: Original Data extrapolated from PreLex and Celex (author 2006)
 These data refer to 8,475 decisions (D), directives (L) and regulations (R) proposed by the Commission. The applied legislative procedure is documented in PreLex.

Figure 2a: Share of Parliamentary Involvement in the Transposition of EU Directives between 1986 and 2002 (N=8382 transposition measures)

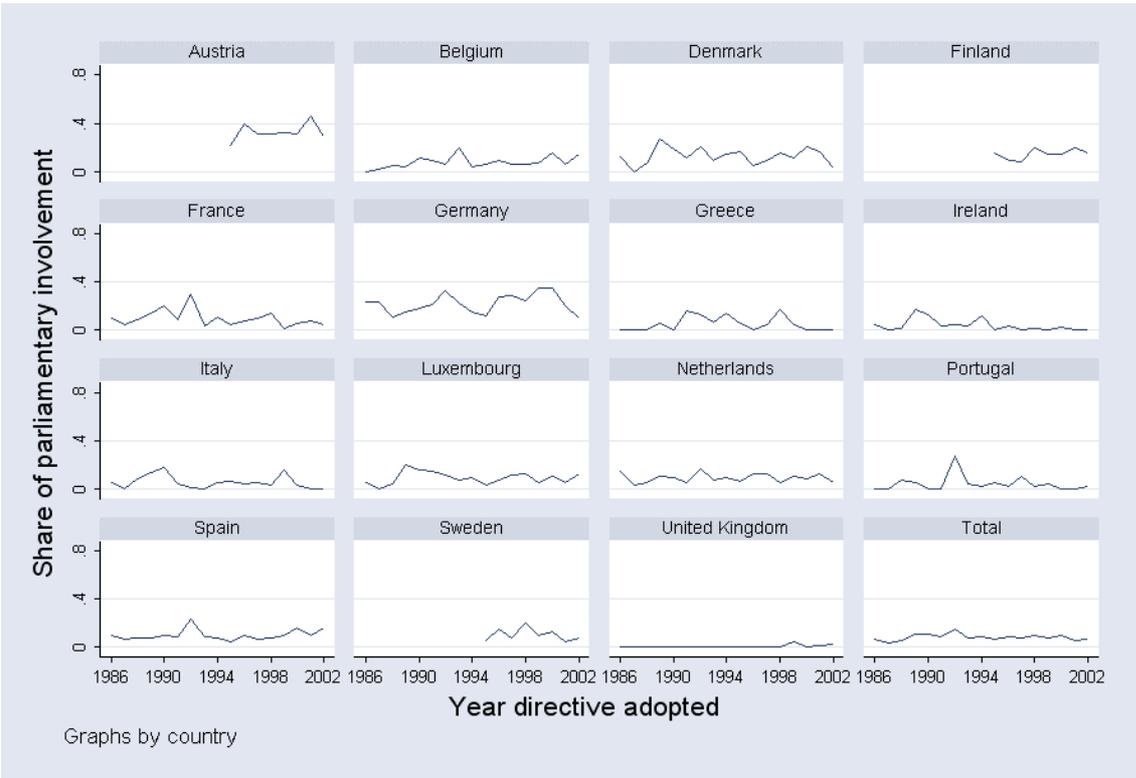


Figure 2b: Share of Parliamentary Involvement (No/Yes – 0/1) in the Transposition of EU Directives between 1986 and 2002 (N=8382 transposition measures)

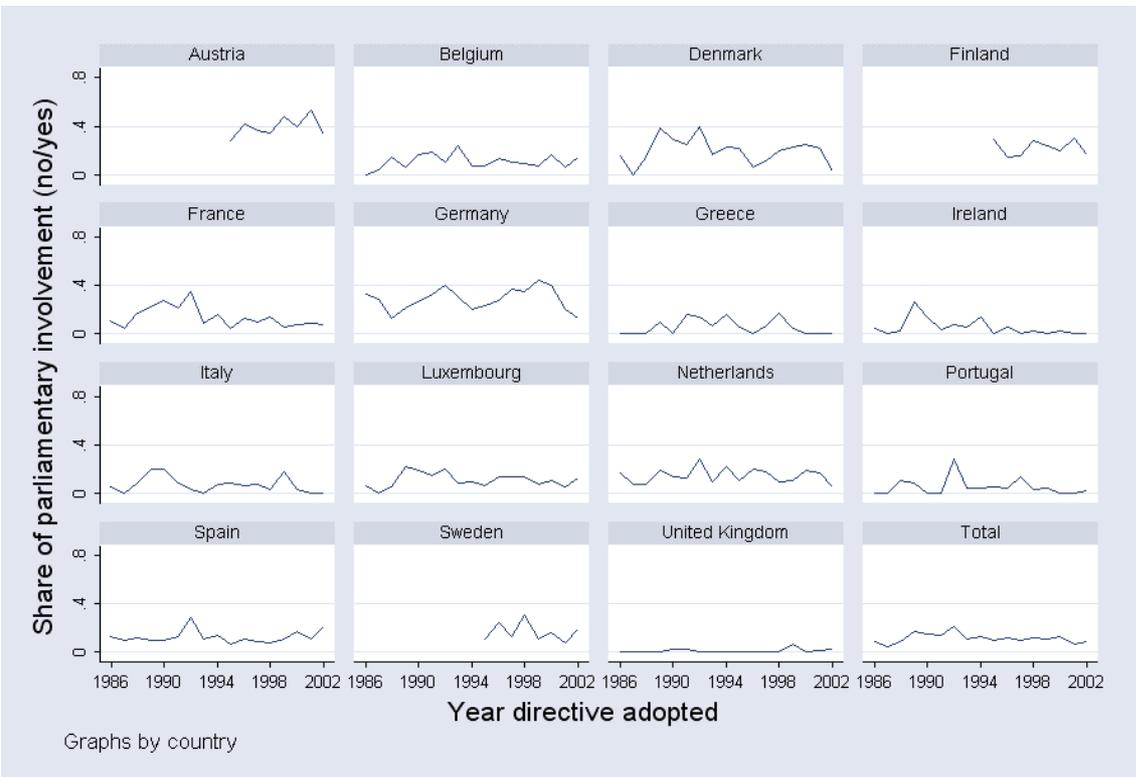


Table 2: EU member states' response to EU directives between 1986 and 2002

Member states	Total number of EU directives (transposition not required)	Pending on 1 Nov 2004 (no match Celex3)	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

Source: Original Data extrapolated from Celex Sector 7 (downloaded on 01.11.2004)

*For Austria, Finland and Sweden our data only includes directives enacted during the period of their membership, 1995 -2002

Table 3: Member State transposition instruments subject to national elections and changes in government between 1986 and 2002

	Total	no election	election	no change in government	change in government
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

Table 4a: Direction and extent of sector-specific governmental preference change affecting national transposition measures between 1986 and 2002 across all member states

	no change	minimal change	moderate change	maximum change	Total
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)

Source: Original Data extrapolated from Celex Sector 7 (downloaded on 01.11.2004)

Note: cases in parentheses indicate application of unanimity voting in Council as extrapolated from the Celex data

Table 4b: Extent of sector-specific governmental preference change affecting national transposition measures between 1986 and 2002

	no change	minimal change	moderate change	maximum change	Total
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)

Source: Original Data extrapolated from Celex Sector 7 (downloaded on 01.11.2004). The data for Austria, Finland and Sweden only includes directives enacted during the period of their membership, 1995 -2002

Note: Cases in parentheses indicate application of unanimity voting in Council as extrapolated from the Celex data.

Table 5a: Direction and extent of governmental EU preference change affecting national transposition measures between 1986 and 2002 across all member states

	no change	minimal change	moderate change	maximum change	Total
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)

Source: Original Data extrapolated from Celex Sector 7 (downloaded on 01.11.2004).

Note: Cases in parentheses indicate application of unanimity voting in Council as extrapolated from the Celex data.

Table 5b: Extent of governmental EU preference change affecting national transposition measures between 1986 and 2002

	no change	minimal change	moderate change	maximum change	Total
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)

Source: Original Data extrapolated from Celex Sector 7 (downloaded on 01.11.2004). The data for Austria, Finland and Sweden only includes directives enacted during the period of their membership, 1995 -2002

Note: Cases in parentheses indicate application of unanimity voting in Council as extrapolated from the Celex data.

Table 1: Legislative Procedures in 15 EU Member States: The Principle of Discontinuity and the Legislative Life of Bills

	General*	Institutions	Comments
Austria	D at end of LP or dissolution	<i>Nationalrat</i> <i>Bundesrat</i>	<u>Constitution:</u> Article 27(1): "Die Gesetzgebungsperiode des Nationalrates dauert vier Jahre, vom Tag seines ersten Zusammentrittes an gerechnet, jedenfalls aber bis zu dem Tag, an dem der neue Nationalrat zusammentritt." Art. 28 (4): "Bei Eröffnung einer neuen Tagung des Nationalrates innerhalb der gleichen Gesetzgebungsperiode werden die Arbeiten nach dem Stand fortgesetzt, in dem sie sich bei der Beendigung der letzten Tagung befunden haben." (RP: §46(4): "Bei Eröffnung einer neuen Tagung des Nationalrates innerhalb derselben Gesetzgebungsperiode werden die Arbeiten nach dem Stand fortgesetzt, in dem sie sich bei der Beendigung der letzten Tagung befunden haben.") ¹⁸ <u>Constitution:</u> Article 35(3): "(3) Nach Ablauf der Gesetzgebungsperiode eines Landtages oder nach seiner Auflösung bleiben die von ihm entsendeten Mitglieder des Bundesrates so lange in Funktion, bis der neue Landtag die Wahl in den Bundesrat vorgenommen hat." (RP: §3(2): "Nach Beendigung der Gesetzgebungsperiode eines Landtages bleiben die von ihm entsandten Bundesräte so lange in Funktion, bis der neue Landtag die Wahl in den Bundesrat vorgenommen hat.") ¹⁹
Belgium	D at end of LP or dissolution, but may be considered in next LP of one of the chambers has agreed to. If not adopted by both, bill dies within 8 years	<i>Chambre des Représentants</i> <i>Sénat</i>	For both houses (as of 2000, see Schorn 2000: 60-68) situation is unclear : <u>Loi du 3 mars 1977 relative aux effets de la dissolution des Chambres législatives à l'égard des projets et propositions de loi antérieurement déposés.</u> <u>Moniteur belge</u> 12 mars 1977: Principle of "non-caducité" : bills expire only when neither house has voted (and passed it to the other house) by the end of the S, or when the resolution was introduced more than 8 years earlier. <u>Loi du 6 avril 1995</u> (only applicable for LP 1995-99): bills that have not passed through both houses are subject to D. <u>Suggestions in a recommendation from the Service juridique du Sénat</u> (see Schorn 2000: 62,66-68) range from the introduction of strict D, to the limited retention of non-caducité, and even a regulation according to which the continued consideration of a bill would depend on the petition of 15 members of the respective house within a certain period. ¹ Addendum: <u>1993:</u> fundamental constitutional amendments altered the parliamentary structure from a pure bicameral system to a <i>bicaméralisme inégalitaire</i> with clear primacy of house of representatives in the legislative process. The Sénat is no longer consulted in certain matters, or matières monocomérale. The regulation of D was (as of 2000) not modified. Problematic of D is described in Schorn 2000: 60f. <u>Situation in Feb. 2006:</u> the problems mentioned above are not addressed in either the constitution or the current RPs.
Denmark	D at end of S or dissolution	<i>Folketing</i> (Parliament)	<u>In the Constitution:</u> § 41(4): " In the case of a new election, and at the end of the sessional year, all Bills and other measures which have not been finally passed shall be void." <u>In the RP:</u> Art. 10(3): " In view of the planning of the legislative work, the majority of Bills which the Government intends to introduce during the sessional year should be introduced at the beginning of the sessional year in question. As a rule, Bills should be introduced no later than by April 1 st in order to be passed within the current sessional year." ²
Finland	D at end of LP or dissolution	<i>Eduskunta</i> (single chamber parliament)	<u>Constitution: § 49 - Continuity of consideration</u> "Consideration of matters unfinished in one parliamentary session continues in the following parliamentary session, unless parliamentary elections have been held in the meantime. However, the consideration of an interpellation or a statement by the Government does not continue in the following parliamentary session. The consideration of a report by the Government shall continue during the following parliamentary session only if the Parliament specifically so decides. When necessary, the consideration of an international matter pending in the Parliament may continue during the parliamentary session following parliamentary elections." ⁵
France	D at end of LP, but may be considered in next LP	<i>Assemblée nationale:</i> <i>Sénat:</i>	Not explicitly regulated in either the constitution or the RP except under "coutume constante" (circumstances remaining constant): "En vertu d'une coutume constante, l'Assemblée nationale nouvellement élue, n'est plus saisie des textes qui se trouvaient en instance devant l'Assemblée précédente" The Assemblée nationale is bound by D at end of LP, but may be considered in new LP if the Sénat passes the bill without further amendment. ⁶ For the Sénat, bills are differentiated as <i>Projets de loi</i> (Government bills) and <i>Propositions de loi</i> (Parliament bills) where <i>Projets de loi</i> : are not generally subject to discontinuity, and expire only after a change in government (Schorn 2000: 53, based on Pierre Avril, H'Jean Gicquel, 1996: Droit parlementaire, p. 147). <u>And Propositions de loi</u> : propositions from the Sénat expire with the third session following initiation (Art. 28-2 der GO d. Senats, according to Schorn 2000: 53) ⁷

	General*	Institutions	Comments
Germany	D at end of LP	<i>Bundestag</i> : bound by D at end of LP or dissolution <i>Bundesrat</i> : not bound by D	“§125 Unerledigte Gegenstände: Am Ende der Wahlperiode des Bundestages gelten all Vorlagen als erledigt. Dies gilt nicht für Petitionen und für Vorlagen, die keiner Beschlussfassung bedürfen.” ³ “(…) zu beachten ist jedoch, dass der Grundsatz der Diskontinuität nur für den Bundestag gilt, nicht aber für Bundesrat oder Bundesregierung. Allerdings wird auch von einer Staatspraxis berichtet, wonach Gesetzesentwürfe, zu denen der Bundesrat schon Stellung genommen hat, die aber dem alten Bundestag nicht mehr zugeleitet wurden, dem Bundesrat nochmals vorgelegt werden.” ⁴
Greece	D at end of LP or dissolution	<i>Vouli</i> (single chamber parliament)	Art. 85: "8. Le dépôt de projet ou proposition de loi est valable pour toute la législature sous réserve des paragraphes 2 et 3 respectivement, de l'article suivant." ¹⁰
Ireland	D at end of LP or dissolution, but may be carried over to next LP	<i>Seanad Éireann</i> (upper house) <i>Dáil Éireann</i> (lower house)	RP: "Lapsed Bills: §122. (1) Any Bill which lapses by reason of a general election for the Seanad may be proceeded with after the general election at the stage it had reached prior to the general election upon a Resolution restoring it to the Order Paper. (2) Unless the Resolution restoring the Bill to the Order Paper directs otherwise, the Bill shall be proceeded with at the commencement of the particular stage which it had reached prior to the general election." ¹¹ RP: "Restoration of Lapsed Bills to Order Paper: §135. (1) Any Bill, which lapses by reason of the dissolution of the Daíl, before it has reached its final stage, may be proceeded with on the reassembly of the Daíl at the stage it had reached prior to the dissolution, upon a Resolution restoring it to the Order Paper. (2) Unless the Resolution restoring the Bill to the Order Paper directs otherwise, the Bill shall be proceeded with at the commencement of the particular stage which it had reached prior to the dissolution of the Daíl." ¹²
Italy	D at end of LP or dissolution, but may be considered in next LP	<i>Camera die Deputati</i> (house of representatives) <i>Senato della Republica</i>	RP (official English Translation): Part XXII, Rule 107: "Bills already considered by the previous Parliament 1. If in the six months immediately following the beginning of a new Parliament a bill is introduced which reproduces in full the text of a bill approved by the Chamber in the previous Parliament, the House may, if it declares such bill to be urgent and at the request of the Government or of a Group Chairperson, set a time limit of fifteen days for the Committee to report. 2. Once this time is up, the President shall enter the bill in the agenda of the House or of the Committee acting in a legislating capacity, in accordance with paragraph 6 of Rule 25. 3. In the same six-month period from the beginning of the new Parliament, each Committee may decide, subject to a brief preliminary consideration, to report to the House on any bills approved by the same Committee in a reporting capacity during the previous Parliament, and to adopt the report presented at that time. 4. For bills initiated by citizens, the procedure envisaged in paragraph 1 for introduction shall not be necessary. When such bills have been approved by the Chamber in the previous Parliament or have been considered in full at the Committee stage, if the Government or a Group Chairperson so requests, the provisions set out in the preceding paragraphs shall apply; otherwise the bill shall be referred again to the appropriate Committee according to subject matter, following ordinary procedures." ¹³ RP (official English Translation): "Rule 81: Bills already passed or considered in the previous Parliament: 1. In the case of bills introduced in the first six months of a new Parliament which are identical to the text of bills approved only by the Senate in the previous Parliament, the government or twenty Senators may, within one month of their introduction, a move that they be declared 80 bills and that summary proceedings may be adopted as provided in the following paragraphs. (...) 3. Should the Senate resolve that the bill is urgent and adopts the summary proceedings, if the bill is referred to a committee sitting in a reporting capacity it shall be authorised to report orally to the Senate, and the bill shall be automatically set down in the calendar or the Work Plan immediately following the current one so that the Senate can vote on it, with the speakers restricted to the rapporteur, the representative of the government and the sponsors of any amendments, and the explanations of vote provided by Rule 109(2) shall be permitted. (...) 5. standing committees to which bills are referred in a reporting capacity which identical to bills which had been fully considered by the same committees in the previous Parliament may resolve, within the first seven months from the beginning of the new Parliament, and after a after summary consideration thereof, to adopt the reports submitted in the previous Parliament without further debate." ¹⁴ Addendum: The law "Legge La Pergola" (Nr. 86/1989) is of particular importance with reference to Community legislation and in connection with discontinuity because it quickly resolved the related legislative backlog (according to Chiti in Schwarze 1996: 254; the legal text is available online in Italian)

	General*	Institutions	Comments
Luxembourg	Bill does not lapse with end of S or LP	<i>Chambre de Députés</i> (single chamber parliament)	Indirect reference in the RP: Art. 61: "Ne peuvent être réintroduites au cours d'une même session les propositions que la Chambre n'a pas prises en considération ou qu'elle n'a pas adoptées." ¹⁵
The Netherlands	Bill does not lapse with end of S or LP	<i>Eerste Kamer</i> ¹⁶ <i>Tweede Kamer</i> ¹⁷	The RP of the Eerste Kamer is only available in Dutch There is no mention of discontinuity in either the constitution or RP of the Tweede Kammer. Addendum: Relative to discontinuity in administrative law, refer to the "General Administrative Law Act" (GALA, niederl.: Algemene Wet Bestuursrecht, AWB) from 1994 (vgl. Widdershoven/de Lange in Schwarze 1996: 532)
Portugal	Bill usually die at the end of LP or dissolution	<i>Assembleia da República</i> (single chamber parliament)	RP: "Article 47 (Legislative sessions and normal parliamentary term) 1. Legislative sessions shall last for one year commencing on 15 September. 2. Without prejudice to suspensions decided by a two-thirds majority of all Members present, the Assembly of the Republic's normal parliamentary term shall be from 15 September to 15 June." "Article 135 (Renewal of initiatives): 1. Bills that are not put to the vote in the legislative session in which they are submitted shall not require resubmission in the following legislative sessions, unless the legislature itself comes to an end. 2. Government bills shall lapse upon the resignation or removal of the Government, or, when the initiative was taken by a regional legislative assembly, when the respective legislature comes to an end." ²⁰ Addendum: Relative to discontinuity in administrative law, refer to the "Código do Procedimento Administrativo" (CPA, Nr. 442/91 from 15.11.1991). (Botelho Moniz/Moura Pinheiro in Schwarze 1996: 662; CPA is available online in Portuguese).
Sweden	Bill continue from year to year but die if not disposed of within the year following the year of introduction	<i>Riksdag</i> (single chamber parliament)	Riksdag Act: Chapter 5. Settlement of business: "Deferral of business: Art. 10: A matter shall be settled in the electoral period in which it is introduced. The Riksdag may however consent to defer consideration to the first parliamentary session of the next electoral period. Consideration of a matter put forward during a break in the work of the Chamber lasting until the first parliamentary session of the next electoral period is treated as having been deferred to that parliamentary session. The same applies to consideration of a matter which the Riksdag has not had time to settle when the work of the Chamber was suspended due to an extraordinary election. (...) A draft law held in abeyance for twelve months under Chapter 2, Article 12, paragraph three of the Instrument of Government shall be examined and approved before the end of the following calendar year. If another draft law is closely connected with legislation held in abeyance under this rule, the Riksdag may determine that it shall be settled within the time applying to the examination and approval of the draft law held in abeyance. If a matter under this paragraph cannot be settled within the time prescribed due to the calling of an extraordinary election, it shall be settled as soon as possible after the newly-elected Riksdag convenes." (Note that supplementary provisions apply) ²¹
Spain	D at end of LP	<i>Congreso de los Diputados</i> (house of representatives): bound by D <i>Senat</i> : bound by D	"PART XIII Business pending upon expiry of the term of Congress, Section 207: Upon the dissolution of Congress or at the expiry of its term, all business pending examination and decision by the House shall lapse, except for such business as must constitutionally be transacted by the Permanent Deputation." (RP: 115, 68 C) ²² Standing Order of the Senate, First Additional Provision: "Upon dissolution of the Senate or expiration of its mandate, all the matters pending consideration and decision by the House shall be cancelled except those that, for constitutional reasons, must be referred to the Permanent Deputation." ²³
United Kingdom	D at end of S, but may be considered in next S	<i>Public bills</i> : all die at the end of S (prorogation) ⁸ <i>Private bills</i>	Prorogation as a constitutional convention is not documented but is considered to be a gentlemen's agreement (Schorn 2000: 57); Public bills may be government bills as well as private member bills, but de facto most are government bills (Schorn 2000: 58) Private bills: Initiatives relating to the activities of public administration or an individual and initiated by groups or persons outside of parliament (Schorn 2000: 58); Prorogation, but may be continued in the next session if decided by parliament. Addendum: The distinction here is not made between different state organs because the government more or less defines all legislation. Instead, we differentiate between the type of initiative when referring to D "es der Regierung zu ermöglichen, ihr Legislativprogramm schnell und effektiv durchzubringen" (Schorn 2000: 59). ⁹

Legend: D: Discontinuity, RP: Rules of internal procedure, LP: Legislative period, S: Session * For more general information, please refer to Döring (1995:242, Table 7.7).