

(Non-) Compliance with European Law in France: The Impact of Parliamentary Scrutiny

SECOND DRAFT

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Introduction

Whereas the so-called “democratic deficit” of the European Union (EU) has been only of academic interest for a long time, the ratification process of the Maastricht Treaty initiated a public debate about the legitimacy of European politics. As a result, we can observe increased efforts of both the European Commission (see White Paper on Governance) and the governments of the Member States in the 1990s to respond to the perceived lack of legitimacy by opening the EU policy-making process to parliaments and to civil society. The underlying assumption is that an early and equal involvement of actors potentially affected by EU decision-making increases the acceptance of policy outputs and generates voluntary compliance with European rules. In this perspective, parliamentary and societal actors were given a say in the process of constitutionalisation via their participation in the European Convention, and national parliamentary participation in EU policy-making *ex ante* has been facilitated (e.g. by strengthening scrutiny rights) throughout the 1990s in the EU-15.

At the same time however, both scholars and EU officials point to the continued compliance deficit of member states with EU law (e.g. Börzel 2003; Knill and Lenschow 1999; Mastenbroek 2003; Mendrinou 1996). This is particularly true with regard to the implementation of EC *directives*, in which national parliaments are often directly or indirectly involved: the overwhelming majority of all infringements proceedings opened against Member states for violation of European law refer to problems in transposing directives into national law and applying the resulting obligations (Börzel et al. 2003a; 2003b). Moreover, the transposition deficit is rising again in the last years (European Commission 2003). Thus, at first glance, this ongoing – and even partly increasing - number of violations of European law despite the recent “democratization strategies” seems to challenge the assumptions of both democracy theory and research on implementation about a positive effect of *ex ante* participation of relevant actors on their willingness to comply with binding decisions.

How can the continual implementation deficit be explained? What role does parliamentary involvement *ex ante* play? To what extent does it have a positive impact on compliance? While there is a rich literature by now on the participation of national parliaments in EU policy-making *ex ante* (e.g. Maurer and Wessels 2001; Norton 1996; Smith 1996) on the one hand and on variables which can account for the ineffective implementation of these EU policies *ex post* (Börzel 2003; Knill 2001; Tallberg 1999) on the other hand, only little attempts have been made so far to link these levels of analysis and to specify the conditions under which the presumed “input”-legitimacy (Scharpf 1999) provided by parliamentary participa-

tion in the decision-making stage is translated into “output”-legitimacy (ibid.) resulting in compliance with policy outputs and effective implementation of legal measures.¹ This is the aim of this paper, which focuses on analysing and explaining the impact of national parliamentary participation *ex ante* on the effective implementation of EC directives.

In order to conceptualise possible interaction effects and feedback loops between the *ex ante* and the *ex post*-dimension of the European legislation process, I draw on the literature on Europeanization and implementation. Whereas European studies have focused on how Member States shape the process of European integration (bottom-up perspective) for a long time, scholars have started to analyse the effects of Europe on its Member states (top-down perspective) in the last decade (Börzel 1999; Börzel and Risse 2003; Cowles et al. 2001; Featherstone and Radaelli 2003). Implementation of European law in the Member states like the transposition of directives, on the one hand, can be conceived as a feature of the top-down dimension of Europeanization which refers to processes of domestic institutional adaptation to pressures of Europeanization (Börzel 1999; Börzel and Risse 2003; Cowles et al. 2001; Featherstone and Radaelli 2003). National parliamentary involvement in EU policy-making *ex ante* -itself being a result of Europe’s effect on the member states in the 1990s - on the other hand can be conceptualised as a feature of the bottom-up dimension. I argue that *ex ante* parliamentary participation *per se* does not necessarily have a positive impact on implementation, but that it is the specific nature of *ex ante* involvement, i.e. the level and scope of participation which determines the capacity and willingness to contribute to effective implementation. Moreover, the empirical study of the French case will show that the way in which the *Assemblée Nationale* participates in the implementation of EC directives is largely determined by the way in which it is involved *ex ante*, suggesting that problems of domestic adaptation can be partly anticipated.

In order to analyse to what extent the quality of bottom-up processes affects the way in which Member States respond to Europeanization pressures, I proceed in the following steps. First, I briefly introduce the scope of my dependent variable “effective implementation of directives” in the EU (I) by using the number of infringement proceedings opened by the European Commission for incorrect or non-transposition of EC directives between 1978 and 1999 as a proxy. In the following, I briefly describe the independent variable role of national parliaments in European policy-making since 1993 (II). The third section will provide a conceptual framework for analysing feedback loops between the top-down and bottom-up dimension of

¹ However, compliance with policy outputs is only a necessary, but not sufficient condition for the “output-legitimacy” of policies.

Europeanization (III). The different hypotheses will then be tested in the case of France in order to know to which extent they can explain the poor implementation record (IV). The paper concludes with a discussion of the theoretical and empirical implications of the findings and with some considerations the extent to which the lessons of the French case can account for level of non-compliance with European law in other Member States (V).

I. Non-compliance in the European Union: the implementation of directives

1. Infringement proceedings as a proxy for the effectiveness of implementation

Directives are by far the most important type of European legal acts, since they make up about 80 percent of all Community legislation (Mastenbroek 2003). In contrast to other types of legal acts like regulations or decisions, directives are framework legislation and have to be transposed into the domestic legal systems of the member states through national law before they can be applied and enforced (Art. 249 EC). As a result, member states have more flexibility and discretion in adapting European rules to domestic requirements. Member states are left the choice as to the form and methods of implementation. The adaptation can take the form of a national law, thereby directly involving national parliaments or the directive can be incorporated through executive action, often requiring parliamentary delegation of authority (Martin 1995). However, national governments as the rule addressees are generally responsible for changing domestic law.

In order to specify conditions of *effective* implementation of EC directives, it is crucial to know when implementation can be considered as being effective. This can be done by counterfactual analysis (Van Evera 1997), i.e. by knowing what are cases of “*ineffective implementation*”. While there is an emerging literature about the implementation problems within the EU (Börzel 2003; Ciavarini Azzi 1999; Knill 2001; Mastenbroek 2003; Mendrinou 1996; Szukala 1998), it uses various understandings of what constitutes the perceived implementation deficit. Definitions vary according to the nature of the “deficit” (e.g. every case in which the transposition time of a directive exceeds the deadline or only those in which official infringement proceedings are opened) and according to the definition of “implementation” (e.g. only the stage of legal incorporation in the domestic law or also the stage of enforcement and application). In this perspective, a broad understanding of implementation problems can imply any behaviour which is not consistent with a European rule at any point of time, while a narrow view might only refer “hard cases” in which the European Commission officially accuses

the national government for not having legally transposed a directive. For practical reasons, I define cases of ineffective implementation in this paper as *the cases in which the European Commission has opened an infringement procedure against a Member State for violation of a directive*.² In its infringement proceedings, the European Commission distinguishes several forms of non-compliance according to the nature of violation as well as the nature of the legal act which is violated³ (see Börzel et al. 2003a). Three out of five types of violation refer to directives, reflecting the fact that the discretion granted to Member States also offers more opportunities for violation:

1) *Non-transposition of Directives ('no measures notified')*

Directives are not directly applicable, as a result of which they have to be incorporated into national law. The directive specifies a deadline up to which it has to be transposed by the Member States (18 months in average) which then have to notify the measures taken to the European Commission. Non-compliance relates to the failure to issue the required national legislation assumed by the non-communication of measures.

2) *Incorrect legal implementation of Directives ('not properly incorporated')*

The transposition of Directives may be wrongful. Non-compliance takes the form of either incomplete or incorrect incorporation of Directives into national law. Parts of the obligations of the Directive are not enacted or national regulations deviate from European obligations because they are not amended and repealed, respectively.

3) *Improper application of Directive ('not properly applied')*

Even if the legal implementation of a Directive is correct and complete, it still may not be practically applied. Non-compliance involves the active violation of taking conflicting national measures or the passive failure to invoke the obligations of the Directive. The latter also includes failures to effectively enforce European Law, i.e. to take positive action against violators, both by national administration and judicial organs, as well as to make adequate remedies available to the individual against infringements, which impinge on her rights.

In the annual reports of the European Commission on monitoring the application of Community law, violation of *directives* represent the overwhelming majority of all infringements. In this paper, I focus on the stage of *transposition* when referring to (in-) effective implementation for three reasons. First, more than 2/3 of the infringements of EC directives refer to the first and the second type of violation (Börzel et al. 2003b; Treib 2003a, 2003b). These implementation deficits have for a long time been considered as a minor and only temporal compliance problem compared with application problems due to the general high transposition rates - the average level of transposition is usually higher than 90%- and the fact that even the remaining directives are finally transposed (Martin 1995; 2000). However, this view does not take into account that even timely transposition can constitute a form of non-compliance. On

² Consequently cases which might constitute a violation but are not detected or revealed by the Commission cannot be considered.

³ The most important types are treaty provisions, regulations, directives and decisions with vary according to their specificity and their binding effect for the Member States. Moreover, another possible type of non-compliance is the violation of judgments of the European Court of Justice (ECJ) by Member States. For a more detailed analysis of the different forms of non-compliance, see Börzel et al. 2003a.

the one hand, directives can be transposed in an incorrect way by incomplete incorporation or by deviating from the initial objectives. On the other hand, Member States might not have respected the doctrine of the *effet utile*, which stipulates that the member states have to choose the most effective means⁴, thereby allowing a proper application of the directive. Second, delays and faults in transposing EU measures are considered to cause severe legal and political problems alike, since it leaves a void in the regulatory framework, which disrupts business, deprives citizens of their rights and undermines confidence in the EU (European Commission 2003: 5). Therefore the Oslo European Council in 1998 has set the target of 1,5% deficit of transposition per maximum. The Barcelona European Council of March 2002 added a 'zero tolerance' target for directives whose transposition is two years or more overdue. Third, the focus on transposition allows assessing the role of national parliaments, which are hardly included in the stage of application.⁵

In sum, implementation of directives is considered as *effective* when

- (a) transposition is timely (directive is transposed in the designated amount of time and legal measures are notified to the Commission) or
- (b) transposition is complete (all parts of the obligations are transposed) or
- (c) transposition is correct (it does not deviate from the initial objectives) or
- (d) transposition occurs with the most effective means (produces the intended results).

2. The level of effective implementation of directives in the European Union

For assessing the level of effective implementation of EC directives, I draw on a database containing all infringement proceedings opened by the European Commission against Member States from 1978-1999.⁶ The 6230 cases are classified by infringement number, member state, policy sector, legal basis (celex number), legal act, type of infringement, and stage reached in the proceedings (reasoned opinion, referral to the ECJ, ECJ ruling).⁷ Assuming that the level of effective implementation of directives depends on the respective number of in-

⁴ ECJ *Fédéchar v. High Authority*, C-8/55; ECJ *Van Gend en Loos*, C-26/62.

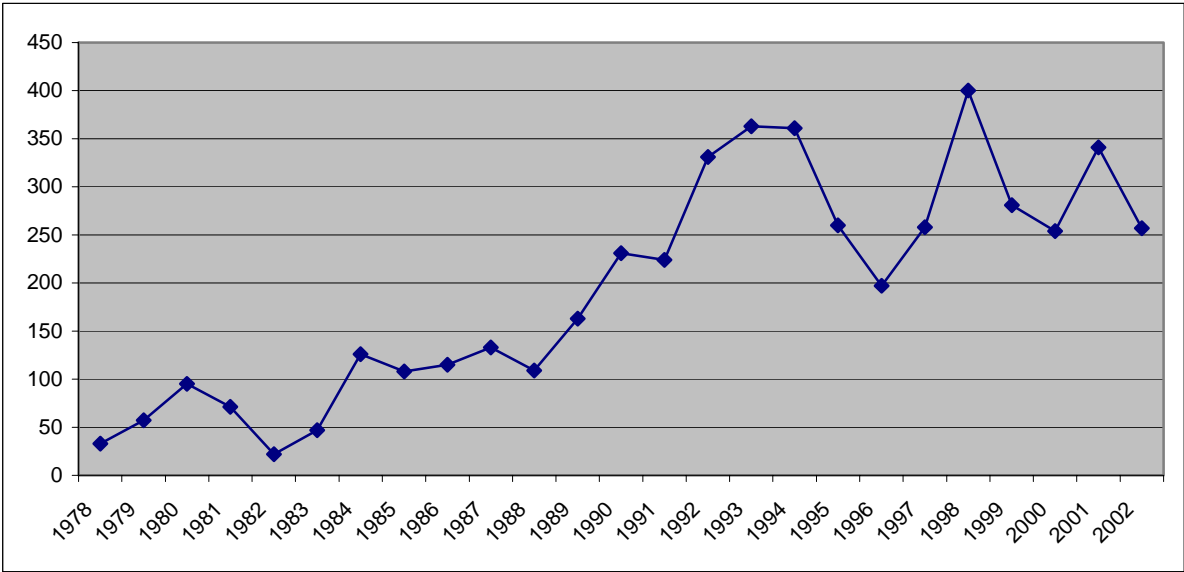
⁵ Theoretically, the tasks of national parliaments in the *ex post* stage of EU legislation consist of the legal incorporation as well as the following control of proper application and impacts on the domestic system (Kretschmer 1994). But the actual activity of parliaments is not only difficult to detect, it is also more likely that regional administrations, local actors, interest groups (and last not least the EU Commission) are the main actors once a directive is transposed.

⁶ The author participates in a research project funded by the German Research Council (DFG) on "Compliance with law beyond the nation-state", directed by Prof. Dr. Tanja A. Börzel. The project aims at analysing the conditions under which Member States of the EU do not comply with EC law on the basis of a dataset provided by the Commission provided the projectgroup "compliance" drawn from its own database containing all the 6230 infringement cases, in which the Commission officially initiated proceedings between 1978 and 1999. For further information on the database, see www.boerzel.uni-hd.de.

⁷ For the different stages of the infringement proceedings, see Börzel 2003.

fringements opened by the European Commission against the Member States, (a) is operationalised with the number of cases of the first type of violation (“no measures notified”), (b), (c) and (d) refer to cases of violation in the second type (“not properly incorporated”).⁸ Figure 1 shows the level of effective implementation of directives in the EC-12⁹ over time by drawing on the absolute number of infringements corresponding to the first and the second type of violation per year.

Fig. 1: Number of infringement proceedings opened for incorrect or non-transposition of EC directives per year for the EC-12, 1978-2002 (absolute numbers)



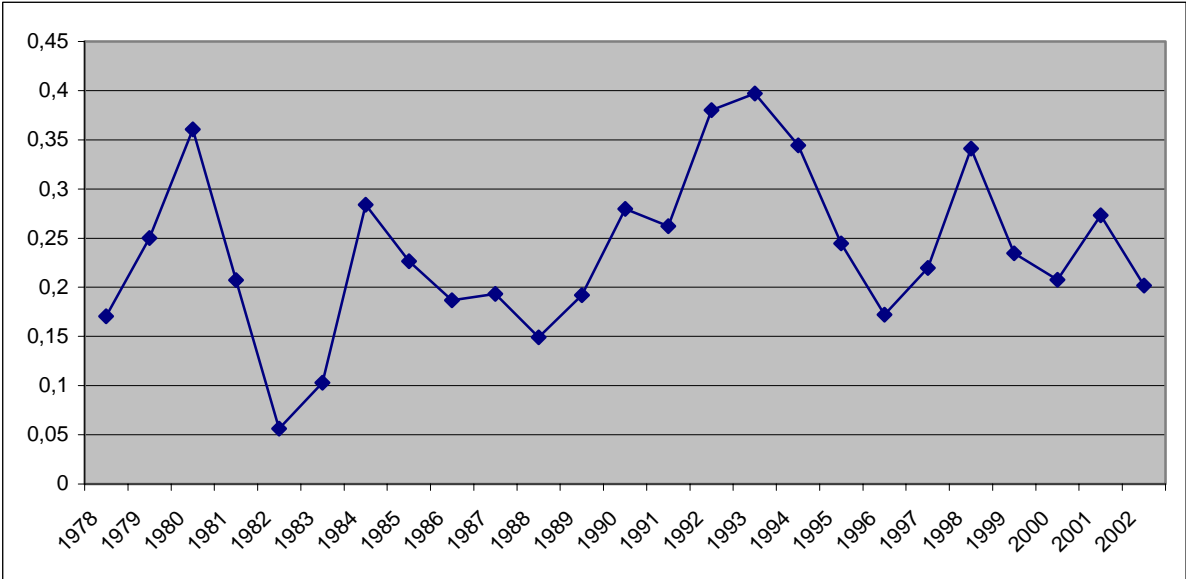
The figure points to the increasing number of infringement proceedings for transposition problems of directives which culminate in 1993 and 1994 with more than 350 infringements per year, suggesting that effective implementation of directives is continually increasing. However, this interpretation is problematic for methodological reasons. For assessing changes over time, the number of infringement proceedings opened has to be measured against the numbers of directives that can be potentially infringed as well as the number of member states that can potentially infringe them. Between 1983 and 1998, the number of all legal acts in force has more than doubled¹⁰ and five more member states have joined the Union. Moreover,

⁸ The assumption is certainly the lower the number of infringements, the higher the level of effective implementation of directives.
⁹ The three Member States joining the EU in 1995 (Austria, Finland and Sweden) are not included since it is expected that EU accession challenges the domestic legal system and is likely to result in a high number of infringements in the first years after accession which does not necessarily reflect the general level of implementation problems.
¹⁰ These data are drawn from the project on compliance. The participants are thankful to Wolfgang Wessels and Andreas Maurer for providing them with the annual numbers of legislation in force.

the high number of infringements in the early 1990s could be explained by the more aggressive enforcement policy pursued by the Commission in order to ensure the effective implementation of the Internal Market Programme (Tallberg 1999).

If we control for the general number of legal acts in force and the number of Member States and count the number of “violative opportunities”¹¹ (see also Börzel et al. 2003a, 2003b), the relative number of infringements remains relatively stable over time (Fig. 2).¹² There is no general trend towards an increasing or decreasing number of infringements proceedings opened for incorrect or non-transposition of EC directives. But this finding also implies that the level of effective implementation of directives does not increase despite the “new” *ex ante* empowerment of national parliaments in 1992/93. If we include a certain time lag until the strengthening of parliaments can deploy an effect and consider only cases from 1995 on, the level of infringements even increases, while it drops again in 1998.

Fig. 2: Number of infringement proceedings opened for incorrect or non-transposition of EC directives per year for the EC-12 in relation to “violative opportunities” (x 100), 1978-2002

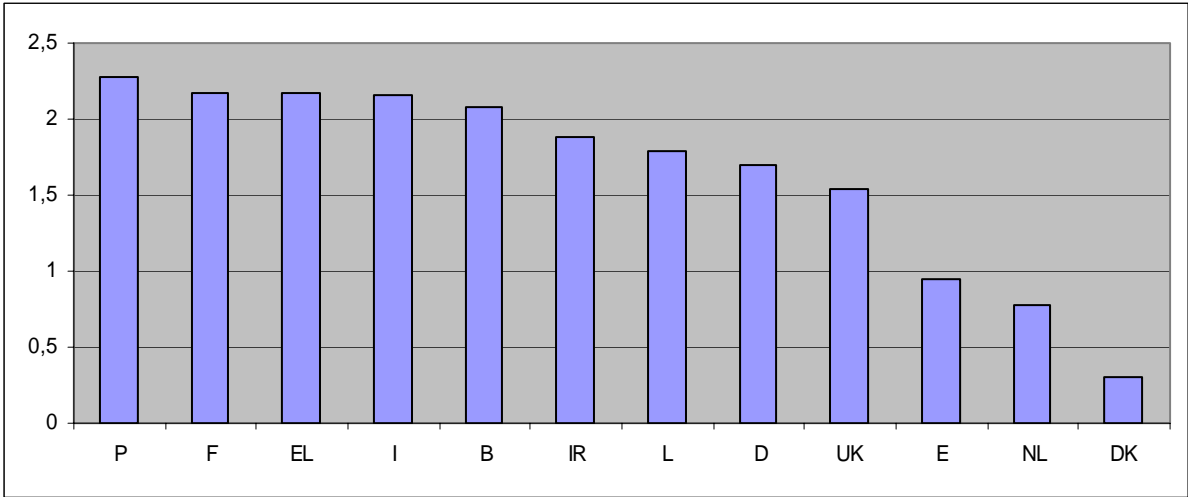


¹¹ This means that the number of infringement proceedings opened is calculated as a percentage of the number of legal acts in force multiplied by member states for each year.

¹² Unfortunately, the number of *directives* in force was not yet available. Therefore, the data on the number of legal acts in force refer to *all* legal acts. While this might affect the actual number of infringements per year, it does not affect the overall trend, since we can assume that the number of directives in force does not deviate significantly from the overall pattern of an increasing number of legal acts in force.

Figure 3 shows a member state-ranking of the EC-12 with regard to the number of infringement proceedings for incorrect or non-transposition of EC directives from 1996-2002, i.e. taking the time period during which the *ex ante* participation of national parliaments could have deployed an effect on the effective implementation of directives.

Fig. 3: Percentage of numbers infringement proceedings opened for incorrect or non-transposition of EC directives per member state and year in the EC-12 in relation to average number of legal acts in force, 1996-2002



The number refers to the total number of infringements of a member state as a percentage of the average number of legal acts in force from 1996-2002. In this perspective, Portugal, has infringed about 2, 3% of the number of legal acts in force in average in this time period according to the European Commission. However, as mentioned above, we are again not able to assess the absolute level of effective implementation in each Member State (due to the lack of data about *directives* in force)¹³. But we can at least evaluate the *relative* implementation record in relation to other Member States. Thus, Portugal, France, Greece and Italy belong to the “laggard group”. Interestingly, Spain as another Southern European country is part of the “leaders”, together with Denmark and the Netherlands. In the next section, we will analyse the level of parliamentary participation *ex ante* in the EC-12.

¹³ Moreover, the opening of an infringement proceeding does not necessarily constitute a violation, since the assessment of the European Commission might be wrong.

II. Democratizing Europe: the changing role of national parliaments in EU policy-making

With the ongoing transfer of competencies from the domestic to the European level, national parliaments are often considered as the „losers“ of the European integration process (Maurer and Wessels 2001) for two reasons. First, domestic legislatures lost competencies in policy areas formerly subject to domestic legislation. Second, they were not compensated for these constraints by “getting a say” in the EU policy-making process. While the disempowerment of national parliaments has for a long time been only of academic concern, it became subject to a public debate about the so-called “democratic deficit” of EU politics in the ratification process of the Maastricht Treaty. Both scholars and political actors argue that the legitimacy of EU politics is challenged by the severe loss of competencies national parliaments. In this perspective, national parliamentary participation in the policy-making process of the evolving system of European governance is crucial for its legitimacy, since the European Parliament (EP) cannot and will not –even in the long run- provide this effect (Grimm 1993).

As a result, several mechanisms for improving and strengthening parliamentary *ex ante* participation have been introduced in the 1990s on the national and the European level. On the one hand, most EU parliaments have been given specific rights for information about the EU legislation process and for scrutinizing European politics, and all parliaments have adapted their institutional structures to their new European role e.g. with the creation of specific European Affairs Committees (EAC).¹⁴ On the other hand, the interparliamentary *Comité des organes spécialisé en affaires communautaires* (COSAC) has been institutionalised, the European Convention has established a special working group on the future role of national parliaments in the EU, and the draft treaty establishing a constitution for Europe now provides further participation rights for national parliaments in the European policy-making process. The annexed *Protocol on the Role of National Parliaments in the European Union* states that all EU documents dealing with legislation shall be transmitted to the national parliaments in a way that allows them to express their point of view – particularly with regard to the respect of the principle of subsidiarity- before adoption in the Council of Ministers.¹⁵ In sum, all the mechanisms aim at enabling national parliaments to influence EU legislation *ex ante* via better access to information or via improving their capacity to deal with and react on these information. They thus focus on strengthening the parliamentary function of controlling the

¹⁴ These institutions are not always referred to as “committees”. I use the term for reasons of simplicity.

¹⁵ See www.european-convention.eu.int (accessed on July 16th, 2003).

executive branch of government.¹⁶ I have argued elsewhere that the role of national parliaments in EU affairs *ex ante* consists of the exertion of an EU-specific control and as well as an EU-specific communication function (Sprungk 2003, 2004).

This changing pattern of parliamentary participation in EU policy-making over time has been the trigger for an emerging literature on the European role of national parliaments (see e.g. Ágh 2002; Judge 1995; Maurer and Wessels 2001; Norton 1996; Raunio 1999). The literature has mainly focused on analysing the variation between Member States.¹⁷ As empirical studies suggest, all EU parliaments have reacted on the substantial loss of competences caused by Europeanization processes, albeit in a very different way. First, adaptation processes vary according to the institutional structure established within the parliament for dealing with EU legislation. Thus, the British, French and Greek parliaments have institutionalised different scrutiny mechanisms similar in the logic of their domestic institutional culture (Dimitrakopoulos 2001). Second, parliamentary participation varies according to the actual “use” of these structures for scrutinizing EU politics (e.g. the voting on resolutions, the share of public debates about EU politics in the plenary). In this respect, the French *Assemblée Nationale* plays a more active role than the German *Bundestag* (Sprungk 2003, 2004). The “ranking” of national parliaments according to the level of their *ex ante* involvement in EU policy-making is particularly important in order to assess the impact on the respective level of effective implementation of directives in the Member States.

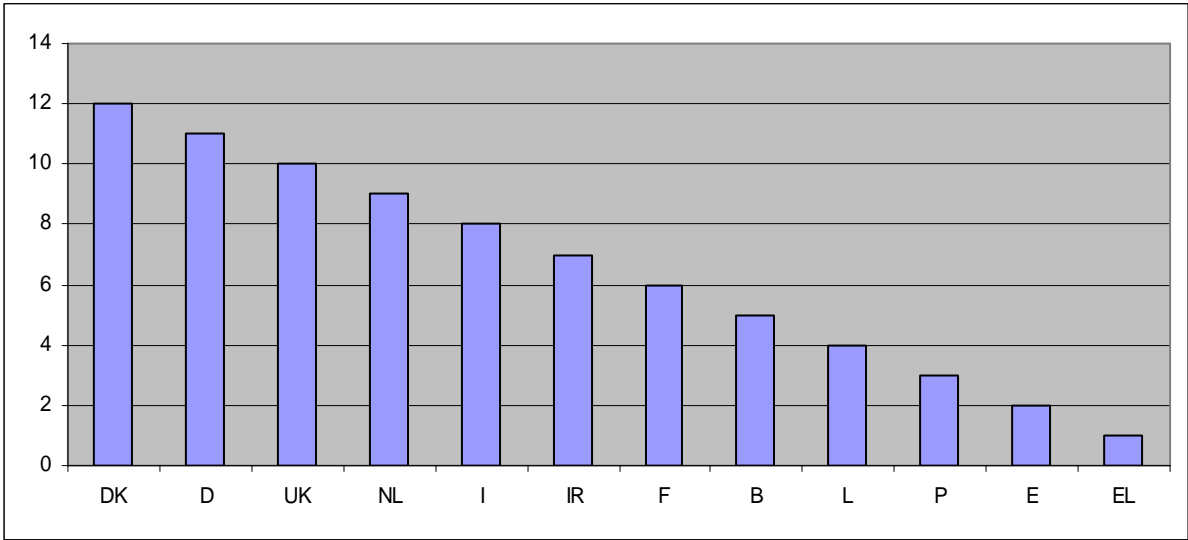
A certain branch of the literature has focused on questions about how to measure the *ex ante* involvement of national parliaments in EU affairs (Maurer 2001; Raunio 2003; Rozenberg 2002). As a result, there is a variety of indicators used for describing the level of *ex ante* participation of national parliaments in EU affairs. Thus, the studies suggest for example to include the quantity and quality of information the parliament receives from the national government about the preparation of EU legislation as well as their timeliness (Maurer 2001; Rozenberg 2002). Other indicators used refer to the procedures of handling with this information within the parliament, including the number of parliamentary actors involved and their level of expertise in EU affairs (Fuchs 2001; Hourquebie 1999). Another type of measurement deals with the level of parliamentary activity, operationalised with the number of EAC meet-

¹⁶ In contrast to other parliamentary functions, the function of controlling the politics of the government explicitly requires precise information about these politics, the capacity to deal with and to evaluate it and the competence to react on this information by articulation, co-operation or sanction (Schüttemeyer 1978: 270).

¹⁷ However, only little attempts have been made so far for *explaining* this variation.

ings, the number of resolutions concerning the EU legislation process or the number of plenary debates about EU politics (Huber 2001; Saalfeld 2002). The overall challenge is to classify all EU parliaments according to these criteria, which demands an in-depth study of each parliament.¹⁸ In this paper, I draw on the respective attempts of Bergman (1997; 2000) who establishes a ranking according to who is involved in EACs, which pillars parliamentary scrutiny covers, if the plenum is involved in the process and to what extent the process is binding for the government (Bergman 1997: 378). Fig. 4 shows the reviewed version of the 1996 ranking for the year 1999, thus drawing on the development from 1996-99 (Bergman 2000).

Fig. 4: Ranking of national parliaments in the EC-12 Member States according to their level of participation *ex ante* 1999 (according to Bergman 2000)



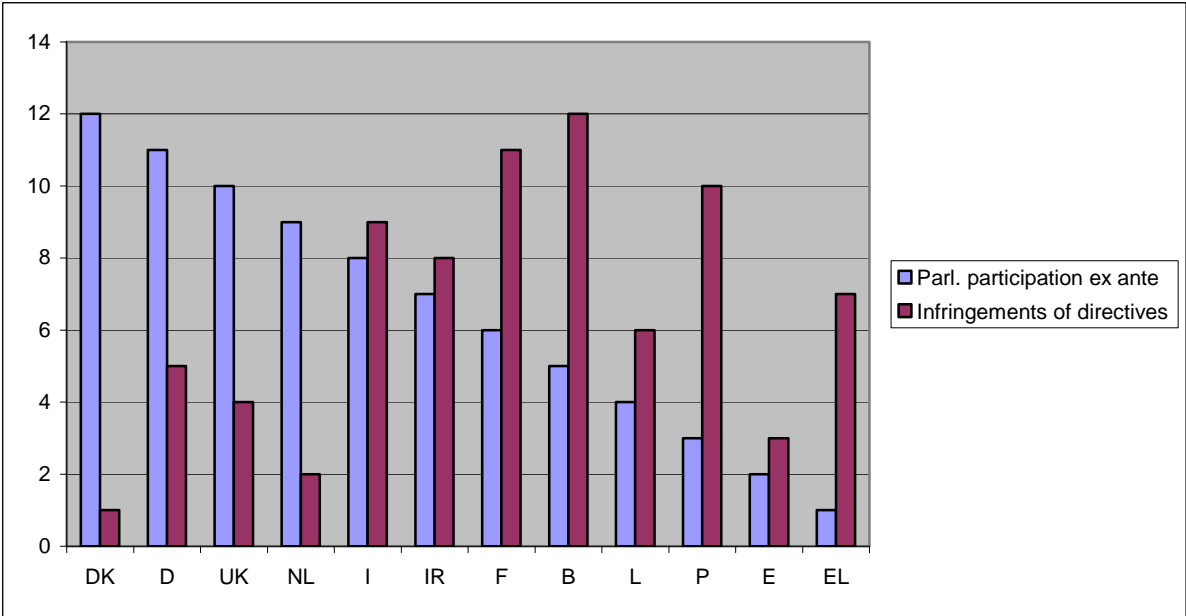
The diagram clearly shows that Southern European countries like Portugal, Spain and Greece, on the one hand, are classified as having the lowest level of parliamentary participation. The northern Member State Denmark, on the other hand, as the country which has the lowest number of infringements proceedings for violation of directives, is also the “leader” in parliamentary participation *ex ante*. But the geographic variable can only partly account for the other EU parliaments, since both Italy and France are in an intermediate position. The pattern

¹⁸ However, the main problem of these studies consists in the fact that the indicators are rarely developed in a systematic way within a conceptual framework and that they do not specify the implications of their approaches. Thus, the frequent use of scrutiny rights can slow down the EU legislation process or even block it, which can result in unintended consequences like the decrease of legitimacy of EU politics (Auel 2003). I have argued elsewhere that the *ex ante* participation of EU affairs can be conceptualised as the exertion of an EU-specific control and communication function, and indicators can be derived from the contents of these functions (Sprungk 2003, 2004). For reasons of scope, this framework cannot be applied to all EU parliaments in this paper.

is largely confirmed by the study of *Olivier Rozenberg* for the year 2000, drawing on a six-point-scale of parliamentary involvement of EU affairs (Rozenberg 2000). But he assumes that the level of participation in the parliaments Germany, the United Kingdom, Ireland and Luxembourg has slightly decreased from 1996 up to 2000, whereas the French parliament could improve its position (see also Rozenberg 2002).

According to the hypothesis of a positive impact on parliamentary participation in EU politics *ex ante* on the effective implementation of EC directives, we would expect a strong involvement correlates with a low number of infringement proceedings opened for that matter and vice versa. Fig. 5 juxtaposes the position each member states occupies in the ranking of national parliamentary involvement *ex ante* to its ranking according to the average number of infringement proceedings opened for incorrect or non-transposition of EC directives between 1996 and 1999 (percentage of average number of legal acts in force).

Fig. 5: Ranking of national parliaments in the EC-12 Member States according to their level of participation *ex ante* 1999 (Bergman 2000) in relation to their ranking in the average number of infringements opened for incorrect or non-transposition of EC directives 1996-99 (own elaboration)



The diagram suggests that there is no evident relationship between the extent to which a national parliament participates *ex ante* in EU policy-making and the level of effective implementation of directives in that member state. While the assumption of a negative correlation fits well in the case of Denmark with extreme positions on both the *ex ante* and the *ex post-*

dimension, Germany's implementation record is much higher than in the Danish case, though its parliament is strongly involved in the decision-making stage. Moreover, if the poor implementation record of Greece could be explained by the weak *ex ante* participation of the parliament, infringements occur even more often in France or Ireland, where the legislatures scrutinize EU politics far more actively. The same holds true for Member States like Italy or Spain, which both have nearly the same ranking according to the level of parliamentary participation and effective implementation of directives, suggesting that there are no interaction effects at all between both dimensions. Apart of Denmark, a positive impact of parliamentary scrutiny *ex ante* can only be observed in cases like the Netherlands (low number of infringements, relatively high level of *ex ante* parliamentary participation) and Portugal (high number of infringements, weak *ex ante* involvement of parliament).

What can we conclude from the analysis of the dependent (effective implementation of directives) and the independent variable (parliamentary participation in EU policy-making *ex ante*)? First, contrary to the assumption of a positive relationship between input- and output-legitimacy, the participation of national parliaments in EU policy-making changed significantly after 1992/93 and varies also throughout the 1990s, the level of effective implementation remains relatively stable over time (Fig. 2). Second, the ranking of Member States does not necessarily differ according to the legitimacy hypothesis, i.e. in Member States where parliamentary participation is high, the number of infringements is low (meaning that the level of effective implementation of directives is high) and vice versa (Fig. 5). This is only the case for Denmark, the Netherlands and Portugal, while Member States like France or Italy continue to have a poor implementation record despite an intermediate or relatively high *ex ante* involvement of their national parliaments in EU politics. How can we account for these contrainuitive findings? Does the legitimacy hypothesis have to be rejected?

III. Uploading and downloading EU policies: a conceptual framework for analysing interaction effects between the bottom-up and the top-down dimension of Europeanization

Whereas European studies have for a long time focused on how Member States shape the process of European integration (bottom-up perspective), scholars have started to analyse the effects of Europe on its Member States (top-down perspective) in the last decade. The "top-down"-approach of Europeanization suggests that the emergence of distinct structures of governance on the European level exerts a pressure on Member States to adapt to European rules

and procedures and thereby causes policy and institutional changes on the domestic level (Börzel 1999; Börzel and Risse 2003; Cowles et al. 2001; Featherstone and Radaelli 2003). Since the literature has largely identified the conditions, causal mechanisms and outcomes of these adaptational processes, recent studies claim for “bringing the bottom-up perspective back in” in order to analyse interaction effects between both dimensions (Börzel 2002; Radelli and Featherstone 2003). Attempts to analyse feedback loops have been made so far with regard to the *capacity* of EU Member States in “shaping” and “taking” EU policies. However, interaction effects have not yet been explained via the mechanism of legitimacy.

The assumption that the effectiveness of implementation can be affected by features of the decision-making procedure has been first made in the early research on implementation processes (Pressmann and Wildavsky 1973; Mayntz 1980; Sabatier 1986).¹⁹ The successful implementation of a political program was explained by the involvement of those actors to whom the rules are formally addressed and of those who are targeted by the rule. Two causal mechanisms can be at work according to this literature. On the one hand, rules are effectively implemented because they reflect the actors’ interest which they could defend thanks to their participation in the decision-making procedure. A more constructivist approach on the other hand explains effective implementation less with the agreement to the contents of the rule than with the acceptance of the procedure by which the rule was made (and the actors’ role in it). In this perspective, actors perceive the procedure as fair when it offers every actor affected by the rule an equal right to participate in the formulation and preparation stage. In sum, the involvement of potentially affected actors in the preparation stage enhances the likelihood of acceptance of the policy output, resulting in effective implementation. From the late 1980s on, this approach has been taken up by International Relations (IR) literature for explaining compliance with international law despite the “shadow of anarchy” (Franck 1988; 1990; Hurd 1999; Koh 1997). These studies refer explicitly to the notion of the perceived “legitimacy” (defined as procedural justice) as the mechanism pulling states to comply and to implement international agreements in the absence of a hegemon.

However, neither studies on domestic implementation nor IR- research on compliance refer to the impact of *parliamentary* participation as a “compliance pull” (Finnemore and Sikkink 1998), i.e. as a means for pushing rule addressees towards compliance. Implementation studies stress the participation of local actors or domestic interest groups (Mayntz 1980, 1983;

¹⁹ Moreover, the notions of “bottom-up” vs. “top-down”-processes used in the literature on Europeanization were also developed for the first time in implementation research (Sabatier 1986).

Windhoff-Héritier 1987), while IR-literature essentially focuses on national governments as the central actors in international decision-making procedures and the formal addressees of international rules (Franck 1990; Koh 1997) and on transnational actors influencing these governments (Risse and Sikkink 1999). This is the more surprising since parliaments are especially capable of contributing to the acceptance of policy outputs via the described mechanisms thanks to their representative function. On the one hand, actors might accept the output and for example implement a rule when parliaments have participated in the formulation stage because they can safely assume that their interests have been represented. On the other hand, the representative nature of parliaments is likely to result in compliance via the diffuse acceptance of the procedure which guarantees a *permanent* involvement of *all* actors potentially affected by a decision.²⁰ This is particularly crucial in cases in which decision-making procedures are relatively closed or difficult to access like in international politics.

Scholars and politicians generally refer to this legitimating effect on policy outputs when they claim for a stronger participation of parliaments in the policy-making stage (see the 2001 White Book on Governance of the European Commission).²¹ However, this “pathway of legitimacy” is unlikely to be found in the same way for national parliamentary participation in EU policy-making and the implementation of directives for several reasons.

1. The role of national parliaments in the implementation of directives

Implementation of EC directives can be conceived as a feature of the top-down-dimension of Europeanization, since it consists in a process of domestic adaptation to Europe by legal measures, resulting in a change of domestic policies and/or institutional structures (Börzel and Risse 2003). The actors inducing these changes are the national government (on which the adaptational pressure is exerted, since it can be sanctioned for the lack of adaptation by opening an infringement procedure), national parliaments or the administrative bureaucracy. As mentioned above, Member states are left the choice as to the form and methods of adaptation. In most cases, directives are incorporated through executive action like regulations or decrees (Szukala 1998; Treib 2003b). National parliaments have the main responsibility for effective adaptation when directives are implemented through a national law, and there are also indi-

²⁰ In this paper, I cannot refer to the question to which extent does actually represent the people (see low turnout in elections etc.).

²¹ Several studies analyse the impact of parliamentary scrutiny *ex ante* on the implementation of directives in this perspective (Bergman 2000; Martin 1995, 2000; Szukala 1998). Though they come to different results, suggesting a positive impact (Martin 1995, 2000), no impact at all (Bergman 2000) or a sufficient, but not necessary condition for effective implementation (Szukala 1998), they do not explain *why* and *in which way* the participation of parliaments can have an effect on “output-legitimacy”.

rectly involved in the transposition when they have to delegate the authority to transpose the directive through executive action to the national government (Martin 1995; 2000). Therefore we have to differentiate between *direct* and *indirect* parliamentary participation *ex post*.

Thus, contrary to the assumption of the parliamentary-specific legitimacy hypothesis, parliaments themselves can also play a role in the *ex post* stage of decision-making. This approach conceptualises parliamentary participation as being constrained to the bottom-up-process, assuming a spill-over to the actors which have to implement the policy-output via their representative function. But when parliaments are both those who “shape” and who “take” EU policies (see also Börzel 2002), the “pathway of legitimacy” equals the original legitimacy hypothesis about the importance of involving those actors who have to implement the rule as a means for effectiveness. In sum, with regard to the implementation problems in the stage of transposition of directives, the specific conditions underlying the claim for strengthening *parliamentary* participation are not given.²² Involvement of parliaments is thus not likely to have a *particular* positive impact on effective implementation (different from those of other actors).

As a result, two hypotheses about the impact of parliamentary participation *ex ante* on the effective implementation of directives can be stated for cases in which implementation involves parliaments.

The first hypothesis specifies the rational choice approach of the legitimacy hypothesis by referring to the extent to which the contents of the rule reflect the interests of the actors which have to implement it. With regard to national parliaments, effective implementation is likely to occur when the directive which the parliament has to transpose or for which it has to delegate the authority for transposition reflects the interests the parliamentary majority has expressed in the formulation stage.²³ Otherwise the parliamentary majority can use its veto power and delay the transposition into national law. Moreover, if it is mainly responsible for transposition, it can even transpose the directive according to its interests, thereby running

²² This is certainly different when the stage of application is reached and other actors than parliaments have to comply with the directive. Here, effective adaptation could be explained as a result of parliamentary participation *ex ante* (and even as a result of parliamentary transposition of the law). In this paper, the dependent variable only implies the stage of transposition, in which the citizens are hardly included.

²³ According to the representative function, the “interest” of national MPs usually reflects the interests of the voters (their personal interest being to be re-elected) according to which they try to influence the preparation procedures of directives.

into problems of incorrect implementation. EU officials continually point to the importance of a good co-operation between national governments and parliaments in the process of implementation (European Commission 1997, 1999, 2001, 2003), suggesting that problems in the transposition stage are related to parliamentary opposition. The first hypothesis is:

H1: The more the contents of a directive correspond to the interests of the parliamentary majority, the more likely they will implement the directive in an effective way.

The extent to which an EC directive reflects the interests of a national parliamentary majority can be determined by several factors. First, the way in which parliaments express their point of view to the government *ex ante* is crucial, e.g. its preciseness and the method they choose (formal parliamentary resolution or informal contacts). Second, the national government must be willing to defend the position of the parliament in the negotiation stage, which depends on the nature of the domestic relationship between executive and legislative. Third, the government must also have the capacity to consider the parliament's point of view, which decreases in cases of qualified majority voting (QMV). Thus, ineffective implementation due to parliamentary opposition is likely to occur in highly politicized cases (e.g. when parliament puts formal pressure on the government) and/or cases of a minority government and/or cases in which the directive has been decided with QMV.

The second hypothesis specifies the constructivist variant of the legitimacy hypothesis which relates to the perceived justice of the decision-making procedure which affects effective implementation. In the case of national parliaments, the extent to which the parliamentary majority transposes EC directives or delegates authority for transposition depends on the extent to which it accepts the way in which EC directives are produced in general and their role (or the role of national parliaments) in this procedure in particular.²⁴ Both timely and correct transposition through legislative action and timely delegation of authority is likely to occur when the parliamentary majority supports the justice of the decision-making procedure. The second hypothesis is:

H2: The more the parliamentary majority accepts the way in which the directive has been produced and their role in the decision-making procedure, the more likely they will implement the directive effectively.

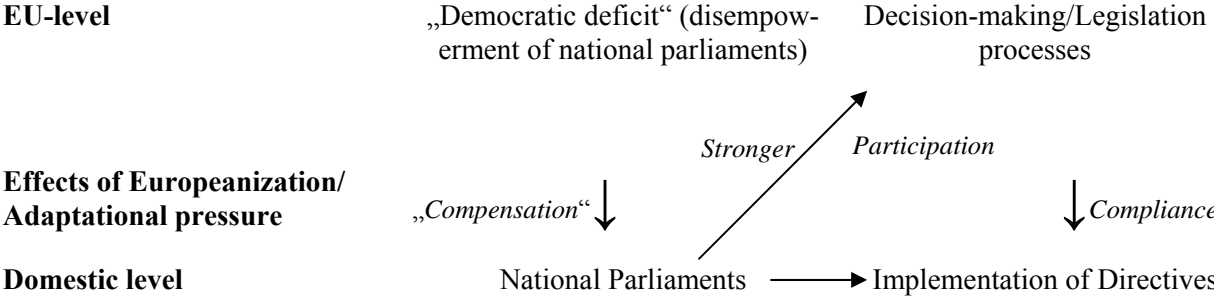
²⁴ In the parliamentary-specific approach of the legitimacy hypothesis, it is not the parliament itself, but the citizens who accept the procedure because of parliamentary involvement.

The extent to which national parliaments accept the decision-making procedure of an EC directive can depend on the one hand on the level of commitment of the parliamentary majority towards European integration in general. On the other hand, it can depend on the degree of “misfit” (Börzel and Risse 2003; Cowles et al. 2001), i.e. the extent to which the domestic decision-making procedure is similar to the specific nature of EU decision-making process (e.g. dominance of the executive). In this perspective, cases of ineffective implementation due to parliamentary opposition occur when the parliamentary majority is Euro-skeptical and/or the domestic parliament is strongly involved in the domestic decision-making procedure. However, since the latter is rather a constant than a variable, it cannot explain variation in the level of effective implementation as a result of parliamentary involvement, while Euro-scepticism can vary with changes in the composition of the parliament.

2. The specific role of national parliaments in processes of Europeanization

While implementation of directives refers to the top-down-dimension of Europeanization, the *ex ante* participation of national parliaments in EU policy-making constitutes a feature of the “bottom-up”-dimension: a domestic actor tries to shape the process of European integration by “uploading” his or her preferences (Börzel and Risse 2003). But the fact that parliaments have a (varying) shaping capacity is itself a result of a process of adaptation to Europeanization pressures on the domestic level. As mentioned above, the severe loss of competencies in the context of the Maastricht Treaty has triggered a change within the national parliaments (accompanied by several mechanisms of compensation), explicitly aiming at re-gaining a say in policy areas formerly subject to domestic legislation and resulting in a stronger involvement in the preparation stage of the EU legislation process. Fig. 6 illustrates the complex role of national parliaments in the process of Europeanization.

Fig. 6: National parliaments in bottom-up and top-down processes of Europeanization



In this perspective, the scope and level of parliamentary participation in the EU legislation process is the result of a previous adaptation on the domestic level to top-down pressures from

Europe. If we assume feedback loops and interaction effects between the top-down and bottom-up-dimension of Europeanization, the way in which national parliaments “take” EU policies (i.e. implement EC directives or contribute to it) is expected to be related to the way in which they “shape” EU policies (thereby indirectly related to the former domestic adaptation). As mentioned above, the *ex ante* role of national parliaments mainly consists in the exertion of an EU-specific control function. Consequently, strong scrutiny and intensive control of the national government in EU decision-making procedures via specific mechanisms—requiring extensive and timely information – is considered as a means to counteract the executive dominance of EU decision-making. In general, parliamentary participation *ex ante* aims at counterbalancing (at best re-establishing) the relationship with the executive which has been changed in favor to the latter one as a result of the transfer of competencies to the European level. This logic can also be pursued in the stage of implementation. Since the majority of EC directives are transposed through executive action, parliamentary participation can consist in the controlling the effective implementation in cases in which it is deprived from direct participation.²⁵ Parliaments which actively use control rights and scrutinize EU affairs are then expected to follow-up EU-related executive action even after the decision-making. As a result of their *ex ante* participation, the parliament disposes of the relevant information regarding the effective transposition (requirements, timetables etc.) can therefore control the activity of the government e.g. by using interpellation or EU-specific information rights. In this perspective, parliamentary scrutiny can have a positive impact on the effectiveness of implementation of directives even when they are not implemented by domestic law by having the function of a “watchdog” regarding timely and correct transposition. The third hypothesis is:

H3: The more actively the parliamentary majority scrutinizes EU affairs, the more likely it will contribute to effective implementation by controlling the government ex-post.

The extent to which national parliaments follow up the effective transposition of directives by the government as a result of parliamentary participation *ex ante* depends on several factors. First, the parliamentary majority will be inclined to control the activity of the government even *ex post* when the relationship between executive and legislative is not very co-operative (e.g. in case of minority governments) and use *ex post* control as a means to counteract the

²⁵ Moreover, following the logic of counterbalancing the relationship with the executive, this is also likely to be the case in areas which are usually regulated by executive action. The analysis of national parliamentary participation in EU affairs *ex ante* has shown that some parliaments are even more active in EU politics than in domestic politics (Rozenberg 2002; Sprungk 2003).

executive. Second, for cases in which issue salience is high, the parliamentary majority (and the parliament as a whole) can be pushed to control effective implementation of the government by interest groups or other societal actors (Koutalakis forthcoming). Contribution to effective implementation can thus be expected for cases in which there is a rather competitive relationship between executive and legislative and/or in cases with high issue salience.

But the active scrutiny of national parliaments in EU affairs *ex ante* cannot only indirectly contribute to effective implementation when directives are incorporated through executive action. When domestic legislatures have already acquired the necessary information for the effective transposition of a directive in the *ex ante* stage, they are also able to effectively implement it when they are directly responsible for transposition. In this perspective, parliaments which participate actively in the *ex ante* stage already know about the purpose, the (financial) impact, the timetables, the obligations resulting from a directive and the adequate measures for transposing it. Domestic legislatures which did (or could) not acquire this information *ex ante* have either to acquire it *ex post* – thereby likely to delay transposition- or to transpose it without this information- thereby likely to result in problems of incorrect transposition. Thus, the level of *ex ante* participation is negatively correlated to parliamentary *ex post* activity. The last hypothesis is:

H4: The less actively the parliamentary majority scrutinizes EU affairs ex ante, the more likely it will run into problems of ineffective implementation as a result of weak capacity.

The capacity of parliaments to effectively transpose EC directives as a result of the level of scrutiny *ex ante* is largely determined by the scope of information they have acquired during the decision-making process. Domestic legislatures can get information about EU legislative proposals from their national government (Maurer 2001; Norton 1996; Raunio 1999; Smith 1996) and/or through own activities (Fuchs 2001; Sprungk 2003). Thus, on the one hand, parliamentary capacity is a result of the nature of the relationship with the executive (which will provide more information in case of a co-operative relationship) and of intra-parliamentary resources and the efficiency of intra-parliamentary organisation (which affects the ability of the parliament to get information on its own) on the other hand. In this perspective, cases of ineffective implementation are likely to occur when the executive benefits from its position as a gate-keeper and does not transmit all relevant information to the parliament and/or when intra-parliamentary capacity is low.

In sum, theoretically speaking, there are various possibilities for the way in which parliamentary participation in the formulation stage of EC directives can impact on their effective implementation. A positive impact is expected when the contents of the directive corresponds to the interest of the parliamentary majority (*H 1*), or when it generally accepts the nature of EU decision-making (*H 2*), or when it has the relevant information for the effective transposition (*H 4*) and is willing to use it even for controlling the government *ex post* in cases directives are incorporated through executive action (*H 3*). The following section will test the explanatory power of the hypotheses for the *ex ante* participation in EU affairs of the French *Assemblée Nationale*²⁶ and the level of effective implementation of directives in France. The French case is selected because France has a persisting poor implementation record in the 1990s which even tends to increase in the last years (1), while the French parliament has been empowered in a significant way in 1993 with regard to its scrutiny rights in EU policy-making and could even slightly improve its position throughout the 1990s (2).

IV. The role of the French *Assemblée Nationale* in the effective implementation of directives

1. The level of effective implementation in France

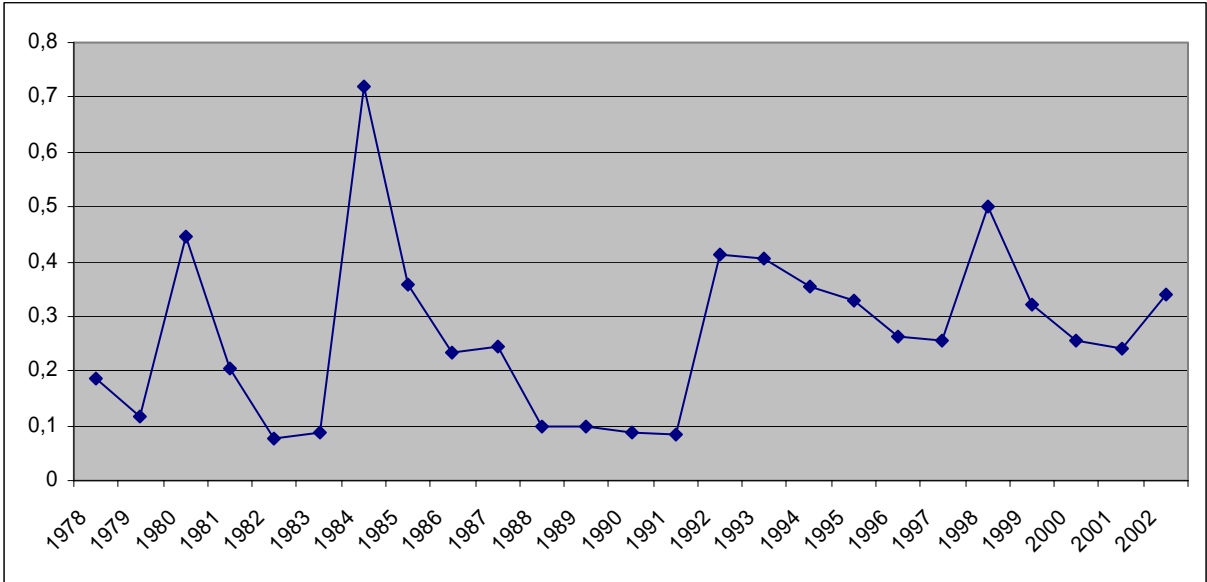
Since the European Commission published its “Annual Report on monitoring the application of Community Law” for the first time in 1984, France continually figures as one of the so-called “laggards” („*en queue de classe*“)²⁷ in compliance with European Law- together with Italy, Greece and Portugal. France and Italy account for 30% of all violations of European Law (Assemblée Nationale 2003). The poor compliance record can also be observed regarding the violation in the transposition of directives as a specific form of non-compliance (see Fig. 3). The French implementation record is particularly poor regarding the timely transposition of directives. In the biannual reports on the progress in notification of national measures implementing directives, France continually occupies one of the last positions (European Commission 2000b, 2002b, 2004). Furthermore, France is the country which needs the biggest amount of time for transposing directives (14 months in average) (Assemblée Nationale 2003). Moreover, implementation problems persist over time: France figures as the country with the second worst implementation record both in the phase between 1996 and 1999 (Fig. 5) and in the whole period between 1996 and 2002 (Fig. 3), while member states like Belgium

²⁶ I focus on the lower chamber of the *Assemblée Nationale* because it follows a functional logic of parliamentary representation, while the composition of the *Sénat* follows a territorial logic of representation.

²⁷ The term is borrowed from an article in *Fenetre sur l'Europe* from the 12th of November 2002, available on www.fenetreurope.com/actu/2002/11a_1759.htm (accessed on July 1st, 2003).

and Portugal respectively change positions in the ranking. The persistence of implementation problems is also confirmed by the number of infringement proceedings. According to the database, the European Commission has initiated 367 infringement proceedings against France for incorrect or non-transposition of EC directives between 1978 and 1999, resulting in an average of 17 cases per year. If we add the 68 proceedings opened in 2000, 2001 and 2002 according to the annual reports on monitoring the application of Community Law (European Commission 2000, 2001, 2002), the *average* number slightly increases (16,7 to 17,4) but remains overall stable.²⁸ However, Fig. 7 shows that the number of infringements in relation to the number of legal acts in force tends to increase since 2001, after it had significantly dropped from 1998-2000.

Fig. 7: Number of infringement proceedings opened for incorrect or non-transposition of EC directives per year in France in relation to number of legal acts in force, 1978-2002



At first glance, even if we include a certain time lag until the 1992/93 strengthening of the French parliament can deploy an effect and consider only cases from 1995 on, there is no evidence of a *permanent* positive impact of the stronger parliamentary *ex ante* participation in France.²⁹ Like in the overall pattern showed in Fig. 2, transposition problems of directives in France tend even to increase in 1997. But contrary to the general decrease in implementation problems since 2001, the number of infringements in France has raised in recent years (see

²⁸ The numbers taken from the Annual Reports relate to the number of Reasoned Opinions sent to France by the European Commission.

²⁹ Moreover, the dramatic increase of infringements in 1992 should not be explained to the stronger involvement of the French parliament, but can be related to the more aggressive enforcement policy of the European Commission (see above).

also European Commission 2003). In sum, France has a structural implementation deficit which seems to be unaffected by parliamentary participation *ex ante*.

2. The changing role of the *Assemblée Nationale* in EU affairs

Empirical studies analysing the role of the French parliament in EU politics agree that it has been significantly empowered in 1993 and that it is a rather active player in EU affairs (Dubois 1996; Hourquebie 1999; Laporte 1995 1995; Rizzuto 1996; Szukala and Rozenberg 2001; Sprungk 2003). Compared with other EU parliaments, the French legislature has a rather weak position in the national political system, since the Fifth Republic's Constitution has transferred power from Parliament to the Executive (Rizzuto 1996: 46). The government and even the Constitutional Court have several constitutional rights to intervene in the parliamentary's work (Wieber 1999: 14). In the context of the Maastricht debate, a new article 88-4 has been introduced in the French Constitution,³⁰ which obliges the French government to transmit to the parliament all documents with legislative character³¹ immediately after their reception in the Council. In addition, the legislature gets the right to vote on resolutions concerning these documents. The so-called *réserve d'examen parlementaire*, provided by a "ministerial circular" in July 1994 obliges the government to enable the parliament to vote on resolution before the Council's decisions. Finally, the status of the *Délégation pour l'Union Européenne* (DUE) which has been established in 1979 has been improved.

Concerning the activities of the *Assemblée Nationale*, the DUE plays a central role in EU affairs. First, it analyses the political, legal and financial impact of *all* received documents by EU experts before transmitting them to the specialised committees (Weber-Panariello 1995: 154). Second the DUE regularly publishes its analyses of specific EU documents as well as detailed reports on COSAC meetings and on current EU topics or on issues of specific interest (the so-called information reports). Third, members of the DUE make intensive use of their right to deliver an opinion or to move an amendment on resolution proposals of a committee (Sprungk 2003). Fourth, the DUE aims at informing the public about EU topics and at making its work transparent and accessible by organising public hearings or providing information about meetings or current EU issues on the Internet or to interest groups. It publishes minutes

³⁰ In 1999, the article 88-4 has been slightly modified as a result of the ratification process of the Amsterdam Treaty.

³¹ Documents which would be subject to regulation by the executive if they were domestic legal acts are not transmitted.

of every meeting on the Internet and thereby offers the opportunity to be well informed about the European work of the French parliament.

Moreover, the *Assemblée Nationale* has also actively used its new uses its control rights. Thus, it makes a regular –but not excessive - use of its possibilities to state a parliamentary opinion by adopting a resolution one time per month in average (DUE 2000; 2001). Concerning the follow-up of resolutions, the government hardly informs the parliament, but DUE members regularly ask to provide them with more systematic information (Hourquebie 1999). The relatively low number of interpellations for EU issues in the plenary³² and the fact that the *Assemblée Nationale* does not frequently hold public debates about EU issues (Sauron 2000) does not reveal an intensive “European” activity of French MPs. However, they seem to be more willing to put (formal) pressure on the government to get information about European issues and to initiate a public debate on their own than their German counterparts in the *Bundestag* (Sprungk 2003).³³

In general, the role of the French parliament in EU affairs has been characterised as being in a stage of “progressive assertion” since 1993 (Szukala and Rozenberg 2001). Some studies point to the paradox that it has even more powers in EU affairs than in domestic politics (Dubois 1996; Hourquebie 1999; Sprungk 2003). First, it receives information about EU legislation even if the proposals do not correspond to a policy area in which parliament would have a say if it was a domestic one. Second, thanks to Article 88-4 of the Constitution, the parliament has an exclusive right to articulate its position concerning European issues, which it does not have for domestic policy issues.³⁴ Moreover, the French parliament could improve its status throughout the 1990s and is thus in a better position in recent rankings than in 1996 (Rozenberg 2002).

In sum, we find a stronger parliamentary involvement *ex ante* in EU policy-making since 1993 thanks to new scrutiny rights, while the implementation deficit has persisted over time.

³² In the XI electoral term (1997-2002), three of the one hour-lasting *Questions au gouvernement* were exclusively dedicated to European issues. In addition, 13 EU-specific questions were raised during other “question hours” in the same time period (see www.assemblee-nationale.fr/europe). Unfortunately, there are no data available for other time periods and for the percentage of written questions concerning EU affairs.

³³ While both parliaments do not frequently hold public debates about EU issues in the plenary (Saalfeld 2002; Sauron 2000), most of the plenary debates in the *Bundestag* took place after a government’s information about European Council meetings or for debating the government’s regular report in European integration (EUA 1999-2001) and were thus not initiated by German MPs.

³⁴ In the Fifth Republic, the French parliament only has the right to vote on resolutions concerning the organization of the parliamentary work (for details, see Hourquebie 1999).

Moreover, scholars observe a recent trend towards a stronger parliamentary participation *ex ante* (Rozenberg 2002) while EU officials point to the increasing implementation problems of directives in recent years (European Commission 2003). This finding can also be observed with regard to other member states: France figures permanently as one of the implementation “laggards” (together with Belgium and Portugal), but has the highest level of parliamentary participation *ex ante* within this group (see Fig. 5). On the other hand, Spain has one of the best implementation records, but parliamentary participation *ex ante* is extremely weak. In this perspective, France figures as one of the “least likely” cases for a positive impact of parliamentary participation in the decision-making stage on the effective implementation of EC directives. In order to analyse if, in which way and to what extent the *ex ante* empowerment of the *Assemblée Nationale* and its rather active use of the new scrutiny rights affects the effective implementation of directives, it is crucial to know how the *Assemblée Nationale* is involved in the implementation process.

3. Effective implementation of directives: the role of the *Assemblée Nationale*

According to Lisa Martin (1995; 2000), parliaments are either directly (transposition occurs through a national law) or indirectly (authority has to be delegated to the executive) involved in the implementation of directives and can therefore impact on its effectiveness. In the case of France however, the parliament can be completely absent from the implementation of a directive due to the constitutional provisions of Art. 34 and 37 fixing the policy areas subject to parliamentary influence (Art. 34) and stipulating that all matters not mentioned can be regulated via regulations and thus fall into the sphere of influence of the executive. The opportunity of the national government to interfere in the legislative process and to issue binding decisions without the consent of the parliament is an important feature of the so-called “*parlementarisme rationalise*” of the French 5th Republic. Since the form and methods of implementation of EC directives are chosen according to provisions of the domestic legal system, transposition can theoretically occur in certain areas without the involvement of the parliament. In this perspective, we would have to add a French-specific case of no parliamentary involvement *ex post* at all, neither in a direct nor an indirect way. However, this is rather unlikely to happen, since directives often concern several policy areas or imply obligations affecting indirectly other policy issues (Fuchs 2001). In France, transposition of directives usually takes place according to Art. 38 of the Constitution, that is via laws delegating the authority for incorporation to the national government. The executive then chooses the ade-

quate measure between a variety of instruments.³⁵ The direct incorporation through a national law requiring a broader involvement of the parliament occurs in about 1/5 of all cases (*Assemblée Nationale* 2003).³⁶ In sum, for the vast majority of cases, parliamentary participation in the implementation of directives takes place through the decision whether (and to what extent) to delegate authority of transposition to the government.

a. Effective implementation as a matter of interest

The first hypothesis assumes that parliamentary involvement can contribute to an effective implementation when the directive corresponds to their interests (i.e. the interests of their voters). In the case of the *Assemblée Nationale*, ineffective implementation is thus likely to occur when the directive which it has to transpose or for which it has to delegate the authority for transposition does not reflect the interests it has expressed in the formulation stage. The operationalization of this hypothesis is difficult for several reasons. First, regarding the huge number of legal output in the EU per year (more than 2000 measures), it is unlikely that the *Assemblée Nationale* formulates specific interests for each directive. Second, communication of parliamentary interests to the government often occurs in an informal way, particularly in the case of the parliamentary majority. Third, a detailed testing would require the analysis of the contents of specific directives and an evaluation of the degree of “misfit” with the parliamentary position which cannot be offered within the scope of this paper.

For practical reasons, I take the existence of a parliamentary resolution voted during the preparation stage as a proxy for the parliamentary interest (Szukala 1998). As mentioned above, the *Assemblée Nationale* makes a regular use of the right to vote on resolutions as a way to express its point of view with regard to the EU legislative proposals (Szukala and Rozenberg 2001). In this perspective, French MPs can oppose transposition of a directive or delegation of authority when the demands expressed in the corresponding parliamentary resolution have not been respected.

This was the case for the Council Directive No. 93/109 of 6 December 1993 regulating the exercise by citizens of the Union residing in a Member State of which they are not nationals of the right to vote and to stand as a candidate in elections to the European Parliament (*Assemblée Nationale* 1998). The position of the *Assemblée Nationale* stated in the resolution No. *E 143* was that this right should only be accorded to EU citizens having a permanent resi-

³⁵ For example, directives are transposed via *ordonnance, décret, arrêté, décision ou circulaires ministérielles*.

³⁶ In the 1980s, the number was only about 6-7% of all directives (Szukala 1998).

dence title. The French government having not taken this position into account during the negotiation stage, the directive stated that the right shall be accorded to all EU citizens, including those having only a “secondary” residence title (meaning that they are not permanently based in France). The directive had to be incorporated through a national law, which the *Assemblée Nationale* refused by explicitly accusing the government for not having respected the interests of the parliament (Assemblée Nationale 1994: 289). The opposition was likely to result in a non-transposition as a form of ineffective implementation when a compromise was found between the government and the parliament regarding secondary residence titles which was still in line with the obligations of the directive. A similar situation can be found in the case of the directive proposal of the European Commission (COM (93)237) on the freedom of management and investment of funds held by institutions for retirement provision in which the government changed its original position according to the resolution No. *E 205* during the negotiation stage in order to prevent running into problems of ineffective implementation caused by parliamentary opposition (Hourquebie 1999: 94; Szukala 1998).

However, we have to be careful when interpreting these findings as a confirmation of the hypothesis. First, we do not know whether the *Assemblée Nationale* will realize its opposition and actually not transpose the directive or delegate authority for doing it. Second, the inherent problem of the hypothesis is that it assumes diverging interests between the executive and the legislative. This is rather unlikely in parliamentary systems, which are characterised by a “functional dualism” (Beyme 1999), with a close co-operation of the parliamentary majority and the government on the one side and the parliamentary opposition on the other side. In the case of EU politics, Benoît (1997: 56) even claims that this co-operation goes as far that the government agrees *ex ante* to a parliamentary resolution for having a diplomatic instrument in Council negotiations. And Szukala and Rozenberg (2001: 240) even argue that the “tabling of a resolution is not an arm that the opposition exploits to undermine governmental business”. Third, we have only analysed a low number of cases of parliamentary opposition. In this perspective, the explanatory power of the hypothesis is rather weak, since it can only be applied to the small number of cases in which interests of government and parliamentary majority diverge.

b. Effective implementation as a result of the acceptance of the procedure

The second hypothesis states that problems of implementation emerge when parliaments do not accept the procedure of the European legislation process in general or their role in this procedure. This means for the present case that the *Assemblée Nationale* opposes transposition or delegation of authority because it does not accept the way in which directives are prepared and adopted and how it is implied in this procedure.

Acceptance of the EU law-making procedure can be operationalized with the level of commitment of parliamentary parties towards European integration, assuming that general support of the European integration as such implies support of how decisions are made in the EU. The level of commitment varied in the 1990s, with the Euro-sceptic wing of the former RPR having important positions within the *Assemblée Nationale* (and the DUE in particular) during the 10th electoral term (1993-1997) (Benoît 1997: 54) and the more European-friendly government of *Lionel Jospin* constituting the parliamentary majority from 1997 to 2002. However, these changes in the level of European commitment may result in a different level of control of EU politics with Euro-scepticists favouring an intensive parliamentary scrutiny (Szukala and Rozenberg 2001), but it is unlikely that they differ with regard to the general acceptance of the way in which the European legal system works. This would imply that Euro-sceptic MPs oppose the transposition of *any* directive, which would lead to a high level of ineffective implementation. On the contrary, Fig. 5 shows that the level of implementation does not significantly differ between the two electoral terms.

But parliamentary opposition to the implementation of a directive as a result of lacking acceptance can also take place, i.e. when the *Assemblée Nationale* is not satisfied with the way in which it is included in the preparation of directives. In this perspective, the causal mechanism underlying ineffective implementation is not the specific content of the directive, but e.g. the parliamentary complaint about the executive dominance of the preparation stage of a directive and the fact that the parliament as the directly elected institution representing the French people is not involved in a sufficient way. The literature on the role of the *Assemblée Nationale* (Rizzuto 1996; Szukala and Rozenberg 2001) points to the fact that the permanent struggle of the French parliament since the early 1990s for improving its influence in EU policy-making can be explained by a request for more democratic legitimacy, but that the general role of the government in EU politics is not contested. Moreover, even Euro-sceptic DUE officials stress that they do not aim at changing the general logic of executive dominance in decision-making as a feature of the Fifth Republic (*Assemblée Nationale* 1995).

In general, it is difficult to disentangle the causal mechanisms underlying parliamentary opposition. When threatening that they oppose the effective implementation of a directive, French MPs might argue that the procedure has not been “legitimate” because the parliament was not sufficiently or not effectively involved, but the actual reason for opposing is that the content of the directive does not reflect the parliamentary or national interest. The argument that the legislation procedure has been unfair (lack of “procedural justice”, Franck 1990) as a reason for ineffective implementation can thus be instrumentalised in order to defend substantial interests. Careful process-tracing is needed in order to know which causal mechanism is at work when parliaments oppose effective implementation.³⁷

c. Effective implementation as a result of parliamentary control ex post

The third hypothesis does not refer to parliaments as possible opponents, but as promoters of effective implementation. There are likely to fulfil this role the more they generally tend to scrutinize EU politics and when they are not directly involved in the implementation process, i.e. when incorporation is in the responsibility of the executive. As mentioned above, the *Assemblée Nationale* uses its “new” control rights frequently and has developed efficient scrutiny mechanisms, providing for an effective selection of relevant legislative proposals and their intensive analysis by the DUE (Hourquebie 1999; Szukala and Rozenberg 2001). This can be partly explained by the fact that the specific quality of this empowerment provides an incentive to invoke these rights (Sprungk 2004) thereby enhancing the role of the *Assemblée Nationale* even beyond the *status quo ante*. In this perspective, once the French parliament has become engaged in the preparation of a directive, it is likely that parliamentary control continues even after the adoption. This is particularly true for the French case, in which usually more than 80% of the directives are incorporated through executive action. Similar to the logic partly underlying the *Assemblée Nationale*’s *bottom-up*-strategy, control extended to the *top down* stage could be an instance of re-gaining a say in areas where parliaments are deprived from influence. In this perspective, the government is controlled for the timely and correct transposition of directives.³⁸

³⁷ For reasons of scope, this cannot be provided in this paper, but will be part of my PhD thesis.

³⁸ As mentioned above, in the case of France, the incorporation of a directive through the executive can be an instance of Article 37 or 38 of the Constitution, which respectively excludes or includes the parliament. Since the DUE actually “screens” all legislative proposals, the *Assemblée Nationale* could also control effective implementation of directives for cases in which it is totally excluded. However, regarding the high number of legislative documents and the resulting working load, such an extensive understanding of the control function can hardly be expected.

With regard to specific directives, parliamentary control can be operationalized with the number of interpellation concerning the transposition of EC directives. In the 10th electoral term and the 11th electoral term (1993-2002), MPs raised 624 written and oral questions to the government which referred to the transposition of directives. While this corresponds to only 0,5% of all questions (including domestic affairs), it means that 5 questions per month in average relate to implementation of directives, suggesting a relatively high level of interest of French MPs. However, we do not know in which way these relate to EC directives, i.e. if the government is actually asked to inform the MP about the stage of transposition. But the interest in controlling the following-up of an adopted directive is also illustrated by the fact that the DUE has recently started to issue information reports about the stage of transposition of EC directives (DUE 2001; 2003). These reports are supposed to be published annually and include a detailed analysis of the stage and eventually the reasons for late or incorrect transposition as well as suggestions on how to reach effective implementation (DUE 2003). The *Assemblée Nationale* has thereby reacted on the growing implementation deficit since 2000.

However, similar to the *ex ante* stage of parliamentary participation, the “control” does not imply effective sanction mechanisms for ineffective implementation. Parliamentary scrutiny rather occurs via the acquiring of information. Thus, the *Assemblée Nationale* cannot enforce effective implementation, but only contribute to it by putting “informal” pressure to the government e.g. by communicating the violations to the public, thereby following a “naming and shaming” strategy (see Börzel et al. 2003a, 2003b).

d. Effective implementation as a result of parliamentary capacity

Contrary to the previous assumption, the fourth hypothesis suggests that implementation problems can occur as a result of intensive parliamentary control in the *ex post* stage. But this negative impact is expected only in a specific form of transposition - i.e. when directives are incorporated through legislative or executive action -, and a specific type of ineffective implementation, namely the delay of transposition. Since intensive parliamentary control is time-consuming, it can result in a violation of European law by exceeding the deadline for transposition. While the previous hypothesis assumed that a strong involvement *ex ante* is likely to lead to intensive participation *ex ante*, this approach assumes a negative relationship between the intensity of involvement at the two stages. In this perspective, parliaments which have acquired the necessary information via scrutiny *ex ante* do not need to acquire it in the *ex post*

stage.³⁹ In this respect, the reason for ineffective implementation is the lack of capacity (Chayes and Chayes-Handler 1993) in terms of information about the precise requirements and obligations of the directive.

The *Assemblée Nationale* acquires information about EC directives by the *Sécretariat général du comité interministeriel pour les questions de coopération économique européenne* (SGCI).⁴⁰ In addition to legislative proposals, the SGCI and the Foreign Ministry also transfer draft proposals which do not have a legislative character as well as any further document like the Green and White Papers and the working program of the European Commission and the agenda of the Council meetings (Sauron 2000: 116).⁴¹ Taken the annual number of 2000 transmitted documents⁴², the *Assemblée Nationale* is well informed about European issues. However, the SGCI does not add any explanatory memorandum to the documents, and the parliament gets no information about the important deliberations on the COREPER level or the negotiation processes in the Council (Szukala and Rozenberg 2001: 238). Even oral information via hearings is not given in a very extensive way (Rizzuto 1995: 47). But as mentioned above especially members of the DUE actively try to acquire information on their own e.g. through contacts with other parliaments or EU institutions (DUE 2001).

However, we could argue that this is unlikely to compensate the missing information about the negotiation procedure. At this stage, initial legislative proposals of the Commission are changed and adapted to the interests of the Council, whose members define the purpose and contents of the directive by anticipating possible impacts. In the German or the British case for example, the governments transmit a detailed explanatory memorandum with every directive proposal, informing the responsible committees about the necessity of a European rule, the financial implications and the timetable. The constantly high level of delayed or incorrect implementation could thus partly be explained by the fact that the *Assemblée Nationale* lacks important information. In the process implementing the directive No. 92/43 on the conservation of natural habitats and of wild fauna and flora which was accompanied by several infringement proceedings, the parliament finally agreed in 2000 on delegating the authority to

³⁹ However, this does not apply to the control to what extent the directive corresponds to the parliamentary interests *ex ante*.

⁴⁰ The number of “E-documents” has continually increased since the introduction of Art. 88-4 CF. This can be explained by the increasing EU legal output as well as by a “parliament-friendly” jurisdiction of the *Conseil d’État*.

⁴¹ According to a recent “ministerial circular” of former Prime minister *Lionel Jospin* (13th December 1999), which obliges the government to transfer **all** documents, that is not only those with a legislative character, to the parliament.

⁴² According to an internal paper of the *Assemblée Nationale* of 2002.

the national government (with a vivid opposition by the parliamentary minority), arguing that this would accelerate the effective implementation (Assemblée Nationale 2000).

Yet, this finding can only account to the 20% of cases in which the *Assemblée Nationale* is mainly responsible for the implementation, i.e. in which directives are incorporated through legislative action. The large majority of cases in which directives are not transposed in time and in a correct way as a result of the ineffective executive action have to be explained by other factors. In its annual reports on the stage of transposition, the *Assemblée Nationale* points to variables like the multiplicity of intervening actors or the problems of interministerial co-ordination (Assemblée Nationale 2003).

V. Conclusion

The aim of this paper was to analyse to which extent mechanisms of “input”-legitimacy (Scharpf 1999) can be translated into “output”-legitimacy (ibid.) resulting in compliance with policy outputs and effective implementation of legal measures by drawing on the impact of national parliamentary participation in EU policy-making on the effective implementation of EC directives. The point of departure was the puzzling fact that despite national parliaments have become involved in the preparation of EU legislation in a more intensive way, the compliance deficit with European law has not decreased. The dependent variable “effective implementation” has been defined as timely and correct transposition of EC directives and operationalized by the number of infringement proceedings opened against EU Member States by the European Commission for incorrect or non-transposition of directives between 1978 and 1999. The analysis has shown a stable level of ineffective implementation of directives, suggesting that there is at least no general and permanent positive impact of the stronger *ex ante* parliamentary participation.

In order to study the extent to which parliamentary involvement can contribute to the effective implementation of directives, I developed a conceptual framework by drawing on the literature on implementation and Europeanization. The theoretical discussion has shown, on the one hand, that participation of parliaments does not necessarily provide a *specific* legitimating effect (superior to other legitimacy-providing mechanisms) as it is expected thanks to their representative function and that, on the other hand, parliamentary involvement *ex ante* can have both a positive *and* a negative impact on the effective implementation of directives.

The empirical case study of France has confirmed that there is no overall positive impact of the stronger involvement of the *Assemblée Nationale* on the effective implementation of directives in France. An effect on the quality of the implementation process can thus only be expected for single cases and has to be analysed with qualitative methods. But even for the transposition of specific directives, it is difficult to say if the French parliament has affected the quality of the implementation process at all and if yes, in which way. This is due first to the lack of data, especially regarding the communication between the government and the parliament, and second to the complexity of the transposition process, resulting in a high number of intervening variables which have to be controlled for.

However, the analysis has shown that the way in which the *Assemblée Nationale* participates *ex ante* can have a **positive** impact on implementation of directives in two ways. First, since the French parliament frequently uses the opportunity to express its point of view towards a legislative proposal *ex ante* and since the parliamentary majority has a co-operative relationship with the national government at the same time, directives are likely to be effectively implemented because they reflect to a certain extent parliamentary interests – either in the directive itself or in the legal measure transposing it as a result of domestic negotiation. Second, since the *ex ante* participation of the *Assemblée Nationale* is characterised by an active acquiring of information about the government’s EU politics, this form of participation is likely to be continued in the *ex post* stage in cases where the executive is responsible for implementation. In this perspective, the positive impact consists of putting in “informal” pressure on the government by asking for reasons of ineffective implementation. But the nature of the *ex ante* participation can also **negatively** impact the effective implementation. When the parliament mainly acquires information about the EC directive in the *ex ante* stage on its own and when the directive has to be implemented through legislative action, problems are likely to occur as a result of missing the relevant information about the obligations of the directive.

In sum, the empirical analysis points to the fact that a strong co-operation with the national government is crucial when parliamentary participation *ex ante* is supposed to contribute to effective implementation. An important intervening variable is thus the nature of the relationship between executive and legislative. A co-operative relationship could guarantee that the parliament’s point of view is respected in the stage of formulation (or at latest in the stage of implementation), lead to the response of the government to “informal” *ex post* pressure by national parliaments and finally provide the parliaments with the necessary information.

Moreover, another intervening factor is the issue salience of a directive: parliamentary *opposition* in France mainly occurred in highly politicized cases. Since the single case study of France cannot provide information about the causal importance of the intervening variables, quantitative analysis and comparative case studies are needed.

With regard to the theoretical debate on Europeanization, the analysis has shown that the quality of the *bottom-up* process in which domestic actors *upload* their preferences and ideas deeply affects the way in which they respond to Europeanization pressures in the *top-down* process, thereby allowing to anticipate problems in domestic adaptation.

Finally, the results point to the fact that parliamentary participation can have a positive, but not necessarily *significant* impact on the effective implementation of directives. While the limited explanatory power of the legitimacy hypothesis might be explained in the case of France with the limited number of directives are more often incorporated through legislative action than in France, it can hardly account for Member States in which the incorporation of directives through executive action is less prominent, but the level of implementation problems still high. Moreover, since most Member States mainly use executive measures for transposing directives, other explanatory factors are needed to account for implementation problems in these cases. For explaining ineffective implementation of directives, future research has to combine parliamentary-specific explanations and other factors identified by research on implementation and define scope conditions and interaction mechanisms.

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